JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
25 October 2002 *

In Case T-5/02,

Tetra Laval BV, established in Amsterdam (Netherlands), represented by A. Vandencasteele, D. Waelbroeck, A. Weitbrecht and S. Völcker, lawyers,

applicant,

v

Commission of the European Communities, represented by A. Whelan and P. Hellström, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

APPLICATION for annulment of Commission Decision C (2001) 3345 final of 30 October 2001 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case No COMP/M.2416 — Tetra Laval/Sidel),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of: B. Vesterdorf, President, J. Pirrung and N.J. Forwood, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 3 and 4 July 2002,

hereby gives the following

Judgment

Legal background

1 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1, corrected version in

OJ 1990 L 257, p. 13, as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1), hereinafter 'the Regulation') provides for a system of control by the Commission of concentrations having a 'Community dimension' as defined by Article 1(2) of the Regulation.

2 Article 2 of the Regulation states:

'1. Concentrations within the scope of this Regulation shall be appraised in accordance with the following provisions with a view to establishing whether or not they are compatible with the common market.

In making this appraisal, the Commission shall take into account:

(a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;

(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

2. A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market.

3. A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.

...'

3 Article 4 of the Regulation requires the party acquiring control, or the parties acquiring joint control, of another undertaking to notify the concentration within a week to the Commission, which is required by Article 6(1) to examine that notification 'as soon as it is received'. Article 6(1)(c), read in conjunction with Article 10(1), provides that the Commission is to initiate proceedings in respect of a notified concentration within one month, and at most six weeks, where it finds that the concentration falls within the scope of the Regulation 'and raises serious doubts as to its compatibility with the common market'.

4 Once proceedings have been initiated in respect of a notification, the decision-making powers of the Commission are fixed by Article 8 of the Regulation. Under Article 8(3), '[w]here the Commission finds that a concentration fulfils the

criterion laid down in Article 2(3) ..., it shall issue a decision declaring that the concentration is incompatible with the common market'. Under Article 10(3), such decisions 'must be taken within not more than four months of the date on which the proceedings are initiated'.

5 Although Article 7(1) of the Regulation provides that a concentration is not to be put into effect either before its notification or until it has been declared compatible with the common market, the implementation of a public bid that has been notified to the Commission may, in accordance with Article 7(3), proceed 'provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of those investments and on the basis of a derogation granted by the Commission under paragraph 4'.

6 Article 18 of the Regulation, which concerns the hearing of the parties and of third parties, provides:

'1. Before taking any decision provided for in Article 7(4), Article 8(2), second subparagraph, and (3) to (5), and Articles 14 and 15, the Commission shall give the persons, undertakings and associations of undertakings concerned the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them.

...

3. The Commission shall base its decision only on objections on which the parties have been able to submit their observations. The rights of the defence shall be

fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets.

...'

7 Article 13(3) of Commission Regulation (EC) No 447/98 of 1 March 1988 on the notifications, time-limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ 1998 L 61, p. 1) provides:

'After having addressed its objections to the notifying parties, the Commission shall, upon request, give them access to the file for the purpose of enabling them to exercise their rights of defence.

The Commission shall, upon request, also give the other involved parties who have been informed of the objections access to the file in so far as this is necessary for the purposes of preparing their observations.'

8 Article 17 of Regulation 447/98, entitled 'Confidential information', provides:

'1. Information, including documents, shall not be communicated or made accessible in so far as it contains business secrets of any person or undertaking, including the notifying parties, other involved parties or of third parties, or other

confidential information the disclosure of which is not considered necessary by the Commission for the purpose of the procedure, or where internal documents of the authorities are concerned.

2. Any party which makes known its views under the provisions of this Chapter shall clearly identify any material which it considers to be confidential, giving reasons, and provide a separate non-confidential version within the time limit fixed by the Commission.'

Factual background

9 On 27 March 2001, Tetra Laval SA, a privately held company incorporated under French law and a wholly owned subsidiary of Tetra Laval BV (hereinafter 'Tetra' or 'the applicant'), a holding company belonging to the Tetra Laval group, announced a public bid for all outstanding shares in Sidel SA (hereinafter 'Sidel'), a French publicly quoted company. On the same day, Tetra Laval SA acquired roughly 9.75% of the shares in Sidel from Azeo (5.56%) and Sidel's directors (4.19%).

10 The bid was in cash at EUR 50 per share and, in accordance with French law, was unconditional. Acceptance of the bid was unanimously recommended by the Board of Directors of Sidel and was also approved by Sidel's major shareholders. The joint offer document from Tetra Laval SA and Sidel was approved on 11 April 2001 by the stock exchange committee. Following publication on 14 April 2001, the bid was officially opened for the period 17 April to 22 May

2001. It provided that, in the event of the bid being successful, the shares of Tetra SA would be quoted again in the week beginning 11 June 2001, subject to the restrictions in Article 7(3) of the Regulation.

11 Pursuant to the bid, Tetra acquired approximately 81.3%, of the outstanding shares in Sidel. After the closing of the bid, the applicant acquired certain additional shares, making its current holdings roughly 95.20% of the shares and 95.93% of the voting rights in Sidel.

12 Tetra comprises, *inter alia*, the Tetra Pak company, which is mainly active in the area of liquid food carton packaging, where Tetra Pak is the world-wide market leader. Tetra also has more limited activities in the plastic packaging sector, mainly as a converter (which consists of manufacturing and supplying empty packaging to producers who then fill the packaging themselves), particularly of high density polyethylene (hereinafter 'HDPE') bottles.

13 Sidel is involved in the design and production of packaging equipment and systems, particularly stretch blow moulding machines (hereinafter 'SBM machines'), which are used in the production of polyethylene terephthalate (hereinafter 'PET') plastic bottles. It is the world-wide leader for the production and supply of SBM machines. It is also active in barrier technology, used to make PET compatible with products which are sensitive to gas and light, as well as in the manufacture of filling machines for PET and, to a lesser extent, HDPE bottles.

14 On 18 May 2001, the operations by which Tetra acquired its shareholding in Sidel were notified to the Commission.

15 It is agreed by the parties that those operations (hereinafter 'the merger' or 'the notified transaction') constitute an acquisition within the meaning of Article 3(1)(b) of the Regulation and that the merger has a Community dimension within the meaning of Article 1(2) thereof.

16 By decision of 5 July 2001, the Commission, having concluded that the merger raised serious doubts as to its compatibility with the common market and the Agreement on the European Economic Area ('the EEA Agreement'), initiated proceedings in accordance with Article 6(1)(c) of the Regulation.

17 On 7 September 2001, the Commission sent to Tetra and Sidel a statement of objections, in accordance with Article 18 of the Regulation, explaining why its initial conclusion was that the transaction should be prohibited. The applicant replied to the statement on 21 September 2001.

18 On 24 September 2001, an additional statement of objections, which focused in particular on the activities of Tetra in the HDPE sector, was sent to Tetra and Sidel, and was replied to by the applicant on 1 October 2001.

19 On 25 September 2001, the applicant proposed a number of commitments, in accordance with Article 8(2) of the Regulation, with a view to remedying the competition concerns expressed in the first statement of objections.

20 On 26 September 2001, a hearing took place before the hearing officer, in accordance with Articles 14, 15 and 16 of Regulation No 447/98.

21 On 9 October 2001, the applicant offered the Commission a new set of firm commitments (hereinafter 'the commitments'), replacing those dated 25 September 2001.

22 The Commission carried out a specific market investigation regarding the commitments by sending 51 questionnaires to different operators in the economic sector in question (customers, converters and competitors); the questionnaires were sent out on 11 October 2001, with the deadline for reply set at 17 October. It received 34 responses (hereinafter 'the responses to the market investigation') and, judging them to be entirely confidential, drew up two non-confidential summaries concerning, first, customers and converters and, second, competitors. It sent those summaries to the applicant.

23 The draft of the Commission's final decision, which also dealt with the commitments, was discussed and approved by the Advisory Committee on concentrations at its meeting on 19 October 2001.

24 By decision of 30 October 2001 (Case No COMP/M.2416 — Tetra Laval/Sidel C (2001) 3345 final) (hereinafter 'the contested decision'), the Commission declared the notified transaction incompatible with the common market and the functioning of the EEA Agreement, pursuant to Article 8(3) of the Regulation.

25 The contested decision was notified to Tetra on 6 November 2001.

26 In the light of the findings in the contested decision and following a separate administrative procedure initiated by the sending of a statement of objections to Tetra on 19 November 2001, the Commission adopted, on 30 January 2002, a

decision setting out measures in order to restore conditions of effective competition pursuant to Article 8(4) of the Regulation (Case No COMP/M.2416 — Tetra Laval/Sidel).

The contested decision

27 In the contested decision, the Commission, in analysing the compatibility of the transaction with the common market, first describes the liquid food packaging industry and examines the relevant product and geographic markets, and then assesses the notified transaction from a competition standpoint. After that analysis, the Commission assesses the scope of the commitments in the light of that prior assessment of competition.

The liquid food packaging sector

28 The Commission considers that the 'competitive impact of [the notified transaction] will be primarily in the liquid food packaging industry', ('liquid food' meaning essentially liquid dairy products ('LDPs')), fruit juices and nectars ('juices'), fruit flavoured still drinks ('FFDs') and tea/coffee drinks, these four products together being referred to hereinafter as 'the sensitive products') and, in particular an impact on the sectoral segments in which the parties are primarily active, namely 'plastic, in particular PET packaging, and carton packaging' (recital 12). The Commission states that PET enables the manufacture of transparent bottles. For products which are sensitive to oxygen and light, PET must be enhanced using a 'barrier technology'. There are three stages in the PET packaging process: (i) production of plastic preforms, which are the pre-production tubes used to make the bottles; (ii) production of the empty bottles themselves using SBM machines (see paragraph 13 above); and (iii) filling of the

bottles (recital 20). It describes HDPE packaging as having a rather 'cloudy' appearance. HDPE is produced in a similar way to PET but using extrusion blow moulding machines (hereinafter 'EBM machines') (recital 26). Unlike plastic packaging, pack construction, filling and sealing are integrated operations in the carton packaging process (recital 28).

29 The Commission draws several distinctions, in particular between aseptic and non-aseptic packaging, in line with its earlier decisions in this area, between the packaging itself and the packaging machines, and between packaging performed in-house by the producers of liquid foods and packaging by converters (see paragraph 12 above). However, according to the Commission, that distinction is lessened by the existence of 'hole-through-the-wall' arrangements (hereinafter 'HTW arrangements') whereby a converter produces the bottles at a site next to the premises of the beverage producer and conveys them directly to the producer for filling.

The relevant product markets

30 Since the 'competitive impact of [the notified transaction] will be primarily in the liquid food packaging industry', the Commission concentrated its analysis on the segments of that industry in which Tetra and Sidel are primarily active: 'plastic, in particular PET packaging, and carton packaging' (recital 12). The Commission considers that 'end-use segmentation constitutes a meaningful analytical tool for assessing the liquid food packaging equipment market' (recital 44). It acknowledges that 'packaging systems using different materials, for example glass and cans, form distinct relevant product markets for competition law analysis and that, therefore, PET packaging systems belong to a distinct product market'. The Commission categorically rejects the idea that 'carton and PET do not share

common product segments and that there can be no interaction between the two' and, accordingly, decides to look at 'the interplay between carton and PET and the future growth of PET in the traditional carton end-use segments' (recital 53).

31 Turning to carton packaging, which is non-transparent, the Commission considers that it is 'suitable for oxygen and light-sensitive products but cannot withstand carbonation'. PET packaging, on the other hand, 'is transparent and can withstand carbonation but has been traditionally less suitable for oxygen- and light-sensitive products' (recital 55). The Commission emphasises that 'PET is a suitable material for the packaging of *all* the products that have been traditionally packaged in carton', that is, sensitive products, and concludes that 'PET may potentially provide an alternative competing material for the entire spectrum of carton-packaged products' (recital 57, emphasis in the original). These products can none the less be distinguished from one another, because 'the specific characteristics of the product dictate slightly different packaging solutions (juices are high acid whereas LDPs are low acid, FFDs and ice tea do not require the same extent of oxygen barrier as juices)' (recital 58).

32 Regarding the expected growth of PET use for sensitive products, the Commission dismisses the assertion of Tetra that 'PET's use is very limited and will not grow significantly in the future' (recitals 59 to 148). It states in that regard that '[t]he fastest growing PET segment has been water and [carbonated soft drinks] mainly due to a switch from glass packaging' and that 'PET is popular with consumers and producers' (recital 55, footnote 22). The Commission finds 'that already today it is possible to package and sell commercially fresh milk, flavoured milk, ice tea, fresh juice, long-life (hot-fill) juices, fruit flavoured drinks and sports drinks in PET' and that there are only two segments for which PET use presents technical problems: 'aseptic juices and aseptic white (UHT) milk' (recital

61). Referring to the figures provided on behalf of Tetra by the consulting company Canadean, it observes that, even though PET use is not currently very significant for LDPs and juices (0.5% in both segments in 2000), 'the picture [...] is already today very different for the segments of FFDs and tea/coffee drinks which do not require the same barrier properties as LDPs and juices', segments where PET 'has already made more significant inroads' (recital 69) (reaching 20% for FFDs and 25% for tea/coffee drinks in 2000).

33 For the years 2000 to 2005, the Commission, in the light of its own market investigation, that of Canadean and 'independent studies' by PCI, Warrick and Pictet (recital 104), concludes that 'there is already significant overlap between PET and carton in the FFDs and tea/coffee drinks segments' and that 'PET will continue to make inroads into these segments at the expense of carton', so much so that '[u]nder a conservative estimate, with PET reaching 30% in each of these segments by 2005, PET would pack 800 million litres of tea/coffee drinks (including sports drinks) and 1 billion litres of FFDs' (recital 144). It adds that 'improvements in barrier technology and aseptic PET filling are expected to enhance PET's position in all four [sensitive] product segments' and that 'in the LDP and juice segment, PET will grow significantly in the next five years' (recital 146). According to the Commission, 'it is realistic to expect that PET will reach at least 10-15% in fresh milk and 25% in flavoured and other dairy beverages by 2005', but that 'PET's use for UHT milk (which represents approximately 50% of the total milk market in the EEA) is uncertain' (recital 147). Emphasising the 'significant potential' of PET, 'at least in smaller, premium segments of aseptic milk such as single serve packages', the Commission considers that '[w]ith PET reaching at least 15% of fresh milk, 25% other dairy beverages and only 1% UHT milk by 2005, PET will package approximately 3 billion litres per annum (this represents approximately 9% of the total European market for [LDPs]' (recital 147). Regarding juices, the Commission believes that 'it is realistic to expect PET to reach at least 20% of the overall juice market in the EEA by 2005',

even if this growth will mainly result from 'substantial switching from glass to PET' (recital 148).

34 Turning to the competition between PET and carton in overlap products, the Commission concludes that 'carton packaging systems and PET packaging systems (and hence carton packaging equipment and PET packaging equipment) form distinct relevant product markets'. It finds that 'although substitution between the two systems does not currently have the necessary effectiveness and immediacy required for the purposes of market definition (i.e. they are weak substitutes), this may change in the future as PET's barrier technology improves and PET/carton costs converge'. The convergence could even be such that the two systems might in future, 'belong to the same relevant product market for competition law purposes' (recital 163).

35 The Commission then examines the segments of 'specific equipment within each packaging system' in order to determine 'whether there are distinct relevant product markets' for each of them (recital 164).

36 Regarding the PET packaging systems, the Commission considers that, for SBM machines, in the light of the specific characteristics of the sensitive products and the ability for price discrimination, 'separate relevant markets exist for each distinct group of customers on the basis of end-use in particular in the four "sensitive" beverage segments, LDPs, juice, FFDs and tea/coffee drinks' (recital 188). The Commission considers that the different barrier technologies form part of the same product market, although some of them might, in future, be placed in a distinct product market (recitals 198 et 199). There are also two distinct markets for aseptic and non-aseptic PET filling machines (recital 204), whilst PET preforms constitute yet another distinct market (recital 206).

37 With respect to carton packaging systems, the Commission notes that there is consensus that 'there are four distinct product markets: aseptic carton packaging machines, aseptic cartons, non-aseptic carton packaging machines and non-aseptic cartons' (recital 209).

The relevant geographic market

38 The relevant geographic market is defined as the EEA because 'all suppliers [of PET packaging equipment] are active throughout the EEA, [and] are capable of providing and provide their equipment on a cross-border basis' (recitals 210 and 211)

Competition law analysis of the notified transaction

39 The assessment of the merger under competition law is contained in a detailed analysis (recitals 213 to 408) and is essentially as follows:

'213 The Commission's market investigation and analysis has shown that the operation could strengthen Tetra's dominant position in the market for aseptic carton packaging machines and aseptic cartons and create a dominant position in the market for PET packaging equipment and, in particular SBM machines (low and high capacity) in the "sensitive" product and end-use segments, LDPs, juices, FFDs and tea/coffee drinks.

214 The merged entity's future dominant position in two closely neighbouring markets as well as a notable position in a third market (EBM machines and HDPE filling machines) are likely to reinforce its position in both markets, raise barriers to entry, minimise the importance of existing competitors and lead to a monopolistic structure of the whole market for aseptic and non-aseptic packaging of "sensitive" products in the EEA.'

40 In support of its findings, the Commission notes, first, that, as regards the carton packaging market, very little has changed since the '*Tetra Pak II*' judgments (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, confirmed on appeal in Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-5951). Thus it finds that, in the year 2000 in the EEA, Tetra had a dominant position on the market for aseptic packaging machines and cartons, with a market share of 80% (recitals 219 and 223) and a 'leading' position in the market for non-aseptic packaging machines and cartons, with a market share of [50-60%] [1] (recitals 229 and 231). Second, whilst acknowledging that Sidel does not have a dominant position on the market for SBM machines, the Commission concludes that it has a 'leading' position, since it is 'the only company capable of providing the full range of SBM machines from very low capacity to the highest capacity always using leading rotary technology' (recital 248). Noting that '[t]he importance of effectively managing filling operations in combination with blow moulding is particularly apparent with regard to "sensitive" products such as milk and fruit juice to ensure clean or ultra-clean packaging processes' (recital 249), the Commission observes that Sidel manufactures aseptic and non-aseptic filling machines (recital 250) and that it has an innovative Combi technology which allows it to integrate blowing, filling and capping in a single machine (recital 254). The Commission concludes that Sidel has a 'leading position in the [...] SBM market' and a 'strong position' in other PET packaging equipment, in particular 'aseptic filling machines, secondary equipment and associated services' (recital 259).

1 — Confidential information omitted.

41 With respect to the creation of a dominant position on the market for PET and the reinforcement of Tetra's position on the carton markets, the contested decision deals, firstly, with the horizontal and vertical effects of the merger; secondly, the 'leveraging' effect from the carton markets into the PET market; thirdly, the effects on the carton markets following from the elimination of competitive pressure from the PET market; and, lastly, the overall effects on the carton and PET markets.

42 First of all, as regards horizontal effects, the Commission considers that, since both Tetra and Sidel are active on three distinct product markets: 'SBM machines (low capacity); barrier technology and aseptic PET filling machines' (recital 263), the transaction would strengthen the position of the merged entity on those three markets. Whilst acknowledging that that position does not constitute a dominant position, the Commission finds that it would reach 'the level of dominance through the leveraging of the merged entity's dominant position in aseptic carton packaging equipment and aseptic cartons' (recital 263).

43 Secondly, the Commission states that the 'significant vertical effects' which would result from 'the vertical integration of the merged entity in the three packaging systems (carton, PET and HDPE)' could 'lead to vertical foreclosure of independent converters' (recital 291). The market structure created by the merger would foreclose independent converters in the following way (recital 292):

'(i) the merged entity would be the only vertically integrated liquid food packaging company in carton (carton packaging machines and carton reels), HDPE (EBM machines and HDPE bottles) and PET packaging (SBM machines, barrier technology, aseptic fillers, preforms and bottles); (ii) the merged entity's dual position as supplier and competitor of converters would be likely to create a channel conflict in the market. Using its strong market position as supplier of

SBM machines to converters which are to a certain extent dependent on Sidel, the merged entity may be able to raise converters' costs and marginalise their market position as suppliers of preforms and turnkey installations. Tetra/Sidel may be able to offer combined packages of SBM machines and preforms for instance by using Tetra's successful business strategy in carton, offering the SBM machines at a low price and recouping the cost by tying the customer with a long-term contract for the supply of standard and barrier enhanced preforms. The merged entity may also have the ability to offer turnkey installations to its customers without the use of converters'.

44 Next, the extent of Tetra's vertical integration on the markets for carton is highlighted, markets in which it has a 'business model of offering integrated solutions of machines and cartons (reels or blanks) to its customers' (recital 296) on the market for HDPE, where it produces HDPE bottles on EBM machines through an alliance with Graham Engineering Corporation and supplies them to customers as a converter through HTW agreements, and also on the PET market. Regarding the PET market, the Commission observes that Tetra is 'the third largest independent preform supplier in the world with a market share of 10%', that it 'has plans to produce a limited number of finished PET bottles enhanced with its proprietary barrier technology Glaskin' and that, since 1999, it 'is active in plastic beverage bottle closures through its subsidiary Novembal' with a '[10-20%] market share in 2000 in the EEA' (recital 298). This integration distinguishes it from Sidel, which 'is not a vertically integrated company' (recital 293). None the less, the entity resulting from the merger 'is likely to create a channel conflict in the market as the merged entity would be a supplier and competitor of converters' (recital 301) and 'may have the ability to marginalise converters by offering customers combined packages of SBM machines and preforms as well as turnkey installations' (recital 312). It is also possible that it might be able to 'marginalise converters from these activities by refusing the supply of SBM machines or raising their costs and favouring its own integrated business' (recital 318). As for Tetra's decision to leave the preforms market, the Commission states that it 'does not conclude that these vertical concerns would, by themselves, result in the creation of a dominant position for PET or preforms' (recital 324).

45 The Commission then sets out in detail (recitals 325 to 389) the reasons for its concern that the merged entity would exploit its dominant position on the carton markets by 'leveraging' into the market for PET packaging equipment in order to 'dominate the PET market for "sensitive" end-products' (recital 328). It takes the view that it is sufficient that Tetra/Sidel have that possibility for the transaction to be incompatible with the common market. Thus the concerns of the Commission arise not from the position currently held by Sidel on the SBM machine market, but rather from '*Tetra's* dominance in the *carton* market' (recital 328, emphasis in the original). Referring *inter alia* to the close links between the two markets for carton packaging and PET packaging equipment, the Commission finds that the merger 'would create a market structure providing considerable scope for anti-competitive effects arising from the merged entity's simultaneous dominant and leading position in carton and PET equipment respectively' (recital 330).

46 Its analysis '[is] explained in four stages' (recital 331). First, the markets for carton and PET packaging systems 'belong to closely neighbouring product markets with a common pool of customers'. Second, given the future growth of PET in the new sensitive product segments, the merger would enable the merged entity to acquire a dominant position on the PET market by leveraging Tetra's current dominant position on the carton markets. Third, the merger would strengthen Tetra's dominant position in the carton markets. Fourth, the combination of the two dominant positions would consolidate the merged entity's position in the sector for packaging for 'sensitive' products, especially aseptic packaging, thus reinforcing the two dominant positions.

47 In support of its analysis, the Commission cites the fact that the notified transaction is of strategic importance to Tetra, that Tetra has the ability and would have an incentive to engage in leveraging, that the competitors of the merged entity would not be able to rival it at various levels, and, lastly, that Tetra could practise price discrimination.

48 With respect to the ability and the incentive to engage in leveraging, the Commission concludes that 'the market structure resulting from the merger would be particularly conducive to leveraging effects' (recital 359):

'(a) There would be a common pool of customers requiring both carton and PET packaging systems to package "sensitive" liquids.

(b) Tetra has a particularly strong dominant position in aseptic carton packaging with more than [80-90%] of the market and a dependent customer base.

(c) Tetra/Sidel would start from a strong, leading, position in PET packaging systems and in particular SBM machines with a market share in the region of [60-70%].

(d) Tetra/Sidel would have the ability to target selectively specific customers or specific customer groups as the structure of the market enables price discrimination.

(e) Tetra/Sidel would have a strong economic incentive to engage in leveraging practices. As carton and PET are technical substitutes, when a customer switches to PET he/she is a lost customer on the carton side of the business either because he/she partially switched *from* carton or because he/she did not switch some of the production *to* carton from other packaging materials. This creates an added incentive to capture the customer on the PET side of

the business to recover the loss. Therefore, by leveraging its current market position in carton, Tetra/Sidel would not only enhance its market share on the PET side but defend or compensate its possible loss on the carton side.

(f) Competitors of Tetra/Sidel in both the carton and the PET equipment markets would be much smaller, with the largest competitor having no more than [10-20%] share in the market for carton packaging machines or SBM machines.'

49 The leveraging practices would be based on Tetra's current dominant position on the aseptic carton markets (recital 364):

'Leveraging [this position] [...] in a number of ways [...] Tetra/Sidel would have the ability to tie carton packaging equipment and consumables with PET packaging equipment and, possibly, preforms (in particular barrier-enhanced preforms). Tetra/Sidel would also have the ability to use pressure or incentives (such as predatory pricing or price wars and loyalty rebates) so that its carton customers buy PET equipment and, possibly, preforms from... Tetra/Sidel and not from its competitors or converters'.

50 The Commission also states that '[m]any customers who will continue to need carton packaging for part of their production needs could be forced or provided with incentives to source both their carton and PET equipment from a single supplier of carton and PET packaging equipment' and that '[c]ustomers having long-term agreements with Tetra for their carton packaging needs will be particularly vulnerable to such pressures' (recital 365).

51 The leveraging could cause competitors of Tetra/Sidel to be foreclosed from the SBM machine market for sensitive products for the following reasons (recital 369):

'(a) whether competitors can continue to sell in the untied product segments (e.g. water or CSDs) is not relevant. This is due to the ability to price discriminate and target specific customer groups which results in a segmentation of the relevant markets by end-use; b) the "sensitive" product segments consist of very complex liquids which require very specific PET lines including barrier technologies and aseptic filling machines or aseptic Combi SBM machines [which combine blowing, filling and capping]. Competitors would not have sufficient incentive to invest and compete in these high technology areas of PET equipment [...] [and] would thus be foreclosed from the so-called "second era" markets of PET'.

52 They could also be foreclosed 'from the rest of the SBM machine market' (recital 370).

53 According to the Commission, this outcome is all the more likely given the weak position of the merged entity's competitors and its customers' lack of purchasing power. The Commission notes, in relation to the competitors' position, that a 'crucial' point for it is that, even if Sidel's three competitors in the market for high capacity SBM machines can match Sidel's offerings, the fact remains that they will 'lack the merged entity's dominant position in carton packaging' (recital 372). It states that:

'The SIG group, the only one of the three competitors which will have both carton and PET activities, will have market shares of no more than [10-20%] in

carton packaging machines and SBM machines. SIG lacks the full range of the merged entity in PET equipment as it currently lacks an essential element, barrier technology, for any future penetration in PET's new product segments. No other supplier of packaging equipment will be able to offer both carton and PET packaging equipment.'

54 It concludes that 'by combining the dominant company in carton packaging, Tetra, and the leading company in PET packaging equipment, Sidel, the proposed transaction would create a market structure which would provide the merged entity with the incentives and tools to turn its leading position in PET packaging equipment, in particular SBM machines (low and high capacity) used for the "sensitive" product segments, into a dominant position. This is also likely to enhance the merged entity's position and have anti-competitive effects on the overall SBM machine market' (recital 389).

55 Regarding the alleged effects on the carton markets, the Commission takes the view that the merger 'would create a market structure which would enable Tetra to strengthen its current dominant position in carton packaging by eliminating a source of significant competitive constraint', which could have 'serious negative consequences in the carton packaging sector' (recitals 390 and 391). The Commission refers to the need to be particularly vigilant when faced with the strengthening of such a high degree of dominance, as in the present case.

56 According to the Commission, without the merger, companies active in PET packaging, especially Sidel and converters, would engage in business strategies aimed at increasing the use of PET in order to take market share from carton. It dismisses the relevance of Tetra's argument that Sidel is able to influence only the

price of SBM machines, which forms a very small proportion of the total packaging cost, on the ground that it is the ability of Tetra to influence the price of both carton machines and cartons which is important.

57 Without the merger, 'PET companies would be expected to compete vigorously to gain market share from carton' (recital 398), and 'Tetra would also be expected to defend its position fiercely by seeking to improve its carton packaging solutions by innovating, bringing better carton technology, new carton shapes and closures and, in some cases, lowering carton prices to defend its position. Indeed, Tetra has been active in this field and has produced new carton packages with more user-friendly features such as the carton gable top package with screw top closure' (recital 398). The merger would not only eliminate the need for Tetra to compete as vigorously, but would also enable it to 'control significantly the shift from carton to PET' (recital 399). Thus, it could keep 'its carton package prices at the current high levels for those customers or that part of customers' production unable or unlikely to switch totally or partially to PET due to consumer preferences, switching costs and long-term contracts', whilst continuing, for customers wishing to switch to PET, to 'be in a position to influence its customers' choice of packaging machines, for example, through the timing of the shift, and to offer its timely and tailor-made solutions, thus increasing its PET equipment market share' (recital 399). Thus, Tetra could pre-empt 'the major advantage of its main competitor, the SIG group which is the only other company in the world that manufactures and sells both carton and PET packaging equipment' (recital 400).

58 The Commission also finds that '[t]he fact that the merged entity [holds] dominant positions in two closely related neighbouring markets (carton and PET packaging equipment) and a notable presence in a third market (HDPE) would enable the merged entity to have a particularly strong presence in the sectors for the packaging of the relevant end-use products (LDPs, juice, FFDs, tea/coffee

drinks)' (recital 404). This would also strengthen the already 'strong' position (recital 407) of Tetra in the sector of packaging of the 'sensitive' products and would increase the barriers to entry for the competitors of Tetra/Sidel, which would allow the merged entity to 'marginalise competitors and [...] reinforc[e] dominance in the relevant markets for carton packaging equipment and PET packaging equipment, in particular SBM machines used for "sensitive" products' (recital 408).

The commitments

59 The commitments, set out in the Annex to the contested decision, are summarised by the Commission as consisting of: '(i) divestiture of Tetra's SBM business; (ii) divestiture of Tetra's PET preform business; (iii) holding Sidel separate from Tetra Pak companies and pre-existing behavioural remedies under Article 82 of the Treaty; and (iv) granting a licence for Sidel's SBM machines for sale to customers filling "sensitive" products and for sales to converters' (recital 410). The Commission finds them to be 'insufficient to eliminate the major competition concerns identified on the PET packaging equipment and carton packaging markets' (recital 424). The proposed divestiture of Tetra's SBM business and PET preform business would only have 'a minimal impact on the position of the merged entity', whilst the licence, in particular for Sidel's SBM machine business for sensitive products, would not only be insufficient to eliminate the problems but would not appear to be 'a viable option' (recital 424). The licence 'may actually introduce complex mechanisms in the market resulting in artificial regulation' (recital 424). Lastly, the two behavioural commitments concerning the separation of Sidel's and Tetra's business and compliance with Article 82 EC 'are considered insufficient as such to resolve the concerns arising from the structure of the market following the merger' (recital 424).

60 Given their 'overall insufficiency to address the competition concerns raised by the transaction', the Commission finds that the commitments 'thus cannot form the basis for an authorisation decision' (recital 451).

61 Accordingly, Article 1 of the contested decision states:

'The concentration, notified to the Commission by Tetra Laval BV [...], whereby Tetra would acquire sole control of the undertaking Sidel SA is declared incompatible with the common market and the functioning of the EEA Agreement.'

Procedure

62 By application lodged with the Registry of the Court of First Instance on 15 January 2002, the applicant brought the present action against the contested decision.

63 By a separate document lodged the same day, the applicant also applied for an expedited procedure, pursuant to Article 76a of the Rules of Procedure. The Commission, in its observations on that application, lodged on 5 February 2002, agreed that the procedure was justified.

64 On 6 February 2002, the First Chamber of the Court of First Instance, to which the case has been assigned, decided to grant the application for an expedited procedure.

65 The Commission lodged its defence on 12 March 2002.

66 By application lodged at the Registry of the Court of First Instance on 19 March 2002, the applicant brought an action, registered under Case T-80/02, seeking the annulment of the decision of 30 January 2002 (see paragraph 26 above) and the joinder of the present case with Case T-80/02. By a separate document lodged on the same day, Tetra also requested an expedited procedure in Case T-80/02, which was supported by the Commission in its observations in respect of that application, lodged on 3 April 2002. That case was also assigned to the First Chamber of the Court of First Instance.

67 By way of measures of organisation of procedure, on 19 March 2002 the parties were requested, pursuant to Article 64(3)(e) of the Rules of Procedure, to attend an informal meeting on 4 April 2002 with the Judge-Rapporteur.

68 The applicant accepted at the informal meeting that its application for joinder of the present case and Case T-80/02 could be regarded as withdrawn if the oral hearings in both cases could be held consecutively and if the judgments were to be delivered, pursuant to the expedited procedure, on the same date. At the meeting the parties were given leave to lodge speaking notes no later than one week prior to the oral hearings for the two cases.

69 On 18 April 2002, the First Chamber of the Court of First Instance granted the application for the procedure to be expedited in Case T-80/02 and set 26 and 27 June 2002 as the dates for the hearings in the two cases.

70 Upon hearing the report of the Judge-Rapporteur, the First Chamber of the Court of First Instance decided, at its meeting on 10 June 2002, to open the oral procedure and, by way of measures of organisation of the procedure, invited the parties to answer, preferably before the hearing by the deadline set for the filing of speaking notes or, if not, at the hearing, a number of written questions notified by letter of 11 June 2002 (hereinafter 'the written questions'). The Commission was also requested to produce one document.

71 On 19 June 2002, the parties lodged their speaking notes with the Registry of the Court of First Instance. The applicant's notes contained a request that some of the information contained in some of the documents in the case-file be treated as confidential. In its notes the Commission does not dispute the confidentiality of those documents. On the same day, the parties also replied to the written questions and the Commission lodged the document requested.

72 As one of the judges of the First Chamber of the Court of First Instance was prevented from attending, the President of the Court designated Judge Pirrung on 24 June 2002, pursuant to Article 32(3) of the Rules of Procedure, in order to attain the quorum necessary to give judgment and re-scheduled the two hearings for 3 and 4 July 2002.

73 By letter of 24 June 2002, the applicant supplemented its request for confidential treatment of some of the information contained in the case-file.

74 By separate letter on the same day, it asked that a document, a copy of which was already held by the Commission, be included in the case-file. The document in question is the 'rapport de gestion du Conseil d'administration' of Sidel for the

2001 fiscal year (hereinafter the 'Sidel annual report'). The request was granted by the First Chamber of the Court of First Instance by decision of 26 June 2002.

75 Upon hearing a supplementary report of the Judge-Rapporteur, the First Chamber of the Court of First Instance decided, at its meeting on 27 June 2002, to ask the Commission to produce a number of documents, in particular the Canadean, PCI, Warrick and Pictet studies, and to answer two additional written questions (hereinafter 'the additional written questions').

76 On 1 July 2002, the Commission lodged its answers to the additional written questions and produced the documents requested. Those documents, with the exception of the responses to the market investigation, which the Commission considered to be confidential, were put into the case-file.

77 The parties presented oral argument and answered questions put to them by the Court of First Instance at the hearing on 3 and 4 July 2002.

78 At the hearing, the Court of First Instance decided to grant the applicant access to a non-confidential version of some of the responses to the market investigation. Five of the responses were found, following verification by the Court, either not to contain answers to the questions asked (four documents) or clearly to be of an entirely confidential nature (one document) and were not given to the applicant. The non-confidential version of the responses, as drawn up by the Court pursuant to Article 67(3) of the Rules of Procedure, was put into the case-file and a copy was supplied to the applicant. The applicant requested, and was granted by the Court, a week to lodge any written observations it might have on that version of the responses to the market investigation. By letter of 8 July 2002, the applicant waived that right, whilst maintaining its substantive plea concerning those documents.

Forms of order sought

79 Since the conditions stated during the informal meeting for the amendment of the form of order sought have been met, the applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

80 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

Law

81 The applicant puts forward essentially five pleas in support of its action. At the informal meeting on 4 April 2002, the applicant stressed that, as stated in its written pleadings, it was contesting the contested decision in so far as it

prohibited the merger as modified by the commitments (hereinafter 'the modified merger'). It has asked the Court to focus its examination on the situation which would result following the commitments it has offered.

82 By its first plea, of a procedural nature, the applicant argues that the Commission did not respect the applicant's right of access to the case-file prior to the adoption of the contested decision. On the merits, it maintains that, by refusing to allow the modified merger, the Commission incorrectly applied Article 2(3) of the Regulation. In support of this claim, the applicant asserts that the modified merger has (i) no appreciable anti-competitive horizontal or vertical effects and (ii) no appreciable anti-competitive conglomerate effect. Furthermore, it claims (iii) that the assessment by the Commission of the applicant's commitments is inadequate and (iv) that the Commission has failed to give sufficient reasons for the contested decision.

I — *The plea alleging infringement of the right of access to the file*

A — *Arguments of the parties*

83 The applicant states that the Commission failed to give it access to the file, as several documents on which the Commission relies extensively for the purpose of making findings adverse to Tetra in the contested decision were never communicated to it. They are, first, the report of 10 September 2001 by an external economic expert, Professor Ivaldi (hereinafter 'the Ivaldi report'), containing an econometric analysis of Sidel's previous sales margins (hereinafter 'the econometric analysis') of which the applicant received only a one-page summary, and, second, the responses to the market investigation, of which it

received two summaries. Despite a request by Tetra on 19 October 2001 to obtain complete access to those responses, as opposed to inadequate summaries, on 25 October 2001 the hearing officer confirmed the Commission's refusal to allow access to those documents. The applicant maintains that the refusal is contrary to both the Commission Notice on the internal rules for processing requests for access to the file in cases pursuant to Articles [81] and [82] of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89 (OJ 1997 C 23, p. 3, hereinafter the 'access to the file notice') and the case-law (Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 23 et seq.; and Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775, paragraph 58 et seq.).

84 The applicant also stresses that the Commission, because of the importance it gave to the econometric analysis in the contested decision (particularly in recital 346 et seq.), must have relied on documents other than merely the Ivaldi report in the form of the summary disclosed to the applicant.

85 The Commission states that the applicant had access to matters in the file to which the Commission refers and on which it relies in the contested decision. Referring to Article 13(3) of Regulation No 447/98 and to Case T-221/95 *Endemol* v *Commission* [1999] ECR II-1299, paragraph 65, the Commission states that access to the file is justified only in so far as it enables the undertaking in question, faced with the Commission's objections and with the documents on which the Commission relies, to present observations on the foundation of those objections. In the present case, Tetra was given the opportunity to present such observations.

86 Firstly, as regards the Ivaldi report, the Commission states that, during the administrative procedure, the applicant did not complain about lack of access to the file so far as concerns the econometric analysis and, accordingly, cannot now

argue that its rights of defence have been infringed. The brevity of the summary of that analysis in the report can be explained by the fact that it was a response and correction to the analysis previously submitted by Tetra. Tetra could have presented its observations on that report (and its experts did so during the oral hearing before the Commission on 26 September 2001). Moreover, the report constituted merely a supplementary part of the market investigation carried out by the Commission. Thus, even if there were some substance to the applicant's allegations, which there is not, this should not lead to annulment of the contested decision because the report did not affect its content.

87 Secondly, as regards the responses to the market investigation, the Commission states that they also were of secondary importance, since it relied on its own analysis of the inadequacy of the commitments. The Commission is required to refuse access to those responses on grounds of confidentiality (Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraph 26), and, although Article 17(2) of Regulation No 447/98 allows a party which submits observations to supply a non-confidential version of its response, the Commission had the right, as confirmed by *Endemol* v *Commission*, to prepare objective, non-confidential summaries and to limit access by the applicant to those summaries.

88 The Commission did, moreover, discuss the responses with the applicant at a meeting on 18 October 2001, during which the summaries were made available to it. That access, along with the examination and confirmation by the hearing officer of the objectivity of the summaries, ensured that the applicant's rights of defence were fully respected. In any event, as the results of the investigation merely confirmed the Commission's initial analysis, there is no reason to conclude that the contested decision would have been different even if the requested access had been granted. The alleged infringement of rights of the defence cannot, therefore, justify the annulment of the contested decision.

B — *Findings of the Court*

1. Preliminary observations

89 First of all, it must be observed that access to the file in competition cases is intended in particular to enable the addressees of statements of objections to acquaint themselves with the evidence in the Commission's file, so that on the basis of that evidence they can express their views effectively on the conclusions reached by the Commission in its statement of objections (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraphs 9 and 11; *BPB Industries and British Gypsum* v *Commission*, paragraph 21; Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, paragraph 75). The general principles of Community law governing the right of access to the Commission's file are designed to ensure effective exercise of the rights of the defence and, in the case of a decision concerning infringement of the competition rules applicable to undertakings and imposing fines or penalty payments, breach of those general principles of Community law in the procedure prior to the adoption of the decision can, in principle, cause the decision to be annulled if the rights of defence of the undertaking concerned have been infringed (*Hercules Chemicals* v *Commission*, paragraphs 76 and 77).

90 It must also be recalled that, in order to hold that the rights of the defence have been infringed, it is sufficient for it to be established that the non-disclosure of the documents in question might have influenced the course of the procedure and the content of the decision to the applicant's detriment (Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847, paragraph 78; Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 1021; and *Endemol* v *Commission*, paragraph 87).

91 The Court of First Instance has already confirmed that these principles are applicable to the procedures provided for by the Regulation, even though their application may reasonably be adapted to the need for speed, which characterises the general scheme of the Regulation (*Endemol* v *Commission*, paragraph 68).

92 Accordingly, in the present case it is necessary to examine whether the applicant's rights of defence were affected by the conditions under which it had access to some of the documents in the Commission's administrative file.

2. The first part of the plea: the Ivaldi report

93 First of all, even if the Commission's argument regarding the lateness of the complaint of infringement of the rights of the defence were valid, it cannot, in the particular circumstances of the present case, be upheld. The applicant's assertion that Professor Ivaldi apparently had a very limited role at the hearing before the hearing officer has not been denied by the Commission; nor did the Commission respond to the economists' report produced by Tetra at that hearing. In those circumstances, it is reasonable to conclude that the applicant did not, prior to the adoption of the contested decision, appreciate the importance which the Commission would attach to the econometric analysis in the Ivaldi report.

94 Secondly, it must, however, be observed that the applicant had sufficient access to the Ivaldi report, a fact which it has not seriously disputed. The Court accepts the Commission's explanation that the report is brief because it was a response to an analysis submitted by the applicant itself. It follows that only the existence of other documents relating to the econometric analysis in the contested decision

and to which Tetra did not have access could establish a failure by the Commission to allow access to the file.

95 In that connection, it is clear from case-law that, where the institution concerned asserts that a particular document to which access has been sought does not exist, there is a presumption that it does not exist. That, none the less, is a simple presumption, which the applicant may rebut in any way by relevant and consistent evidence (see, to this effect, Case T-123/99 *JT's Corporation* v *Commission* [2000] ECR II-3269, paragraph 58; Case T-311/00 *British American Tobacco (Investments)* v *Commission* [2002] ECR II-2781, paragraph 35). It must be found in the present case, however, that the applicant has not rebutted that presumption.

96 In support of its allegation, the applicant essentially refers to the details of the econometric analysis carried out in the contested decision. However, it is apparent from the file, in particular the annexes to the parties' written observations concerning the accuracy of the opposing econometric analyses, that the Commission's analysis is based largely on the information supplied to it by the applicant. The only other factors which the Commission took into account in the formulation of the variables used in its analysis are based on some of the criticisms of the variables used in the Tetra analysis which Professor Ivaldi made in his report. This is corroborated by the very title of the Ivaldi report in that it is referred to, in the singular, as a 'Note to the File/Internal'.

97 That conclusion is not affected by the applicant's argument based on the access to the file notice. In fact, it is clear that the assistance, in the form of advice provided by Professor Ivaldi, is not a 'study' which must be made accessible pursuant to the fourth subparagraph of point I B of the access to file notice. Nor can the adequacy of the analysis in the report be contested by alleging an infringement of the right of access to the file. It follows that the Commission, in having Professor Ivaldi assist it in the study of the econometric analyses submitted by the applicant, did not fail to meet the obligations which it imposed on itself in the access to the file notice.

3. The second part of the plea: the responses to the market investigation

98 As for the second part of the plea, concerning the responses to the market investigation, the case-law also makes it clear that, with regard to answers by third parties to requests by the Commission for information, the Commission must take into account the risk that an undertaking holding a dominant position might adopt retaliatory measures against competitors, suppliers or customers who have collaborated in the investigation carried out by the Commission (*BPB Industries and British Gypsum* v *Commission*, paragraph 26; and *Endemol* v *Commission*, paragraph 66). Faced with such a risk, third parties who submit documents to the Commission in the course of its investigations, and who consider that reprisals might be taken against them as a result, are entitled to expect that their request for confidentiality will be complied with.

99 It is possible, where certain third parties have asked that their identity not be divulged, that it will be necessary for the Commission not to reveal the identity of other third parties who are involved in the procedure but who did not request confidentiality before replying to the Commission's questionnaires (*Endemol* v *Commission*, paragraph 70).

100 Thus it cannot be excluded that this requirement of confidentiality also justifies the drawing up of non-confidential summaries of all of the responses in question (see, to this effect, *Endemol* v *Commission*, paragraphs 71 and 72).

101 In other words, the mere fact that Article 17(2) of Regulation No 447/98 imposes an obligation on each third party requesting confidentiality to indicate clearly which parts of its response are to be considered confidential does not prevent the Commission, in the light of Article 17(1) of Regulation No 447/98 and the objective of Article 287 EC, from examining of its own volition whether there is a

risk that business secrets of some of the third parties involved in the procedure, or even other confidential information, may be divulged if unlimited access is allowed to the responses of other third parties who have not themselves requested confidentiality.

102 However, when faced with a request for access to the file from a notifying party (namely a 'person concerned' within the meaning of Article 18(1) of the Regulation), it is for the Commission, at least until the Advisory Committee has been consulted pursuant to that article, to justify any restrictions on that right of access, since any exception to the right of access to the file must be interpreted narrowly, particularly when the Commission intends to prohibit the notified merger in question.

103 Tetra was allowed access to only two non-confidential summaries by the Commission of all the responses to the market investigation and not to the responses themselves or to a non-confidential version of them (see paragraph 22 above). The Commission observes that it received requests for confidential treatment from many of those responding to the market investigation, in some cases because they stated that they feared reprisals. However, following verification by the Court of First Instance pursuant to Article 67(3) of the Rules of Procedure, it became clear that the Commission had not informed the 51 recipients of the questionnaires, at least in the faxed cover sheets of the questionnaires, of their obligation under Article 17(2) of Regulation No 447/98 to indicate clearly all those parts of their responses which they deemed to be confidential. Despite that omission, six of the 30 usable responses, out of the 34 responses received, expressly requested confidentiality. One of the respondents provided a non-confidential version of its response to the Commission, pursuant to Article 17(2) of Regulation No 447/98.

104 Accordingly, it is necessary to examine whether the Commission was justified in refusing the applicant access to the responses to the market investigation and to one non-confidential version of those responses, and in limiting access to two non-confidential summaries of all of the responses.

105 The need for speed, which characterises the general scheme of the Regulation, cannot by itself justify a refusal of the kind at issue here. If the Commission did not have the time needed to ask the respondents to the market investigation for a non-confidential version of their responses, pursuant to Article 17(2) of Regulation No 447/98, it had at least to explain to the applicant how the nature and scope of the fear of reprisals or other negative or undesired consequences expressed by respondents who simply requested confidentiality without providing a non-confidential version of their responses justified a refusal to allow access to those responses or to a non-confidential version thereof. Although the short deadlines in the second phase of a merger procedure may, for practical reasons and especially when many requests for confidentiality have been received, give grounds for drawing up non-confidential summaries, the Commission is still obliged to give valid reasons for a blanket refusal to allow access to the responses to a market investigation concerning the commitments offered by a person concerned. That obligation applies even more strongly to the responses submitted to it without any — at least any formal — request for confidentiality.

106 It is apparent from the hearing officer's reply of 25 October 2001 to the applicant's request for access of 19 October 2001 that the Commission's position on access to the file in the present case reflects its general position. The Commission believed that the provision of summaries of the responses to the market investigation, the accuracy and detail of which was confirmed by the hearing officer, constituted adequate access to the file and thus respected Tetra's rights of defence.

107 It must be held, first, in particular in the light of the fact that some of the respondents to the market investigation expressed their fears of possible retaliation by the applicant if their responses were not treated confidentially, that confidential treatment had to be given to all of the responses.

108 Since the Court of First Instance has itself been able to establish that access could have been given to a non-confidential version of at least 30 of the responses to the

market investigation, prepared by blanking out confidential information, it is necessary to examine whether access solely to the summaries did actually infringe the applicant's rights of defence in the present case.

109 The Commission's assertion that it referred to the responses to the market investigation in the contested decision only to support a conclusion it had already reached concerning the commitments for other unrelated reasons is supported to a certain extent by the wording of the contested decision (see recitals 424 and 425). It is nevertheless true that at least one adverse finding for the applicant regarding the commitments is presented as being 'confirmed by the market test' (recital 428).

110 It should be noted that, in a memorandum of 18 October 2001 and a formal complaint filed by Tetra on 19 October 2001 with the hearing officer, Tetra complained of a number of deficiencies and inaccuracies in the market investigation questionnaires to which it had access, particularly as concerns the discussion of the commitment offered by Tetra concerning the licence for Sidel's SBM machines. In his reply of 25 October 2001, the hearing officer stated that the Commission's market investigation was conducted in an objective manner and that the questionnaires were not misleading. He also stated that, since the non-confidential version of the commitments had been attached to the questionnaires, the Commission was entitled to assume that the recipients of the questionnaires had read that document.

111 It must be pointed out, firstly, that the complaint and the memorandum are both annexed to, and cited in a footnote of, the application. It follows that the Court cannot uphold the objection raised by the Commission at the hearing, namely that the arguments in the applicant's oral submissions regarding the alleged inaccuracy of the fifth question in the questionnaire sent to customers were new and, therefore, inadmissible.

112 The Court cannot, however, accept the applicant's argument that the questionnaires, by asking the recipients to express a view on whether the commitments '[would] reduce significantly' the applicant's position in carton packaging and '[would] effectively eliminate' the strong position of the merged entity on the market for sensitive liquid food packaging, may have misled the recipients as to the test under Article 2(3) of the Regulation. Suffice it to note in that respect that, even if some of the recipients may have formulated their answers by reference to a test other than that prescribed by Article 2(3) of the Regulation, the applicant did not need to have access to the answers to those questions in order to be able to remind the Commission of the significance of that test during the administrative procedure.

113 This is confirmed by the fact that Tetra did actually have access from the beginning to the questionnaires sent to customers and converters, as it acknowledged in its memorandum of 18 October 2001. Although the Commission was required to give it access also to the questionnaire sent to its competitors, the applicant nevertheless acknowledged at the hearing that it had subsequently gained access to it by other means. In any event, as Tetra also acknowledged at the hearing, its arguments do not really relate to the latter questionnaire. It is thus clear that, through its access to the questionnaires and using the summaries of the responses supplied by the Commission, the applicant was able to point out, in its complaint to the hearing officer, that the Commission should apply only the test laid down in Article 2(3) of the Regulation.

114 As regards the allegedly misleading nature of the depiction, in the questionnaires sent to customers and converters, of Tetra's commitment regarding the licence, it can be seen, merely by reading them, that a normally attentive recipient could not have been misled. Whilst the questions asked did contain certain details about the licence which, at most, might have the potential to mislead a recipient who did not take care to examine them in the light of the non-confidential version of the commitments attached as an annex, the Commission was entitled to assume that such an examination was in fact undertaken. The applicant has not shown that,

in so far as a recipient might have found the details to be ambiguous, a simple check against the commitment concerning the licence would not have clarified the precise scope of that commitment.

115 In any event, it is not apparent from the non-confidential version of the responses by the customers and converters to the market investigation that they were misled or confused when formulating their responses. Nor do the summaries of the responses provided to Tetra by the Commission, when examined in the light of the non-confidential version of the responses, indicate that information or details were omitted which might have been useful to the applicant to show that recipients of the questionnaires had been misled or confused in that way. This conclusion is supported by Tetra's decision not to submit additional written comments on that version of the responses during the present proceedings (see, to this effect, *Hercules Chemicals* v *Commission*, paragraph 80).

116 Lastly, there is nothing in the summaries of the responses to the market investigation to indicate that they do not faithfully reflect the one response whose entirely confidential nature has been recognised by the Court, following its verification of that question (see paragraph 78 above).

117 It follows that the Commission's decision to allow Tetra access only to the non-confidential summaries of the responses to the market investigation did not infringe Tetra's rights of defence.

4. Conclusion

118 It follows from the foregoing that the plea alleging infringement of the right of access to the file must be dismissed.

II — *The pleas alleging infringement of Article 2 of the Regulation*

A — *Preliminary observations*

119 As a preliminary point, it must be recalled that the substantive rules of the Regulation, in particular Article 2, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature. Consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations (Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* (*'Kali & Salz'*) [1998] ECR I-1375, paragraphs 223 and 224; Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraphs 164 and 165; and Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585, paragraph 64).

120 It must also be recalled that under Article 2(3) of the Regulation a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it must be declared incompatible with the common market. Conversely, the Commission is bound declare a concentration falling within the scope of application of the Regulation compatible with the common market where the two conditions laid down in that provision are not fulfilled (Case T-2/93 *Air France* v *Commission* [1994] ECR II-323, paragraph 79; see also, to this effect, *Gencor* v *Commission*, paragraph 170; and *Airtours* v *Commission*, paragraphs 58 and 82). If, therefore, a dominant position is not created or strengthened, the transaction must be authorised and there is no need to examine the effects of the transaction on effective competition (*Air France* v *Commission*, paragraph 79).

121 The issue of whether the applicant's second, third and fourth pleas are well founded must be examined in the light of these considerations.

B — *The plea based on the absence of horizontal and vertical anti-competitive effects of the modified merger*

1. Preliminary observations

122 The applicant argues that the commitments eliminated all the potential negative 'horizontal' and 'vertical' effects arising from the notified transaction which are identified in the contested decision. However, inasmuch as the Commission raises some objections to the merger which are based on such effects (recitals 263 to 324), Tetra maintains that the objections have become unfounded in the light of those commitments.

123 The Commission contends that the applicant is wrong to state that the contested decision contains objections relating to horizontal or vertical effects. The decision does not refer to the creation or strengthening of a dominant position as a result of the horizontal or vertical effects of the merger taken in isolation. The Commission maintains, however, that the modified merger would have significant continuing horizontal and vertical effects which it cannot ignore. It states that the contested decision correctly took into account the remaining (post-commitment) horizontal and vertical effects of the modified merger in the assessment of the conglomerate effects.

124 The Court finds that, even though the Commission did not base the contested decision on those horizontal and vertical effects, it did take them into account in support of its finding that the modified merger must be prohibited. Thus, the Commission states in the contested decision that the 'strengthening and creation of dominance' on the market for PET packaging equipment, in particular the market for high- and low-capacity SBM machines, and the market for carton packaging systems 'would take place through a number of factors', including 'horizontal and vertical effects' (recital 262). Moreover, the observations of the Commission, especially the explanations given by its Agent at the hearing, indicate that it is its concerns about the PET equipment markets in particular which are based on such effects. Accordingly, it is necessary to examine the applicant's separate plea relating to the creation of a dominant position on those markets due to those effects.

2. Horizontal effects

(a) Arguments of the parties

125 The applicant begins by stating that, although the contested decision finds that there is an overlap between three markets, each one of which is considered to be a distinct market, namely low-capacity SBM machines, aseptic PET filling machines, and barrier technologies, the Commission does not foresee either the creation or the strengthening of a dominant position in any of those markets. The main problem identified by the Commission as regards horizontal effects concerns the market for low-capacity SBM machines, but Tetra's decision to divest itself of Dynaplast, that is to say, its own SBM machines business, would eliminate this problem. The applicant also emphasises that its commitment to grant a licence for Sidel SBM machines would reduce even further Sidel's pre-existing position on the market for low-capacity SBM machines.

126 The Commission acknowledges that the horizontal effects of the modified merger would not by themselves, that is, independently of the other effects of the transaction, lead to the creation or strengthening of a dominant position, but maintains that they would significantly strengthen the position of the merged entity on the PET market and would not be eliminated by the commitments. Moreover, the commitments would not resolve the problem of the strengthening of Tetra's dominant position on the carton markets which, according to the Commission, would result from the elimination of Sidel as a potential competitor on the global market for packaging systems for sensitive products. The Commission stresses that the divestiture of Dynaplast would eliminate only the horizontal overlap between the activities of Tetra and Sidel in low-capacity SBM machines, whilst the commitments would have no effect on Sidel's leading position in high-capacity SBM machines. The Commission also stresses, both in its defence and its answers to the written questions, that the merger would strengthen the global position of the merged entity for PET equipment, including aseptic PET filling machines, barrier technology and PET bottle capping systems.

(b) Findings of the Court

127 The contested decision identifies three horizontal effects which are problematic from a competition law standpoint and which, as acknowledged by the Commission at the hearing, concern only the PET market. They are the alleged negative effects of the transaction on the markets for low-capacity SBM machines, aseptic PET filling machines, and barrier technology. It is therefore necessary to examine whether, despite the commitments, negative horizontal effects remain which could support the Commission's argument that the merged entity might use its current dominant position on the carton markets to leverage its way into a dominant position on the PET market.

128 As regards low-capacity SBM machines, the commitment by the applicant to divest itself of Dynaplast means that the merger would not strengthen in any way the share of that market currently held by Sidel. This precludes Sidel's position from being strengthened on that market and, *a fortiori*, the transaction from 'significantly' impeding competition in that part of the SBM machine market. The contested decision (recital 427) even recognises that the commitments will eliminate the horizontal overlap of the parties to the transaction in the market for these machines. Although the information obtained from the responses to the market investigation, to which the Commission refers in its defence on this point, have some probative value, the Commission cannot, on the one hand, rely on Dynaplast's contribution to Sidel's position in the market for low-capacity SBM machines, namely an almost [20-30%] market share (recital 266), and, on the other hand, plead before the Court that some of the responses refer to the unimportance or unprofitability of that range of machines. Nor can the mere fact that Tetra was subsequently unable to find a purchaser for Dynaplast, as it confirmed in its answers to the written questions and at the hearing, support the conclusion reached by the Commission, since it merely confirms Tetra's unprofitable and, notwithstanding a large market share, relatively weak position in the market for low-capacity SBM machines prior to the merger.

129 It must therefore be held that the modified merger would not create any horizontal overlap between the activities of the parties thereto in the market for low-capacity SBM machines. The correctness of this conclusion cannot be called into question, at least not in support of the validity of the contested decision, by the Commission's reference to an alleged new technology, 'TetraFast', developed by Tetra for low-capacity SBM machines, which the Commission mentioned for the first time in its answers to the written questions.

130 As regards the market for aseptic PET filling machines, the Commission should have ruled out the existence of significant, negative horizontal effects on competition. First of all, the modified merger would have only relatively modestly strengthened the merged entity's market share ([0-10%] of the installed base of

this type of machine in 2000 in the EEA), if that share is calculated in relation to Sidel's current position, which is [10-20%] on that market (recital 288). Second, there are already sizeable competitors on this market, including new arrivals who have already captured a significant share of the sales on this market (namely [40-50%]), as acknowledged in the contested decision (recital 251). Lastly, the emphasis placed by the Commission, in its written answers and at the hearing, on the commercial potential of LFA-20 machines, referred to in the contested decision (recital 82, footnote 32, and recital 202), which will be capable of filling aseptically both HDPE and PET bottles, cannot support its argument. Those machines, at least according to Tetra, which the Commission did not contradict on this point at the hearing, are still being tested by it and by three competitors which are also developing them.

131 As regards the market for barrier technologies, the Commission acknowledges that the effects of the notified transaction would significantly enhance the merged entity's position in that market, but not 'to the extent that a dominant position [...] would be created' (recital 282). The Commission could have hardly found otherwise, since the combination of Tetra's and Sidel's activities in this area would only provide the merged entity with a market share in the order of [10-20%], and that is without taking into account the, at least potential, effects of Tetra's renunciation of its licence to the Sealica technology, a point confirmed by the Commission in its answers to the written questions. This estimate of the market share is, moreover, strongly disputed by the applicant in its answers to the written questions. It has argued convincingly that, given that these are emerging technologies, the market shares calculated by reference to existing products are not very reliable. At the hearing, moreover, Tetra referred to the problems currently posed by the development of plasma barriers, such as Sidel's Actis technology for beer, a point confirmed by Sidel's annual report. It also stressed that new barrier technologies, especially for some sensitive products like LDPs, do not use PET but require the development of a new plastic resin. In the light of the foregoing, it must be found that the Commission has not shown that there would be significant, negative horizontal effects on competition in the market for barrier technologies.

132 It follows that, if the commitments are taken into account, the negative horizontal effects of the merger referred to by the Commission in the contested decision are merely minimal, if not almost non-existent, on the various relevant PET packaging equipment markets. In these circumstances, the Court finds that the Commission made a manifest error of assessment in so far as it relied on the horizontal effects of the modified merger to support its finding that a dominant position on those PET markets would be created for the merged entity through leveraging.

3. Vertical effects

(a) Arguments of the parties

133 The applicant submits that the Commission's main fear arises from the alleged vertical integration of the merged entity in carton, PET and HDPE packaging systems. Since Tetra/Sidel would have a significant position in the SBM machines market, there would, according to the Commission, be a channel conflict resulting from the partial dependency of converters on Sidel. That conflict would allow the merged entity to marginalise converters by offering their customers combined packages of SBM machines, preforms and turnkey installations, in other words integrated PET solutions, thereby foreclosing converters from those activities. The Commission recognised, however, that these fears would be realised only if Sidel became dominant on the market for SBM machines. It also recognised that Tetra's commercial decision to exit the preforms market would eliminate all the concerns raised by the converters, and that the anticipated vertical problems would not by themselves result in the creation of a dominant position for the merged entity for PET equipment or preforms. The applicant concludes from this that the modified merger does not have vertical anti-competitive effects in the PET packaging market, does not strengthen Tetra's pre-existing vertical integration on the carton markets and, as recognised by the

Commission, does not create any dominant position in the market for EBM machines producing aseptic HDPE bottles with handles.

134 The Commission maintains that the vertical integration of the merged entity could lead to converters being foreclosed from the market. Although the entity's vertical integration would not make it dominant in the preforms and PET equipment markets, the opportunity provided by that integration to marginalise converters is an important factor in the assessment of the conglomerate effects of the merger. The commitments do not eliminate all of these effects, because the merged entity could still offer integrated PET solutions without offering preforms, for instance, through HTW agreements. Neither the proposed exit by Tetra from the preforms market nor the granting of a licence for the Sidel technology would eliminate the dependency of the converters on the merged entity. These commitments could even serve to uphold the strong position of the merged entity in the sale of SBM machines to converters because there would no longer be any channel conflict which might encourage them to purchase SBM machines from competitors of Sidel.

(b) Findings of the Court

135 It should be observed, initially, that, as the Commission pointed out several times during the hearing, its concerns about the modified merger pertain mainly to Tetra. Unlike Sidel, Tetra is a highly vertically integrated company in the aseptic carton markets and, consequently, has a reputation for offering its customers integrated packaging systems. The Commission is of the view that the applicant's presence in the merged entity would lead to a substantial reduction in competition in the PET packaging equipment markets.

136 First of all, it must be found that the sale by Tetra of its interests in preforms would entirely eliminate the initial concern raised by the Commission about converters.

137 Turning to the Commission's post-commitment concern that the converters will purchase more readily from Sidel once Tetra had divested itself of its interests in preforms, thereby strengthening the position of the merged entity, no cogent evidence to that effect was put forward by the Commission in the contested decision, other than the reference to the responses to the market investigation (recital 428). Although it cannot be excluded that some converters will be less worried about purchasing SBM machines from the merged entity if it is no longer active in preforms, the reassurance thereby given is far from being equivalent to the 'channel conflict' referred to in the statement of objections (points 232 to 236 and 249 of the statement of objections). Since there is currently strong competition in the preforms market, that reassurance for some converters would at most only slightly reduce the scope for Sidel's competitors to sell SBM machines to them.

138 Whilst it is true that the modified merger would enable Sidel, through Tetra's presence in the market for plastic bottle capping systems, to offer almost totally integrated PET lines, it is obvious that the vertical effects of Sidel's entry into that market through the merged entity, and Sidel's concomitant disappearance as a potential customer of the other operators active on that market, would be minimal in the light of the relatively weak position held by Tetra on that market. In addition, the global capacity of the merged entity, compared with Sidel's current capacity, to offer such integrated PET lines would not be strengthened by the modified merger, because Tetra would divest itself of its PET preforms activities. The Sidel annual report shows that sales of those lines accounted for only around 20% of Sidel's SBM machine sales in 2001, despite the alleged 'exponential growth' of 30% between 1999 and 2000 to which the Commission refers in its defence.

139 As for the alleged effects on the EBM machines market, the contested decision expressly acknowledges that, in the light of Tetra's reply of 1 October 2001 to the supplemental statement of objections, 'the position of other players allayed concerns about dominance in a potential market for machines producing aseptic HDPE bottles with handles' (recital 297, footnote 125). It is thus clear that the modified merger would not have significant negative effects on the position of converters active in the HDPE market. That market would, post-merger, remain a highly competitive market.

140 Consequently, it has not been shown that the modified merger would result in sizeable or, at the very least, significant vertical effects on the relevant market for PET packaging equipment. In those circumstances, the Court finds that the Commission made a manifest error of assessment in so far as it relied on the vertical effects of the modified merger to support its finding that a dominant position on those PET markets would be created for the merged entity through leveraging.

4. Conclusion

141 It follows from the foregoing that the Commission committed manifest errors of assessment in relying on the horizontal and vertical effects of the modified merger to support its analysis of the creation of a dominant position on the relevant PET markets. These errors do not, however, lead to the annulment of the contested decision, since the conglomerate effect alleged by the Commission could by itself suffice to justify the decision. Accordingly, the plea based on the lack of conglomerate effect must be examined.

C — *The plea based on the lack of foreseeable conglomerate effect*

1. Preliminary observations

142 It is common ground between the parties that the modified merger is conglomerate in type, that is, a merger of undertakings which, essentially, do not have a pre-existing competitive relationship, either as direct competitors or as suppliers and customers. Mergers of this type do not give rise to true horizontal overlaps between the activities of the parties to the merger or to a vertical relationship between the parties in the strict sense of the term. Thus it cannot be presumed as a general rule that such mergers produce anti-competitive effects. However, they may have anti-competitive effects in certain cases.

143 In the contested decision, the Commission essentially considers that the modified merger will have foreseeable anti-competitive conglomerate effects in three ways. First, the merger would enable the merged entity to use its dominant position on the global carton packaging market as a 'lever' in order to achieve a dominant position on the PET packaging equipment markets. Second, the merger would reinforce the current dominant position of Tetra on the markets for aseptic carton packaging equipment and aseptic cartons, because it would eliminate the competitive constraint, represented by Sidel, coming from the neighbouring PET markets. Third, the merger would generally strengthen the overall position of the merged entity on the market for packaging of sensitive products.

144 At the hearing, the Commission stressed the intrinsically prospective nature of its analysis, in which it must assess the future effects of a merger transaction notified to it. It stressed that, in a case involving a merger with a conglomerate effect, just as in a case involving a classical horizontal merger, the concern of the

Commission is to prevent future anti-competitive conduct which would be likely to follow from the transaction, and that its analysis must be conducted having regard to the existing means and capacities of the parties to the notified transaction. The mere fact that with a conglomerate-type merger, unlike other types of merger, the probability of such conduct does not result directly from the combination in a single market of the market shares which will be held in future by the merged entity does not mean that a different approach must be adopted.

145 The three pillars of the Commission's reasoning concerning leveraging, the elimination of potential competition and the general effect of strengthening the competitive position of the merged entity must be examined in turn.

2. The first pillar: leveraging

(a) Considerations relating to the general context of the case

146 It should be observed, first, that the Regulation, particularly at Article 2(2) and (3), does not draw any distinction between, on the one hand, merger transactions having horizontal and vertical effects and, on the other hand, those having a conglomerate effect. It follows that, without distinction between those types of transactions, a merger can be prohibited only if the two conditions laid down in Article 2(3) are met (see paragraph 120 above). Consequently, a merger having a conglomerate effect must, like any other merger (see paragraph 120 above), be authorised by the Commission if it is not established that it creates or strengthens

a dominant position in the common market or in a substantial part of it and that, as a result, effective competition will be significantly impeded.

147 However, the analysis of potentially anti-competitive conglomerate effects of a merger transaction raises a certain number of specific problems relating to the nature of such a transaction. Those problems should be examined first. In that connection, the Court will first examine the temporal aspects of the conglomerate effects and then the aspects relating to the specific nature of those effects, which may be either structural in the sense that they arise directly from the creation of an economic structure, or behavioural in the sense that they will occur only if the entity resulting from the transaction engages in certain commercial practices.

(i) Temporal aspects of conglomerate effects

148 It is necessary first to determine whether a merger transaction creating a competitive structure which does not immediately confer on the merged entity a dominant position may nevertheless be prohibited under Article 2(3) of the Regulation, when in all likelihood it will allow that entity, as a result of leveraging by the acquiring party from a market in which it is already dominant, to obtain in the relatively near future a dominant position on another market in which the party acquired currently holds a leading position, and when the acquisition in question has significant anti-competitive effects on the relevant markets.

149 The applicant stressed the need to establish with certainty that the merger would enable it to achieve a dominant position on the PET equipment markets in question, that is to say, not to establish the likely occurrence of such a position, but to foresee its immediate emergence. As pointed out in paragraph 144 above,

the Commission, referring to *Kali & Salz*, stressed the inherently prospective nature of the analysis it is required to carry out when it examines the foreseeable effects which the notified transaction will have on the reference market.

150 The Court observes that, in principle, a merger between undertakings which are active on distinct markets is not usually of such a nature as immediately to create or strengthen a dominant position due to the combination of the market shares held by the parties to the merger. The factors which are of significance for the relative positions of competitors within a given market are generally to be found within the market itself, namely in particular the market shares held by the competitors and the conditions of competition on the market. It does not follow, however, that the conditions of competition on a market can never be affected by factors external to that market.

151 Thus, by way of example, in a case where the markets in question are neighbouring markets and one of the parties to a merger transaction already holds a dominant position on one of the markets, the means and capacities brought together by the transaction may immediately create conditions allowing the merged entity to leverage its way so as to acquire, in the relatively near future, a dominant position on the other market. This could especially be the case where the relevant markets are tending to converge and where, in addition to the dominant position held by one of the parties to the transaction on a market, the other party, or one of the other parties, to the transaction holds a leading position on another market.

152 Any other interpretation of Article 2(3) of the Regulation could deprive the Commission of the power to exercise control over merger transactions which have solely or principally a conglomerate effect.

153 Consequently, in a prospective analysis of the effects of a conglomerate-type merger transaction, if the Commission is able to conclude that a dominant position would, in all likelihood, be created or strengthened in the relatively near future and would lead to effective competition on the market being significantly impeded, it must prohibit it (see, in this regard, *Kali & Salz*, paragraph 221; *Gencor* v *Commission*, paragraph 162; and *Airtours* v *Commission*, paragraph 63).

(ii) Aspects concerning the specific nature of the conglomerate effects

154 In this context, it is also appropriate to distinguish, on the one hand, between a situation where a merger having conglomerate effects immediately changes the conditions of competition on the second market and results in the creation or strengthening of a dominant position on that market due to the dominant position already held on the first market and, on the other hand, a situation where the creation or strengthening of a dominant position on the second market does not immediately result from the merger, but will occur, in those circumstances, only after a certain time and will result from conduct engaged in by the merged entity on the first market where it already holds a dominant position. In this latter case, it is not the structure resulting from the merger transaction itself which creates or strengthens a dominant position within the meaning of Article 2(3) of the Regulation, but rather the future conduct in question.

155 The Commission's analysis of a merger producing a conglomerate effect is conditioned by requirements similar to those defined by the Court with regard to the creation of a situation of collective dominance (*Kali & Salz*, paragraph 222; and *Airtours* v *Commission*, paragraph 63). Thus the Commission's analysis of a merger transaction which is expected to have an anti-competitive conglomerate effect calls for a particularly close examination of the circumstances which are relevant for an assessment of that effect on the conditions of competition in the reference market. As the Court has already held, where the Commission takes the

view that a merger should be prohibited because it will create or strengthen a dominant position within a foreseeable period, it is incumbent upon it to produce convincing evidence thereof (*Airtours* v *Commission*, paragraph 63). Since the effects of a conglomerate-type merger are generally considered to be neutral, or even beneficial, for competition on the markets concerned, as is recognised in the present case by the economic writings cited in the analyses annexed to the parties' written pleadings, the proof of anti-competitive conglomerate effects of such a merger calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects (see, by analogy, *Airtours* v *Commission*, paragraph 63).

156 In the present case, the leveraging from the aseptic carton market, as described in the contested decision, would manifest itself — in addition to the possibility of the merged entity engaging in practices such as tying sales of carton packaging equipment and consumables to sales of PET packaging equipment and forced sales (recitals 345 and 365) — firstly, by the probability of predatory pricing by the merged entity (recital 364, cited in paragraph 49 above); secondly, by price wars; and, thirdly, by the granting of loyalty rebates. Engaging in these practices would enable the merged entity to ensure, as far as possible, that its customers on the carton markets obtain from Sidel any PET equipment they may require. The contested decision finds that Tetra holds a dominant position on the aseptic carton markets, that is to say, the markets for aseptic carton packaging systems and aseptic cartons (recital 231, see paragraph 40 above), a finding which is not disputed by the applicant.

157 It should be recalled that, according to settled case-law, where an undertaking is in a dominant position it is in consequence obliged, where appropriate, to modify its conduct so as not to impair effective competition on the market regardless of whether the Commission has adopted a decision to that effect (Case 322/81

Michelin v *Commission* [1993] ECR 3461, paragraph 57; Case T-51/89 *Tetra Pak* v *Commission* [1990] ECR II-309, paragraph 23; and Joined Cases T-125/97 and T-127/97 *Coca-Cola* v *Commission* [2000] ECR II-1733, paragraph 80).

158 Moreover, in response to the questions put by the Court at the hearing, the Commission did not deny that leveraging by Tetra through the conduct described above could constitute abuse of Tetra's pre-existing dominant position in the aseptic carton markets. This could also be the case, according to the concerns expressed by the Commission in its defence, in circumstances where the merged entity refused to participate in the installation and any necessary conversion of Sidel SBM machines, to provide after-sales service or to honour the guarantees for such machines when sold by converters. However, the Commission went on to state that the fact that a type of conduct may constitute an independent infringement of Article 82 EC does not preclude that conduct from being taken into account in the Commission's assessment of all forms of leveraging made possible by a merger transaction.

159 In this regard, it must be stated that, although the Regulation provides for the prohibition of a merger creating or strengthening a dominant position which has significant anti-competitive effects, these conditions do not require it to be demonstrated that the merged entity will, as a result of the merger, engage in abusive, and consequently unlawful, conduct. Although it cannot therefore be presumed that Community law will not be complied with by the parties to a conglomerate-type merger transaction, such a possibility cannot be excluded by the Commission when it carries out its control of mergers. Accordingly, when the Commission, in assessing the effects of such a merger, relies on foreseeable conduct which in itself is likely to constitute abuse of an existing dominant position, it is required to assess whether, despite the prohibition of such conduct, it is none the less likely that the entity resulting from the merger will act in such a

manner or whether, on the contrary, the illegal nature of the conduct and/or the risk of detection will make such a strategy unlikely. While it is appropriate to take account, in its assessment, of incentives to engage in anti-competitive practices, such as those resulting in the present case for Tetra from the commercial advantages which may be foreseen on the PET equipment markets (recital 359), the Commission must also consider the extent to which those incentives would be reduced, or even eliminated, owing to the illegality of the conduct in question, the likelihood of its detection, action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue.

160 Since the Commission did not carry out such an assessment in the contested decision, it follows that, in so far as the Commission's assessment is based on the possibility, or even the probability, that Tetra will engage in such conduct in the aseptic carton markets, its findings in this respect cannot be upheld.

161 Moreover, the fact that the applicant offered commitments regarding its future conduct is also a factor which the Commission should have taken into account in assessing whether it was likely that the merged entity would act in a manner which could result in the creation of a dominant position on one or more of the relevant PET equipment markets. There is no indication in the contested decision that the Commission took account of the implications of those commitments when it assessed the creation of such a position in future through leveraging.

162 It follows from the foregoing that it is necessary to examine whether the Commission based its analysis of the likelihood of leveraging from the aseptic carton markets, and of the consequences of such leveraging by the merged entity, on sufficiently convincing evidence. In the course of that examination it is necessary, in the present case, to take account only of conduct which would, at

least probably, not be illegal. In addition, since the anticipated dominant position would only emerge after a certain lapse of time, by 2005 according to the Commission, its analysis of the future position must, whilst allowing for a certain margin of discretion, be particularly plausible.

(b) Arguments of the parties

(i) The possibility of leveraging

163 The applicant claims that the Commission has not shown that the merged entity will be able, by leveraging, to acquire a dominant position on the PET packaging equipment markets, in particular the market for high- and low-capacity SBM machines.

164 The applicant claims that the Commission has acknowledged that PET packaging equipment and carton packaging equipment are not 'complements' in the economic sense of the term but rather technical substitutes (recital 345). In this case, however, contrary to the Commission's assertions, the economic incentive to leverage is weaker than when the products are 'complements'. Firstly, the incentive to bundle sales of different products is clearly weaker in those circumstances. Secondly, there is no significant customer overlap for the two products. Thirdly, the fact that the two products are not 'complements' precludes the setting-up of barriers owing to the incompatibility of the Tetra carton machines with the SBM machines offered by manufacturers other than Sidel.

165 The Commission's position is all the more untenable in that its decision-making practice shows that it has consistently relied on the complementarity of products

to justify concerns about conglomerate effects (see, *inter alia*, decisions of the Commission declaring a concentration to be compatible with the common market: Case IV/M.0050 — AT&T/NCR (OJ 1991 C 16, p. 20); Case IV/M.164 — Mannesmann/VDO (OJ 1992 C 88, p. 13); Case IV/M.836 — Gillette/Duracell (OJ 1996 C 364, p. 4); decision of 29 September 2000, Case COMP/M.1879 — Boeing/Hughes; and decision of 3 July 2001 declaring a concentration to be incompatible with the common market, Case COMP/M.2220 — General Electric/Honeywell).

166 The demonstration of leveraging through future growth in the PET markets is not convincing. That growth would, in fact, not result significantly from a switch from carton to PET, because most of the products currently packaged using PET cannot be packaged using carton. Products which can be packaged using either carton or PET account for a mere 5% of total PET usage. Moreover, PET packaging for beer offers the most significant growth prospects, owing to the possible discontinuance of glass as a form of packaging.

167 In addition, large-scale customers, who for the most part are the only ones to use both carton and PET packaging, would be able to resist any leveraging.

168 The Commission contends that the structural conditions favourable to leveraging would be created by the merger. It relies on a number of factors in making this assertion: first, Tetra's dominant position on the aseptic carton markets and Sidel's leading position on the PET packaging equipment markets; second, the negligible positions of the competitors of Tetra and Sidel on those markets; and, third, the so-called 'first-mover advantage' which the merged entity would have

due to its strong presence in the sensitive products segment, products which are common to the carton and PET markets. The Commission also emphasises the financial strength of the merged entity, which would be largely superior to that of its competitors, its high degree of vertical integration, despite the commitments, and its high level of expertise and know-how in aseptic processing.

169 Leveraging is possible not only when the products in question are 'complements' in the economic sense of the term, but also when they are 'commercial complements', that is to say, when the products are used by the same group of customers. This is so when, for example, as in the present case, the products in question are related and belong to closely neighbouring markets. The assessment of leveraging involving products which are commercially related (such as whisky and gin or vitamins for different psychological needs) is based on an approach which is supported by the case-law (Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, confirmed on appeal in Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667; and also the *Tetra Pak II* cases, cited above in paragraph 40).

170 According to the Commission, since Tetra holds an undisputed dominant position on the aseptic carton markets, and since the customers will continue to require that kind of packaging in order to work in parallel with the new PET chains during the switch-over period to PET, it is obvious that the applicant will be able to leverage the 'lost customers' into the market for the new material.

171 As regards the customer overlap between the parties to the merger, although most of the producers of sensitive products currently use carton, the potential future overlap between carton packaging and PET packaging would be in the order of 100% if barrier technologies were found which enabled the use of PET for all of those products.

172 The Commission argues that the PET growth forecasts used in the contested decision (see paragraphs 32 and 33 above) are based on a prudent analysis of the PCI, Warrick and Pictet studies (hereinafter 'the independent studies') and on a solid, coherent bundle of evidence obtained by it through its general market investigation (recitals 141 to 143).

173 The Commission stresses, as further evidence of the potential for leveraging, the leading role which would be played by the merged entity in the important switch to PET from carton, where Tetra holds a dominant, almost monopolistic, position on the aseptic carton market.

(ii) Foreclosure effects

174 According to Tetra, since it is 'unlikely' (recital 367) that the merged entity would resort to bundling or tying, the Commission's concerns are in reality based on the ability of the merged entity to use indirect means such as 'incentives' or 'pressure' (recital 364) in order to foreclose the PET markets. However, such means are not anti-competitive inasmuch they would not foreclose other competitors from the PET markets in question. The Commission's arguments in this respect are defective.

175 First, the Commission wrongly distinguishes the markets according to the final product to be packaged. The definition of those alleged separate markets is also erroneous because SBM machines are generic and can be used for any of the sensitive products. At the hearing, Tetra stated that the SBM machines can be adapted, at low cost, to suit the product to be packaged. The COMBI and hot-fill machines are only rarely used for sensitive products.

176 Second, the sensitive products segment makes up only a small proportion of PET packaging activities as a whole. Thus, even if the merged entity tried to marginalise Sidel's current competitors on the market for machines for sensitive products, it would not be in a position to diminish significantly their financial resources.

177 Third, even if the Commission's strong growth forecasts for sensitive products are correct, it is unlikely that the merger would prevent Sidel's competitors, in particular SIG, from having an incentive to expand.

178 Fourth, Tetra stated at the hearing that the technical obstacles (mainly barrier technologies against light and oxygen) do not affect all sensitive products in the same manner. Thus, there is no longer a technical problem as regards PET packaging for FFDs and tea/coffee drinks. This means that any undertaking active in non-sensitive products would be able to enter the market for sensitive products for which there are no specific technical requirements. As for segments involving barrier treatment, it would not only be the merged entity which would offer the necessary barrier technologies, since it holds only a [10-20%] share of the specific market for those technologies.

179 Fifth, the importance of the overlap between Tetra's and Sidel's customers has been exaggerated. The few cases of overlap concern customers who have major purchasing power and would thus be able to resist any pressure which might be brought to bear on them.

180 The Commission argues that Article 2(3) of the Regulation does not require that it be proven that the planned merger would lead to the definite elimination of competitors. Rather, the relevant legal criterion is whether the competitors would

be marginalised, that is to say, whether the merged entity would be in a position to act largely in disregard of its competitors, its customers and ultimately consumers (*Hoffmann-La Roche* v *Commission*, cited in paragraph 89 above, paragraphs 38 and 39).

181 Tetra's line of argument, aimed at proving the absence of distinct markets for SBM machines for sensitive and non-sensitive products, was correctly analysed and dismissed in the contested decision (recitals 176 to 188 and 346 to 358). Even the allegedly 'generic' SBM machines would have to be extensively adapted to make them suitable for their specific end-use and would require complex additional components. The segmentation of the PET equipment market into distinct sub-markets, by distinguishing *inter alia* between sensitive and non-sensitive products, is justified (Case T-229/94 *Deutsche Bahn* v *Commission* [1997] II-1689, paragraph 56).

182 Turning to price discrimination, the Commission contends that the evidence submitted shows that Sidel has in the past engaged in price discrimination according to end-use.

183 It was rightly held in the contested decision that competitors might lose an incentive to develop their activities in the sensitive products segment. Almost all of the PET equipment market is still closed to them, because the SBM machines market is highly concentrated, with Sidel holding a roughly [60-70%] share. Competitors remaining after the merger would not be in a position to strengthen their presence in the sensitive products segment due to technical, commercial and strategic barriers to entry.

184 Turning to barrier technologies, the Commission lists several additional components which it maintains are necessary to enable an SBM machine to be used in a PET chain for sensitive products. It also argued, particularly at the

hearing, that a truly aseptic facility must also have complex barrier technologies to protect against oxygen in the case of juices, FFDs and tea/coffee drinks and, in the case of LDPs, an additional barrier against light.

185 As regards commercial barriers, because of the high risk of contamination producers of sensitive products do not want to take risks with suppliers of aseptic PET equipment without a proven reputation. Tetra's unquestionable reputation in aseptic filling would be a major advantage for the merged entity.

186 There is also an important strategic barrier to entry to the PET market for sensitive products owing to the fact that more than [80-90%] of the producers of UHT (i.e., aseptic) milk are currently customers of Tetra on the carton markets. According to the contested decision, Tetra's customer base covers almost the entire LDP and juice industry (recital 361). The merged entity would thus have a considerable 'first-mover advantage' in those segments. In addition, the merged entity would have a large customer base, would wield enormous financial strength, would have sizeable research and development capacity, and would be a major presence in three packaging materials: carton, PET and HDPE, all of which are used to varying degrees for the packaging of sensitive products.

187 At the hearing, the Commission stressed the very strong position held by Sidel on the market for high-capacity SBM machines (those capable of blowing more than 8 000 bottles per hour, hereinafter 'bph'), in which it now has the highest-performance machine in the world, with a capacity of over [...] bph. It also highlighted Sidel's strong position at the top end of the market for low-capacity machines, namely those just under the threshold of 8 000 bph, using a rotative technology comparable to that used in high-capacity machines.

(c) Findings of the Court

188 It should be observed, as a preliminary point, that the contested decision (particularly recitals 213 and 389, referred to in paragraphs 39 and 54 above) shows that the Commission's competition law analysis of leveraging is based on the hypothesis that a market structure would immediately be created which would confer on the merged entity the incentive and necessary tools to transform its current leading position on the markets for PET equipment, especially the market for low- and high-capacity SBM machines used for sensitive products, into a dominant position. Moreover, the statement of objections (point 289) and the contested decision (recital 328, referred to in paragraph 45 above) indicate that a dominant position on the PET equipment markets could be achieved in the near future through leveraging from Tetra's dominant position on the aseptic carton markets, rather than through Sidel's current position on the SBM machines market.

189 It should be noted, first, that the definition of the relevant markets is virtually undisputed by the applicant. Thus, it is necessary to distinguish the SBM machines market, itself divided into low- and high-capacity machines according to the number of bph (recital 167); the barrier technology market (recitals 189 to 191); the PET filling machines market, itself divided into aseptic and non-aseptic machines (recital 201); the PET preforms market (recital 206); and also the markets for auxiliary equipment, distribution packaging equipment and services relating to various relevant sectors (recital 257).

190 On the other hand, the applicant challenges the subdivision of the markets for SBM machines according to their end use, particularly the identification of a specific market for the sensitive products in question here (recital 188), that is, the products common to the carton and PET markets (recital 45). In challenging the subdivision, Tetra essentially argues that the SBM machines are generic in nature

and are not manufactured for specific uses. It follows, according to the applicant, that leveraging aimed at sales of SBM machines could not be successful owing to the number of active competitors, particularly in the market for low-capacity machines. Consequently, this challenge will be examined below only as part of the assessment of the foreseeable consequences of a possible leveraging effect on the SBM machine markets.

191 It is appropriate to examine, first, whether the implementation of the merger would, at least in principle, enable the merged entity to exercise leveraging.

(i) The possibility of leveraging

192 The Commission's analysis of foreseeable leveraging as a result of the modified merger is based on mostly objective, well-established evidence. The analysis of the close links between the markets for carton packaging and PET packaging is based on a series of factors which, taken together, support the findings of the Commission to the requisite legal standard: the markets belong to the same industrial sector; PET can be used to package most carton-packaged products (that is, sensitive products) to such an extent that PET can be considered to be a 'weak substitute' for carton; the principal suppliers of carton packaging, namely, Tetra (at least until the sale of its PET preforms operations and the divestiture of its interests in Dynaplast), SIG and Elopak, are all present on the PET markets; some customers require both carton and SBM machines, and their number will inevitably increase in future with the anticipated growth of PET for sensitive products (recital 329).

193 As regards growth of the PET sector, as is noted in the contested decision (recital 72) and as the applicant confirmed at the hearing, the applicant accepts that some

growth is anticipated for sensitive products such as FFDs and tea/coffee drinks. However, it disputes the level of expected growth for other sensitive products, and challenges the Commission's refusal to take account of the effects of the foreseeable growth in PET use for beer packaging.

194 In rejecting, in the contested decision, the argument of the parties to the merger that the PET market would not grow significantly by 2005 due to technical limitations, the Commission also relied on convincing evidence. The contested decision (especially recitals 73 to 88) indicates that aseptic filling technologies which are currently available enable PET to be used for all sensitive products and that these technologies will continue to improve. The principal impediment to growth for these technologies is the commercial difficulty in applying them, in particular to LDPs.

195 The Court finds in that regard that the Commission has established to the requisite legal standard that growth in the PET market is foreseeable, rendering possible the occurrence of the predicted leveraging. However, the extent of the growth for the various sensitive products will have to be examined subsequently, as part of the assessment of the Commission's assertion that that growth will give the merged entity an incentive to leverage.

196 The Court finds unconvincing the applicant's argument that no leveraging from one market into another is possible when, as in the present case, a product in one market and a product in another market are merely technical substitutes. From *Hoffmann La Roche* v *Commission*, cited in paragraph 89 above, and *Hilti* v *Commission*, cited in paragraph 165 above, it can be concluded by analogy that leveraging may be carried out when the products in question are ones which the customer finds suitable for the same end use, namely, in the present case, the packaging of certain types of beverages. This assessment is not affected by the

Commission's decision-making practice referred to by Tetra (see paragraph 165 above), since those decisions concerned mergers involving factual circumstances very different from those at issue in this case. The Commission did not commit an error in relying in the present case on factors such as the use of the products by the same customer group (manufacturers of sensitive products) for the same purpose (the packaging of sensitive products) and on the fact that the Commission's market investigation confirms the willingness of those manufacturers to use simultaneously both types of packaging, a point not contested by the applicant. The Commission rightly pointed out in this connection that the extent of the need those manufacturers perceive for PET is a question of marketing, although the cost factor cannot be ignored (recital 333). Accordingly, as the Commission pointed out at the hearing, it is not very likely that they will abandon carton altogether, but they will probably feel a need to move some of their production over to PET, which supports the finding of a link between the relevant products in the present case.

197 In those circumstances, given the very strong dominant position held by Tetra on the aseptic carton markets, with a roughly 80% market share (recital 219), and the dominant position it holds on the global carton packaging market (namely the aseptic and non-aseptic carton markets taken as a whole), with some [60-70%] of the market (recital 231), it is clear that a large number of the manufacturers of sensitive products who will move their production over to PET are current Tetra customers. In particular, as regards LDP's, the contested decision finds that 'consumption of milk in single serve bottles and flavoured milk, for example, is expected to grow fast' and that 'the capacity for such products does not necessarily need to replace existing capacity' (recital 99), a finding which is not contested by the applicant. In finding, at least as regards the installation at dairies of new lines of production, that the costs of switching to PET need not necessarily lead to excessive delays in the development of PET use, the Commission did not commit a manifest error of assessment. Thus it correctly emphasised the

'first-mover advantage' which the merged entity would have for those products. In addition there is, in particular, the financial strength of the parties to the merger, especially that of Tetra; Tetra's outstanding reputation and the widely recognised reputation of Sidel on the carton and PET markets, respectively; and the wide range of products and services they offer, including after-sales service.

198 The merged entity's ability to engage in leveraging practices is not called into question by the applicant's argument that there is no significant overlap between the customers of the parties to the merger. The Commission did not commit a manifest error of assessment by finding, on the basis of the current overlap found to exist and in the light of expected growth in use of PET for sensitive products, that the number of customers using both carton and PET equipment at the same time will increase and could, at least in theory, give rise to a very significant overlap in packaging for sensitive products (recital 341).

199 Consequently, the Commission did not commit a manifest error of assessment in finding that it would be possible for the merged entity to engage in leveraging practices.

200 It is, therefore, necessary to examine whether the merged entity will have an incentive to engage in such practices owing to the foreseeable growth in the PET market, as the Commission maintains.

(ii) Likely levels of growth

201 The contested decision indicates, and the Commission confirmed this point at the hearing, that the incentive for the merged entity to exercise leveraging depends to a large extent on the anticipated level of growth in the PET markets. Accordingly,

it is appropriate to examine whether the foreseeable volume of sensitive products packaged in PET by 2005, as compared with the total future volume of products packaged in PET, makes that incentive unlikely or at least reduces the likelihood significantly, as the applicant maintains.

202 According to the Commission, 'PET use in the common product segments will grow significantly in the next 5 years' (recital 103). In considering that growth, the Commission relied not only on its own specific market investigation, but also on the Canadean study and on the independent studies (recital 104). The relevant forecasts in those studies will be examined first.

203 For the period 2000 to 2005, the Canadean study forecasts growth of 0.7% in the use of PET for LDP packaging and 0.6% for juices (table 5, recital 105). For FFDs and tea/coffee drinks, it forecasts 'faster growth' of 1.5% and 5.1%, respectively (recital 107). The Commission also refers to an independent study carried out by Canadean in 2000 on PET penetration in the juice segment. According to the Commission, although PET was 'non-existent' in that segment in 2000, 'if the example of other regions is followed Europe represents enormous growth potential' (recital 126).

204 The PCI study, entitled 'The Potential for PET in the Packaging of Liquid Dairy Products (2001)', considers that PET is not likely to capture new market shares in UHT milk and that it will reach 9.2% for plain fresh milk and 25% for other dairy beverages based on milk, that is, flavoured milk and drinks based on milk and yoghurt. As for the low-end commodity part of the milk market, the PCI study does not anticipate that PET 'will be very successful in replacing existing packaging — mainly cartons and HDPE — [...] mainly because this is by and large a price sensitive segment' (PCI, p. 12, cited in recital 129).

205 The Warrick study, entitled 'Warrick Research Report Packaging Markets — "Aseptic Packaging Markets World & Western Europe" (2000)', forecasts, for the period 1999 to 2003, annual growth of 2.4% in this market, giving a total of 28 billion litres packaged (Warrick, p. 4). Whilst it observes that milk and juice account for roughly 80% of aseptically packed product volume (see also recital 131), the forecasted annual growth for UHT milk and flavoured milk is 0.8% and 1%, respectively, and a small decline is forecast for other milk-based drinks (Warrick, p. 6). Aseptic packaging is expected to grow by about 50% for the period 1999 to 2003, and that growth will be mainly in PET, the use of which could double to 2 billion packs per year (Warrick, p. 32, see also recital 136). That growth will be concentrated mainly in ready-to-drink tea (Warrick, p. 16). It is, however, the aseptic carton packages which account for 70% of packs, representing 90% of packaged products in terms of volume (Warrick, p. 15). Growth in these types of packaging is expected to be around 2% per year, to reach 30.8 billion packs for 2003. The ideal application of aseptic PET packages will concern premium products which do not require a complete barrier, such as tea/coffee drinks (including isotonic drinks) and possibly juices and juice-based drinks (Warrick, p. 4). Most of the expected growth will, therefore, be in these products (Warrick, p. 32).

206 According to the Pictet study, entitled 'Analysts' Report, Pictet "*European Packaging Machinery, Move into PET*", September 2000', PET offers advantages for large-scale filling of consumer goods, such as mineral water and soft drinks, and future world demand for PET will increase by 10% per year, and that will be strongly underpinned by the use of PET bottles for oxygen-sensitive products (Pictet, p. 5 and 12). According to the report, there are 'clear comparative advantages for PET containers over aseptic cartons [...] and [...] plastic [can be expected] to gain ground rapidly on cartons' (Pictet, p. 11, see also recital 138). Whilst no figures are given for growth in PET use for milk, growth of 12% to 25% for the period 1996 to 2006 is forecast for juice.

207 Like the statement of objections (point 90), the contested decision finds that the market investigation carried out by the Commission shows that 'third parties were very enthusiastic about PET's future growth when improvements in barrier technology become established' (recital 143). In such a situation, a large number of operators expect growth of over 50% by 2005 for milk and juice, at the expense of carton. At the hearing, the Commission stated that it did not share this same level of optimism, but had opted for much more prudent forecasts (see paragraph 33 above).

208 The contested decision also refers to a number of earlier forecasts from Tetra and Sidel. Thus, in a presentation in May 2000, Sidel forecasted that PET sales for juice and tea/coffee drinks would grow by over [...] (recital 139), whilst Sidel's president, in an interview with the trade publication 'PET Planet' published in the same month, stated that he foresaw growth of [...%] due to a 'new application [which] will include beer, milk, fruit juices...' (recital 139). As regards Tetra, the contested decision refers to its forecast of [20-30%] annual growth in the coming years for the aseptic PET filling market (recital 140).

209 On the basis of this evidence, the Commission foresees major growth for the LDP and juice segments for the period 2000 to 2005 which will bring PET up to at least a 10% to 15% share for fresh milk and 25% for flavoured milk and milk-based drinks (see paragraph 33 above). For UHT milk, which represents approximately 50% of the milk market, the Commission acknowledges that the future of PET is 'uncertain' (recital 147) but none the less predicts that it will attain 1%. Taking the upper figure of 15% predicted for fresh milk and taking into account its forecasts for other milk-based drinks, the Commission concludes that in 2005 PET will be used to package approximately 3 billion litres per year, or 9% of the European LDP market (see paragraph 33 above). For juices, whilst it predicts growth generating a 20% share of the total market for 2005, the Commission acknowledges that that growth will be due mainly to switch-over

from glass to PET. For FFDs and tea/coffee drinks, it believes that PET will continue to gain market shares at the expense of carton, to reach 30% in each of those segments by 2005.

210 At the hearing, the Commission stated that its reasoning is not based on the precise accuracy of its forecasts, inasmuch as it is accepted that there will be significant future growth. It also acknowledged there that, in the light of the remaining uncertainties surrounding the commercial applicability of the necessary barrier technologies, it could not assume significant PET growth for the UHT milk market, and that even the weak growth predicted in the contested decision could turn out to be an overestimation. It did, however, emphasise that its forecasts for probable strong growth in the use of PET for fresh milk, juices, FFDs and particularly tea/coffee drinks in the period up to 2005 were entirely plausible.

211 The Court finds that the use of PET will not actually increase for UHT milk and, consequently, for approximately half of the LDP market.

212 As regards the rest of the LDP market, it must be found that the PCI report, the only independent study to concentrate on the LDP market, predicts growth as a result of which PET use will be 9.2% of the fresh non-flavoured milk market in 2005 (PCI, p. 64). In addition there is the fact that, for aseptic packaging, the Warrick report predicts only minimal growth, of 1%, for flavoured milk, and a slight decline for other milk-based drinks, whilst the Pictet report does not give any specific forecasts for LDPs. On the basis of that evidence, the Commission has not shown what it claims to have shown in its defence, namely that its forecasts for LDPs are based on a prudent analysis of the independent studies or on a solid, coherent body of evidence obtained by it through its market investigation. The growth estimates adopted by the Commission (paragraph 209

above) are not really very convincing. The PCI report, on the other hand, provides the only proof which might possibly support the forecast of a 25% market share for PET in other milk-based drinks (namely flavoured milk and drinks based on milk and yoghurt) by 2005 (PCI, pp. 63 and 64). However, if that growth were to be realised, the relevant volume would increase only by 62 000 tonnes for 2000, to reach 92 800 tonnes in 2005, an increase which is not very significant in relation to the roughly 120 million tonnes of milk produced in the Community each year (PCI, p. 9). More generally, the contested decision does not explain adequately how PET could displace HDPE as the main material competing with carton by 2005, especially in the important fresh milk packaging segment. It must be pointed out that the Commission does not dispute either the overall figure of 17.3% for the use of HDPE for LDPs given by Canadean for 2000 (see table 3 in recital 66) or the forecast that that figure could reach 19.5% by 2005 (see table 5 in recital 105).

213 As regards juices, the Commission's forecast is even less convincing. Although the Commission itself acknowledged that the growth in question would be due mainly to a switch from glass to PET, it did not conduct any analysis of the glass market. In the absence of such an analysis, the Court is unable to ascertain the accuracy of the Commission's forecasts for juices. An analysis of that kind would have been indispensable to enable the Court to determine the likely level of switch from glass to carton, PET and HDPE. It was all the more indispensable given the differences between the relevant forecasts made in the Canadean and Warrick studies, on the one hand, and the Pictet study, on the other, as regards levels of growth and the time periods used in the analyses.

214 It follows that the growth forecasts for LDPs and juices as stated by the Commission in the contested decision have not been proven to the requisite legal standard. Although a certain amount of growth in those segments is likely, especially for premium products, convincing evidence of the extent of the growth is lacking.

215 By contrast, the independent studies do show that, by 2005, there will in all likelihood be a significant increase in the use of PET for packaging FFDs and tea/coffee drinks, including isotonic drinks. Since the level of growth forecast in the contested decision was not seriously called into question by the applicant at the hearing and is not overestimated compared with the forecast in the studies, the Court finds that the Commission did not commit an error on this point.

216 However, having regard to the fact that PET use will probably increase by 2005, even if less sharply than that forecast by the Commission, the incentive to leverage cannot be excluded. It is, therefore, necessary to examine the ways in which the merged entity could engage in leveraging.

(iii) Leveraging methods

217 The leveraging methods referred to in recital 364 of the contested decision (cited in paragraph 49 above) are based on Tetra's dominant position on the aseptic carton markets. Given, in particular, Tetra's commitment to divest itself of its preforms operations, the leveraging would be carried out by two types of measures: first, through pressure leading to tied sales or sales which bundle equipment and consumables for carton packaging jointly with PET packaging equipment. That pressure could be put on Tetra customers needing to continue to use carton packaging for some of their production and especially those customers with long-term agreements with Tetra for their carton packaging needs (recital 365, cited in paragraph 50 above). Second, measures could be adopted to offer incentives, such as predatory pricing, price wars and loyalty rebates.

218 However, the use, by an undertaking with a dominant position like Tetra's on the aseptic carton markets, of pressure in the form of tied sales or incentives such as predatory pricing or loyalty rebates that are not objectively justified, would usually constitute an abuse of that position. As this Court has already held, the possible recourse to such strategies cannot be presumed by the Commission, as it has done in the contested decision, in order to justify a decision prohibiting a merger transaction which has been notified to it in accordance with the Regulation (see paragraphs 154 to 162 above). It follows that the leveraging practices which may be taken into consideration by the Court are limited to those which, at least probably, do not constitute an abuse of a dominant position on the aseptic carton markets.

219 It is, therefore, necessary merely to consider strategies for tied or bundled sales which are not in themselves forced, for loyalty rebates that are objectively justified on the carton markets, and for offers of reduced prices for carton or PET packaging equipment that are not predatory within the meaning of well-established case-law (Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, particularly paragraphs 102, 115, 156 and 157; judgment in Case C-333/94 *Tetra Pak* v *Commission*, paragraphs 41 to 44, upholding the judgment in Case T-83/91, and the Opinion of Advocate General Fennelly in Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others* v *Commission* [2000] ECR I-1365, particularly paragraphs 123 to 130). Against that background, it is necessary to examine whether the Commission took account of the commitment concerning separation between Sidel and Tetra Pak companies, agreed in principle for a 10-year period, according to which no 'joint offerings of any of Tetra Pak's carton products together with Sidel's SBM machines' are to be made.

220 It is apparent from the contested decision that Tetra asked the Commission to take note of its existing obligations under Article 3(3) of Commission Decision 92/163/EEC of 24 July 1991 relating to a proceeding pursuant to Article [82] of

the [EC] Treaty (IV/31.043 — Tetra Pak II) (OJ 1992 L 72, p. 1), which provides:

'Tetra Pak shall not practice predatory or discriminatory prices and shall not grant to any customer any form of discount on its products or more favourable payment terms not justified by an objective consideration. Thus, discounts on cartons should be granted solely according to the quantity of each order, and orders for different types of carton may not be aggregated for that purpose.'

221 It follows that Tetra gave a clear indication of its willingness to comply fully with the special obligations imposed on it by Article 82 EC as a result of the dominant position it holds on the aseptic carton markets. It also reiterated its acceptance of all of the relevant obligations imposed on it following the finding in Decision 92/163 of an infringement of Article 82 EC as regards those markets. It also undertook, in the context of the present proceedings, to make no joint offers of its carton products together with Sidel's SBM machines.

222 Consequently, the only methods of tied or bundled sales which would actually be feasible for the merged entity would be offers made by Tetra to its current customers on the carton markets which would not be compulsory or forced and which would only be in respect of carton packaging equipment and/or carton products, on the one hand, and PET packaging equipment other than SBM machines, on the other. It must also be observed that, notwithstanding the emphasis placed by the Commission in the contested decision (recitals 177 and 369), in its written observations and oral pleadings on the significance of the merged entity's ability to offer almost all of the equipment necessary for setting up an integrated PET production line, it is clear from the commitments that it would not be possible for that entity to make a joint offer to a customer for carton packaging equipment and an integrated PET production line, at least not one containing a Sidel SBM machine.

223 Moreover, although the finding in the contested decision regarding the price discrimination allegedly practised in the past by Sidel is not, having regard to the parties' written pleadings and the oral pleadings of the Commission concerning the underlying econometric analysis, vitiated by a manifest error of assessment, it cannot constitute sufficiently convincing evidence that the merged entity will continue to behave in a similar way. Unlike Sidel prior to the merger, the merged entity would be bound not only by the commitments but also by the various obligations limiting Tetra's conduct.

224 It must therefore be found that the merged entity's possible means of leveraging would be quite limited. An examination of the foreseeable consequences of its resorting to such conduct must take account of this.

225 When examining the foreseeable effects of leveraging, it is necessary to distinguish the various PET equipment markets from those specifically for SBM machines.

(iv) Foreseeable consequences of leveraging on the markets for PET equipment other than SBM machines

Preliminary considerations

226 Notwithstanding the fact that the applicant challenges the Commission's definition of distinct markets for each category of sensitive product likely to be packaged in carton or in PET (see recitals 45 and 188), it is clear from the

contested decision that the Commission's choice to confine its analysis solely to the sensitive products examined by it is due to the fact that those products can now, at least technically, be packaged in both carton and PET and that the anticipated growth in the use of PET makes the switch from carton to PET foreseeable. In its conclusion on the analysis of leveraging, the Commission foresees that the 'leading position' of the merged entity 'in PET packaging equipment' would be turned into a 'dominant position' (recital 389). Since this analysis relates to machines used for packaging sensitive products, it is therefore necessary to examine the consequences of any leveraging on the various PET equipment markets identified in the contested decision.

227 Although it is clear from the contested decision, and from the confirmation by the Commission in particular at the hearing, that the Commission's main concern from a competition standpoint is the future creation of a dominant position for the merged entity on the SBM machine markets, particularly for high-capacity machines, it stresses the possible acquisition of a dominant position on each of the PET equipment markets on which the merged entity would be active. It is necessary to examine this contention in relation to the objective information about those PET markets in order to determine whether it is supported by convincing evidence.

228 Since Tetra has given a commitment to divest itself of its PET preforms operations, the relevant markets are the markets for barrier technologies, aseptic and non-aseptic PET filling machines and plastic bottle closure systems. It is also appropriate to consider Sidel's interests in the auxiliary markets for equipment, mainly conveyor belts and distribution packaging equipment, such as 'palletisers', the importance of which was emphasised by the Commission at the hearing in relation to the attractive range of products (and services) which could be offered by the merged entity.

Barrier technologies

229 The contested decision principally examines the position of the parties to the merger in the area of plasma technology, which is a technology applied to PET bottles using specialised machines in a separate step after the bottles have been blown (recital 272). This approach is justified and largely uncontested by the applicant. It is based on the Commission's market investigation of the notified transaction, according to which the widely-held opinion in the industry is that the multi-layer technology, such as Tetra's Sealica, is not the 'winning technology', that is, the technology of the future; rather, it is plasma. Accordingly, it is necessary to consider the position of the parties in the area of plasma technology and the foreseeable conglomerate effects of the implementation of the modified merger on that position.

230 The Commission acknowledges that, to date, Sidel has not achieved great success with its Actis technology (recital 273). Nor did it dispute the applicant's statement at the hearing that it is mainly a technology intended for packaging beer and that Sidel had encountered problems in developing this technology. The Commission merely emphasises the importance of the Actis Lite technology, to which reference is made in the same point, at least as regards juices. Regarding Tetra, the Commission refers to two different technologies (recital 274), namely, Glaskin, a plasma technology, and Sealica, whilst noting the commercial decision to abandon the latter, a decision which was in fact subsequently specified in one of the commitments. It finds that '[i]n the overall barrier technology market, the combination of the parties' technologies would give the merged entity a market share [of] approximately [10-20%] on the basis of barrier-enhanced bottles produced in 2000' (recital 275). It stated at the hearing that this estimate was based on that of the parties to the merger (point 156 of the notification); the estimate excluded certain monolayer technologies (improved plastics already containing barrier properties), whereas the parties to the merger took the view that they should have been included (recitals 192 and 195 and footnotes 93 and 95).

231 However, the Commission stated that the technical complexity of the market prevents it from confirming or rebutting the allegation of the parties to the merger that a combination of Sidel's Actis and Tetra's Glaskin technologies, even if that were possible, would not result in an enhanced 'winning' plasma barrier (recital 279). It none the less concludes that 'the combination of the parties' plasma and multilayer technologies would enhance the merged entity's position [...] significantly', although 'not to the extent that a dominant position in barrier technology would be created' (recital 282).

232 The Court considers that it is clear that a market share of [10-20%] is far short of amounting to a dominant position on that market. It should be recalled that the 15th recital in the preamble to the Regulation states that 'concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market; [...] an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25%'. The contested decision does not provide any additional evidence to support the Commission's argument, with the possible exception of the various references to the financial strength of the merged entity and the reputation of Tetra's and Sidel's allegedly extensive research programmes, whose importance was emphasised several times by the Commission at the hearing.

233 It has not been shown in the contested decision that the applicant is in a better position than its various competitors on this market. In the notification, the parties to the merger stated that there were at least 20 other actual or potential competitors working alone, together or under licence, to find a high-performance technology. They included undertakings with resources comparable to those of the merged entity. The Court finds that the veracity of this information is, in essence, confirmed by the contested decision (see especially recitals 69 and 87).

234 Against this background, the discovery of the technology of the future would ordinarily be the one factor which would enable an undertaking or an association

of undertakings active in this market to capture a dominant position. Accordingly, the Commission committed an error in finding, at least on the basis of the evidence to which it refers in the contested decision, that the modified merger would significantly enhance the merged entity's position in barrier technology.

235 It follows that, as regards the barrier technology market, the evidence in the contested decision is not sufficient as a matter of law to show that, if the anticipated leveraging were to take place, the foreseeable consequences would be sufficiently far-reaching to enable the merged entity to achieve a dominant position on that market by 2005.

PET filling machines

236 As regards PET filling machines, the Commission maintains the distinction it drew in particular in *Tetra Pak II* between aseptic and non-aseptic packaging systems (recitals 201 and 204). That finding is not disputed by the applicant (recital 51), which, moreover, stressed that the PET filling machines should be separated into these two distinct product markets (paragraph 312 of the notification, recital 200 of the Decision).

237 Although there is no dispute that aseptic filling is possible with glass containers and PET and HDPE packaging, the Commission states that carton is the main aseptic packaging material (recital 46). According to the Commission, this filling method is used mainly for certain sensitive products, 'namely juices (or juice-based drinks) and [LDPs]', although they may 'also be packaged non-aseptically in which case they require refrigerated distribution', whilst '[m]ost other products are packaged non-aseptically without requiring chilled distribution' (recital 47). It follows that a major part of the sensitive products market as

defined by the Commission in the contested decision, namely sensitive products belonging to the 'common product segments' (recital 45), uses non-aseptic methods for the filling of the products concerned. The positions held by the parties to the merger on the market for non-aseptic PET filling machines should therefore be examined first.

— Non-aseptic PET filling machines

238 The contested decision provides only limited information about the non-aseptic PET filling machines market. The decision contains, firstly, under the heading 'Sidel's leading position in PET packaging equipment' a section entitled 'Sidel's strong experience in [...] non-aseptic PET filling and the innovative Combi-machines', which includes recitals 249 to 255. Secondly, the Commission states that Sidel manufactures non-aseptic filling machines (recital 250). Thirdly, as regards combined machines, namely SBM machines and filling machines integrated in a single machine, which are described as innovative (recital 243), reference is made to Sidel's 'Combi SRU' (ultra-clean non-aseptic filling) range of machines for sensitive products (recitals 173 and 254). The contested decision (recital 84) states that Sidel has already sold three combined machines of this type in the United States for the filling of 'extended shelf life' milk. Lastly, the fact that Tetra is not present on the non-aseptic filling machines market and that Sidel holds a market share of under 10% is recognised in the contested decision (table 8 in recital 299).

239 The above information does not show that the merged entity, whose position would not in any way be strengthened by the contribution from Tetra, would be able to achieve a dominant position on that market by 2005, if ever. Even if it is true that Sidel is the first undertaking to offer a non-aseptic combined PET

machine for non-sensitive products, a fact recognised in the notification itself (recital 380), and although it is clear from the information provided at the hearing that the current use of those machines is almost exclusively confined to that segment (56 combined machines sold worldwide by various manufacturers, as compared with only two machines sold in the aseptic filling segment, that is, excluding extended shelf life milk, one of which sold by Sidel) there is nothing in the contested decision to support a finding that this advantage of Sidel would be so spectacularly strengthened by the merger that the merged entity would achieve a dominant position in the market for non-aseptic filling machines by 2005. This conclusion is confirmed by the fact that the technical difficulties which currently impede the development and sale of combined machines for aseptic filling have not been encountered in relation to non-aseptic filling machines. Thus, as Tetra argued at the hearing, without being contradicted by the Commission on this point, almost all of the manufacturers of non-aseptic filling machines already offer non-aseptic combined machines.

— Aseptic PET filling machines

240 Tetra and Sidel both became active in the market for aseptic PET filling machines through acquisitions in 1999. Between 1998 and 2002, the market for these machines grew by [70-80%] and the Commission believes, on the basis of the information provided in the notification, that it will continue to grow by at least [20-30%] annually in the next few years (recital 250). The Commission examines Tetra's and Sidel's share of the installed base in the EEA — shares being calculated in terms of capacity because that is the most reliable method by which to reflect their actual position on this new, growing market — and concludes that the merged entity 'would have a strong position in aseptic PET filling machines, being one of the three biggest players in the aseptic PET filling machine market with one third of the installed base, possession of leading aseptic PET filling technology, high aseptic "brand" recognition and an international sales force' (recital 290). In its answers to the written questions, the Commission none the less admits that the market share must be understood as being a mere

[25-35%]. It recognises that Procomac is 'clearly the market leader' in this market, having made [...%] of sales between 1998 and 2000, giving it [30-40%] of the installed base of machines in 2000 (recitals 288 and 289). It also accepts that Procomac has sold world-wide five of the 21 machines sold in the first two quarters of 2001, compared to three sold by Sidel (recital 289, footnote 121), and that several new competitors have entered that market since 1998 and 'have captured almost [40-50%] of new sales between 1998 and 2000' (recital 288).

241 The Court finds, first of all, that the joining of Tetra's and Sidel's operations on this market will not enable them to obtain directly a leading position on the market, since the joining only modestly strengthens (namely [0-10%]) Sidel's current share (see paragraph 130 above). Given the power of Procomac and the intensity of competition on the market, especially with the arrival of new competitors, it is also unlikely, on the basis of the current market shares held by Tetra and Sidel, that the merged entity would be able to achieve a dominant position in the relatively near future through leveraging from the aseptic carton markets. This is at least implicitly recognised by the Commission in the contested decision when it mentions the 'strong position' the merged entity would have on this market (recital 290).

242 There are, however, several items in the contested decision which might, at first sight, support the Commission's contention that a dominant position would be created on this market by 2005. They are Tetra's own analysis, according to which '[t]here seems to be an opportunity to take a leading position for a company that acts decisively' (recital 289, referring to an internal document of Tetra attached as an annex to the notification), and the existence of certain aseptic filling machines, namely Tetra's LFA-20 ON and Sidel's Combi SRA (see paragraph 130 above).

243 As regards the Tetra analysis, however, the mere fact that Tetra believes it is possible to achieve a leading position in the market and thus replace Procomac as

the pre-eminent company, does not in itself, in the absence of other evidence to support that analysis, have any probative value and does not, in any event, show at all that such a position could then be transformed into a dominant position. Admittedly, the Commission does emphasise the peerless reputation of Tetra in aseptic carton filling, which could make the purchase of aseptic filling machines manufactured by the merged entity an attractive option, at least for Tetra's current or former customers in the aseptic carton markets who intend to switch to PET, even though carton technology is not directly applicable to PET filling machines. However, the contested decision does not examine the advantage held in this area by the company Serac, which is, at least potentially, of comparable commercial importance.

244 According to the notification, Serac is, unlike both Tetra and Sidel, one of the pioneers in aseptic PET filling and currently holds a strong, recognised position in this field, with a market share of [...%] in 2000 (points 244 and 250). It also holds a leading position on the market for aseptic HDPE filling, with a [...%] market share (point 323). Since the contested decision refers to the fact that the existing technical distinctions which currently separate the PET and HDPE filling machines markets 'may blur in the future' with the development of machines such as Tetra's LFA-20 ON 'that can switch between HDPE and PET aseptic filling' (recital 202), the Commission should at least have examined the apparent advantage of Serac in this area. This is all the more so when Tetra's relatively modest position on the market for aseptic PET filling machines is considered (recital 284), given the fact that Tetra had not been able, at least not by the date of the notification, to sell an aseptic HDPE filling machine, with the possible exception of one machine being tested (notification, point 322) and the fact that the LFA-20 ON machine is also being tested (see paragraph 130 above).

245 In any event, the Commission committed an error by failing to examine the fundamental issue of the intensity of competition on the market for aseptic PET filling machines, a market which, according to an undisputed forecast, will see strong, continued growth. On this issue, the contested decision does not state

how the merged entity would manage, by permissible forms of leveraging (see paragraphs 217 to 224 above), to prevent new competitors from entering the market. In other words, even if it is possible to find that there will be growth in combined sales of SBM machines and aseptic PET filling machines, it has not been shown that the number of sales could reach a level which could threaten the strong competition prevailing on the market, as represented particularly by Procomac (see paragraph 240 above).

246 It must therefore be concluded that the Commission's prediction that a dominant position would be achieved in future on the market for aseptic filling machines is not plausible.

247 Regarding aseptic combined PET machines, in the contested decision the Commission decided not to treat them as a separate market (recital 175). Although there is currently only one Sidel machine of this type, the Combi SRA, installed at a Spanish juice producer (recital 85), it is clear that, in the light of the advantages of these machines (basically, as outlined in recital 174, the fact that they take up less space and are less labour intensive than a traditional PET production line), the commercial success of this machine would strengthen Sidel's current position on the market for aseptic PET filling machines. However, it is much less clear that those advantages suffice to enable the merged entity to achieve a dominant position on this latter market through sales of Combi SRA machines.

248 It should be noted in that regard, that the Commission did not dispute the two statements made by the applicant at the hearing concerning these machines. Firstly, Tetra stated that one of the disadvantages of the combined machines which has, at least to date, been a factor in delaying their sales in the aseptic filling segment, is the need to maintain aseptic conditions when moulds are being

replaced. Secondly, the use of these machines is less flexible than the combination of an SBM machine and a PET filling machine in a normal PET production line.

249 Nor does the Commission dispute in the contested decision Tetra's statement, in its response to the statement of objections, that the combined machines of some major competitors of the merged entity, namely Krones and Procomac/Sipa, 'have substantially the same advantages' (recital 174). Tetra also stated in its response to the statement of objections, and reiterated its position at the hearing, that Procomac/Sipa sold the only other aseptic combined machine already installed in Europe. This statement is not disputed in the contested decision and the Commission merely observed in its pleadings that it was only a 'quasi-combi' type of machine. In any event, the Commission itself highlighted the investments that various companies which are active in the aseptic filling market are making to develop aseptic combined machines. Given the current level of competition in this market, it is likely that at least one of the main competitors will manage to market a combined machine comparable to Sidel's Combi SRA in the near future.

250 Lastly, as regards hot-fill machines, the importance of which, at least for the German market, was emphasised by the Commission at the hearing, it should be noted that the Commission, in the contested decision, on the one hand recognises that those machines 'are of limited use in the EEA' (recital 171). Apparently Sidel has sold only five in the EEA (recital 170) out of a total of eight sales of those machines estimated in the notification (point 315). On the other hand, the Commission held that these machines did not constitute a distinct market from the market for aseptic filling machines. The Court finds, firstly, that hot-fill machines represent only a small part of the market for aseptic filling machines and, secondly, that it is unlikely that that share will increase significantly, given the inherent disadvantages of this method (change in taste). Accordingly, the Commission cannot rely on the merged entity's market share for hot-fill machines in order to show that a dominant position on the market for aseptic PET filling machines will be acquired in the future.

— Conclusion regarding PET filling machines

251 It follows from the foregoing that, as regards the markets for aseptic and non-aseptic PET filling machines, the contested decision does not adduce evidence that suffices in law to show that the implementation of the modified merger would make it likely that, as a result of leveraging practised essentially on Tetra's current carton customers who wish to switch to PET for packaging sensitive products, a dominant position on those markets would be created in the future and, at the latest, by 2005.

Plastic bottle closure systems and auxiliary PET equipment

252 As for plastic bottle closure systems, it is apparent from Tetra's relatively weak position on this market, a market share of merely [10-20%] (see paragraph 44 above), that it is very unlikely that the anticipated leveraging practices would be sufficient, at least in the near future, to transform that position into a dominant one. Although Sidel's current position on some of the various auxiliary PET equipment markets is stronger than Tetra's on the market for bottle closure systems, the Commission does not dispute the applicant's statement that the relevant market shares do not generally exceed [20-30%] (recital 257). Moreover, the contested decision does not answer the assertion in the notification that the equipment in question is not very complicated from a technical standpoint and can, in any event, easily be supplied by 'numerous engineering firms' (point 347).

253 It is, therefore, clear that it has not been demonstrated that it is likely that a dominant position will be created for the merged entity by 2005.

General conclusion on the markets for PET equipment other than SBM machines

254 It is clear from the foregoing that the contested decision does not provide sufficiently convincing evidence to show that leveraging from the aseptic carton market would enable a dominant position to be created for the new entity by 2005 on the markets for barrier technology, aseptic and non-aseptic filling machines, plastic bottle closure systems and auxiliary equipment.

255 At the hearing, the Commission placed particular emphasis on how the strengthening of the merged entity's position on the PET equipment markets would be the result of a 'cascade effect' from the position acquired on those SBM machine markets. It should be noted, however, that this analysis does not appear explicitly in the contested decision and has not therefore been proved to the requisite legal standard. In any event, the merged entity's foreseeable position on the markets for PET equipment other than SBM machines, as found above, is sufficiently weak that, even if such a cascade effect were foreseeable, it would not have a fundamental effect on that position.

256 In the absence of convincing evidence, it must be concluded that the first condition under Article 2(3) of the Regulation is not met as regards the abovementioned PET equipment markets.

257 It is necessary, next, to examine the Commission's analysis of the creation of a dominant position on the SBM machines markets.

(v) The SBM machines markets

The generic nature of SBM machines

258 It is first necessary to examine the evidence on which the Commission relies in distinguishing specific sub-markets for SBM machines by reference to the sensitive products, an approach disputed by the applicant on the ground that these machines are generic in nature.

259 In the contested decision, the Commission finds, firstly, that 'even for an allegedly "generic" piece of equipment such as an SBM machine it is justified to examine the equipment market with reference to the end-use segments', which is 'even more relevant when comparing whole packaging systems in order to assess whether or not they may belong in the same product market' (recital 43). It goes on to state that each liquid product intended for packaging has its 'very particular characteristics which dictate the availability of a given form of packaging', before concluding that end-use segmentation constitutes a meaningful analytical tool for assessing the liquid food packaging equipment market (recital 44, cited in paragraph 30 above). Thus it distinguishes between sensitive products belonging to 'common product segments' and other products, on the basis of the ability of the former to be packaged, at least from a technical standpoint, in either carton or PET, unlike non-sensitive products such as water and carbonated drinks, which cannot be packaged in carton (recital 58). Whilst accepting that 'the majority of SBM machines are "generic"' (recital 177), the Commission states in the same recital that 'a PET packaging line, of which the SBM machine is only one component, is usually tailored to the specific products filled by the customer', which is especially the case for sensitive products, an argument reiterated in its assessment of the consequences of leveraging (recital 369). It refers by way of example to Sidel's SRS G Combi, which is 'designed for carbonated drinks [and] cannot be a substitute for a beverage producer wanting to fill juices' (recital 177),

for which an aseptic Combi SRA machine is required. Referring to the Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5, point 43), it then finds that the two conditions which normally must be met for a finding of a distinct group of customers and thus of a narrower product market are met in the present case: it is possible to identify clearly which group an individual customer belongs to at the moment it purchases an SBM machine, and the trade in the machines among customers or arbitrage by third parties is not feasible (recital 178).

260 The Court finds, firstly, that the emphasis placed in the contested decision on sensitive products belonging to 'common product segments' is based on an objective criterion, namely the fact that these products belong to the category of carton-packaged products and the possibility, at least from a technical standpoint, of them being packaged in PET, which, in the light of the growth to be expected (see paragraphs 201 to 216 above), is likely to become a fairly widespread commercial reality by 2005, at least for FFDs and tea/coffee drinks.

261 However, the contested decision fails to provide sufficiently convincing evidence to demonstrate the allegedly specific characteristics of SBM machines used for packaging sensitive products. Admittedly, a combined machine specifically designed for filling carbonated drinks cannot be used for juices. However, that far from proves that low- and high-capacity SBM machines, even ones tailored before sale to the specific wishes of their purchasers, do not remain generic machines, as argued in essence by the applicant, that is to say, capable of packaging several types of products.

262 As for the alleged specificity of packaging moulds according to the product intended for them, as argued by the Commission, whilst the applicant does not dispute that the number of moulds determines the capacity of the machine, this

specific fact does not prove that SBM machines, of which moulds are merely a component, differ significantly from each other. It is clear from the notification that moulds last on average for three years, whilst an SBM machine lasts for up to 15 years (recital 304). Although Sidel makes its own moulds, the contested decision does not dispute the information on the moulds market provided in the notification, according to which Sidel is not active in that market (that is, as a supplier of moulds to third parties) and the competition amongst those undertakings which are active is very strong, especially from SIG, which claims on its internet site that it is a world leader (recital 309).

263 Nor does the contested decision call into question the statement in the notification that, in a large facility, a customer can use several SBM machines in order to combine them for its various production needs. The contested decision does not contain any examination of whether the flexibility required by some customers for SBM machine moulds can be explained by needs relating to such uses.

264 In its defence, the Commission refers to a number of changes which can be made to an SBM machine to enhance its performance or make it more useful in an integrated PET production line, such as the addition of a special blow air filtration system or ultraviolet treatment to reduce the risk of contamination before the preforms enter the SBM machine. At the hearing, the Commission stated that these changes are evidence of the very specific characteristics of an SBM machine used in a PET packaging line to which the contested decision refers (recital 177). Tetra, whilst disputing the Commission's approach of attributing specific characteristics of other components of a PET production line to SBM machines, none the less stated that these changes represented a mere 5% of the cost of an SBM machine.

265 The Court finds, first, that the contested decision makes no reference to this information. Although the decision correctly stresses the importance of the individual needs of customers who require an aseptic PET filling line in

particular, namely a basic guarantee of aseptic conditions, this cannot justify the definition of a distinct sub-market for SBM machines used in filling lines for the sensitive products at issue here. The mere fact that each SBM machine must be installed in a PET line in order to be useful to its purchaser does not justify that specific characteristics of other PET equipment in that line should be attributed to the SBM machines themselves.

266 There is all the more reason to accept the generic nature of SBM machines, inasmuch as at the hearing the Commission was unable to rebut Tetra's assertion regarding the relatively low cost, when compared to the cost of a so-called 'standard' SBM machine, especially a high-capacity SBM machine, of making any necessary changes to render the machine more compatible for use with aseptic and non-aseptic PET filling machines, or possibly with aseptic filling machines capable of conversion from PET to HDPE.

267 The parties agree, moreover, that combined machines, which are still only rarely used for aseptic filling (see paragraphs 248 and 249 above), do not constitute a distinct market, as is also clear from the contested decision.

268 As regards the possibility of determining exactly which group a given customer belongs to when he purchases an SBM machine and whether or not that customer may, at least currently within the EEA, be able to find a better price through arbitrage between the available suppliers, it is clear that those possibilities, if established, would apply as much to SBM machines used for non-sensitive products as to those used to package sensitive products. The possibility for the merged entity to identify the group to which a customer belongs is due to the fact that many customers in the carton markets who will switch to PET will be current Tetra customers. However, this possible benefit, resulting from the 'first-mover

advantage' which the merged entity will foreseeably have, does not preclude those customers from turning to other suppliers of SBM machines if they become dissatisfied with the conditions offered by the merged entity.

269 Therefore, on the basis of the evidence in the contested decision, the Commission committed an error, first, by finding that 'the majority of SBM machines are generic' (recital 177) and, second, by distinguishing between them according to end-use. The contested decision does not provide sufficient evidence to justify the definition of distinct sub-markets among SBM machines with reference to their end-use. Consequently, the only sub-markets it is necessary to consider are those for low- and high-capacity machines.

Foreseeable foreclosure effects

270 The Court finds, as a preliminary point, that the two distinct SBM machine markets identified by the Commission display notable differences as to the level and intensity of the current level of competition which Sidel must face in them. Accordingly, the consequences of the foreseeable leveraging by the merged entity from the carton market onto the distinct markets for low- and high-capacity SBM machines must be examined separately.

— Low-capacity SBM machines market

271 It should be recalled, as regards low-capacity SBM machines, that the merger would in no way strengthen Sidel's current market share (see paragraph 128 above). The finding in the contested decision that the merged entity 'would be by

far the biggest player' in that market and that '[s]everal competitors would remain in the market but with small market shares of no more than [10-20%]' (recital 269) is not, in the light of Tetra's commitment to divest itself of Dynaplast, an undertaking which is active on this market, sufficient evidence of the likelihood of a future dominant position being created for the merged entity on this market. In its written pleadings, the Commission maintains — referring to the finding in the contested decision that Sidel's competitors could be foreclosed from the low-capacity SBM machine market (recital 370) — that it is not necessary to establish that Sidel's competitors will be foreclosed from the market, as long as it is shown that they will be marginalised. At the hearing, it stressed that, through a cascade effect, the notified transaction could enable the merged entity to achieve a dominant position on that market, given that Sidel's competitors are dispersed and that Sidel already has a leading position in certain segments of the market, in particular the segment for low-capacity machines that are at the top end of that range of machines and are equipped with rotary technology, that is, the technology used in all high-capacity machines except for those of Sasib, an undertaking recently acquired by SIG, whose machines use a two-step linear technology with a capacity of [...] bph (notification, point 48).

272 In order to examine the Commission's conclusion with respect to this market, it is necessary to consider the merged entity's share of this market after implementation of the modified merger. The Commission admits in the contested decision that, in low-capacity SBM machines, Sidel had 'a market share of [30-40%] both in terms of capacity and by unit sales in the EEA in 2000' (recital 233). The Commission highlights the fact that Sidel's competitors are 'much smaller', the biggest one being ADS with a market share of around [10-20%] (recital 233). Inasmuch as elsewhere in the contested decision the Commission refers to Sidel's current 'leading position with [60-70%] of the SBM machine market', it clearly neglected to take account of Tetra's commitment relating to Dynaplast (recital 370).

273 The notification indicates that during the period from 1998 to 2000, Sidel's share of the low-capacity SBM machine market was, without exception, under 40%

and that its share and that of Tetra — the latter entered the market through its acquisition of Dynaplast, which was at its peak in 2000, thus capturing a market share of 24% — were only 'estimates' which may even have been overstated (point 56). Referring to some 12 other competitors who were all, according to the parties to the merger, capable of providing an appropriate SBM machine for the needs of any low-capacity machine customer, they stressed that the competition on the market was not only strong but intense (points 57 and 71). In its reply to the statement of objections (point 51), moreover, Tetra stated that two new major competitors had then entered the market in 2001, one of whom, Uniloy, holds a leading position on the EBM machine market, whilst the other, Husky, holds a similar position on the preforms production machine market, the importance of which is recognised in the contested decision (recital 321, footnote 138).

274 The contested decision, which does not take account of this very pertinent information, merely accepts, without further explanation, that since 1998 Sidel has experienced a decline of 'only [0-10%]' in the low-capacity machines market (recital 238). This single fact is not sufficient to support the Commission's finding that the merged entity would face negligible competition, especially if it did not have Dynaplast's means and capacity. Nor is any assessment made, either in the contested decision or in the Commission's written pleadings, of the likely fate of Dynaplast's market share, which had always increased up to 2000. At the hearing, in response to questions from the Court about Dynaplast's operations which, in the course of a relatively short period under Tetra's control (1994 to 2000) had been able to capture a fairly high market share, the Commission stated that its initial success could be attributed to Tetra's financial strength and the fact that Tetra could offer attractive bundled sales combining SBM machines and PET preforms. However, since Tetra has given a commitment to divest itself of its preforms operations and Sidel is not active on the preforms market, the merged entity would no longer be able to pursue such a strategy. Its competitors, especially the new arrival Husky, the Canadian company which is a world leader in the manufacture of preforms production machines, would not be hampered by this constraint.

275 The contested decision does not provide evidence to show that the merged entity would be able to capture a particularly large proportion of Dynaplast's former customers or obtain through other means enough new customers to enable it to achieve a dominant position on the low-capacity SBM machine market, either in the near future or especially by 2005. Such a position is *a fortiori* not foreseeable in the light of the growing competition currently on that market.

276 In both its written and oral pleadings, the Commission, in highlighting Sidel's strong position in the high-capacity machines market and, at least partially, in assimilating the sale of low-capacity SBM machines with the packaging of non-sensitive products, stressed the power of the merged entity 'in the "new era" PET markets i.e. "sensitive" beverages)' (recital 369). The contested decision states that the merged entity's share of the 'SBM market (regardless of end-use) [...] leaves a smaller part of the market available to competitors', whilst 'the [...] non-sensitive product markets are saturated and much less growth is expected' (recital 370). This finding of saturation is based on information in Sidel's annual accounts for 1999 and a study of Sidel carried out by BNP-Paribas, dated 9 October 2000.

277 The importance of the low-capacity machines market cannot thus be underestimated, either generally or as regards the sensitive products. The case-file shows that, at least to date, there has not been a great difference in the use of low- and high-capacity machines for the packaging of non-sensitive products. As stated by the applicant at the hearing, everything depends on customers' requirements. Non-sensitive products account for 95% of all beverages currently packaged in PET. Yet the contested decision contains no analysis of the breakdown of low- and high-capacity SBM machines according to product. The notification indicates that high-capacity machines are usually sold to large-scale customers, such as [...], who produce large quantities of soft drinks and mineral water (point 93). In its

reply to the statement of objections, Tetra stated that the fastest machine sold by Sidel had a capacity of [...] bph and was sold in [...] to [...], a producer mainly of mineral waters (point 44) and that the statement of objections ignored the fact that low-capacity machines are, among many other uses, also used for packaging sensitive products (point 45).

278 The Court is thus not in a position to assess precisely the scale of low- and high-capacity SBM machine sales for packaging non-sensitive products. It is likely, given the very high volumes of these products already packaged in PET (over 35 billion litres in 1999 for water and soft drinks according to table 2 in recital 56), that sales of these two types of machine will remain very strong for packaging of non-sensitive products, even after the implementation of the modified merger. The assertion regarding the alleged saturation of the PET packaging market for these products has not been established to the requisite legal standard. Leaving aside the enormous market potential for PET in beer packaging, the independent studies referred to in the contested decision confirm that PET packaging of mineral waters in particular will continue to see steady growth. It follows that there is no proof that demand for low-capacity SBM machines will decline in any significant manner during the period 2000 to 2005.

279 Nor is the analysis in the contested decision convincing as regards packaging of sensitive products. According to the information supplied by the applicant in its reply to the statement of objections, low-capacity machines have hitherto been used for much, if not most of, the packaging of sensitive products. Thus, according to the reply, the average rate of machines sold by Dynaplast and used for the packaging of such products was just over [...] bph, whereas Sidel's machines packed (at least for juices) at a rate of [...] bph (point 45). The applicant stated that the use of low-capacity machines could be explained by the fact that sensitive beverages currently are and will mostly remain 'niche products' with lower production volumes than the other products. The Commission replied in the contested decision by stating that all SBM machines having a capacity of over 8 000 bph used for that purpose should be considered high-capacity machines

and that the use of low-capacity machines can be explained by the fact that customers do not wish to purchase high-capacity machines when they initially equip themselves to package sensitive products in PET (recitals 184 and 185). Although this latter explanation is not clearly erroneous, the fact remains that a significant proportion of the SBM machines used to package sensitive products will, in all likelihood, be low-capacity machines. As pointed out by the applicant at the hearing, this settled use seems all the more likely for more specialised beverages such as tea/coffee drinks and FFDs, which will see some growth, given their smaller production volumes as compared to LDPs and juices. Thus, a significant part of the foreseeable growth between now and 2005 in sensitive product packaging in PET will probably be in products for which low-capacity machines are particularly appropriate.

280 Thus the contested decision does not contain a sufficient analysis of current and future use of low-capacity SBM machines. It is clear that, with Tetra's exit from that market, the merged entity's position will remain basically unchanged as compared to Sidel's current position. Sidel will, moreover, be far from holding a dominant position. The merged entity may remain the most important operator on this market, with a market share of approximately [30-40%], but it will have to face competition from at least 12 other undertakings, not to mention new competitors which have just entered the market (see paragraph 272 above).

281 The contested decision does not therefore provide sufficiently convincing evidence to show that the merged entity would be in a position, by leveraging current Tetra carton customers wishing to purchase a low-capacity SBM machine or a PET production line comprising a low-capacity SBM machine, to marginalise its competitors, especially those whose customer base is comprised principally of producers of non-sensitive products and beer, to the point where it would succeed in transforming its current position into a dominant position by 2005. This finding is all the more valid given that a bundled sales offer made by the merged entity cannot include such a machine.

282 Regarding the argument that a dominant position on the low-capacity machine market could be achieved through a cascade effect from the future creation of a dominant position on the market for high-capacity machines, it suffices to find that, since the analysis in the contested decision does not deal with this eventuality, the Court is not in a position to examine it.

283 Consequently, as regards low-capacity SBM machines, it must be found that, in so far as the Commission predicts that a dominant position will be created on that market by 2005 through leveraging, it committed a manifest error of assessment.

— High-capacity SBM machines market

284 The Court observes that the Commission was correct in highlighting Sidel's leading position on this market. With a market share of [60-70%] in terms of capacity, it is, as stated by the Commission at the hearing, three times as big as its three main competitors and almost [45-55%] bigger than all competitors together on this market. It is thus by far the market leader. It does not, however, hold a dominant position (recital 248) and Tetra would add nothing to the merged entity on this market.

285 It is, therefore, necessary to assess, first, whether the modified merger would enable the merged entity, by leveraging directed at Tetra's current customers on the carton markets, to capture enough additional customers on the PET market to

attain a dominant position on the high-capacity SBM machine market by 2005 and, if so, whether the remaining competition would be significantly weakened.

286 Admittedly, as regards FFDs and tea/coffee drinks as well, probably, as juices, at least the premium ones, the merged entity would be able to offer, to its customers on the carton markets who wish to switch part of their production to PET, sales of aseptic PET filling machines or combined machines bundled with other important components of a PET production line, such as bottle closures. Those offers could be attractive for those products, given the importance of the aseptic guarantee for those customers and Tetra's strong reputation in aseptic filling, especially as a supplier of aseptic carton packaging equipment. This could be even more so for customers having long-term contracts with Tetra.

287 There are, however, some factors which diminish the foreseeable importance of these advantages, most of which are not assessed adequately in the contested decision.

288 First, the 'first-mover' advantage has been overestimated in the present case. The foreseeable growth in PET use among Tetra's current customers on the aseptic carton market is not considerable (see paragraphs 201 to 216 above). Thus, it is not very likely that its dairy customers will want to switch from carton to PET, since there is no barrier against light which can be used in a commercially satisfactory manner and the cost of PET is higher than that of carton and HDPE (see paragraph 34 above). The contested decision does not give an adequate explanation as to why, if there were to be a major movement towards plastic, that movement would not be, completely or to a large extent, towards HDPE rather than PET. This finding is supported by the fact that the Commission no longer maintains that there is a likelihood of significant growth in PET use by 2005 for UHT milk, a very important LDP sector. It is also noteworthy that the share of the LDP market already held by HDPE, the material which is currently carton's

main competitor, will probably grow by 2005 in the important UHT milk and fresh milk segments, according to both the Canadean study and the independent PCI study.

289 As regards fresh milk in particular, the contested decision does not give an adequate explanation of the relationship between HDPE and PET. Given the cost advantage of HDPE, amounting to 10%, it is at least as likely that Tetra's existing customers who wish to switch part of their fresh milk production to plastic will choose HDPE rather than PET. Fresh milk is not a product for which the marketing advantages offered by PET have any particular importance. The contested decision does not explain why Tetra, which acts as a converter on the HDPE market, would be more concerned to see its customers switch to PET than simply to utilise HTW agreements in order to sell them HDPE plastic bottles blown to suit their requirements, as it currently does in the United Kingdom, according to the notification (point 326). It should also be observed that the merged entity would be in a position to provide main components of an HDPE filling line, such as EBM machines and aseptic or non-aseptic HDPE filling machines. Moreover, since barrier technologies are not relevant for fresh milk, which is distributed in a refrigerated line, it is difficult to see how the merged entity could view leveraging as a useful strategy for that product line, since many of the merged entity's competitors would be able to offer both SBM machines and the other components of a non-aseptic PET production line which are necessary for a dairy customer wishing to switch from fresh milk in carton to PET.

290 As for juices, although 'the Commission expects substantial switching from glass to PET and a more limited switching from carton to PET to occur' (recital 148), there is no analysis of the glass market. The applicant argues that this fact places its competitors, in particular SIG, Krones and KHS (Klöckner), all three of whom are active on the glass and PET packaging markets, in a position where they can

enjoy an important 'first-mover' advantage with respect to customers switching from glass to PET. Against this background, the Commission has not shown to the requisite legal standard the extent of the 'first-mover' advantage which the merged entity would have in the context of the likely, but uncertain, level of growth in PET use for juice packaging in the period 2000 to 2005.

291 As regards FFDs and tea/coffee drinks, it is common ground that the volume of packaged products will remain fairly low. Even with an increase by 2005 of 20% to 30% for the first category of products and 25% to 30% for the second (attaining an annual total of 1.8 billion litres packaged), the extent, in terms of volume, of the 'first-mover' advantage for the merged entity would be limited. Furthermore, although the contested decision does not call into question Canadean's forecast for carton use in those segments (anticipated to be 37% and 46%, respectively, by 2005 for those products, compared to 42% and 53% for 2000), it does not state why those increases in the use of PET would enable the merged entity, by leveraging Tetra's current customers on the carton markets, to attain a sufficiently large additional share of the high-capacity SBM machine market and thereby achieve a dominant position. This explanation was all the more necessary given that it is at least probable that a significant number of the machines used in new PET production lines intended for these niche products would be low-capacity machines, for which the market is very competitive (see paragraphs 271 to 283 above).

292 Second, Tetra's commitment not to offer sales of its carton products bundled with SBM machines would reduce the scope for leveraging. A current carton customer could be attracted by a favourable price for a part of a PET production line other than an SBM machine, for instance an aseptic PET filling machine, the most important part, but still purchase an SBM machine from one of Sidel's current competitors. Whilst it is true that this option would not be open to him if a bundled sale concerned a combined machine, the contested decision does not

provide evidence to establish that the use of those machines, at least for the aseptic filling market — which on the whole is the one most concerned by the anticipated growth in PET use in the sensitive product segments — will become sufficiently widespread that the merged entity will actually be able to sell combined machines as a way of circumventing its commitment not to make joint offerings for carton packaging equipment and SBM machines.

293 Third, the Commission committed an error in finding that, apart from SIG, '[n]o other supplier of packaging equipment will be able to offer both carton and PET packaging equipment' (recital 372). The contested decision itself refers to a recent example of PET introduction for fresh milk by the Czech dairy OLMA. However, it is Elopak which is the supplier of the 'additional PET line' in question (recital 94). The contested decision also notes that Elopak 'has entered into alliances with PET equipment manufacturers to address its consumers' needs' (footnote 146 at recital 329). Thus it is clear that at least two major competitors of Tetra in the carton packaging equipment markets are already able to offer both carton and PET products, and to do so without the constraints on the range of PET equipment that would apply to offerings of bundled sales by the merged entity. Given especially the growing overlap between the carton and PET packaging equipment markets foreseen in the contested decision, there should have been an adequate analysis of the potential importance of the 'first-mover' advantage enjoyed by SIG and Elopak.

294 The Court's assessment of the foreseeable effects of leveraging by the merged entity is also hampered by the absence in the contested decision of an adequate analysis of the competition which Sidel must face in the market for high-capacity machines. The competition provided by its three major competitors, SIG, SIPA and Krones, is under-estimated. Those competitors were able to increase their market shares from [10-20%] to [35-45%] in three years (1997 to 2000), with

each one attaining comparable new market shares, which is by no means insignificant. Since the market is thus evidently subject to competition which is growing and at least quite considerable, the contested decision should have examined in more detail the ability of that competition to resist leveraging on the part of the merged entity.

295 In fact, only SIG's position is examined, and even then only summarily. The contested decision finds that it lacks 'the full range of the merged entity in PET equipment' and also 'an essential element, barrier technology, for any future penetration in PET's new product segments' (recital 372). This statement cannot be reconciled, in the absence of further explanation which is not to be found in the present case, with the notification, which shows SIG's far from insignificant positions on the markets for aseptic and non-aseptic PET filling machines, on the latter market through its recent acquisition of Sasib. Moreover, in the light of the fact that there are 'over 20 companies' (recital 87) offering different oxygen barrier technology solutions suitable for juices, the manner in which SIG would be prevented from competing with the merged entity on that market — where the growth in terms of volume will probably be the greatest — is far from evident in the contested decision. In so far as that growth comes from glass, SIG will have a 'first-mover' advantage which the merged entity will not have. Moreover, at the hearing, the Commission did not dispute the applicant's statement that SIG also had the necessary barrier technology for FFDs and tea/coffee drinks.

296 Furthermore, in its written and oral pleadings, Tetra stressed that, in a presentation made in April 2002 at the first world congress on PET, SIG described itself as a supplier with the ability to offer a complete PET packaging line. That presentation shows that SIG, unlike the merged entity following Tetra's commitment to divest itself of its preform operations, would from now on be

present on the preforms market. The notification also shows that SIG holds a very significant position in the mould manufacturing market for SBM machines, and has more than 50 years' experience in moulds (point 309).

297 It follows, on the basis of the evidence relied on in the contested decision, that the Commission committed an error in under-estimating the importance of SIG's current position on the market for high-capacity machines and by playing down the positions held on that market by the merged entity's other principal competitors, in particular SIPA and Krones.

298 It should also be remembered that high-capacity SBM machines, like low-capacity machines, are in fact generic. Therefore, the merged entity's competitors may well hold strong positions in the sale of high-capacity SBM machines to producers of non-sensitive products and to brewers which would enable them to resist any leveraging by the merged entity from its position on the aseptic carton packaging markets into sales of high-capacity SBM machines. The finding in the contested decision that this cannot be the case is not based on evidence which is sufficient in law.

299 Moreover, since the leveraging which would have an impact particularly on the high-capacity machines market is, according to the Commission, rendered foreseeable due to the growth in PET, it must be pointed out that beer represents a significant part of the anticipated growth in PET. The sole fact that beer cannot be packaged in carton does not by itself justify the total failure to take account of this distinct sensitive product — according to recital 41, when PET is used to package beer both a light barrier and oxygen barrier are necessary — in the light of trends in the PET markets. This is all the more so given that growth in PET packaging of beer is anticipated not only by the applicant but also in the Pictet study.

300 According to the notification, PET packaging of beer is expected to grow by 10% per year over the next five years (point 86). In addition, with a switch of 5% of world beer production to PET bottle packaging, this market will account for 15 billion packs per annum, making it comparable in size to the current market for carbonated soft drinks sold in PET packaging in Europe (point 15). This forecast is supported, at least in part, by the independent studies referred to by the Commission to justify its own growth forecasts in the common product segments. Thus, according to the Pictet study, 'the vast beer market is about to be opened for PET' (p. 10). The notification also states that PET is already being used by some of the larger breweries in Europe, such as [...], to package beer using multilayer barrier technologies supplied by competitors of Tetra and Sidel (principally Schmabach-Lubeca) (points 119 and 157).

301 Since beer is not packaged in carton, the merged entity could not in any way exercise leverage on breweries which switch from glass and metal cans to PET. Furthermore, since some of the merged entity's main competitors in the SBM machines markets (SIG, Krones and KHS (Klöckner)) are also active on the glass and metal can packaging markets, they will have a 'first-mover' advantage with the breweries who switch part of their production over to PET. If significant PET growth for beer materialises by 2005, the incentive will increase for the merged entity's competitors to remain in the SBM machine market. However, the contested decision provides no analysis of the potential importance of this development.

302 It should also be observed that, according to the notification, the barrier technology necessary for packaging beer in PET could be modified for application to sensitive products in the common products segment, at least for juices

(points 119 and 157). At the hearing, the applicant reiterated this argument, maintaining that beer raises some very difficult technical problems in terms of PET use (most notably the risk of carbon dioxide escaping from the packaging), but that, since these are surmountable problems, the technology could be used for other PET applications, both aseptic and non-aseptic. The contested decision makes no analysis of this potentially very important aspect either.

303 As part of the prospective analysis which the Commission carried out for the other sensitive products, it should have explained why the possible growth in PET packaging for beer by 2005 did not justify an analysis of the influence which that might have on the incentive for the merged entity to exercise leveraging with regard to sensitive products in the common products segments defined in the Commission's analysis.

304 Lastly, the Court finds that the applicant rightly raised the question of converters at the hearing. Since converters are not active in the aseptic carton markets, the implementation of a commercial policy by the merged entity aimed at leveraging could not hamper them significantly in the supply of finished PET bottles to producers of sensitive products, under HTW agreements or, possibly, the supply of SBM machines which they have previously purchased from manufacturers, and they could do so also to Tetra's current customers on the carton markets who chose to switch some of their production to PET. The current structure of the industry (namely the commercial strategy of PET equipment suppliers to concentrate on PET equipment sales rather than to offer complete production lines, with or without preforms) facilitates converters' operations, a point recognised in the contested decision (recitals 293 and 294). It does not explain why a large increase by 2005 in sales of complete production lines by the merged entity as compared to their current level (20% of Sidel's SBM machines sales in 2001) might suffice to marginalise converters.

305 The Commission argues, however, that converters are 'to a certain extent' dependent on Sidel for their SBM machine purchases and that they 'would continue to be dependent on the merged entity' (recital 310). At the hearing, it added that the absence of converters in the carton markets was a disadvantage for them if they wish to sell SBM machines to Tetra's current customers on the carton markets. However, given the current level of existing competition, also in the high-capacity SBM machine market, the finding of the converters' dependency on Sidel is not convincing. If the sales conditions offered by the merged entity were to become less attractive, converters could always purchase such machines from one of Sidel's current competitors (see paragraph 137 above), particularly SIG, whilst SIG and Elopak could also offer carton equipment if the converters' customers want the joint supply of PET and carton packaging equipment.

306 Consequently, as regards the market for high-capacity SBM machines, the evidence relied on by the Commission does not justify a finding that both the merged entity's competitors and the converters would be marginalised by 2005 due to leveraging by that entity directed at Tetra's current customers on the carton markets who, during that period, intend to switch all or part of their production over to PET for packaging of sensitive products.

Conclusion on SBM machines

307 It must therefore be concluded that the contested decision does not prove to the requisite legal standard that by 2005 the merged entity could acquire a dominant

position on the market for low- and high-capacity machines, thereby fulfilling the conditions of Article 2(3) of the Regulation as regards those markets.

(vi) General conclusion on leveraging

308 It follows from the foregoing that, in relying as it did on the consequences of leveraging by the merged entity in order to support its finding that a dominant position would be created by 2005 on the PET packaging equipment markets, especially those for low- and high-capacity SBM machines used for sensitive products, the Commission committed a manifest error of assessment.

309 Since the conditions required by Article 2(3) of the Regulation have not been fulfilled as regards the leveraging foreseen by the Commission, it must be examined whether those conditions are fulfilled with regard to the second pillar of the Commission's reasoning concerning the carton markets.

3. The second pillar: reduction of potential competition on the carton markets

(a) Preliminary considerations

310 The contested decision finds that the modified merger would enable Tetra to strengthen 'its current dominant position in carton packaging by eliminating a source of significant competitive constraint' (recital 390). The present case thus

raises the question whether the Commission, when it wishes to prohibit a merger on the ground that it would strengthen an existing dominant position, in this case that of the acquiring party on the aseptic carton markets, may rely on the elimination or, as it stated at the hearing, at least the significant reduction, of potential but growing competition on a neighbouring market from the undertaking acquired, in this case Sidel, which holds a significant position on the PET markets.

311 The Commission refers to *Tetra Pak II*, to support its analysis of the extent to which that potential competition would be weakened. At the hearing, it stated that the commitments would in no way reduce the harmful effect on competition resulting from the weakening of that competition, and that the merger would, therefore, enable Tetra to feel much less threatened on the aseptic carton markets, which would be tantamount to a strengthening of its dominant position, as competition on those markets is already very limited.

312 The Court finds in that regard that when the Commission relies on the elimination or significant reduction of potential competition, even of competition which will tend to grow, in order to justify the prohibition of a notified merger, the factors which it identifies to show the strengthening of a dominant position must be based on convincing evidence. The mere fact that the acquiring undertaking already holds a clear dominant position on the relevant market may constitute an important factor, as the contested decision finds, but does not in itself suffice to justify a finding that a reduction in the potential competition which that undertaking must face constitutes a strengthening of its position.

(b) Arguments of the parties

313 According to the applicant, the contested decision finds that the PET and carton packaging equipment markets are distinct owing in particular to the current weak cross-elasticity of demand by reference to price between the two materials. The applicant maintains that marketing- and barrier technology-related factors are, and will remain, decisive for the choice of packaging and prevent a future increase in such cross-elasticity of price between PET and carton.

314 The Commission's specific arguments concerning the strategies which Tetra might pursue through the merged entity in order to strengthen its dominant position on the aseptic carton markets are erroneous. In particular, the Commission wrongly asserts that the merged entity would have an incentive not to lower its prices and to stop innovating on the carton markets.

315 As regards prices, the notified transaction would not have any effect on the incentive for the merged entity to lower its carton prices, since, firstly, customers on the carton markets switching to PET might decide to obtain their supplies from competitors of Sidel; secondly, the merged entity will certainly prefer to sell a carton packaging system rather than an SBM machine.

316 Nor, as regards innovation, would the merger affect the rate of innovation on the carton markets. First, any lack of innovation in carton would essentially benefit Tetra's current competitors in the carton markets. Second, as past experience as shown, the principal driving forces behind innovation in carton are consumer preferences and marketing strategies, and not the arrival of PET on the packaging market.

317 According to the Commission, the contested decision does not merely recognise that the merged entity could simply slow down the erosion of its power on the carton markets, but states that Tetra's dominance on those markets 'would be strengthened' by the notified transaction (recital 399). Referring to *Tetra Pak II*, the Commission maintains that where the weakening of a dominant position which would benefit an external source of competition is prevented, that can 'strengthen' the dominant position within the meaning of Article 2 of the Regulation.

318 The Commission maintains that, notwithstanding the fact that carton and PET packaging systems do not belong to the same market, they may converge in future and there is already significant interaction between them. In the present case, since the aseptic carton markets are highly concentrated, competition on them is already weakened to such an extent that any further reduction, even from external sources, could have a significant impact. The Commission asserts that carton and PET will be used in future to package the same products. PET would thus exert pressure on the aseptic carton markets; it is not necessary for the two materials to belong to the same relevant product market.

319 As for Tetra's pricing policies, the Commission maintains that the merged entity will have sufficient increased capacity to be able to act independently of its competitors. The entity could attract customers wishing to switch from carton to PET and still maintain high carton prices, or even increase them more easily than Tetra could have if the merger had not taken place. The merged entity would, in any event, have much less incentive to compete in order to retain marginal customers, since it would be likely that most of Tetra's existing 'lost' customers on the carton markets would be drawn to Sidel.

320 As for the rate of innovation in carton, it would henceforth be determined principally by the competition from PET. Where Tetra supplies a customer specific carton packaging, it is with a view to enabling its customer to compete with products packaged in PET bottles. The Commission argues in particular that improvements in the production speed of carton packaging equipment, the importance of which was recognised in the independent Warrick Report, could enable Tetra to resist better the potential threat posed by PET.

(c) Findings of the Court

321 Before examining the extent of the potential competition which could be eliminated or reduced by the modified merger, it is necessary to ascertain the relevance of *Tetra Pak II*, on which the Commission relies. It should be observed as a preliminary point that the applicant does not dispute the findings of the contested decision that Tetra still holds a dominant position on the aseptic carton markets and a leading position on the non-aseptic carton markets (see paragraph 40 above).

322 The Court finds, first, as the contested decision itself states (recitals 224, 226 and 227), that there is, in principle, nothing to prevent the application of the 'associative links' theory in merger control, the exceptional application of which was recognised in the context of the applying of Article 82 EC in *Tetra Pak II*. The Commission's analysis underlying the second pillar of its reasoning relates to the strengthening of Tetra's current position on the aseptic carton markets resulting from the elimination of the potential competition represented by Sidel on the neighbouring markets for PET packaging equipment. *Tetra Pak II* concerned precisely conduct on the non-aseptic carton markets which, exceptionally, constituted an abuse of Tetra's dominant position on the aseptic carton

markets under Article 82 EC, since the two market categories were 'closely associated' and Tetra was placed 'in a situation comparable to that of holding a dominant position on the markets in question as a whole' (Case C-333/94 *Tetra Pak* v *Commission*, cited in paragraph 40 above, paragraph 31).

323 The reference to *Tetra Pak II* is not relevant here, however, since the present case concerns simply the effect of the elimination, or the significant reduction, of potential competition which is, according to the Commission, sizeable and growing. It suffices to point out in that regard that amongst the criteria laid down in Article 2(1) of the Regulation, which the Commission is bound to apply in assessing notified merger transactions, are 'the structure of all the markets concerned and the [...] potential competition from undertakings'. Thus the Commission did not commit any error in examining the significance for the carton markets of a reduction of potential competition from the PET equipment markets. It does have to show, however, that such a reduction, if it exists, would tend to strengthen Tetra's dominant position in relation to its competitors on the aseptic carton markets.

324 In maintaining that significant competitive pressure will be eliminated as a result of the modified merger, the Commission relies principally on the considerable growth it foresees in PET use for packaging sensitive products. However, the above analysis of the first pillar, concerning leveraging (see paragraphs 201 to 216 above), shows that this growth, with the exception of growth in FFDs and tea/coffee drinks, will probably be much less marked than the Commission believes. As for FFDs and tea/coffee drinks, the contested decision itself recognises that their potential influence on the position of carton is more limited than that of other sensitive products in view of the fact that their segments are 'smaller' in size (recital 393). It is, therefore, not possible, on the basis of the evidence relied on in the contested decision, to determine, with the certainty required to justify the prohibition of a merger, whether the implementation of the modified merger would place Tetra in a situation where it could be more independent than in the past in relation to its competitors on the aseptic carton markets.

325 The Court stresses in that regard that the two factual elements regarding Tetra's future conduct, on which the Commission relies in order to prove the alleged negative effects which the modified merger would have on the aseptic carton markets, have, on any view, not been established to the requisite legal standard. Thus it has not been shown that, in the event of elimination or significant reduction of competitive pressure from the PET markets, Tetra would have an incentive not to reduce its carton packaging prices and would stop innovating.

326 As regards price competition, the contested decision does not call into question the finding of the independent Warrick Report, to which it refers and according to which 'PET is 30-40% more expensive than carton currently' and that, 'to be competitive on total cost', the packaging price of PET 'would need to be 5-10% lower than aseptic carton cost, to compensate for the lower distribution cost of carton systems' (recital 90).

327 As regards the 'more price-sensitive' carton customers who indicated to the Commission, during its market investigation, 'that they would only consider a switch from carton to PET if carton prices rose by a significant amount of 20% or more' (recital 397), it is clear that a lowering of carton prices is not necessary to keep them in the carton markets. In finding simply that '[t]hese same price-sensitive customers would presumably be dissuaded from making a switch from carton to PET if a carton-price reduction increased the price difference between a carton and PET packaging line' (recital 397), the contested decision does not explain why, without the merger, Tetra would be obliged to make such price reductions in order to keep those customers. These customers would not switch to PET unless carton prices rose by at least 20% or there was a corresponding reduction in PET prices. The finding that, in the absence of the merger, Tetra 'would [...] defend its position fiercely [...] in some cases, [by] lowering carton prices' (recital 398) is, therefore, not based on convincing evidence. Inasmuch as

the Commission pleads before the Court that, once the merger is implemented, it is possible that Tetra might find it more easy to raise its prices on the aseptic carton markets for those customers, it does not explain, in particular, why this would not enable Tetra's competitors on the carton markets who are also active on the PET market, such as SIG and Elopak, to benefit from this.

328 As for beverage producers who will switch from carton to PET for commercial reasons despite the fact that PET is considerably more costly than carton, a reduction in carton prices would not necessarily persuade those 'non-price-sensitive customers' to keep carton packaging. The contested decision does not show why companies active in the PET equipment markets which, without the modified merger, 'would be expected to compete vigorously to gain market share from carton' (recital 398), would modify their behaviour following the transaction in question here. If the pressure from Sidel were to disappear, the contested decision does not explain why, if Sidel's competitors had not been marginalised through successful leveraging, the other companies active in the PET equipment markets would no longer be able to promote the advantages of PET to Tetra's customers on the carton markets. The finding in the contested decision that Tetra would be exposed to less pressure to lower its carton prices if it could acquire Sidel is, therefore, not based on convincing evidence.

329 Turning to the allegedly diminished need for Tetra to innovate following implementation of the modified merger, both the contested decision and the explanations given in the Commission's written and oral pleadings show that, at present, competition on the various carton markets takes place principally through innovation. According to the Commission, Tetra's introduction in the past of 'new carton packages with more user-friendly features such as the carton top package with screw top closure' (recital 398) shows that innovation is a practical necessity. According to Tetra's pleadings at the hearing, which were not disputed on this point by the Commission, these innovations were not due to pressure from the PET equipment markets, but rather to the demands of

consumers of carton-packaged products. Even if the acquisition of Sidel were to reduce the pressure on innovation emanating from the indirect, but growing, competition from the PET equipment markets, at least as regards FFDs and tea/coffee drinks packaging, for which not insignificant growth is predicted by 2005, the contested decision does not state why demand from customers wishing to remain with carton would not continue in the future to be the driving force behind innovation, especially on the aseptic carton markets. Although the Commission correctly points out, in particular, that Tetra can improve the production rate of its carton packaging equipment, the contested decision does not show that the incentive to do so would disappear simply because of the acquisition of Sidel. This is even less likely given that it is not disputed that Tetra's activities in the carton markets are very profitable. Consequently, it is unlikely that Tetra, following the modified merger, would be less inclined to continue investing in any innovation possible for the range of equipment and products it offers its customers on the carton markets.

330 This finding is supported by the continued presence of competitors of the merged entity on the aseptic carton markets. Although Tetra's share of that market is very strong at present, the Commission recognises that its position is 'slightly lower' (recital 220) compared with 1991. No explanation whatsoever is given of why Tetra's competitors, particularly SIG, 'its main competitor' (recital 400), with a market share of [10-20%] (recital 218), could not benefit from a decision by the merged entity to innovate less. Such an explanation was all the more necessary in the light of the fact that SIG is active in particular on the carton packaging equipment and PET packaging equipment markets and, unlike the merged entity, would not be subject to any constraints as to joint offers of carton and SBM machines. Against that background, the mere fact that Tetra possess 'know-how' and 'superiority of [...] technology' in aseptic carton and that SIG, at present, 'cannot match Tetra's system of [packaging by] continuous reel of aseptic carton'

(recital 218) does not suffice to show that SIG, or its other competitors, would not be able to benefit from a possible decision by the merged entity to innovate less in carton. The reference by the Commission at the hearing to the high costs of innovation on the relevant markets, although pertinent and probably correct, cannot by itself justify its finding that Tetra's competitors would not be able to benefit from a decision by the merged entity to innovate less.

331 The Commission was also incorrect in finding that, apart from Tetra, the SIG group 'is the only other company in the world that manufactures and sells both carton and PET packaging equipment' (recital 400), since, as is apparent from the contested decision (recital 94 and footnote 146 at recital 329), the Elopak group can also do this, under agreements with other companies active on the PET equipment markets (see, in this connection, paragraph 291 above). Although the Commission was aware of this capacity of Elopak at the time of adoption of the contested decision, it has not explained why it believed it to be irrelevant for the purposes of the contested decision.

332 Consequently, the contested decision has not established to the requisite legal standard that the merged entity would have less incentive than Tetra currently has to innovate in the carton sector.

333 It follows that the evidence relied on in the contested decision does not establish to the requisite legal standard that the effects of the modified merger on Tetra's position, principally on the aseptic carton markets, would, by eliminating Sidel as a potential competitor, be such as to fulfil the conditions of Article 2(3) of the Regulation. It follows from the foregoing that it has not been shown that the merged entity's position would be strengthened vis-à-vis its competitors on the carton markets.

4. The third pillar: general strengthening effect

334 The last pillar of the Commission's reasoning as regards the conglomerate effect of the modified transaction concerns the overall position which the merged entity would achieve in sensitive products packaging, that is, 'dominant positions in two closely related neighbouring markets (carton and PET packaging equipment) and a notable presence in a third market (HDPE)' (recital 404). According to the Commission, the merged entity would then be able to strengthen its dominant position on the carton and PET markets by raising the barriers to entry into those markets and by marginalising its competitors.

335 The Court points out that this pillar of the contested decision concerns the overall position of the merged entity in the packaging of sensitive products. These effects of the notified transaction cannot, however, be considered in isolation from the analysis in the contested decision concerning the first two pillars of the Commission's reasoning. Since the analysis of those two pillars is vitiated by manifest errors of assessment (see paragraphs 146 to 333 above), the third pillar must also be dismissed and it is not necessary to examine it in detail.

5. General conclusion regarding the plea alleging an absence of foreseeable conglomerate effect

336 It follows from all of the foregoing that the contested decision does not establish to the requisite legal standard that the modified merger would give rise to

significant anti-competitive conglomerate effects. In particular, it does not establish to the requisite legal standard that any dominant position would be created on one of the various relevant PET packaging equipment markets and that Tetra's current position on the aseptic carton markets would be strengthened. It must therefore be concluded that the Commission committed a manifest error of assessment in prohibiting the modified merger on the basis of the evidence relied on in the contested decision relating to the foreseen conglomerate effect.

III — *Overall conclusion*

337 Accordingly, the pleas alleging lack of horizontal, vertical and conglomerate anti-competitive effects must be declared well founded, and it is not necessary to examine the other pleas.

338 Consequently, the contested decision is annulled.

Costs

339 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the defendant has been unsuccessful and the applicant has asked

for the defendant to pay the costs, the latter must be ordered to bear its own costs and to pay those of the applicant.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber),

hereby:

1. **Annuls Commission Decision C (2001) 3345 final of 30 October 2001 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case No COMP/M.2416 — Tetra Laval/Sidel);**

2. **Orders the Commission to bear its own costs and to pay the costs of the applicant.**

Vesterdorf Pirrung Forwood

Delivered in open court in Luxembourg on 25 October 2002.

H. Jung B. Vesterdorf

Registrar President

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