JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
6 October 1994 *

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In Case T-83/91,

Tetra Pak International SA, whose registered office is in Pully (Switzerland), represented initially by Christopher Bellamy QC, then by John Swift QC, of the Bar of England and Wales, and by Michel Waelbroeck and Alexandre Vandencasteele, of the Brussels Bar, and by Vivien Rose and, initially, Stephen Morris, then Rhodri Thompson, of the Bar of England and Wales, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented by Julian Currall, of the Legal Service, acting as Agent, assisted by Nicholas Forwood QC and David Lloyd Jones, of the Bar of England and Wales, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Decision 92/163/EEC of 24 July 1991 relating to a proceeding pursuant to Article 86 of the EEC Treaty (IV/31043 —Tetra Pak II) (OJ 1992 L 72, p. 1),

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

composed of: J. L. Cruz Vilaça, President, C. P. Briët, A. Kalogeropoulos, A. Saggio and J. Biancarelli, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 22 March 1994,

gives the following

Judgment

I — Facts and procedure

1 By Decision 92/163/EEC of 24 July 1991 relating to a proceeding pursuant to Article 86 of the EEC Treaty (IV/31043 — Tetra Pak II) (OJ 1992 L 72, p. 1) (hereinafter 'the Decision') the Commission found that Tetra Pak International SA (hereinafter 'Tetra Pak') was in a dominant position on the markets in aseptic machines and cartons intended for the packaging of liquid foods in the European Economic Community (hereinafter 'the Community') and that it abused that position within the meaning of Article 86 of the EEC Treaty from at least 1976 until 1991 both on those markets and on the markets in non-aseptic machines and cartons. The Commission imposed a fine of ECU 75 million on Tetra Pak and ordered it to bring to an end the infringements found.

2 Tetra Pak, whose registered office is in Switzerland, coordinates the policy of a group of companies, originally Swedish, which has acquired a global dimension. The Tetra Pak group specializes in equipment for the packaging of liquid and semi-liquid food products, mainly milk, in cartons. Its activities cover both the aseptic and the non-aseptic packaging sectors. They consist essentially in manufacturing cartons and, using the group's own technology, carton-filling machines.

3 It is apparent from the information given in the Decision that the consolidated turnover of the Tetra Pak group amounted to ECU 2.4 billion in 1987 and ECU 3.6 billion in 1990. Approximately 90% of that turnover is in the carton sector and the remaining 10% in the field of packaging equipment and associated operations. The proportion of that turnover arising in Community territory amounts to a little more than 50%. In the Community, Italy is one of the countries, if not *the* country, in which Tetra Pak is most firmly established. The consolidated turnover of the seven Italian companies within the group stood at ECU 204 million in 1987.

4 The Decision is one of a series of three concerning Tetra Pak. The first is Commission Decision 88/501/EEC of 26 July 1988 relating to a proceeding under Articles 85 and 86 of the EEC Treaty (IV/31.043 — Tetra Pak I (BTG licence)) (OJ 1988 L 272, p. 27) (hereinafter 'the Tetra Pak I decision') in which the Commission found that by acquiring, through the purchase of the Liquipak group, the exclusivity of a patent licence for a new aseptic milk-packaging process called 'ultra-high temperature' (hereinafter 'UHT'), Tetra Pak had infringed Article 86 of the Treaty from the date of the acquisition until the exclusivity came to an end. That decision was challenged in an action which was dismissed by the Court of First Instance in its judgment in Case T-51/89 *Tetra Pak* v *Commission* [1990] ECR II-309. The second decision is Decision 91/535/EEC of 19 July 1991 declaring the compatibility with the common market of a concentration (Case No IV/M068 — Tetra Pak/Alfa-Laval) (OJ 1991 L 290, p. 35), by which the Commission, on the basis of Article 8(2) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the

control of concentrations between undertakings (corrected version published in OJ 1990 L 257, p. 13), declared the acquisition by Tetra Pak of Alpha-Laval AB to be compatible with the common market.

5 So far as concerns the products in issue in this case, the figures given in the Decision (recital 6) show that some 90% of cartons were used in 1983 for the packaging of milk and other liquid dairy products. According to the same source, in 1987 that share was approximately 79%, of which 72% was for packaging milk. Approximately 16% of cartons were at that time used for packaging fruit juice. Other products (wine, mineral water, tomato-based products, soups, sauces and baby food) accounted for only 5% of cartons used.

6 As regards the packaging of milk, it should be noted that milk is sold mainly in a pasteurized form (fresh milk) or after an ultra-high temperature treatment under aseptic conditions which makes it possible to attain a storage period of several months in a non-refrigerated environment (UHT milk). As for 'sterilized' milk, according to the Decision such milk now has only a relatively small market share in the Community.

7 In the aseptic sector, Tetra Pak manufactures the so-called 'Tetra Brik' system, designed for packaging UHT milk in particular. According to information supplied by the applicant, that system was launched on the German market in 1968 and in the other European countries from 1970 onwards. In that process, the cartons are delivered to the user in the form of rolls, which are sterilized in the filling machine itself by being soaked in a hydrogen peroxide bath and are then used to package the liquid as it flows in an aseptic environment. In the same sector, only one competitor of Tetra Pak, PKL, controlled by the Swiss company SIG (Société

Industrielle Générale), also manufactures a system of aseptic packaging in brick-type cartons, known as 'Combiblocs'. In contrast to Tetra Pak's continuous packaging process, those cartons are pre-shaped at the time of packaging. For technical reasons and because in practice the manufacturers of aseptic machines also provide the cartons to be used in their own machines, possession of an aseptic-filling technique is the key to market entry both for machines and for aseptic cartons.

8 In contrast, non-aseptic packaging, in particular of fresh pasteurized milk, does not require the same degree of sterility and so calls for less sophisticated equipment. On the non-aseptic carton market, Tetra Pak initially used brick-type cartons and continues to do so, but its main product on that market is now a gable-top carton, the 'Tetra Rex'. That carton is in direct competition with the 'Pure-Pak' carton produced by the Norwegian group Elopak (hereinafter 'Elopak').

9 Tetra Pak manufactures its own machines for non-aseptic packaging. Moreover, like Elopak and PKL but only occasionally, it also distributes machines manufactured by some ten small producers, the main ones being Nimco, Cherry Burrel and Shikoku.

10 The documents before the Court indicate that Tetra Pak has patented the basic technology which it has developed in relation to machines, cartons and processes, and also the modifications made subsequently to those products and certain techniques, such as the method of folding the carton. The latest patents protecting the aseptic Tetra Brik cartons, developed in the 1960s, will expire in the early years of the next century (recital 22 of the Decision). As both parties have indicated, Tetra Pak has granted no manufacturing licences for its cartons in the Community.

11 The Decision also indicates that distribution of Tetra Pak machines and cartons in the Community is — with the exception of the distributors working for Liquipak, taken over by Tetra Pak — wholly undertaken by the network of Tetra Pak subsidiaries (recital 21).

12 During the period in question, various standard-form contracts for the sale and leasing of machines and the supply of cartons were in force between Tetra Pak and its customers in the various Member States of the Community. The content of the clauses incorporated in those contracts which had an effect on competition was summarized in recitals 24 to 45 of the Decision as follows:

'2.1. Conditions of sale of Tetra Pak equipment (Annex II.1)

(24) Standard purchase contracts exist in the following five countries: Greece, Ireland, Italy, Spain and the United Kingdom. For each clause, the country or countries in which it is applicable are indicated in brackets.

2.1.1. *Equipment configuration*

(25) In Italy, Tetra Pak reserves an absolute right of control over the equipment configuration by prohibiting the buyer:

(i) from adding accessories to the machine (Italy);

(ii) from making modifications to the machine, and adding or removing anything to or from it (Italy);

(iii) from moving the machine (Italy).

2.1.2. *Operation and maintenance of equipment*

(26) There are five clauses concerning the operation and maintenance of equipment, which are intended to give Tetra Pak an exclusivity and a right of inspection in this area:

(iv) it has an exclusive right to maintain and repair equipment (all countries except Spain);

(v) it has an exclusive right to supply spare parts (all countries except Spain);

(vi) it has the right to provide, free of charge, assistance, training, maintenance and updating services not requested by the client (Italy);

(vii) there is a sliding scale for part of the charges made for assistance, maintenance and technical updating (with a possible discount of up to 40% of the basic monthly charge) depending on the number of cartons used on all Tetra Pak machines of the same type (Italy);

(viii) the purchaser is required to inform Tetra Pak of any improvements or modifications to the equipment and to grant Tetra Pak ownership of any resulting intellectual property right (Italy).

2.1.3. *Cartons*

(27) There are four clauses relating to cartons which also give Tetra Pak an exclusive right of control over the product:

(ix) the purchaser must use only Tetra Pak cartons on the machines (all countries);

(x) the purchaser must obtain supplies of cartons from Tetra Pak or a supplier designated by Tetra Pak (all countries);

(xi) the purchaser is required to inform Tetra Pak of any improvements or technical modifications made to the cartons and to grant Tetra Pak ownership of any resulting intellectual property rights (Italy);

(xii) Tetra Pak reserves the right to inspect the wording to be used on cartons (Italy).

2.1.4. *Inspections*

(28) Two clauses are more specifically concerned with monitoring the purchaser's compliance with his contractual obligations:

(xiii) the purchaser is required to submit a monthly report (Italy);

(xiv) Tetra Pak has the right to carry out inspections without notice (Italy).

2.1.5. *Transfer of ownership or use of equipment*

(29) Two clauses in the contract limit the purchaser's right to resell or transfer the equipment to third parties:

(xv) the purchaser is required to obtain Tetra Pak's agreement before selling or transferring the use of the equipment (Italy), resale is subject to conditions (Spain), and Tetra Pak reserves the right to repurchase the equipment at a pre-arranged fixed price (all countries); failure to comply with this clause may give rise to a specific penalty (Greece, Ireland, United Kingdom);

(xvi) the purchaser must ensure that any third party to whom he resells the equipment assumes all his obligations (Italy, Spain).

2.1.6. *Guarantee*

(30) (xvii) The guarantee given on the equipment applies only if the purchaser complies with all of his contractual obligations (Italy) or, at the very least, uses only Tetra Pak cartons (other countries).

2.2. Conditions for the leasing of Tetra Pak equipment (Annex II.2)

(31) Standard lease contracts exist in all countries within the Community except Greece and Spain.

These contracts include the majority of the clauses contained in purchase contracts, adapted to the circumstances of leasing. Other conditions are specific to leasing but invariably pursue the same goal, i. e. maximum reinforcement of the links between Tetra Pak and its customer.

2.2.1. *Equipment configuration*

(32) Clauses (i), (ii) and (iii) (Italy in the case of clause (i); all countries in the case of clause (ii); France, Ireland, Italy, Portugal, United Kingdom in the case of clause (iii)) are included.

(xviii) An additional clause requires the leaseholder to use only cases, outer packages and/or containers supplied by Tetra Pak for transport purposes (Germany, Belgium, Italy, Luxembourg, the Netherlands) or if the conditions are equal to give preference to obtaining supplies from Tetra Pak (Denmark, France).

2.2.2. *Operation and maintenance of equipment*

(33) Clauses (iv) and (v) (all countries) are included, granting Tetra Pak exclusive rights.

Likewise, clause (viii) appears, conferring on Tetra Pak ownership of the intellectual property rights to any modifications made by the user (Belgium, Germany, Italy, Luxembourg, the Netherlands) or, at the very least, requiring the leaseholder to grant an operating licence to Tetra Pak (Denmark, France, Ireland, Portugal, United Kingdom).

2.2.3. *Cartons*

(34) Contracts also contain clauses (ix) (all countries) and (x) (Italy) concerning the exclusive use of Tetra Pak cartons, clause (xi) conferring on Tetra Pak ownership of the rights to any improvements (Denmark, Italy) or, at the very least, requiring leaseholders to grant an operating licence to Tetra Pak (France, Ireland, Portugal, United Kingdom), and clause (xii) giving Tetra Pak the right to inspect the wording or brand names which the client wishes to use on the cartons (Germany, Spain, Greece, Italy, the Netherlands, Portugal, United Kingdom).

2.2.4. *Inspections*

(35) In the case of sale, the leaseholder must return a monthly report (clause (xiii) — all countries), failure to do so giving rise to fixed-rate invoicing (Belgium, Luxembourg, the Netherlands), and allow the premises at which the equipment is installed to be inspected (clause (xiv) — all countries) without notice (all countries except Denmark, Germany, Ireland, Portugal and the United Kingdom).

(xix) A further clause allows Tetra Pak to examine — at any time (Denmark, France) — the accounts of the company leasing the equipment (all countries) and (depending on the country) its invoices, correspondence or any other documents necessary to check the number of cartons used.

2.2.5. *Transfer of the lease, sub-leasing, transfer of use or use on behalf of third parties*

(36) In the case of sale, ownership may be subsequently transferred only where very restrictive conditions are complied with.

(xx) The terms of lease contracts likewise exclude the transfer of the lease, sub-leasing (all countries) or even simple commission work on behalf of third parties (Italy).

2.2.6. *Guarantee*

(37) The wording of lease contracts is less precise than that of purchase contracts: they link the guarantee to compliance with "instructions" given by Tetra Pak concerning the "maintenance" and "proper handling" of the machine (all countries). However, the terms "instructions", "maintenance" and "proper handling" are sufficiently broad to be interpreted as also including at least the sole use of Tetra Pak spare parts, repair and maintenance services and packaging materials. Such an interpretation is confirmed by the written and oral replies given by Tetra Pak to the statement of objections.

2.2.7. *Fixing of rental and conditions of payment*

(38) The rental is made up of the following components (all countries):

(a) (xxi) A "base rental" payable at the time the machine is placed at the leaseholder's disposal. Its amount is not necessarily any lower than the selling price of the machines concerned and in fact makes up almost

the total sum of present and future rental payments (more than 98% in some cases);

(b) an annual rent, payable quarterly in advance;

(c) (xxii) a monthly production rental, the amount of which decreases according to the number of cartons used on all Tetra Pak machines of the same type. This component replaces the sliding scale of charges — set at a similar level — for part of the maintenance costs payable in the case of sale (see clause (vii));

In some countries (Germany, France, Portugal), there is a specific penalty if this fee is not paid within the prescribed period.

2.2.8. *Term of the lease*

(39) The term of the lease and the conditions for its termination vary from one Member State to another:

(xxiii) The minimum term of the lease ranges from three years (Denmark, Ireland, Portugal, United Kingdom) to nine years (Italy).

2.2.9. *Penalty clause*

(40) (xxiv) Over and above the usual damages and interest, Tetra Pak reserves the right to impose a penalty on any leaseholder who infringes any of his obligations under the contract, the amount of such penalty being fixed at Tetra Pak's discretion, up to a maximum threshold, according to the gravity of the case (Italy).

2.3. Conditions for the supply of cartons (Annex II.3)

(41) Standard supply contracts exist in Greece, Ireland, Italy, Spain and the United Kingdom: they are compulsory whenever a client purchases rather than leases a machine.

2.3.1. *Exclusive supplies*

(42) (xxv) The purchaser must undertake to obtain supplies of all packaging materials to be used on the given Tetra Pak machine(s) (all countries) and on any other Tetra Pak machine purchased subsequently (Italy) solely from Tetra Pak.

2.3.2. *Contract term*

(43) (xxvi) The contract is signed for an initial period of nine years, renewable for a further period of five years (Italy) or for the period during which the purchaser remains in possession of the machine (Greece, Ireland, Spain, United Kingdom).

2.3.3. *Fixing of prices*

(44) (xxvii) Cartons are delivered at the price applicable at the time of order. No system of adjustment or indexing is provided for (all countries).

2.3.4. *Wording*

(45) Contracts again include Tetra Pak's right to inspect the wording or brand names which the client wishes to use on cartons (clause (xii)).

13 As regards more specifically the structure of supply on the market in systems for the aseptic packaging of liquid foods in cartons in the Community, it is apparent

from the Decision that it is quasi-monopolistic, with Tetra Pak holding 90 to 95% of the sector at the date of the Decision (recital 12). In 1985, Tetra Pak held approximately 89% of the market in aseptic cartons and 92% of that in aseptic machines in the same territory (Annexes I.1 and I.2 to the Decision). Tetra Pak's only real competitor on that market, PKL, held almost all of the remaining market share of 5 to 10%.

14 The structure of the non-aseptic sector is more open but is still oligopolistic. At the time when the Decision was adopted, Tetra Pak held 50 to 55% of the market in the Community (recital 13 of the Decision). In 1985, it held approximately 48% of the market in non-aseptic cartons and 52% of that in non-aseptic machines in the territory of the twelve current Member States (Annexes I.1 and I.2 to the Decision). For its part, Elopak held, in 1985, some 27% of the market in non-aseptic machines and cartons, followed by PKL which had approximately 11% of that market. Elopak distributed solely on the market in aseptic machines, before acquiring the 'packaging machine' division of Ex-Cell-O in 1987. The remaining 12% of the market in non-aseptic cartons was at that time divided between three companies, whose respective markets remained concentrated in one or more countries, Schouw Packing (Denmark, +/-7%, half-owned by Elopak), Mono-Emballage/Scalpak (France/Netherlands, +/- 2.5%) and Van Mierlo (Belgium, +/-0.5%). Those companies manufactured their own cartons, generally under licence (Ex-Cell-O acquired by Elopak in 1987, Nimco, Sealright etc.). On the market in machines, they acted only as distributors. The 13% or so of the market in non-aseptic machines left in the Community by Tetra Pak, Elopak and PKL was shared between ten or so small manufacturers, the main ones being Nimco (US, +/-4%), Cherry Burrel (US, +/-2.5%) and Shikoku (Japan, +/-1%).

15 In the sector covering the packaging of fresh liquid foods in cartons, Elopak is accordingly Tetra Pak's main competitor. Its operations have not so far extended into the aseptic sector. It is apparent from the Decision (recital 3) that the ratio between Tetra Pak and Elopak as far as their respective turnover figures are concerned could be estimated in 1987 at 7.5: 1. Elopak operates in Italy via a subsidiary, Elopak Italia (Milan). According to the Decision, that company does not produce cartons in Italy but imports them from other subsidiaries of the group.

16 On 27 September 1983, Elopak Italia filed a complaint with the Commission against Tetra Pak Italiana and its associate companies in Italy. The group considered that Tetra Pak had attempted over the years to reduce Elopak's competitiveness in Italy by engaging in trading practices amounting to an abuse within the meaning of Article 86. Those practices essentially involved, according to Elopak, the sale of Tetra Rex cartons at predatory prices, the imposition of unfair conditions on the supply of machines for filling those cartons and, in certain cases, the sale of that equipment at prices which were also predatory. Elopak finally reported attempts at excluding it from certain advertising media.

17 On 16 December 1988, the Commission decided to initiate proceedings in this matter. The statement of objections was sent to Tetra Pak by letter of 20 December 1988. A hearing took place on 21 and 22 September 1989.

18 Following discussions with the Commission on the points which remained in dispute after the hearing, Tetra Pak undertook in a letter sent to the Commission on 1 February 1991 (Annex 7 to the Decision) to abandon its system of exclusive tied sales and as a result to amend its standard-form contracts; the new standard-form contracts (Annex 3 to the application) were annexed to that letter. The Commission accepted those undertakings and expressed the view, in recital 180 of the Decision, that they concerned implementation of the orders set out in points 1, 4 and 5 of the third paragraph of Article 3 of the Decision, quoted in paragraph 21 below.

19 The Commission found as follows in Article 1 of the Decision: 'Taking advantage of its dominant position on the so-called aseptic market in machines and cartons intended for the packaging of liquid foods, Tetra Pak has, at least since 1976, infringed the provisions of Article 86 of the EEC Treaty on both these aseptic markets and on the neighbouring and associated markets in non-aseptic machines and cartons by means of a variety of practices aimed at eliminating competition and/or maximizing, to the detriment of users, the profits which could be drawn from the positions it had acquired.'

20 The essential elements of those infringements were summarized in the Decision as follows:

'1. the pursuit of a marketing policy aimed at severely restricting supply and compartmentalizing the national markets within the Community;

2. the imposition on users of Tetra Pak products in all Member States of numerous contractual clauses — as listed under numbers (i) to (xxvii) — having the essential object of unduly binding them to Tetra Pak and of artificially eliminating potential competition;

3. the charging of prices for cartons which have been shown to discriminate between users in different Member States and, at least in Italy, eliminate competitors;

4. the charging of prices for machines which have been shown to

— discriminate between users in different Member States,

— discriminate, at least in Italy, between users within the same country, and

— eliminate competitors, at least in Italy and the United Kingdom;

5. various specific practices aimed, at least in Italy, at eliminating competitors and/or their technology from certain markets.'

21 The Commission ordered the applicant in Article 3 of the Decision to bring to an end the infringements found, in so far as it had not already done so, by adopting in particular the following measures:

'1. Tetra Pak shall amend or, where appropriate, delete from its machine purchase/lease contracts and carton supply contracts the clause listed under numbers (i) to (xxviii) so as to eliminate the aspects which have been found by the Commission to be abusive. The new contracts shall be submitted to the Commission;

2. Tetra Pak shall ensure that any differences between the prices charged for its products in the various Member States result solely from the specific market conditions. Any customer within the Community shall be supplied by any Tetra Pak subsidiary it chooses, and at the price it practises;

3. Tetra Pak shall not practise 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;

4. Tetra Pak may not refuse orders, at prevailing prices, on the ground that the orderer is not an end-user of Tetra Pak products;

5. Tetra Pak shall inform any customer purchasing or leasing a machine of the specifications which packaging cartons must meet in order to be used on its machines.'

22 Those are the circumstances in which, by application lodged at the Registry of the Court of First Instance on 18 November 1991, Tetra Pak sought the annulment of the Decision. Upon hearing the report of the Judge-Rapporteur, the Court of First

Instance decided to open the oral procedure without any preparatory inquiry. Pursuant to the measures of organization of procedure laid down in Article 64 of the Rules of Procedure, the parties were requested to provide certain documents, and to reply in writing to a number of questions, before the date of the hearing. The hearing took place on 22 March 1994.

II — Forms of order sought

23 The applicant claims that the Court should:

(i) annul the Decision;

(ii) in any event annul in whole or in part Article 1 and/or Article 2 and/or Article 3 and/or Article 4 of the Decision;

(iii) in any event quash or reduce the fine imposed in Article 2;

(iv) order the Commission to pay the costs;

(v) order that Tetra Pak be reimbursed for any expenses incurred in providing security for payment of the fine.

The defendant contends that the Court should:

(i) dismiss the application as unfounded;

(ii) order the applicant to pay the costs.

III — The claim seeking annulment of the Decision

24 In support of its claim for annulment, the applicant relies on four pleas, alleging disregard of the principle of good administration, failure to provide proper minutes of the hearing, non-infringement by the applicant of Article 86 of the Treaty, and, finally, abuse by the Commission of its power to issue orders.

The first plea of disregard of the principle of good administration

Summary of the arguments of the parties

25 The applicant claims that during the administrative procedure the Commission acted improperly and inconsistently. It submits that, whilst the purpose of the administrative procedure is to prepare the way for a decision finding infringement, that procedure must also provide 'the undertakings concerned with an opportunity to bring the practices complained of into line with the rules of the Treaty' (judgment of the Court of Justice in Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ* v *Commission* [1983] ECR 3369, paragraph 15).

26 In this case, the applicant argues that throughout the administrative procedure it demonstrated its willingness to comply in future with the competition rules of the Treaty. The Commission failed to fulfil its obligation to assist it in such endeavours and continually shifted its position as to the basis upon which a solution was being sought, constantly raising new points, re-opening issues that had been resolved and thus indefinitely delaying the conclusion of an agreement. In the light of the Commission's conduct, the applicant was entitled to expect that, if it met the Commission's demands, an agreement could be reached before the Decision was taken.

27 In those circumstances, the applicant claims that the Commission frustrated its legitimate expectations and disregarded its rights as a defendant by refusing to acknowledge that it had willingly put an end to the infringements and by issuing orders to it going well beyond what had been agreed during the negotiations. It submits that the Commission has thus breached the principle of good administration and that the Decision should be annulled, or alternatively that the measures designed to put an end to the infringement and imposed in the Decision should be annulled or reduced.

28 The Commission considers that it did not breach the principle of good administration. It submits that had the applicant really wished voluntarily to change the practices complained of, it would not have waited for six years of preliminary investigation and two and a half years of administrative proceedings to elapse in order to do so.

29 As for the applicant's legitimate expectations, the Commission observes that no legitimate expectation of escaping the consequences of past actions can arise merely because of a change of conduct for the future. In any event, the Commission never gave the applicant any basis for taking that view, which moreover has not been disputed by the latter.

Assessment of the Court

30 It should be noted first that the time taken by the Commission to investigate the matter, from the filing of the complaint in 1983 until the initiation of the procedure and the statement of objections in 1988, cannot in this case constitute an infringement of the principle of good administration since it is attributable to the scale and difficulty of an investigation concerning Tetra Pak's commercial policy in its entirety during a particularly long period of time.

31 Furthermore, although a complaint had been filed as early as 1983, the procedure initiated on 9 December 1988 and the statement of objections sent to it by letter of 20 December 1988, Tetra Pak did not undertake to give up its system of exclusive tied sales until the beginning of 1991, in its letter of 1 February 1991 to the Commission (Annex 7 to the Decision), to which were annexed the new standard-form contracts (Annex 3 to the application). The Court accordingly considers that the applicant cannot complain that the Commission disregarded the principle of good administration.

32 It follows that the first plea must be rejected as unfounded.

The second plea of failure to provide proper minutes of the hearing

Summary of the arguments of the parties

33 The applicant claims that the draft minutes of the hearing which were submitted to the Advisory Committee on Restrictive Practices and Monopolies (hereinafter 'the Advisory Committee') were so incomplete and defective that it was impossible for that committee to give its opinion in full knowledge of the facts. Although the applicant submitted a list of corrections, these concerned only minor points and the applicant had no opportunity to fill important gaps in the text of that draft.

34 The applicant alleges specifically that the statement made by Mr Severi, the managing director of Tetra Pak Italiana, concerning the effect which the proposal to oblige all Tetra Pak group companies to publish price lists to which they would be obliged to adhere would have on his company, was not recorded in the minutes.

That is a serious omission, in that it concerns the main issues raised by the orders set out in the Decision seeking to bring the infringement to an end.

35 The Commission considers that the provision of draft verbatim minutes of the hearing enabled the Advisory Committee to rule in full knowledge of the facts. In particular, it disputes that Mr Severi was heard in connection with the obligation to publish price lists. Moreover, the point attributed to Mr Severi had been made several times in the course of the administrative procedure and appeared in the draft minutes.

Assessment of the Court

36 As a preliminary point, it is important to note that Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47) provides in Article 1 that the Commission shall hear the undertaking concerned before consulting the Advisory Committee. Moreover, so far as concerns the oral stage of the hearing, Article 9(4) of that regulation provides that the essential content of the statements made by each person heard is to be recorded in minutes which are to be read and approved by him.

37 The drawing-up of exhaustive minutes of the hearing is an essential procedural requirement when, in a given case, it proves necessary so as to enable the Advisory Committee to deliver its opinion and the Commission to adopt its decision with full knowledge of the facts, that is without being misled on an essential point by errors or omissions. That would not be the case if the minutes of the hearing simply fail to record certain statements by a representative of the undertaking in question, which contain nothing of importance that was not in other observations submitted by representatives of that undertaking during the hearing and recorded in

the minutes. In such a case, the omission does not prejudice the right of the undertaking concerned to a fair hearing and cannot have any effect on the outcome of the consultation procedure or the content of the final decision. It accordingly cannot vitiate the administrative procedure as a whole and so call in question the lawfulness of the final decision.

38 In this case, it is noteworthy that the only omissions in the minutes of the hearing specified by the applicant and disputed by the Commission relate to a statement by one of the applicant's representatives which essentially concerns a proposal by the Commission to oblige each of Tetra Pak's national subsidiaries to publish a price list for both machines and cartons. However, it is apparent from an examination of the minutes that the applicant's argument concerning those price lists was in any event fully expounded by one of its advisers and recorded in the minutes.

39 It follows that the omission alleged by the applicant has not prejudiced its right to a fair hearing and cannot accordingly vitiate the administrative procedure.

40 The second plea must therefore be rejected as unfounded.

The third plea of non-infringement by the applicant of Article 86 of the Treaty

41 There are two limbs to this plea. The applicant submits, first, that it is not in a dominant position in the common market or any substantial part of it. It maintains, secondly, that the conduct complained of in the Decision did not constitute an abuse within the meaning of Article 86.

I — *The existence of a dominant position*

42 The applicant considers that it is not in a dominant position within the meaning of Article 86. It disputes, first, the definition in the Decision of the product market (A). It contests, secondly, the definition of the geographical market (B). It asserts, thirdly, that it is not in a dominant position on the markets in aseptic products and disputes in any event that Article 86 is applicable on the markets in non-aseptic products, which neighbour the markets allegedly dominated (C).

A — The product market

43 The Decision defines four markets in the relevant products: the market in machinery for the aseptic packaging of liquid foods in cartons and the corresponding market for cartons (hereinafter 'aseptic markets') and the market in machinery for the non-aseptic packaging of liquid foods in cartons and the corresponding market in cartons (hereinafter 'non-aseptic markets'; recitals 9, 11 and 92 to 97, incorporating by reference recitals 29 to 39 of the Tetra Pak I decision). The applicant considers that the relevant market is a 'complex' market encompassing all liquid food packaging systems.

44 It must accordingly be ascertained whether the aseptic markets and the non-aseptic markets are separate markets, distinct both from each other and from packaging systems using other materials (1). It must also be ascertained whether machines and cartons form separate markets, which the applicant disputes (2).

1. The aseptic and the non-aseptic carton markets are not separate markets

Summary of the arguments of the parties

45 The applicant's preliminary submission is that systems for the aseptic packaging of non-UHT products are not covered by the Decision. The Commission erroneously took the view that the state of competition in the market in aseptic systems used for packaging non-UHT products, such as fruit juices for which there are numerous packaging systems that can be substituted for aseptic cartons, was the same as that in the market in aseptic systems used for packaging long-life milk, which requires UHT-treatment. That error is traceable to recital 14 of the Tetra Pak I decision, where it is stated that in the EEC 'most long-life fruit juices are also UHT-treated and packed aseptically.' The aseptic markets were thus defined, in recital 11 of the Decision, as the markets in machines and cartons designed for the packaging of 'UHT-treated liquid foods.'

46 In challenging the definition given in the Decision of the markets in the relevant products, the applicant argues that the Commission should have ascertained specifically whether the various packaging systems on the market are sufficiently interchangeable for each category of liquid foods, characterized by specific packaging needs.

47 It concludes from this that, in both the aseptic and the non-aseptic sectors, the definition of the relevant markets given in the Decision is too wide, in that it includes machinery and cartons used to package liquid food products other than milk without sufficiently analysing the market in packaging systems for those products. The

Commission simply extrapolated to those products the conclusions which it had reached concerning the packaging of milk.

48 The applicant also concludes that the definition of the four relevant markets mentioned above is moreover too restrictive, in that it insulates the markets in aseptic packaging systems from the markets in non-aseptic systems and the markets in systems using cartons from the markets in systems using other materials. The applicant argues that within the market in liquid food packaging systems there are markets which are differentiated according to the category of product to be packaged. Those markets are wider than the markets defined in the Decision.

49 In that connection, the applicant complains that the Commission applied the test of perfect 'substitutability' in the short term at the level of the final consumer, instead of that of sufficient substitutability in the long term at the packaging stage.

50 The applicant stresses in particular that the Commission defined the relevant markets exclusively by reference to consumer demand. However, demand is led not by consumers but by retailers and packers, as regards both the content — namely the product whether fresh or long-life — and the packaging. In those circumstances, slight price differences on Tetra Pak's products may be decisive, since the choice of packaging is, for the packer, the principal component of the costs subject to his control. The Commission did not in this case carry out an investigation of the degree of interchangeability for Tetra Pak's customers of the various forms of packaging, contrary to its practice in particular in the Tetra Pak/Alfa-Laval case, cited above.

51 According to the applicant, the correct application of the test of sufficient 'substitutability' demonstrates first that the various aseptic or non-aseptic systems, using cartons or other materials, are sufficiently interchangeable for the packaging of liquid foods other than milk. In those circumstances, none of the Commission's three principal arguments relating to the milk sector, namely that (1) only aseptic carton packaging is suitable for UHT milk; (2) UHT milk has special qualities of taste and preservation and is associated with a particular type of packaging; and (3) consumers do not regard different types of milk and their associated packages as totally interchangeable, is applicable in the fruit juice and other non-dairy product sector.

52 Secondly, there is also sufficient interchangeability between the various systems for packaging liquid dairy products other than milk. For certain of those products, such as cream, the consumer does not draw a distinction between fresh, long-life and sterilized goods. Thirdly, in the pasteurized milk sector, non-aseptic cartons are sufficiently interchangeable with glass or plastic bottles and plastic pouches.

53 Fourthly, in the general milk sector, aseptic cartons are sufficiently interchangeable with the other types of packaging, both aseptic and non-aseptic. That interchangeability is intensified by consumer awareness of the environmental impact of packaging and by legislation favouring returnable packaging. In addition, the packaging market has become a buyers' market. In that context, contrary to the arguments put forward by the Commission, the absence of perfect substitutability as between pasteurized milk and UHT milk at consumer level does not mean that the alleged monopoly supplier of an aseptic packaging system can profitably raise his price to his customers without running the risk that for packaging milk those customers would choose a well-established non-aseptic system. Furthermore, new systems for

aseptic packaging in plastic or glass bottles pose real substitution threats. In France, for example, Tetra Pak's principal customers, Candia and Lactel, have installed lines for packaging UHT milk in plastic bottles and so captured over 5% of the market since 1987. Since then, the aseptic Tetra Brik has lost 30% of the French market in semi-skimmed milk (accounting for 10% of total UHT milk). In Germany, the system for aseptic packaging in returnable glass bottles, offered by Bosch and SEN, has recently been widely sold. Aseptic plastic pouches have been marketed successfully in Spain and UHT milk packed in cans is sold in the United Kingdom.

54 After considering the question of demand substitutability, Tetra Pak also briefly deals with the complementary test of supply substitutability. It observes that an undertaking operating on neighbouring markets, which is not a current manufacturer of aseptic carton-packaging systems, may easily gain entry to the aseptic markets.

55 The Commission disputes all the applicant's submissions concerning the definition of the product market. It specifies, first, that the definition of the aseptic markets, in recital 11 of the Decision, also covers systems for packaging fruit juices, since it refers to the technology which characterizes the systems for packaging UHT-treated products and does not take account of the use to which they are put. That definition is not vitiated by the reference in recital 14 of the Tetra Pak I decision to 'UHT-treated' fruit juices, the inaccuracy of which is admitted by the Commission.

56 The Commission rejects the complaint that the definition of the aseptic markets is too wide in that it includes systems for packaging non-dairy products. It maintains essentially that, as a matter of economics, it was not necessary to analyse that sector separately, given that milk is the predominant sector.

57 The Commission considers furthermore that the four markets defined in the Decision do indeed constitute separate markets. It notes first that cross-price elasticity of demand by packers, which enables the markets in packaging systems to be defined, depends on cross-price elasticity on the markets in the final products.

58 In those circumstances, the Commission submits in substance that, for packers, aseptic cartons were not sufficiently interchangeable with non-aseptic packaging, because there is no perfect interchangeability between UHT milk and pasteurized milk at the level of the final consumer. In addition, it argues that there were no aseptic packaging systems using other materials, sufficiently interchangeable with aseptic carton-packaging systems, during the period in question, given the characteristics of those products for the users and the fact that aseptic cartons were in practice the only type of packaging used for UHT milk from 1976 to 1987.

59 Moreover, both in the pasteurized milk sector and the UHT milk sector the recently-observed shifts in final consumer demand from one type of packaging to another reflect 'structural trends' linked to external factors such as changes in consumer preferences depending on environmental factors. Demand is accordingly not sensitive to slight but significant variations in the relative prices of the different types of packaging.

Assessment by the Court

60 Before considering whether the definition of the four aseptic and non-aseptic markets given in the Decision is valid, the exact content of that definition in the aseptic sector must be determined.

61 Contrary to the applicant's arguments, the Decision seeks to encompass in the two aseptic markets, mentioned above, all aseptic machinery and cartons, whether used for the packaging of UHT milk or for the packaging under aseptic conditions of liquid foods not needing UHT treatment, such as fruit juice. The aseptic markets are expressly defined in recital 11 of the Decision as '(a) the market for machinery incorporating technology for the sterilization of cartons and the packaging in those cartons, under aseptic conditions, of UHT-treated liquid foods; and (b) the corresponding market for packaging cartons'. It is clear from this that those markets are determined exclusively by reference to the technological characteristics of machinery and cartons for packaging UHT-treated products, on the basis that the machinery and cartons with those characteristics are also used for the aseptic packaging of non-UHT-treated products. That interpretation is confirmed by Article 1 of the Decision, which simply finds the existence of a dominant position on the 'so-called aseptic markets in machines and cartons intended for the packaging of liquid foods', without making any reference to the use to which that equipment is put.

62 It is therefore for the Court to consider whether the four markets so defined by the Decision were indeed markets distinct from other sectors of the general market in systems for packaging liquid food products.

63 A preliminary point to note is that, according to settled case-law, the definition of the market in the relevant products must take account of the overall economic context, so as to be able to assess the actual economic power of the undertaking in question. In order to assess whether an undertaking is in a position to behave to an appreciable extent independently of its competitors and customers and consumers, it is necessary first to define the products which, although not capable of being subsituted for other products, are sufficiently interchangeable with its products, not only in terms of the objective characteristics of those products, by virtue of which

they are particularly suitable for satisfying constant needs, but also in terms of the competitive conditions and the structure of supply and demand on the market (see the judgment of the Court of Justice in Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 37).

64 In this case, the 'interchangeability' of aseptic packaging systems with non-aseptic systems and of systems using cartons with those using other materials must be assessed in the light of all the competitive conditions on the general market in systems for packaging liquid food products. Accordingly, in the specific context of this case, the applicant's approach of dividing that general market into differentiated sub-markets depending on whether the packaging systems are used for packaging milk, dairy products other than milk or non-dairy products by virtue of the specific characteristics of the packaging of those different categories of products, in which the possibility exists that various kinds of substitutable equipment may be used, would lead to a compartmentalization of the market which would not reflect economic reality. There is a comparable structure of supply and demand for both aseptic and non-aseptic machinery and cartons, however they are used, since all belong to one sector, the packaging of liquid food products. Whether they are used for packaging milk or other products, aseptic and non-aseptic machinery and cartons not only share the same characteristics of production but also satisfy identical economic needs. In addition, a not insignificant proportion of Tetra Pak's customers operate in both the milk sector and the fruit juice sector, as the applicant has admitted. In all those respects, therefore, this case is distinguishable from the situation contemplated in the judgment in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, relied on by the applicant, in which the Court of Justice had first considered the possibility of finding that there were two separate markets for one product which, unlike in this case, was used in two ways in wholly distinct sectors, one 'bio-nutritive' and the other 'technological' (paragraphs 28 and 29). Furthermore, as both parties have submitted, Tetra Pak machinery and cartons of the same type were uniformly priced whether they were intended for packaging milk or other products, which confirms that they belong to a single product market. There is accordingly no need, contrary to the applicant's arguments, to find

that there are differentiated sub-markets for packaging systems of the same type depending on whether they are used for packaging a particular category of products.

65 Accordingly, in order to ascertain whether the four markets defined in the Decision were indeed separate markets during the period in question, it is necessary — as the Commission submits — to determine in particular which products were sufficiently interchangeable with aseptic and non-aseptic machinery and cartons in the predominant milk sector. To the extent that the carton-packaging systems were used primarily for packaging milk, a dominant position in that sector was sufficient evidence, if relevant, of a dominant position on the market as a whole. Any such dominant position could not be called in question by the existence of substitutable equipment, alleged by the applicant, in the non-milk-product packaging sector, since such equipment accounted for only a very small proportion of all products packaged in cartons during the period covered by the Decision. The predominance of the milk-packaging sector is clearly demonstrated by data given in the Decision (recital 6) and not disputed by the applicant, according to which in 1987 72% of carton systems were used for packaging milk and only 7% for packaging other milk products. According to the same source, in 1983 90% of those systems were used for packaging milk and other dairy products. That pattern was even more marked in the case of the systems marketed by Tetra Pak. Tables produced by Tetra Pak in reply to a written question from the Court show that in the Community 96% of the aseptic systems manufactured by it were used for packaging milk in 1976, 81% in 1981, 70% in 1987 and 67% in 1991. Those figures indicate that, notwithstanding a decrease, the majority of Tetra Pak aseptic cartons were used for packaging milk during the period in question. As for non-aseptic cartons, 100% were used for packaging milk until 1980 and 99% thereafter, according to the same source. For all those reasons, the Commission was entitled to take the view that it was not necessary to carry out a separate analysis of the non-milk-product packaging sector.

66 In the milk-packaging sector, the Commission correctly based itself, in this case, on the test of sufficient substitutability of the different systems for packaging liquid foods, as laid down by the Court of Justice (see in particular Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 32, and *Hoffmann-La Roche* v *Commission*, cited above, third subparagraph of paragraph 28). It is also in accordance with case-law (see the judgment of the Court of Justice in Joined Cases 6/73 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223, paragraphs 19 to 22) that the Commission applied the test of sufficient substitutability of products at the stage of the packaging systems themselves, which constitute the market in intermediate products on which Tetra Pak's position must be assessed, and not at the stage of the finished products, in this case the packaged liquid food products.

67 In order to assess the interchangeability for packers of the packaging systems, the Commission necessarily had to take account of the repercussions of the final consumers' demand on the packers' intermediate demand. It found that the packers could influence consumer habits in the choice of types of product packaging only by promotion and publicity in a long and costly process, extending over several years, as Tetra Pak had expressly acknowledged in its reply to the statement of objections. In those circumstances, the various types of packaging could not be considered to be sufficiently interchangeable for packers, whatever their bargaining power, referred to by the applicant.

68 It is therefore exclusively to assess the effect of final demand on the packers' intermediate demand that the Commission referred to the lack of perfect substitutability, which concerned only the packaged products and not the packaging systems. In particular, the Commission correctly considered that, because of the small proportion of the retail price of milk accounted for by the cost of its packaging, 'small but significant changes in the relative price of the different packages would not be sufficient to trigger off shifts between the different types of milk with which they are associated because the substitution of different milks is less than perfect' (decision in Tetra Pak I, at the end of recital 32). The applicant's complaints that the

Commission based itself on the model of perfect competition and defined the relevant markets solely by reference to consumer demand must accordingly be rejected.

69 The Court of First Instance therefore holds first that the Commission was entitled to find that during the period in question there was not sufficient interchangeability between machinery for aseptic packaging in cartons and machinery for non-aseptic packaging whatever the material used. At the level of demand, aseptic systems are distinguished by their inherent characteristics, satisfying specific consumer needs and preferences in relation to the duration and quality of conservation and to taste. Moreover, to move from packaging UHT milk to packaging fresh milk requires the setting up of a distribution system which ensures that the milk is continuously kept in a refrigerated environment. Furthermore, at the level of supply, the manufacture of machinery for the aseptic packaging of UHT milk in cartons requires complex technology, which only Tetra Pak and its competitor PKL had succeeded in developing and making operational during the period considered in the Decision. Manufacturers of non-aseptic machinery using cartons, operating on the market closest to the market in the aseptic machinery in question, were therefore not in a position to enter the latter market by modifying their machinery in certain respects for the market in aseptic machinery.

70 As for aseptic cartons, they also constituted a market distinct from that in non-aseptic packaging. At the level of the packers' intermediate demand, aseptic cartons were not sufficiently interchangeable with non-aseptic packages, including cartons, for the same reasons as those already set out in the preceding paragraph in relation to machinery. At the level of supply, the documents before the Court indicate that, notwithstanding the absence of insurmountable technical problems, manufacturers of non-aseptic cartons were not in a position in the circumstances in question to adapt to the manufacture of aseptic cartons. The fact that on that market there was only one competitor of Tetra Pak, namely PKL, with only 10% of the market in aseptic cartons during the period in question, demonstrates that the conditions of

competition were such that in practice there was no possibility for manufacturers of non-aseptic cartons to enter the market in aseptic cartons, in particular given the lack of aseptic filling machines.

71 Secondly, the Court holds that, during the period in question, aseptic machinery and cartons were not sufficiently interchangeable with aseptic packaging systems using other materials. According to the data provided in the documents before the Court, which are not disputed by the applicant, no such substitutable equipment existed, with the exception of the arrival on the market towards the end of the relevant period of systems for aseptic packaging in plastic bottles, returnable glass bottles and pouches in France, Germany and Spain respectively. However, each of those new products was introduced in only one country and, what is more, accounted for only a marginal share of the UHT-milk-packaging market. According to information provided by the applicant, that share has been only 5% of the market in France since 1987. In the Community as a whole, in 1976, all UHT milk was packaged in cartons. The observations submitted by the applicant in response to the statement of objections indicate that in 1987 approximately 97.7% of UHT milk was packaged in cartons. At the end of the period in question, that is in 1991, cartons still accounted for 97% of the UHT-milk-packaging market, the remaining 3% being held by plastic containers, as the applicant indicated in answer to a written question from the Court. The marginal share of the market thus held by aseptic containers made out of other materials demonstrates that those containers cannot be considered, even during the last years of the period covered by the Decision, as products which are sufficiently interchangeable with aseptic systems using cartons (see *Commercial Solvents* v *Commission*, cited above, paragraph 15).

72 Thirdly, the Court finds that non-aseptic machinery and cartons constituted markets which were distinct from those in non-aseptic packaging systems using materials other than cartons. It has already been shown (see paragraphs 67 and 68 above) that, because of the marginal proportion of the price of milk attributable to packaging costs, packers would have been led to consider that containers — in

this case cartons, glass or plastic bottles and non-aseptic pouches — were easily interchangeable only if there had been an almost perfect substitutability of final consumer demand. In the light of their very different physical characteristics and the system of doorstep delivery of pasteurized milk in glass bottles in the UK, that form of packaging was not interchangeable for consumers with packaging in cartons. Moreover, the fact that environmental factors led some consumers to prefer certain types of packaging, such as returnable glass bottles, did not promote the substitutability of those containers with cartons. Consumers who were aware of those factors did not consider those containers to be interchangeable with cartons. The same applies to consumers who, conversely, were attracted to a certain convenience in using products packaged in cartons. As for plastic bottles and plastic pouches, they were on the market only in countries where consumers accepted that type of packaging, in particular, according to information in the Decision which is not disputed by the applicant, Germany or France. Furthermore, according to the same source, that packaging was used only for approximately one-third of pasteurized milk in France and 20% in Germany. It follows that those products were not in practice sufficiently interchangeable with non-aseptic cartons throughout the Community during the period covered by the Decision.

73 Analysis of the markets in the milk-packaging sector thus shows that the four markets concerned, defined in the Decision, were indeed separate markets.

74 Moreover and in any event, the Court finds that an examination of the substitutability of the various packaging systems in the fruit-juice sector, fruit juices being the largest category of liquid foods other than milk, shows that in that sector also there was no sufficient interchangeability either between aseptic and non-aseptic systems or between systems using cartons and systems using other materials.

75 The market in the carton packaging of fruit juices was held mainly by aseptic systems during the period in question. In 1987, 91% of cartons used for packaging fruit juice were aseptic. That proportion remained stable until 1991, when 93% of all cartons were aseptic according to Tetra Pak's reply to a written question from the Court. The marginal share held by non-aseptic cartons for packaging fruit juice, which continued for several years as has been shown, demonstrates that in practice they were barely interchangeable with aseptic cartons.

76 Nor were aseptic machinery and cartons sufficiently interchangeable with equipment using other materials for packaging fruit juice. The tables provided by Tetra Pak in answer to a written question from the Court show that during the period in question the two major rival types of packaging in the fruit-juice sector were glass bottles and cartons. In particular, the tables indicate that in 1976 in the Community more than 76% of fruit juice (by volume) was packaged in glass bottles, 9% in cartons and 6% in plastic bottles. The share held by cartons reached approximately 50% of the market in 1987 and 46% in 1991. The share held by glass bottles increased from 30 to 39% between those dates and the share held by plastic bottles remained negligible, decreasing from approximately 13% to 11%.

77 Taking into account their very different characteristics, concerning both price and presentation, weight and the way in which they are stored, cartons and glass bottles could not be considered to be sufficiently interchangeable. In relation particularly to comparative prices, both parties' answers to a written question from the Court show that the total cost to the packer of packaging fruit juice in non-returnable glass bottles is significantly higher by approximately 75% than that of packaging in aseptic cartons.

78 It follows from all the above considerations that the Commission has established to the requisite legal standard that the markets in aseptic machinery and cartons and those in non-aseptic machinery and cartons were insulated from the general market in systems for packaging liquid foods.

2. The machinery and carton markets cannot be separated

Summary of the arguments of the parties

79 The applicant states that the relevant market must be defined as the integrated packaging-systems market, comprising machines for packaging liquid foods and the packaging itself. It argues that there is a natural and commercial link of the type referred to in Article 86(d) of the Treaty between the machines and the cartons. In particular, segregating aseptic filling machines and aseptic cartons may involve grave risks for public health and serious consequences for Tetra Pak's customers.

80 The applicant considers that the Commission took no account of the submissions of Tetra Pak's competitors, which support Tetra Pak's arguments, and adduced no evidence that the separate provision of machines and cartons reflected either the wishes of packers for independent suppliers of cartons or the wishes of the carton suppliers themselves.

81 The Commission disputes the link alleged by the applicant between machinery and cartons. It submits that Article 86 of the Treaty precludes the manufacturer of a

complex product from hindering production by a third party of consumable products intended for use in its systems.

Assessment by the Court

82 First, and contrary to the arguments of the applicant, consideration of commercial usage does not support the conclusion that the machinery for packaging a product is indivisible from the cartons. For a considerable time there have been independent manufacturers who specialize in the manufacture of non-aseptic cartons designed for use in machines manufactured by other concerns and who do not manufacture machinery themselves. It is apparent in particular from the Decision (recital 16), and not disputed by the applicant, that, until 1987, Elopak, which was set up in 1957, manufactured only cartons and accessory equipment, for example handling equipment. Moreover, also according to the Decision (recital 13), and not contested by the applicant, approximately 12% of the non-aseptic carton sector was shared in 1985 between three companies manufacturing their own cartons, generally under licence and acting, for machinery, only as distributors. In those circumstances, tied sales of machinery and cartons cannot be considered to be in accordance with commercial usage, given that such sales were not the general rule in the non-aseptic sector and that there were only two manufacturers in the aseptic sector, Tetra Pak and PKL.

83 Furthermore, the applicant's argument as to the requirements for the protection of public health and its interests and those of its customers cannot be accepted. It is not for the manufacturers of complete systems to decide that, in order to satisfy requirements in the public interest, consumable products such as cartons constitute, with the machines with which they are intended to be used, an inseparable integrated system. According to settled case-law, in the absence of general and binding standards or rules, any independent producer is quite free, as far as Community competition law is concerned, to manufacture consumables intended for use in

equipment manufactured by others, unless in doing so it infringes a competitor's intellectual property right (see the judgment of the Court of First Instance in Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 68, and the judgment of the Court of Justice Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraphs 11 to 16).

84 In those circumstances, whatever the complexity in this case of aseptic filling processes, the protection of public health may be guaranteed by other means, in particular by notifying machine users of the technical specifications with which cartons must comply in order to be compatible with those machines, without infringing manufacturers' intellectual property rights. Moreover, even on the assumption, shared by the applicant, that machinery and cartons from various sources cannot be used together without the characteristics of the system being affected thereby, the remedy must lie in appropriate legislation or regulations, and not in rules adopted unilaterally by manufacturers, which would amount to prohibiting independent manufacturers from conducting the essential part of their business.

85 It follows that the applicant's argument that the markets in machinery for packaging a product and those in packaging cartons are inseparable cannot be accepted.

B — The relevant geographical market

Summary of the arguments of the parties

86 The applicant denies that the relevant geographical market covers the entire territory of the Community. It considers that the various Member States constitute

separate markets for the products in question because the objective conditions of competition are not the same for all traders throughout the Community.

87 It submits that in each Member State there are local markets on which autonomous subsidiaries both of Tetra Pak and of other manufacturers operate. Moreover, consumer demand for packaged liquid foods varies from one Member State to another. In particular, the markets of north-west Europe, comprising Denmark, Ireland, the Netherlands and the United Kingdom, should have been considered separately, given that the consumption of UHT milk is marginal in those countries. In addition, the applicant argues that variations in the price of machines and cartons between the Member States show that the Community does not constitute the relevant geographical market.

88 Furthermore, the applicant asserts that the territories of Greece, Spain and Portugal must be excluded from the relevant geographical market for the period before their accession to the European Communities. After its accession, Spain should have been excluded from the relevant market because of the tariff barriers which remained in force for a transitional period.

89 The Commission considers that the geographical market encompasses the whole of the Community. It argues essentially that all the types of carton and machinery in question are to be found to a significant extent in each Member State and that the transport costs for both machines and cartons are negligible. Moreover, it considers that the price differences between the Member States, alleged by the applicant, are attributable to a monopoly situation or a partitioning of the markets.

90 The Commission states that the territory of the Member States which acceded to the European Communities during the relevant period is excluded from the

geographical market and from any finding of infringement before the date of their accession. As for the tariff barriers to imports which remained in force in Spain after its accession, they do not 'discriminate' between manufacturers of machines and of cartons since no such manufacturer was established in Spain.

Assessment of the Court

91 The Court notes at the outset that in the scheme of Article 86 of the Treaty the geographical market must be defined so as to determine whether the undertaking concerned is in a dominant position in the Community or a substantial part of it. The definition of the geographical market, as that of the product market, accordingly calls for an economic assessment. The geographical market can thus be defined as the territory in which all traders operate in the same conditions of competition in so far as concerns specifically the relevant products. The Commission correctly points out that it is not at all necessary for the objective conditions of competition between traders to be perfectly homogeneous. It is sufficient if they are 'the same' or 'sufficiently homogeneous' (judgment of the Court of Justice in Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 44; see also paragraphs 11 and 53).

92 It is accordingly necessary to ascertain whether the various factors pleaded by the applicant give rise in the Community to objective conditions of competition of a heterogeneous nature. The Court considers that the establishment of major manufacturers of packaging systems in each Member State by way of national subsidiaries, and similarly the practice of dairies of obtaining supplies at local level, are not sufficient, contrary to the applicant's contention, to establish that the conditions of competition are specific to the territory of each of those States. With regard in particular to Tetra Pak's policy, the context of these proceedings suggests conversely that the circumstances which have just been described are attributable rather to its strategy of partitioning the markets than to the existence of local

markets characterized by objectively different conditions of competition. Even if the various contracts between Tetra Pak and its customers were differentiated by the inclusion of numerous additional clauses which varied depending on the State in question, the fact remains that the commercial policy of the various group subsidiaries was part of a commercial strategy coordinated by the parent company, as is illustrated in particular by the use in all the Member States, which the applicant does not deny, of clause (ix) relating to tied sales and of a clause requiring exclusive supply by Tetra Pak's local subsidiary in the contracts with dairies. Moreover, certain significant items of evidence, such as the letters and telexes between the Tetra Pak group and Tetra Pak Italiana, mentioned in the Decision (recitals 71 to 83) and provided to the Court, confirm that Tetra Pak's commercial policy was determined at group level.

93 In that regard, this case is therefore distinguishable from the facts in issue in *Michelin* v *Commission*, relied on by the applicant, in which the Court of Justice held that the adoption, by the Netherlands subsidiaries of groups operating worldwide and engaged in the manufacture of new tyres, of autonomous commercial policies tailored to the specific conditions of each national market was evidence of the existence of a national market in which the conditions of competition were sufficiently alike (paragraph 26 of the judgment).

94 In this case, the Commission was entitled to define a single geographical market covering the whole Community for three main reasons. First, as the Commission emphasizes without contradiction by the applicant, demand was stable and not insignificant — even though it varied in intensity from one Member State to another — for all the relevant products, throughout the territory of the Community, during the period covered by the Decision. Secondly, according to the same sources, from the technical point of view customers could obtain supplies of machinery or cartons in other Member States, the presence of local distribution units being necessary solely to install, maintain and repair machines. Thirdly, the very low cost of transport for cartons and machines meant that they could be

easily and rapidly traded between States; the applicant does not deny this. In particular, the absence of economic barriers to the import of machines, due to the negligible transport costs, is corroborated by the fact that machines manufactured in the United States by Nimco or Cherry Burrel and in Japan by Shikoku are, according to the Decision, marketed in the Community.

95 In the light of those factors, particular patterns of consumption cannot by themselves constitute evidence of the existence of a distinct geographical market comprising, according to the applicant, the States of north-west Europe. The alleged differences in consumer tastes concerning the type of milk or the form of packaging affected only the overall size of the markets in the relevant products in each Member State and had no effect on the conditions of competition within those markets between the manufacturers of those specific products, who were subject vis-à-vis one another to conditions of competition which were the same for all such manufacturers throughout the Community.

96 Moreover, the differences in price between the Member States, also relied on by the applicant, cannot be evidence of objective conditions of competition of a non-homogeneous nature since, in the context described in the preceding paragraphs, they are rather evidence of an artificial partitioning of the markets.

97 Furthermore, so far as concerns the States which acceded to the European Communities during the period in question, it is clear that they could form part of the relevant geographical market only as from the date of their accession, as is apparent as a matter of logic from the Decision itself and as the Commission has confirmed before the Court. In addition, the defendant was right to take the view that maintaining tariff barriers to imports during the transitional period in Spain did not create non-homogeneous conditions of competition for the various manufacturers of packaging systems in the Community since, according to information provided

by the Commission and not disputed by the applicant, none of those manufacturers was established in Spain and thus by virtue of those dues put in an exceptionally advantageous position in the territory of that Member State compared to its competitors established in the other Member States.

98 It follows from the above that the relevant geographical market comprises in this case the whole of the Community. It thus extended to the nine Member States until 31 December 1980, to the ten until 31 December 1985 and to the twelve as from 1 January 1986.

99 It follows from all the preceding considerations that the definition of the relevant markets used by the Commission is not in any way vitiated by any manifest error of assessment, whether concerning the product markets or the geographical market.

C — Tetra Pak's position on the relevant markets and the application of Article 86 of the Treaty

Summary of the arguments of the parties

100 The applicant maintains that it is not in a dominant position. Moreover, it considers that, even if it were in such a position on the aseptic markets, Article 86 would not apply to practices carried out on the non-aseptic markets, which neighbour but are distinct from the allegedly dominated aseptic markets.

101 The applicant complains first that in assessing its position on the aseptic markets the Commission was over-reliant on market shares without taking into consideration the 'countervailing power' of its major customers or competition by innovation. It refers to the judgment in *United Brands* v *Commission* (paragraphs 109 and 110), in which the Court of Justice ruled that a market share of 40% did not without more support the automatic conclusion that there was a dominant position on the relevant product market.

102 The applicant also emphasizes that it has a prominent and not a dominant position on the non-aseptic markets, as accepted furthermore by the Commission in the Decision. On that ground it disputes the applicability of Article 86 in the non-aseptic sector. It submits that the Commission's proposition that an abuse within the meaning of that article may be committed in certain circumstances on markets which are distinct from but which neighbour those on which a dominant position has been established conflicts with the very basis of the special responsibility of an undertaking in a dominant position, which is justified by the weakened competitive structure of the dominated market. The Court of Justice moreover confirmed in *Michelin* v *Commission*, cited above, that an undertaking not in a dominant position on a given market cannot commit an abuse on that market.

103 In this case, the applicant submits that the practices complained of on the non-aseptic markets were not implemented and had no anti-competitive effects on the allegedly dominated aseptic markets, in contrast to the situation considered by the Court of Justice in *Commercial Solvents* v *Commission*, cited above, Case 311/84 *CBEM* v *CLT and IPB* [1985] ECR 3261 and Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, relied on in the Decision. Unlike in this case, the abuses found in the abovementioned cases had always been committed on the dominated market, even though they had an anti-competitive effect on associated markets, as in *Commercial Solvents* v *Commission* and *CBEM* v *CLT and IPB*, cited above.

104 Furthermore, the applicant considers that in this case the Commission has not demonstrated that there is a causal link between the abuses allegedly committed in the non-aseptic sector and Tetra Pak's dominant position in the aseptic sector. The applicant rejects in particular the Commission's allegation that profits made in the aseptic sector enabled it to practice predatory or discriminatory pricing for non-aseptic machines and cartons. It also disputes the existence of any link between its dominant position in the aseptic sector and the allegedly unfair contractual terms which it is said to have imposed in the non-aseptic sector. In its view, those terms are justified by the need to ensure the proper functioning of the packaging systems and were incorporated in contracts for the supply of non-aseptic machines well before the aseptic equipment was perfected.

105 The Commission considers that the fact that the applicant holds at least 90% of the markets in aseptic machines and cartons provides irrefutable evidence of a dominant position on those markets.

106 As for the non-aseptic markets, the Decision makes no finding of a dominant position, as the Commission confirmed at the hearing. The Commission nonetheless emphasizes, in the second paragraph of recital 104, that the shares of the market held by Tetra Pak in the non-aseptic sector were sufficient to establish the existence of a dominant position on those non-aseptic markets considered separately. However, given Tetra Pak's dominant position on the aseptic markets and the associative links between those markets and the non-aseptic markets, the Commission considers that acts committed in the non-aseptic sector also fall within the scope of Article 86 and that there is 'therefore no need to demonstrate separately the existence of a dominant position held by Tetra Pak on the non-aseptic markets taken in isolation' (fourth paragraph of recital 104 of the Decision).

107 The Commission submits that neither the wording nor the purpose of Article 86 supports the view that it only catches abuses committed on the relevant market used to define the dominant position, whilst at the same time allowing the

undertaking in question to commit abuses on other markets, particularly where they are closely linked to the relevant market.

108 In this case, the Commission argues that the applicant 'has used the association which exists between the four markets in question to commit abuses on the non-aseptic markets, abuses which it could not have committed in the absence of its dominant position on the aseptic markets' (penultimate paragraph of recital 104 of the Decision). It is unthinkable that the applicant would have undertaken a predatory pricing campaign against Elopak, in Italy and more generally in the Community, had it not been aware that approximately 90% of its profits derived from the aseptic sector. Similarly, the applicant was able to impose unfair contractual terms on the non-aseptic markets only because 56% of its customers in that sector also operated in the aseptic sector.

Assessment of the Court

109 In relation first to the aseptic sector, the information provided by both parties shows that Tetra Pak held approximately 90% of the aseptic markets in both machines and cartons throughout the Community and throughout the period in question. It is clear that holding such market shares meant that the applicant's position on the market made it an inevitable partner for packers and guaranteed it the freedom of conduct characteristic of a dominant position. The Commission was therefore correct in taking the view that such market shares were in themselves and in the absence of exceptional circumstances evidence of the existence of a dominant position (see the judgments in *Hoffmann-La Roche* v *Commission*, cited above, paragraphs 41, 60 and 66, and *Hilti* v *Commission*, cited above, paragraphs 91 and 92).

110 Moreover, as the Commission has pointed out, the presence on the markets in aseptic machines and cartons of only one competitor of Tetra Pak, namely PKL,

holding the remaining market shares, that is approximately 10% of those markets, and the existence of technological barriers and numerous patents preventing new competitors from entering the market in aseptic machines, contributed to maintaining and strengthening Tetra Pak's dominant position both on the market in aseptic machines and on that in aseptic cartons. Even though, as both parties accept, it was technically possible for competitors to enter the market in aseptic cartons, the lack of available aseptic machines — primarily due to Tetra Pak's policy of tied sales — was in practice a serious barrier to access to the market by new competitors.

111 In the light of all those factors, the applicant's arguments based on its customers' bargaining power and competition by innovation cannot be accepted and its dominant position on the two aseptic markets in question must be regarded as sufficiently proven.

112 The next question is whether, as the Commission contends, the conditions for the application of Article 86 are also satisfied on the two non-aseptic markets, by virtue of the associative links between those two markets and the two aseptic markets.

113 The Court notes as a preliminary point that Article 86 of the Treaty prohibits any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it. The conditions set out for its application thus simply relate to the extent of the relevant geographical market. It gives no explicit guidance as to the requirements relating to where on the product market the abuse took place.

114 In order to determine those conditions, Article 86 of the Treaty must accordingly be interpreted by reference to its object and purpose as they have been described by the Court of Justice, which held, in *Michelin* v *Commission*, cited above (paragraph 57), that that article imposed on an undertaking in a dominant position, irrespective of the reasons for which it has such a dominant position, a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market, in accordance with the general objective set out in Article 3(f) of the Treaty as it was then worded. Thus Article 86 covers all conduct of an undertaking in a dominant position which is such as to hinder the maintenance or the growth of the degree of competition still existing in a market where, as a result of the very presence of that undertaking, competition is weakened (see the judgment in *Hoffmann-La Roche* v *Commission*, cited above, paragraph 91).

115 The actual scope of the special responsibility imposed on an undertaking in a dominant position must therefore be considered in the light of the specific circumstances of each case, reflecting a weakened competitive situation, as an analysis of the case-law confirms. The Court of Justice has held in particular, in *Commercial Solvents* v *Commission*, cited above (paragraphs 21 and 22), and *CBEM* v *CLT and IPB*, cited above (paragraphs 25 to 27), that Article 86 of the Treaty applies where an undertaking holding a dominant position on a particular market reserves to itself, without any objective necessity, an ancillary or dependent activity on a neighbouring but separate market where it is not in a dominant position, with the possibility of eliminating all competition on that market. Furthermore, in *AKZO* v *Commission*, cited above (paragraphs 39 to 45), the Court of Justice expressly acknowledged that price reductions granted on a 'different market' from the market in the relevant products, of which it was a sub-market, were caught by Article 86. Moreover, in Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraphs 92 and 93, the Court of First Instance accepted that Article 86 applied where the undertaking in question, which was in a dominant position in the plasterboard market, gave a benefit in a separate market, that in plaster, solely to customers who obtained supplies of plasterboard exclusively from it. The Court there based itself on the specific circumstances of the case, in which customers of the undertaking in question operated on both markets and, in the plaster market, were dependent on their supplier.

116 It thus appears that the applicant's arguments to the effect that the Community judicature has ruled out any possibility of Article 86 applying to an act committed by an undertaking in a dominant position on a market which is separate from the dominated market must be rejected. In particular, it is noteworthy that, contrary to the interpretation urged by the applicant, the judgment in *Michelin* v *Commission* is not relevant, since it did not deal with the question whether Article 86 of the Treaty applied to acts committed on a market which neighbours but is distinct from the dominated market. In that case, the Court of Justice was called upon solely to determine the validity of the Commission's decision which found that an extra bonus linked to sales targets on the market in car tyres was in reality akin to a discount on sales of heavy-vehicle tyres and constituted a linked obligation under Article 86(d) of the Treaty. The Commission considered that by that bonus the undertaking in question made obtaining an advantage on the market in heavy-vehicle tyres, where it was in a dominant position, conditional on attaining a sales target on the separate market in car tyres. The Court of Justice annulled the decision on that point, on the ground that the bonus at issue was granted according to a sales target set solely on the car-tyre market and that therefore there was no link between the purchase of lorry tyres and that of car tyres.

117 Irrespective, at this stage in the proceedings, of any assessment of that conduct, it is therefore for the Court to verify whether, in the particular circumstances of this case, Article 86 of the Treaty may apply to Tetra Pak's conduct on the non-aseptic markets.

118 The Commission has stated its reasons in the Decision for considering that Article 86 of the Treaty applies in the non-aseptic sector on the basis both of Tetra Pak's leading position in that sector and of the associative links between the non-aseptic markets and the aseptic markets, where the undertaking in question was in a dominant position. It considered that the existence of such links meant that it did not need to 'demonstrate separately the existence of a dominant position held by Tetra Pak on the non-aseptic markets taken in isolation'. After emphasizing that, in the non-aseptic sector, Tetra Pak was less affected by market forces than any of its competitors, the Decision states that, because of the link between the aseptic and

the non-aseptic sectors, 'it is not however necessary to establish in the context of this proceeding whether the power on the market which gives Tetra Pak its position of leader on the non-aseptic markets should be considered equivalent to its directly occupying a dominant position within the meaning of Article 86' (recital 101). According to the Commission, the existence of the abuses committed on the non-aseptic markets is demonstrated, 'even assuming that Tetra Pak's dominant position ... were not established independently of its position on the aseptic markets' (final paragraph of recital 104 of the Decision). Moreover, the Decision emphasizes that Tetra Pak held 78% of the overall market in packaging in both aseptic and non-aseptic cartons, that is seven times more than its closest competitor, and 'would unquestionably still hold a dominant position', even on that wider market (recital 103, fourth paragraph).

119 In relation, first, to Tetra Pak's market shares in the non-aseptic sector, the Court notes that in 1985 it held approximately 48% of the non-aseptic carton market and 52% of the non-aseptic machine market, according to the information provided by both parties. That share was already higher than 40% in 1976 and continued to grow until it reached approximately 55% in 1987. Moreover, as the Commission notes, Tetra Pak's market share alone was 10 to 15% greater than the combined shares of its two principal competitors, of which the first was approximately half the size of the applicant and the second approximately one-fifth of the size. The Commission was accordingly correct in pointing out in the Decision (recital 99) that such market shares could be considered even on their own as demonstrating the existence of a dominant position.

120 In relation, next, to the alleged associative links between the relevant markets, it is common ground that they are due to the fact that the key products packaged in aseptic and non-aseptic cartons are the same and to the conduct of manufacturers and users. Both the aseptic and the non-aseptic machines and cartons at issue in this case are used for packaging the same liquid products intended for human consumption, principally dairy products and fruit juice. Moreover, a substantial proportion of Tetra Pak's customers operate both in the aseptic and the non-aseptic

sectors. In its written observations submitted in reply to the statement of objections, confirmed in its written observations before the Court, the applicant thus stated that in 1987 approximately 35% of its customers had purchased both aseptic and non-aseptic systems. Furthermore, the Commission correctly noted that the conduct of the principal manufacturers of carton-packaging systems confirmed the link between the aseptic and the non-aseptic markets, since two of them, Tetra Pak and PKL, already operate on all four markets and the third, Elopak, which is well-established in the non-aseptic sector, has for some considerable time been trying to gain access to the aseptic markets.

121 It follows that the Commission was entitled to find that the abovementioned links between the two aseptic markets and the two non-aseptic markets reinforced Tetra Pak's economic power over the latter markets. The fact that Tetra Pak held nearly 90% of the markets in the aseptic sector meant that, for undertakings producing both fresh and long-life liquid food products, it was not only an inevitable supplier of aseptic systems but also a favoured supplier of non-aseptic systems. Moreover, by virtue of its technological lead and its quasi-monopoly in the aseptic sector, Tetra Pak was able to focus its competitive efforts on the neighbouring non-aseptic markets, where it was already well-established, without fear of retaliation in the aseptic sector, which meant that it also enjoyed freedom of conduct compared with the other economic operators on the non-aseptic markets as well.

122 It follows from all the above considerations that, in the circumstances of this case, Tetra Pak's practices on the non-aseptic markets are liable to be caught by Article 86 of the Treaty without its being necessary to establish the existence of a dominant position on those markets taken in isolation, since that undertaking's leading position on the non-aseptic markets, combined with the close associative links between those markets and the aseptic markets, gave Tetra Pak freedom of conduct

compared with the other economic operators on the non-aseptic markets, such as to impose on it a special responsibility under Article 86 to maintain genuine undistorted competition on those markets.

123 It follows from all the above that the first limb of the third plea relied on by the applicant must be rejected.

II — *The abusive practices*

124 The applicant claims that its contracts with its customers did not contain abusive clauses (A). It also denies the allegation that it practised predatory pricing on Tetra Rex cartons in Italy (B). Furthermore, it did not sell its machines and cartons at prices which were discriminatory as between users in different Member States (C). Moreover, it did not sell its machines at predatory prices in the United Kingdom (D). Finally, the prices of its machines and the specific practices complained of in Italy were not abusive (E).

A — The exclusivity clauses and the other contractual provisions at issue

Summary of the arguments of the parties

125 The applicant maintains that neither the requirement to use only Tetra Pak cartons on its machines (clause (ix)) nor the requirement to obtain supplies of cartons exclusively from Tetra Pak (clauses (x) and (xxv)) can be considered to be connected sales constituting an abuse. Both by their nature and according to commer-

cial usage within the meaning of Article 86(d) of the Treaty the Tetra Pak packaging systems are complete and indivisible systems, comprising the machine, the packaging material, training and after-sales service.

126 The applicant submits that the marketing of complete packaging systems was objectively justified by the concern to protect public health and thus its reputation through exclusive control of the entire packaging process. Cartons are much more sophisticated containers than traditional containers such as bottles, and this entails a significant risk of technical errors liable to cause serious problems in vulnerable sectors of the population. For that reason the clauses at issue were justified, even for the non-aseptic machines acquired by Tetra Pak from Nimco and Cherry Burrel, which had to be modified to Tetra Pak's specifications.

127 The applicant argues that all manufacturers of carton-packaging systems within the Community supplied complete packaging systems. Elopak, the complainant to the Commission in this case, moreover confirmed before the Commission that there should be one market for machines and cartons because that was the most efficient way to compete. That proposition was accepted by the Commission itself in recital 24 of the Tetra Pak I decision. Furthermore, in expressing the view in recital 180 of the Decision that a tied sale was justified in certain circumstances, the defendant recognized that such a sale is not unlawful in itself.

128 In those circumstances, the applicant complains that the Commission found the exclusive supply provisions unlawful in themselves, without considering whether they had any real effect on competition. In particular, there is no evidence that a customer would have wanted to purchase aseptic cartons from a competitor of Tetra Pak. This is confirmed by the position in the United States, where Tetra Pak's contracts contain no tied-sale clause and the protection of health is ensured by

legislation. In that country, packers have never used containers supplied by a third party for Tetra Pak filling machines.

129 More generally, the applicant submits that none of the 27 clauses mentioned in the Decision was abusive. It maintains that, contrary to the Commission's allegations, those clauses were not part of a systematic and deliberate anti-competitive commercial strategy throughout the Community. The applicant emphasizes that its autonomous production and distribution system is a legitimate organizational method and does not support a finding of a strategy of market compartmentalization. Similarly, the Commission's criticisms of its patent policy are unfounded.

130 Among the clauses identified by the Commission only two, clauses (iv), concerning the exclusive right to maintain and repair equipment, and (ix), referred to above, were present in the standard-form contracts in each of the twelve Member States. All 27 clauses appeared in all contracts in only one country, Italy. Moreover, it is clear from recitals 25 to 45 of the Decision, setting out the clauses in question, that there were a number of differences in their drafting in the different Member States. Furthermore, only the twelve clauses considered below appeared in at least ten Member States, including the four States with the most extensive geographical market.

131 The applicant submits that the clauses by which it retained exclusive rights over modification, maintenance and replacement of spare parts and intellectual property rights over any technical improvements or modifications to the equipment, such as clauses (ii), (iv), (v) and (viii), were justified on grounds of security and efficiency. As for clauses (xiii), (xiv) and (xix), which entitle Tetra Pak to inspect the commercial operations of the lessees and purchasers of its machines, they reflect the commercially normal and reasonable concern to ensure the efficient operation of its business. Clause (xx), which occurs only in the lease contracts and prevents

transfer of the lease or sub-leasing, is a standard term in that type of contract. Clauses (xxi) and (xxii), providing for the charging of a 'base rental' and of a sliding scale of monthly rental charges according to the number of cartons used, did not prevent the purchase from other suppliers of cartons for use on machines other than Tetra Pak machines. Finally, as regards the term of the lease, the applicant notes that the Commission's complaints apply solely to the Italian market. It points out that even in Italy, although the normal term of the lease was nine years, it was terminable by the lessee at any time on one year's notice.

132 The Commission contends that the tied sale of machines and cartons amounts to an abuse of a dominant position within the meaning of Article 86(d) of the Treaty. There is clear evidence that non-aseptic cartons could be used on different makes of machine. In the aseptic sector, technical barriers to entry to the carton market, arising from certain technical differences between the aseptic and non-aseptic packaging processes, were not insuperable given the similarities in the processes. In those circumstances, the factors relied on by the applicant as justification do not support a finding that the tied-sale clauses complained of were lawful. As for the other contractual clauses, they aimed to make customers totally dependant on Tetra Pak for the entire life of the machine, once purchased, which excluded any possibility of competition at the level of cartons and associated products.

133 In those circumstances, the only time when there was any possibility of genuine competition was on the sale of the machines. The applicant thus artificially limited competition to the area in which it has the greatest technological lead and where entry barriers are therefore at their highest. Furthermore, its contractual policy enabled it to realize virtually all its profits in the form of income from the sale of cartons.

Assessment of the Court

134 So far as concerns the standard clauses requiring only Tetra Pak cartons to be used on the machines sold by that undertaking (clause (ix)) and supplies of cartons to be obtained exclusively from Tetra Pak or a supplier designated by it (clauses (x) and (xxv)), the Court notes first that the applicant does not dispute the facts complained of. It accepts in particular that during the period in question clause (ix) was included in all contracts for the sale or lease of machines made with users of its packaging systems. As for clause (x), it is clear from the applicant's reply to a written question from the Court that it was included in all its contracts for the sale of machines. In the six Member States where Tetra Pak sold machines, such an exclusive supply clause was also included in the contracts for the supply of cartons, according to the documents before the Court. Furthermore, the Commission stated in answer to a written question from the Court, without being contradicted by the applicant, that the machine-leasing contracts contained a clause providing for cartons to be supplied exclusively by Tetra Pak's local subsidiary.

135 Moreover, the Court considers that the Commission correctly found in the Decision that the combined effect of the other 24 contractual clauses at issue (clauses (i) to (viii), (xi) to (xxiv), (xxvi) and (xxvii)) was an overall strategy aiming to make the customer totally dependant on Tetra Pak for the entire life of the machine once purchased or leased, thereby excluding in particular any possibility of competition at the level both of cartons and of associated products. Their effect on competition must therefore be considered in conjunction with clauses (ix), (x) and (xxv), referred to above, which were intended to make the market in cartons wholly dependent on that in machines and which reinforced and completed the elimination of that market. Moreover, those other clauses could be considered as abusive in themselves since their object was in particular, depending on the clause, to make the sale of machines and cartons subject to accepting additional services of a different type, such as maintenance and repair and the provision of spare parts; to

grant discounts, in particular on the costs of assistance, maintenance and updating the machines, or on part of the rent, depending on the number of cartons used, so as to induce customers to obtain supplies of cartons from Tetra Pak; and, finally, to give Tetra Pak control over its customers' activities and to retain for it the exclusive ownership of all technical improvements or modifications made to the cartons by their users.

136 Since it has been established that the clauses complained of all contributed to the attainment of the same objective, it must be ascertained whether, as claimed by the applicant, the resulting system of tied sales was objectively justified in the light of commercial usage and the very 'nature' of the products in question within the meaning of Article 86(d) of the Treaty.

137 That argument by the applicant cannot be accepted. For the reasons already given by the Court (see paragraph 82 above), the tied sale of filling machines and cartons cannot be considered to be in accordance with commercial usage. Moreover and in any event, even if such a usage were shown to exist, it would not be sufficient to justify recourse to a system of tied sales by an undertaking in a dominant position. Even a usage which is acceptable in a normal situation, on a competitive market, cannot be accepted in the case of a market where competition is already restricted. The Court of Justice has in particular ruled that, where an undertaking in a dominant position directly or indirectly ties its customers by an exclusive supply obligation, that constitutes an abuse since it deprives the customer of the ability to choose his sources of supply and denies other producers access to the market (see *Hoffmann-La Roche* v *Commission*, cited above, paragraphs 89 and 90, *AKZO* v *Commission*, cited above, paragraph 149, and the judgment of this Court in *BPB Industries and British Gypsum* v *Commission*, cited above, paragraph 68).

138 As for the fundamental justification pleaded by Tetra Pak, concerning the integrated and indivisible nature of its packaging systems as a matter of economics, the

Court has already also found, in the course of reviewing the definition of the relevant markets (see paragraphs 83 to 84 above), that it does not stand up to examination. The technical considerations and those relating to product liability, protection of public health and protection of its reputation put forward by Tetra Pak must be assessed in the light of the principles enshrined in the judgment in *Hilti* v *Commission*, cited above (paragraph 118), in which the Court of First Instance held that it was 'clearly not the task of an undertaking in a dominant position to take steps on its own initiative to eliminate products which, rightly or wrongly, it regards as dangerous or at least as inferior in quality to its own products.'

39 In this case, reliability of the packaging equipment for dairies and other users and compliance with standards of hygiene in relation to the final consumer could be ensured by disclosing to users of Tetra Pak machines all the technical specifications concerning the cartons to be used on those systems, without the applicant's intellectual property rights being thereby prejudiced. Moreover, the measures imposed on Tetra Pak in the Decision with a view to bringing the infringement to an end include an order by the Commission that Tetra Pak inform any customers purchasing or leasing a machine of the specifications which packing cartons must meet in order to be used on its machines. Furthermore and in any event, even if using another brand of cartons on Tetra Pak machines involved a risk it was for the applicant to use the possibilities afforded it by the relevant national legislation in the various Member States.

40 In those circumstances, it is clear that the tied-sale clauses and the other clauses referred to in the Decision went beyond their ostensible purpose and were intended to strengthen Tetra Pak's dominant position by reinforcing its customers' economic dependence on it. Those clauses were therefore wholly unreasonable in the context of protecting public health, and also went beyond the recognized right of an undertaking in a dominant position to protect its commercial interests (see, in relation to

second point, the judgment in *United Brands* v *Commission*, cited above, paragraph 189). Whether considered in isolation or together, they were unfair.

141 It follows that the Commission has established to the requisite legal standard that the abovementioned clauses taken together were abusive.

B — The allegedly predatory prices of Tetra Rex cartons in Italy

Summary of the arguments of the parties

142 The applicant maintains that the prices it charged from 1976 to 1982 in Italy for non-aseptic Tetra Rex cartons were not predatory as regards competitors. Those prices were justified by the conditions of competition on the Italian market and in particular by the fierce commercial contest between Tetra Pak and Elopak when Tetra Rex cartons were launched with a view to competing with the Pure-Pak cartons manufactured by Elopak and already well established on the market.

143 The applicant denies that setting the price well below not only their cost price but also their average direct variable cost was opposed to any economic rationale other than as part of an eviction strategy. It submits that *AKZO* v *Commission*, cited above (paragraph 71), cannot be interpreted as prohibiting an undertaking in a dominant position from charging prices below average variable cost. It is for the Commission first to prove an eliminatory intent. Secondly, as the applicant stated at the hearing, on the basis of the judgment of the Supreme Court of the United

States of 21 June 1993, *Brooke Group* v *Brown & Williamson Tobacco* (No 92-466), sales at a loss are eliminatory only where the undertaking in question has a reasonable prospect of subsequently recouping losses so incurred.

144 In this case, the applicant considers that neither of the two conditions referred to above was satisfied. Contrary to the allegations of the Commission, the reports of Tetra Pak Italiana's board of directors for 1979 and 1980 disclose no eliminatory intent. Moreover, the applicant submitted at the hearing that since the market in non-aseptic cartons is a competitive market it had no reasonable prospect of recouping in the long term losses incurred on sales of Tetra Rex cartons.

145 In addition, the applicant argues that its pricing of Tetra Rex cartons in Italy had no eliminatory effect. That pricing did not lead to a significant increase of its share of the total market. On the contrary, during the period in question Elopak more than doubled its market share.

146 The Commission contends that Tetra Pak set the prices of Tetra Rex cartons in Italy at a level designed to oust its competitors by resorting to cross-financing of its products, using its dominant position on the aseptic market. It argues that on the basis of the reasoning of the Court of Justice in *AKZO* v *Commission*, cited above, the existence of extremely negative gross margins from 1976 to 1982 gives rise at least to a presumption of eliminatory intent. That strategy of eviction aimed at conquering the Italian market in non-aseptic packaging is corroborated by a whole series of factors, such as the price differences between Tetra Rex cartons sold in Italy and in the other countries of the Community and between Tetra Rex cartons and Elopak cartons, which increased from a few percentage points in 1976 to 30% or more in 1980/1981 while losses on Tetra Rex cartons increased. That strategy is also apparent from the reports of Tetra Pak Italiana's board of directors in 1979 and 1980. Its initial effect was to inhibit the growth in Elopak sales and it then led to a fall in those sales.

Assessment of the Court

147 As a preliminary point, although it may be acceptable for an undertaking in a dominant position to sell at a loss in certain circumstances, that would clearly not be the case where such selling was predatory. Although Community competition law recognizes that an undertaking in a dominant position has the right to take reasonable steps to protect its commercial interests, it does not countenance acts whose actual purpose is to strengthen that dominant position and abuse it (judgment in *United Brands* v *Commission*, cited above, paragraph 189). In particular, Article 86 of the Treaty prohibits an undertaking in a dominant position from eliminating a competitor by practising competition by means of price which does not come within the scope of competition on the basis of quality (judgment in *AKZO* v *Commission*, cited above, paragraph 70).

148 In the light of those precepts, the existence of gross or semi-gross margins — obtained by subtracting from the sale price the variable direct costs or the average variable costs, being the costs relating to the unit produced — which are negative suggests that a pricing practice is eliminatory. As the Court of Justice held in *AKZO* v *Commission*, cited above, paragraph 71, an undertaking in a dominant position has no interest in applying prices below average variable costs (that is to say, those which vary depending on the quantities produced) except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss equal to the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and at least part of the variable costs relating to the unit produced.

149 The Court of Justice also held in *AKZO* v *Commission* that if the net margin is negative and the gross margin positive, that is to say, if the prices are below average total costs (fixed costs plus variable costs), but above average variable costs, those prices must be regarded as abusive if they are determined as part of a plan for

eliminating a competitor. The period during which such prices are applied as part of a plan for damaging a competitor is accordingly a factor to be taken into consideration (paragraphs 72, 140 and 146).

150 In this case, an analysis of Tetra Pak's accounts relating to Tetra Rex cartons in Italy shows an extremely negative net margin (varying from -11.4% to -34.4%) from 1976 to 1982 and an extremely negative gross margin (varying from -9.8% to -33.8%) from 1976 to 1981. The sale of Tetra Rex cartons constantly below not only their cost price but also their variable direct cost is sufficient evidence that the applicant pursued a policy of eviction from 1976 to 1981. By their scale and their very nature, the purpose of such losses, which cannot reflect any economic rationale other than ousting Elopak, was unquestionably to strengthen Tetra Pak's position on the markets in non-aseptic cartons where it already had a leading position as has already been found (see above, paragraphs 118 to 121), thereby weakening competition on those markets. Contrary to the applicant's allegation, such conduct thus constituted abuse within the meaning of Article 86 of the Treaty, in accordance with settled case-law (see above, paragraph 114), and it is not necessary to demonstrate specifically that the undertaking in question had a reasonable prospect of recouping losses so incurred.

151 The same applies to 1982, during which the net margin was -11.4%. A whole series of important and convergent factors provides evidence of the existence of an eliminatory intent. Such intent is apparent in particular from the duration, the continuity and the scale of the sales at a loss made throughout the period from 1976 to 1982. Moreover, the existence of a plan for eliminating Elopak in Italy is demonstrated by the accounting data which show that the applicant, which did not manufacture Tetra Rex cartons in Italy from 1976 to 1980, imported them in order to resell them in that country at prices lower by 10 to 34% than their purchase price. On that basis, the Commission found in particular, as is shown by certain documents concerning orders, without being contradicted on this point by the applicant, that the latter resold in Italy at prices lower by 17 to 29% than their purchase

price Rex cartons imported from Sweden. More generally, another point to note is that the prices of Tetra Rex cartons sold in Italy were lower by 20% at least and often by 50% than the prices applied in other Member States, which the applicant does not dispute. Furthermore, the presumption of an eliminatory intent is consistent with the reports of Tetra Pak Italiana's board of directors of 1979 and 1980, referring to the need to make major financial sacrifices in the area of prices and supply terms in order to fight competition, in particular from Pure-Pak. An analysis of the price differences between Tetra Rex cartons and Pure-Pak cartons, competitors on the Italian market, shows that, contrary to its assertions, Tetra Pak never followed Elopak's prices but on the contrary increased the price difference in response to increases by Elopak. As the Commission emphasizes, that difference increased from a few percentage points in the years 1976 to 1978 to 30% or more in 1980/1981, although losses on Tetra Rex cartons were increasing. Finally, the implementation of an eliminatory strategy is also confirmed by the increase of sales of Tetra Rex cartons in Italy and the corresponding reduction in the growth of sales of Elopak cartons, during a period of market expansion, followed by their decline as from 1981.

152 The Commission has accordingly established to the requisite legal standard that the prices of Tetra Rex cartons sold in Italy from 1976 to 1982 were predatory.

C — The machine and carton prices alleged to be discriminatory as between the different Member States

Summary of the arguments of the parties

153 The applicant maintains that the wide disparities in the price of machinery, from 1984 to 1986, and cartons, from 1978 to 1984, between the Member States were not

discriminatory. The approach of the Commission, which looked at machine and carton prices separately, is wrong in principle. There is some correlation between machine and carton prices, linked to competition on the local market, so that the decisive factor is the cost of the system as a whole. The equilibrium between machine and carton prices varies from one Member State to another.

154 In any event, even if it were acceptable to look at machine and carton prices separately, the Commission has not adduced any proof of unlawful price discrimination as between different Member States. The only valid conclusion which may be extracted from the Commission's data in relation to both machines and cartons is that prices were always lower in one Member State, namely Italy, which was out of line with the general trend of Tetra Pak's pricing policy. In the other Member States there was no discernible pattern.

155 As regards in particular the price of both aseptic and non-aseptic machines, the applicant claims that it is difficult to compare list prices and average prices for sale and leasing as the Commission does. Furthermore, that comparison is of little or no interest since it is common practice in the industry to grant discounts on machines. Moreover, valid conclusions cannot be drawn from the Commission's comparisons between prices in Italy, where consumption of UHT milk is greatest, and those in countries such as Greece and Ireland where virtually no UHT milk is sold. Furthermore and in any event, differences in machine prices in the various Member States are attributable to historical differences between local markets.

156 So far as concerns the price of aseptic cartons, the applicant submits that the price tables on which the Commission relies provide only very approximate indications

of actual prices because of the mix of the various types of aseptic Brik cartons and the use of the average price of those various products in each country. The applicant considers however that the broad picture is reasonably accurate in showing prices converging in 1984 with those in Italy remaining slightly lower.

157 Furthermore, the applicant states that the various price differences for Tetra Brik aseptic cartons are due to a complex interaction of historical factors, local market conditions which vary considerably from one State to the other, dairy industry structures, local cost considerations and Tetra Pak's policy of allowing maximum autonomy to its local subsidiaries.

158 The Commission contends that price discrimination on machines (from 1984 to 1986 at least) and cartons (from 1978 to 1984 at least) between the Member States was observed throughout the Community, although it was particularly striking between Italy and the other Member States.

159 As for the assessment of machine prices, the Commission rejects the criticism concerning the failure to take into account discounts on machine prices when comparing prices taken from price lists with average prices. As regards the price of aseptic Tetra Brik cartons, the Commission considers that the differences observed are too great to be explained by the objective material differences between the products referred to by the applicant. Finally, the various objective factors which, according to the applicant, explain the differences in price between the various Member States, both for machines and for cartons, were set out in extremely general terms without being identified and without their effects being specified.

Assessment of the Court

160 The Court notes as a preliminary point that for an undertaking in a dominant position to apply prices which discriminate between users established in different Member States is prohibited by Article 86(c) of the Treaty, which covers abuses consisting in 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. In *United Brands* v *Commission*, cited above, the Court of Justice stated that Article 86 did not preclude an undertaking in a dominant position from setting different prices in the various Member States, in particular where the price differences are justified by variations in the conditions of marketing and the intensity of competition. However, the dominant undertaking has the right only to take reasonable steps to protect its commercial interests in that way. In particular, it may not apply artificial price differences in the various Member States such as to place its customers at a disadvantage and to distort competition in the context of an artificial partitioning of national markets (paragraphs 189, 228, 229 and 233).

161 In the light of those precepts, it must be ascertained whether in this case the Commission has established to the requisite legal standard the facts on which it bases its finding of discriminatory pricing between the Member States.

162 The Court finds as a preliminary point that the Commission correctly carried out a separate comparison of the prices of machines and cartons, which are in separate markets and must be separately marketed, as has already been shown (see above, paragraphs 137 to 140). Furthermore and in any event, the applicant neither claims nor adduces any evidence to suggest that the outcome of comparing the prices of complete systems would have been different from that of examining the price of machines and cartons separately.

163 As far as concerns the three principal types of carton manufactured by Tetra Pak, the Decision states that a comparison of average prices reveals that 'there are

considerable price disparities between Member States' and that 'these are particularly great between Italy and the other Member States, easily reaching 50% with a minimum of some 20 to 25% (with a few exceptions)'. It must therefore be determined, on the basis of the information before the Court relating to the average prices of the different types of cartons in six Member States, namely Belgium, Denmark, Germany, Italy, the Netherlands and the United Kingdom, from 1981 to 1984, whether the scale of the price differences was such as to establish that in the circumstances of this case they were discriminatory.

164 The Court notes that apart from Denmark, where prices were higher than those in Italy by approximately 14% on average from 1981 to 1984, the most frequent differences in average prices for aseptic Tetra Brik cartons ranged from 40 to 60%, even to 70%. For Tetra Rex cartons, the differences were most frequently at least 20 to 25% and in certain cases reached 50% of the average price. As for non-aseptic Tetra Brik cartons, they were sold in four of the other Member States mentioned above at prices on average 20 to 30% higher than those in Italy and, in the Netherlands, 20% lower in 1984. In this case, contrary to the applicant's allegations, differences between average prices ranging in 1984 from 20 to 37% for the various types of carton cannot be regarded as evidence of convergence. The Commission was accordingly entitled to consider that such wide differences in average prices from 1984 to 1986 could not be due to physical differences between the different sizes of cartons of the same type or by the fact that there was no uniformity in the average quantities ordered.

165 Moreover, the existence of substantial price differences in the various Member States from 1978 to 1984 is demonstrated by the figures given in the price lists of non-aseptic Tetra Rex and Tetra Brik cartons, set out as an annex to the Decision and not disputed by the applicant. In those circumstances, given the marginal nature of the transport costs and the stability of world markets in the raw materials, in this case cardboard, accounting for more than 70% of the cost price of cartons, the Court considers that the price differences found could not be justified by objective economic factors and that they were accordingly discriminatory.

166 With regard to the machines, a comparison must be made between the selling prices and the 'leasing' prices applying in the various Member States. A point to note at the outset is that according to the information before the Court it is possible to assess the level of the 'leasing' prices on the basis of the base rental alone, since the sum of current and future rent represents only a marginal part of that base rental, which the applicant does not dispute. Moreover, the tables annexed to the Decision relating first to the selling price of machines in four Member States, namely Greece, Spain, Ireland and Italy, and secondly to the 'leasing' prices in seven other Member States and in Ireland, further confirm that, in the only State where both selling and 'leasing' prices are given, they are very close.

167 In the light of the findings of fact set out in the preceding paragraph, it is necessary first to ascertain whether for the principal types of machine marketed by Tetra Pak the selling prices and the base rental varied significantly from 1984 to 1986 between one Member State and another, and then to consider whether any disparities found were justified by objective market conditions.

168 First, a comparison of prices on the basis of average prices and prices taken from price lists, set out in annexes to the Decision and not disputed by the applicant, reveals significant differences for aseptic Tetra Brik machines, ranging from 40 to 100%, or more, for six models of aseptic Tetra Brik machine out of seven. The disparities in price were even greater for non-aseptic Tetra Rex and Tetra Brik machines, for which prices varied from 1984 to 1986 for the same model by as much as 100% or more depending on the country, the price differences even exceeding 400% in 1986 for certain Tetra Rex machines.

169 It follows that the Commission has furnished sufficient proof of the existence of considerable variations in price between the Member States for both aseptic and

non-aseptic machines over a period of one or more years, depending on the type of machine, from 1984 to 1986.

170 Secondly, the Court finds that those disparities in price could not be attributed to objective market conditions. In this case, the appreciable differences found in the prices of machines and cartons occurred in the context of a partitioning of national markets by the tied-sale clauses in the contracts, reinforced by Tetra Pak's autonomous production and distribution system and by the group's quasi-monopoly on the aseptic markets in the Community. In those circumstances, it is clear that those price differences could not be due to normal competitive forces and were applied to the detriment of packers. The factors pleaded by the applicant by way of justification are wholly implausible. In particular, the argument concerning the specificity of the conditions on local markets is refuted, as the Commission emphasizes, by the definition of a single geographical market encompassing the entire Community, by virtue in particular of the marginal nature of transport costs.

171 As for the autonomous marketing policy of its subsidiaries alleged by the applicant, even if true it must nonetheless be seen in the context of an overall strategy of partitioning markets. Such a strategy may be inferred from the policies implemented by Tetra Pak, in particular as to contracts, throughout the Community. Furthermore, the existence of an overall plan is also shown by the various documents produced by the Commission at the request of the Court which were exchanged between the Tetra Pak group and its subsidiary Tetra Pak Italiana. Those documents are referred to in recitals 77 to 83 of the Decision.

172 Finally, Tetra Pak's argument, which does not dispute the figures set out in the abovementioned annexes, to the effect that an analysis of the price of the packaging systems taken as a whole, comprising machines and cartons, would have yielded different results, cannot be accepted, since it is not supported by evidence refuting

the Commission's conclusions. Similarly, contrary to the allegations of the applicant, the view cannot be taken that failure to take into account discounts granted on the price of machines was liable to distort the comparison of prices carried out by the Commission, since the applicant does not dispute that such discounts were granted in all Member States, including those such as Italy where prices were already particularly low.

173 It follows from all those considerations that the Commission has established to the requisite legal standard the existence of discriminatory pricing contrary to Article 86(c) of the Treaty between Member States from 1984 to 1986 in relation to both aseptic and non-aseptic machines and to aseptic cartons, and from at least 1978 to 1984 in relation to non-aseptic cartons.

D — The allegedly predatory machine prices in the United Kingdom

Summary of the arguments of the parties

174 The applicant denies that its policy relating to the sale and leasing prices of its machines in the United Kingdom from 1981 to 1984 was abusive. It notes first that because of the insignificant consumption of UHT milk there is no possibility of cross-financing between that sector and the pasteurized milk sector, accounting for more than 90% of the very significant milk market in the United Kingdom. Moreover, and in any event, cross-subsidization would not of itself have contravened Article 86 of the Treaty. It was justified in this case by the intensity of competition as regards price on the non-aseptic markets, where milk is traditionally delivered to the doorstep in glass bottles.

175 In order to demonstrate that it did not engage in predatory pricing, the applicant submits that the relationship between its costs and its prices does not reveal the existence of an eliminatory intent and that no eliminatory effect has been found.

176 The applicant submits first that the findings as to the profitability of its machines, which the Commission based on the applicant's accounts, do not constitute proof of predatory pricing. It repeats, first, the argument that the level of machine prices cannot be assessed separately from that of cartons. Moreover, the figures relating to machine prices on which the Commission relies are irrelevant. They comprise mainly data relating to aseptic machines for packaging fruit juice, which constitute in the United Kingdom the greatest proportion of aseptic machines, but do not, according to the applicant, fall within the definition of the relevant product markets.

177 Moreover, the applicant argues that in order to establish an abuse where prices are lower that average total costs but higher than average variable costs it is for the Commission to prove the existence of a systematic and prolonged practice of below-cost pricing.

178 In this case, the applicant submits that the semi-gross margin levels on which the Decision is based (recitals 56 and 157 and Annex III.4) do not suffice for a finding of abuse. It argues that in 1981 and 1982 the prices charged by Tetra Pak were on average above both direct and indirect variable costs. In 1983 and 1984 the deficit at semi-gross margin level in the United Kingdom was not sufficient to distinguish the position in the United Kingdom from that in the Netherlands in 1984 and France in 1982, where negative gross margins were recorded and in relation to which countries the Commission stated that no definitive conclusions could be drawn. Nor is there any appreciable difference between the level of net margins in the United Kingdom, the Netherlands, France and Germany.

179 Furthermore, the Commission did not carry out a systematic analysis of all offers, as in *AKZO* v *Commission*, cited above. It simply found 'almost systematic' sales at a loss, basing itself on an analysis of overall margins. In the light of all those factors, the applicant considers that the Commission has not adduced evidence of an eliminatory strategy, which in its view cannot be inferred from the abovementioned statistics concerning the annual margin and from the mere fact that its pricing policy was deliberate in a competitive context.

180 Secondly, the applicant claims that the Commission has not established that its pricing practices had any eliminatory effect. It makes the point that not only were other manufacturers of packaging systems not eliminated but also that PKL increased its market share even in the UHT sector. On the pasteurized milk market, the growth rate of Tetra Pak was less than that of cartons in general. The increase — proportionally greater — of machine sales in the United Kingdom from 1981 to 1984 was due mainly to expansion in fruit-juice consumption and to Tetra Pak's growth in the pasteurized sector. That growth was at the expense of glass bottle producers and not at the expense of other manufacturers of carton-packaging systems for pasteurized milk, who increased their sales in that sector to an even greater extent. Those market shares remained broadly the same until 1987.

181 The Commission rejects the applicant's arguments both as to the link between its position in the UHT milk sector in the United Kingdom and its machine-pricing practices and as to the provision of evidence that those practices were eliminatory.

182 To establish that the pricing practices complained of were abusive, the Commission relies on the criterion based on costs and the strategy of the undertaking in a dominant position laid down by the Court of Justice in *AKZO* v *Commission*, cited above. The Commission rejects the applicant's argument that a system of price

reductions can be established only be reference to specific prices granted to specific customers.

183 In this case, the Commission emphasizes first that Tetra Pak's margins on machine sales in the United Kingdom were, contrary to that undertaking's allegations, appreciably worse than in the other Member States where no abuse was found. The Commission notes in particular that Tetra Pak's semi-gross margins — obtained by subtracting the average variable costs, being the average costs relating to the unit produced, from the sale price — on machine sales in the United Kingdom were negative in 1982 [...], 1983 [...] and 1984 [...], which is sufficient to support the conclusion that an abuse was committed during that period in accordance with the principles laid down in the judgment in *AKZO* v *Commission*, cited above.

184 As for the prices charged in 1981, which were higher than the average variable cost and lower than the average total cost, the Commission first confirms that it also considered them to be abusive, in recital 157 of the Decision, on the basis of additional evidence. The reference in recital 170 to eliminatory pricing practices 'from 1982 to 1984' in the United Kingdom should not be interpreted as an acceptance that there was no abuse in 1981. In that context, the Commission submits that Tetra Pak's admission that its policy, resulting from intensive pricing competition, was deliberate, and the eliminatory effect of that policy, constitute irrefutable evidence of a systematic practice of predatory pricing.

Assessment of the Court

185 The Court notes at the outset that the applicant's argument relating to the specific structure of the United Kingdom milk market is not relevant. For as long as there

is in the United Kingdom a market in aseptic carton-packaging machines and a market in non-aseptic packaging machines, Tetra Pak is, in comparison with its competitors, in a competitive position on those markets similar to its position in the Community as a whole, as has already been found in the context of considering the definition of the relevant geographical market (see above, paragraph 95). The smaller scale of those markets in the United Kingdom has no effect on the assessment of whether machine prices on the United Kingdom markets were predatory.

186 Furthermore, given the global scale of the Tetra Pak group, the applicant's argument to the effect that it was unable to use cross-financing between the aseptic and the non-aseptic sectors in the United Kingdom because of the insignificant consumption of UHT milk must be rejected. Moreover, that argument is in any event irrelevant since the Court has already established (see above, paragraphs 112 to 122) that the applicant's leading position in the non-aseptic sector in conjunction with the link between that sector and the aseptic sector was sufficient for Article 86 of the Treaty to apply. The application of Article 86 of the Treaty to the non-aseptic markets does not therefore depend on proof that there was cross-financing between the two sectors.

187 In those circumstances, it must be ascertained whether the Commission has established to the requisite legal standard that machine prices in the United Kingdom were predatory, on the basis of the cost criterion and the strategy of the undertaking in a dominant position, as laid down by the Court of Justice in *AKZO* v *Commission*, cited above (see above, paragraphs 147 to 149).

188 It must first be emphasized that the Commission expressly acknowledges in the Decision (recital 157) that, as claimed by Tetra Pak, selling and leasing at a loss

affected mainly the market in non-aseptic packaging machines. In the light of those statements by both parties, the existence of negative margins for total machine operations, on which the Decision is based, is attributable to the scale of the losses made in the non-aseptic machine sector.

189 In particular, the fact that there were negative net margins of approximately [...] in 1982, [...] in 1983 and [...] in 1984, and negative gross margins of approximately [...] in 1982, [...] in 1983 and [...] in 1984, on total machine operations in the United Kingdom indicates that Tetra Pak regularly sold its non-aseptic machines below not only their cost price but also their variable direct cost, which, in accordance with the principles set out by the Court of Justice in *AKZO* v *Commission* (see above, paragraphs 147 to 149), is sufficient evidence that the applicant pursued a policy of eviction during those years. By their scale and their very nature, the purpose of such losses, which cannot reflect any economic rationale other than ousting competitors, was unquestionably to strengthen Tetra Pak's position on the non-aseptic machine market where it was already in a leading position as has already been found (see above, paragraphs 118 to 121), thereby weakening competition on the market. Such conduct thus constitutes abuse in accordance with settled case-law (see above, paragraph 114).

190 As for the prices charged in 1981 for non-aseptic machines, which were simply lower than the cost price, as is demonstrated by the fact that there was a negative net margin of [...] and a positive semi-gross margin for total machine operations in the United Kingdom, they must also be regarded as abusive since a whole series of important and convergent factors provides evidence of the existence of an eliminatory intent. That intent is apparent in particular from the duration, the continuity and the scale — described in the preceding paragraph — of the losses made, and the deliberate nature of those losses, as expressly recognized by Tetra Pak, in the

context of the policy of intensive pricing competition from 1981 to 1984, although the market was expanding.

191 Moreover, that analysis is corroborated by the eliminatory effect of the competition engendered by Tetra Pak's pricing policy. The documents before the Court indicate that sales and leases of machines in the United Kingdom, which accounted for [...] of Tetra Pak's total turnover there in 1981, reached [...] in 1984. According to information provided by the Commission and not disputed by the applicant, such transactions thus grew by [...], seven times more than in all the other countries considered. Furthermore, Tetra Pak's share of the non-aseptic markets increased greatly between 1980 and 1986, from 34.2% to 43.9% for cartons and from 25.8% to 37.1% for machines.

192 It follows that the Commission has established to the requisite legal standard that the prices of non-aseptic machines sold from 1981 to 1984 in the United Kingdom were predatory.

193 In addition and in any event, the Commission was correct in considering that even a separate examination of the United Kingdom markets shows that the applicant was in a dominant position on the two aseptic markets and in a leading position on the two non-aseptic markets as a result of not only its market shares but also its economic power due in particular to the size of the group, its technological lead and the extent of its range of products (see the judgment in *Michelin* v *Commission*, cited above, paragraph 55). In that context, the Commission has established to the requisite legal standard that Tetra Pak's dominant position on the aseptic markets enabled it to pursue a deliberate policy of sales at a loss in the machine sector from 1981 to 1984, as is demonstrated by the extremely positive overall

results of Tetra Pak's United Kingdom subsidiary during that period, notwithstanding the losses made on nearly all its products except aseptic Brik cartons, whose contribution to net margin ranged from [...] to [...] from 1981 to 1984 according to the accounting records before the Court.

E — Machine pricing and other allegedly abusive practices in Italy

194 The applicant disputes that it charged prices for its machines in Italy which were predatory as regards its competitors (1) and discriminatory as between its customers (2). In addition, it rejects the Commission's allegations as to the various specific allegedly abusive practices followed from 1981 to 1983 at least (3).

1. The allegedly predatory machine prices

Summary of the arguments of the parties

195 The applicant denies that it pursued predatory pricing for its cartons from 1976 to 1986 at least. It states that in setting machine and carton prices it treated those products as forming an indivisible system. Had the Commission examined the system as a whole, it would have found that, taking account of the general costs spread over the contract term, the discounts to which it refers were less significant than it seemed at first sight.

196 In any event, the applicant submits that the Commission accepts in recital 158 of the Decision that machine operations were profitable during the period in question

and that selling machines at a loss was not a general practice in Italy. It reasons from this that individual sales cannot be viewed as an abuse of a dominant position. Such sales were brought about by vigorous competition and were not motivated by an eliminatory intent. In those circumstances their condemnation in the Decision amounts to regarding any sale at a loss as unlawful *per se*.

197 The Commission first rejects the applicant's argument concerning the purportedly indivisible nature of the machines and cartons. It considers moreover that each sale at a loss which is aimed at eliminating competitors is an abuse, whether or not it is a general practice.

198 The Commission submits that analysis of a number of sales and leasing transactions in Italy reveals that discounts of the order of 50%, even 75% in one case, were not uncommon. The fact that the discounts were higher for some transactions than the net margin and the gross margin, and the context in which those transactions took place, show that they were deliberate sales at predatory prices.

Assessment of the Court

199 It should first be emphasized that the applicant's argument relating to an alleged correlation between the price of machines and that of cartons must be rejected for the reasons already given by the Court (see above, paragraphs 137 to 140). Moreover, and in any event, the applicant adduces no real evidence in support of its allegations contradicting the Commission's finding that in Italy Tetra Pak set machine prices independently of carton prices.

200 Furthermore, the Court notes that, contrary to the allegations of the applicant, sales at a loss, even specific ones, by an undertaking in a dominant position are capable of constituting abuses within the meaning of Article 86 of the Treaty where their eliminatory nature is sufficiently proved.

201 In this case, it should first be noted that the Commission uses Tetra Pak's net margins (Annex IV.3 to the Decision) and gross margins (Annex IV.4 to the Decision) on machine operations in Italy from 1981 to 1984 to corroborate its statement that discounts appreciably higher than those margins resulted in principle in loss-making sales/leasing transactions. Its detailed analysis of a number of specific sales and leasing transactions, in particular of machines, is based on that factor (recital 158 and Annex VI.4 of the Decision).

202 The Court considers that in the circumstances of this case specific instances of predatory pricing may be regard as established, on the basis of the abovementioned analysis and the context in which the loss-making sales/leasing transactions took place. In particular, the fact that by its sales or leasing transactions Tetra Pak sought to keep potential markets from competitors or to take back markets already taken by competitors, confirms that they were deliberate sales at 'predatory' prices. The Commission's analysis of a number of transactions, made on the basis of detailed investigations of Italian dairies and set out in Annex 10 to the statement of objections which is before the Court, shows that Tetra Pak granted discounts in various forms which were higher than its gross margin and in certain cases bought back at excessive prices, and even at the price of such machines when new, old machines owned by competitors, whose residual value was almost nil, during the period from 1979 to 1986. It also appears that at least the specific transactions referred to in the Decision (recital 65), concerning four sales of aseptic machines at prices lower by 25 to 50% than those prevailing at that time, and the transactions analysed by the Commission in Annex 10 to the statement of objections, referred to in the Decision (recital 68), were aimed at eliminating competitors.

203 It follows that the Commission has established to the requisite legal standard that from 1979 to 1986 there were a number of machine sales at predatory prices in Italy.

2. The allegedly discriminatory machine prices

Summary of the arguments of the parties

204 The applicant reiterates that machine and carton prices cannot be assessed separately. It notes, by way of example, that a 50% discount on a Tetra Rex (TR/4) machine amounts to a 4% discount on the price of the entire transaction. Setting machine prices which are linked to carton prices is usually attractive to the customer in that it enables payment to be adjusted according to the concerns and priorities of different customers.

205 Furthermore, the applicant submits that price differences between customers may be justified by the working out of normal market forces. There are numerous reasons why price dispersal for the same or similar products is a universal occurrence in highly competitive markets. The applicant cites different customer bargaining power, different perceptions, incomplete market information, uncertainty about competitors' reactions and decentralized decision making.

206 The Commission contends that Tetra Pak's price differentials and trading conditions discriminated between customers contrary to Article 86(c) of the Treaty. It submits that the primary consideration is that the customer should be free to decide to pay more for the machine on purchase and less for the cartons afterwards.

Assessment of the Court

207 The Court finds that detailed analysis of the majority of contracts for the sale or lease of machines in Italy from 1976 to 1986 reveals short-term differences from the prevailing price of 20 to 40%, even in certain cases of 50% to more than 60%, for both aseptic and non-aseptic machines. In the absence of any argument by the applicant which might provide objective justification for its pricing policy, such disparities were unquestionably discriminatory (see recitals 170, 62 to 68, 158 and 161 of and Annex VI.4 to the Decision).

208 It must be emphasized that, in the light of the fact that the machines and cartons are separable, already stressed by the Court (see above, paragraphs 137 to 148), the practice of significant differences in machine prices was in any event discriminatory between Tetra Pak's customers in Italy, and it is not necessary to take into account, as the applicant claims, the price of the packaging system as a whole, including the price of cartons. The Commission was correct in basing itself solely on the comparison of prices of Tetra Pak machines, since under Community competition law users must be perfectly free to use on those machines cartons bought from competitors of Tetra Pak (see the judgment of the Court of First Instance in *Hilti* v *Commission*, cited above, paragraphs 64 to 68, upheld by the Court of Justice in *Hilti* v *Commission*, cited above, paragraphs 13 to 16). Furthermore and in any event, the disparities in machine prices referred to in the Decision cannot be regarded as due to the Commission's separate examination of the price of machines and cartons. There is nothing in the documents before the Court, and the applicant has neither supplied specific information nor adduced evidence, to support the applicant's proposition that the prices of its packaging systems considered as a whole were convergent in Italy during the period in question.

209 It follows that the Commission has established to the requisite legal standard that from 1976 to 1986 Tetra Pak's machine prices in Italy, particularly in the aseptic sector, were discriminatory.

3. The other allegedly abusive practices

Summary of the arguments of the parties

210 The applicant rejects the various complaints set out in recital 165 of the Decision. First, it argues that buying back competitors' machines is not in itself an abuse. Secondly, it asserts that only one isolated incident is alleged of prohibiting an undertaking from using a competitor's machine (recitals 73 to 79 of the Decision) from which general inferences cannot be drawn. Thirdly, the existence of a supposed oral agreement in 1983 with the magazine *Il Mondo del Latte* has not been proved and, since it concerns only one magazine in only one Member State, cannot be considered as appropriating an advertising medium. Fourthly and finally, the Resolvo system, supposedly 'eliminated' by Tetra Pak (see recitals 76 and 79 to 83 of the Decision) was in fact bought in 1981 by the company International Paper, twice the size of Tetra Pak. The applicant argues that it could not have eliminated such a powerful rival had the Resolvo system been competitive. Moreover some Resolvo machines are still on the Italian market.

211 The Commission disputes all the applicant's arguments. First, as regards buying back competitors' machines in order to eliminate them from the market or to deprive them of trade references (recitals 73, 79 and 83 of the Decision), it submits that each transaction must be considered individually in order to ascertain its true purpose. Secondly, the Commission accepts that there is only one incident referred to in the Decision where Tetra Pak obtained an undertaking from its customers no longer to use certain machines made by competitors (recital 73 of the Decision). Thirdly, the Commission asserts that the applicant appropriated a significant advertising medium, the journal *Il Mondo del Latte*, by entering into an exclusive rights agreement (recital 75 of the Decision). Fourthly and finally, the Commission submits that the applicant attempted by various means to prevent the distribution of the Resolvo system of aseptic packaging developed by Poligrafico Buitoni. The evidence adduced in recitals 77 and 83 of the Decision demonstrates the applicant's eliminatory intent.

Assessment of the Court

212 The Court considers, in the light of the evidence adduced by the Commission, in particular the various documents collected in the course of its investigations of certain dairies, referred to in recitals 73 to 83 of the Decision and provided by the defendant at the request of the Court, that the various specific practices identified in the Decision must be regarded as proved. Particular examples of these practices are buying back competitors' machines with a view to withdrawing them from the market; obtaining an undertaking from one of the dairies referred to above no longer to use two machines which it had acquired from competitors of Tetra Pak; eliminating in Italy almost all Resolvo aseptic packaging machines, developed during the 1970s by Poligrafico Buitoni, who represented for Tetra Pak a potential competitor on the aseptic markets; and finally appropriating advertising media by obtaining an oral exclusive rights agreement at least for 1982 in the magazine *Il Mondo del Latte*, the largest specialist journal on the dairy industry in Italy. The Commission correctly considered that the contemporaneous correspondence between Elopak and that journal, which is before the Court, constituted adequate evidence of such an agreement. Thus in a letter of 27 May 1982, the journal refers to 'an agreement with another company in this field, to whom we have granted exclusivity for a long period of time'. The existence of that agreement is also corroborated by the fact that Elopak was not permitted to advertise in that journal, unlike Tetra Pak.

213 It is clear that those various practices, intended to eliminate competitors' machines from the market or to deprive them of trade references, sought, as the Commission contends, to reinforce Tetra Pak's dominant position in the aseptic sector or to oust competitors in the non-aseptic sector, and were accordingly abusive.

214 It follows from all the above that both branches of the third plea alleging non-infringement of Article 86 of the Treaty must be rejected.

The fourth plea of abuse by the Commission of its power to issue orders

Summary of the arguments of the parties

215 The applicant disputes the measures imposed in the Decision with a view to terminating the infringement in the areas of the market where it does not consider itself to be dominant. Furthermore, it disputes the measures imposed in particular in Article 3(3) of the Decision, which provides that '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'.

216 The applicant states that with regard to machines the Commission provides no guidance on what is meant by 'an objective consideration'. As for cartons, the applicant considers that the prohibition of discounts other than for quantity precludes any competitive response by prices, based on merit, to price initiatives by a competitor. It argues that in *Hilti* v *Commission* the Commission itself accepted three exceptions to Hilti AG's undertaking to implement 'a discount policy based on precise organic and transparent quantity/value discount schedules uniformly and without discrimination' (see paragraph 7 of the judgment).

217 Moreover, Article 3(3) of the Decision disregards the principle of the protection of legitimate expectations in so far as it imposes obligations on the applicant although the latter complied with the requirements expressed by the Commission during the negotiations and was accordingly entitled to expect that the Commission would not impose new measures on it.

218 The Commission rejects all the arguments put forward by the applicant. In relation first to the orders set out in Article 3(3) of the Decision, referred to above, it maintains that only the practices condemned as unlawful in the Decision or equivalent practices are prohibited. The Commission also rejects the concept of competition on the merits, as formulated by the applicant. It states that undertakings in a dominant position may compete solely on the merits against others, whilst the latter may in theory resort to other methods, in particular pricing. The Commission mentions that the applicant had stressed the superior quality and particular advantages which its product offers to the user.

Assessment of the Court

219 So far as concerns the matters covered by and the geographical extent of the Commission's orders directed at the applicant, the Court finds that the Commission was entitled by virtue of Article 3(1) of Regulation No 17 of the Council of the EEC of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) (hereinafter 'Regulation No 17') to impose measures designed to bring to an end the infringements found on the four relevant markets where, as has already been held in the context of the third plea (see above, paragraphs 109 to 122), the undertaking in question was caught by Article 86 of the Treaty in the Community as a whole which, as the Court has also already shown (see above, paragraphs 91 to 98), constituted the relevant geographical market.

220 As for the prohibition on any form of discount or more favourable terms for which there is no 'objective justification', set out in Article 3(3) of the Decision, its aim is to put an end to all the practices found unlawful in the Decision and to preclude any similar practice. In this case, it is important to remember that those practices encompassed both discriminatory or predatory pricing and certain of the unlawful contractual terms which were intended to retain Tetra Pak's customers by encouraging them, in particular by means of discounts on a sliding scale of charges for

assistance, maintenance and updating stipulated in the machine sale contracts (clause (vii), set out above) or a sliding scale of monthly rental in the machine leasing contracts (clause (xxii), set out above) depending on the number of cartons used, to obtain supplies of cartons from Tetra Pak.

221 Such a prohibition on loyalty rebates or equivalent practices is neither disproportionate nor discriminatory and is in accordance with settled case-law (see in particular *Hoffmann-La Roche* v *Commission*, cited above, and *Michelin* v *Commission*, cited above, paragraph 71). That prohibition provides justification, in particular in relation to the cartons, for prohibiting discounts other than according to the quantity of each order with no aggregation of orders for different types of carton. Contrary to the applicant's allegations, that prohibition does not preclude an undertaking in a dominant position from competing in particular by price where such competition is based on objective considerations such as, for example, the solvency of the customer and accordingly is not discriminatory or predatory. In those circumstances, permitting solely discounts according to the quantity of each order with no aggregation of orders for different types of carton does not conflict with the judgment of the Court of First Instance in *Hilti* v *Commission* (cited above), in which the Commission had accepted that the undertaking in question could derogate from the obligation to adopt precise and uniform quantity discount schedules in certain specific cases (paragraphs 6 and 7 of the judgment). That case is not relevant to these proceedings since the Decision does not require Tetra Pak to prepare discount schedules but simply requires that discounts be granted by reference to the quantity ordered. Although an obligation to communicate price lists follows from Article 3(2) of the Decision, requiring Tetra Pak to give each customer the possibility of obtaining supplies from any Tetra Pak subsidiary it chooses and at the prices charged by that subsidiary, Article 3(3) of the Decision nonetheless does not require discount schedules. It is sufficient if the discount rate is objectively justified which involves its being neither discriminatory nor predatory.

222 Finally, the Commission did not act in disregard of the principle of the protection of legitimate expectations by imposing in the Decision certain additional measures

designed to put an end to the infringement, over and above the measures which it had already recommended during the administrative procedure. Article 3(3) of Regulation No 17 simply empowers the Commission to address to the undertakings concerned recommendations for termination of the abuses before taking a decision finding an infringement under that article. The effect of compliance with such recommendations by the undertaking in question can in no case be to restrict the Commission's power under paragraph (1) of that article to impose, when it takes the decision, any measure it considers necessary in order to bring the abuses found to an end. The co-operative attitude of the undertaking in question and the fact that it has complied with the Commission's requirements in order to bring the infringement to an end during the administrative procedure may be taken into consideration solely when setting the amount of the fine.

223 Accordingly, the fourth plea alleging abuse by the Commission of its power to issue orders must be rejected.

IV — The claim relating to the amount of the fine

Summary of the arguments of the parties

224 The applicant challenges the amount of the fine of ECU 75 million, far in excess of the total of other fines previously imposed by the Commission under Article 86 of the Treaty. It makes the following points. First, and in any event, the fine is wholly disproportionate and excessive, both in absolute terms and relative to the size of Tetra Pak, when compared to the Commission's previous practice.

225 Second, the applicant argues that the Commission determined the amount of the fine in order to punish in particular certain acts committed on markets where it was not in a dominant position, such as the non-aseptic markets, the markets in systems for packaging liquids other than milk, and the markets of north-west Europe, where the applicant was not in a leading position even in the milk-packaging sector.

226 Third, the Commission has fined the applicant for conduct in all twelve Member States, although three of those States were not members for much of the period covered by the Decision.

227 Fourth, the applicant submits that in setting the amount of the fine the Commission took into consideration its conduct throughout the Community on the basis of evidence limited to one or a few Member States in relation to both its contracts and its pricing policy.

228 Fifth, the Commission has not taken into account the unprecedented nature of both its method of defining the product market and the 'neighbouring market' theory by which it justified the application of Article 86 of the Treaty in the non-aseptic sector.

229 Sixth, the applicant complains that the Commission did not take account of its co-operative attitude during the administrative procedure when setting the amount of the fine.

230 Seventh, the applicant claims that fines imposed under Regulation 17 are of a penal nature. In failing to break down the fine between the different abuses found and in not giving it the chance to comment on the amount, the Commission has acted in disregard of the principles of fairness and good administration and of the general principles of law common to the Member States, in particular the entitlement of the undertaking in question to know what penalty is being imposed for what infringement, and the right of the defendant, hallowed in the common law, to be heard when being sentenced by a court which has found it guilty of conduct for which a criminal penalty may be imposed.

231 Finally, the applicant submits that the Commission took no account of the considerable benefits of its innovations and investments to the consumer and to competition throughout the Community.

232 The Commission considers that the amount of the fine is the direct and unavoidable consequence of the gravity and the duration of the abusive practices which were committed in the majority of the Member States or indeed the entire Community and whose incompatibility with Article 86 was foreseeable at all times. That amount takes account of the size of the undertaking in question, so as not unduly to favour large undertakings.

233 The Commission states that the fine was imposed solely on account of the practices found in the Member States where they occurred and that this is clear from the Decision. Moreover, the Commission took account of the changes in the composition of the Community during the period in question.

234 As regards the procedure for setting the amount of the fine, the Commission submits that there is no obligation to break down the amount or to organize a separate hearing on the fine.

Assessment of the Court

235 So far as concerns the amount of the fine, it is important to note at the outset that the applicant's proposition set out in paragraph 230 above to the effect that the fine is penal in nature and the undertaking in question has the right to be heard by the Commission on its amount cannot be accepted. First, Article 15(4) of Regulation No 17 specifically provides that fines imposed pursuant to paragraph 2 of that article are not to be of a criminal law nature. Secondly, on the question of the right of the undertakings concerned to be heard during the administrative procedure, Article 19(1) of Regulation No 17 and Article 7(1) of Regulation No 99/63/EEC on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17, cited above, expressly provide that, where the Commission proposes to impose a fine, the undertakings concerned must have the opportunity to make their submissions 'on the matters to which the Commission has taken objection'. It is thus by way of their submissions on the duration, the gravity and the foreseeability of the anti-competitive nature of the infringement that the rights of the defence of the undertakings concerned are guaranteed before the Commission in relation to setting the amount of the fine. Moreover, undertakings have an additional guarantee as regards the setting of that amount in that the Court of First Instance has unlimited jurisdiction and may in particular cancel or reduce the fine pursuant to Article 17 of Regulation No 17.

236 It must also be emphasized that in order to enable the undertakings concerned to assess whether the fine is of a proper amount and to put forward their defence and in order to enable the Court to exercise its power of review the Commission is not bound, as the applicant claims, to break down the amount of the fine between the various aspects of the abuse. In particular, such a breakdown is impossible where,

as here, all the infringements found are part of a coherent overall strategy and must accordingly be dealt with globally for the purposes both of applying Article 86 of the Treaty and of setting the fine. It is sufficient for the Commission to specify in the Decision its criteria for setting the general level of the fine imposed on an undertaking. It is not required to state specifically how it took into account each factor mentioned among those criteria which contribute to setting the general level of the fine (see, by analogy, in particular the judgments of the Court of First Instance in Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, paragraph 166, Case T-2/89 *Petrofina* v *Commission* [1991] ECR II-1087 and Case T-3/89 *Atochem* v *Commission* [1991] ECR II-1177, in which the Court held that the different concerted practices constituted a single infringement, and the judgments of the Court of Justice in Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661 and Joined Cases 40/73-48/73, 50/73, 54/73-56/73, 11/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663).

237 In those circumstances, the Court must ascertain whether the infringements were committed intentionally or negligently before it determines whether the criteria used by the Commission in the Decision in setting the amount of the fine are relevant and sufficient.

238 On the question, first, whether the infringements were committed intentionally or negligently and are therefore liable to be punished by a fine in accordance with the first subparagraph of Article 15(2) of Regulation No 17, the Court of Justice has held that that condition is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it was aware that it was infringing the competition rules of the Treaty (see in particular *IAZ* v *Commission*, cited above, paragraph 45).

239 In this case, the Court considers that the applicant could not have been unaware that by their scale, their duration and their systematic nature the practices at issue

involved serious restrictions on competition, in particular given its quasi-monopolistic position on the aseptic markets and its leading position on the non-aseptic markets. Moreover, given its position on the relevant markets and the grave impairment of competition, the applicant could not have been unaware that it was infringing the prohibition laid down in Article 86 of the Treaty. It follows that, even if in some respects defining the relevant product markets and the scope of Article 86 may have been a matter of some complexity, that factor cannot in this case lead to a reduction in the amount of the fine because of the manifest nature and the particular gravity of the restrictions on competition resulting from the abuses in question. The applicant's allegations set out in paragraph 228 above relating to the allegedly unprecedented nature of certain legal assessments in the Decision cannot therefore be accepted.

240 Next, therefore, it is for the Court to assess in accordance with the last subparagraph of Article 15(2) of Regulation No 17 whether the amount of the fine imposed in the Decision is proportionate to the gravity and the duration of the infringements found, in the light of the scale of their anti-competitive effects and the interests of the consumers or competitors injured thereby (see for example the judgment of the Court of First Instance in *Hilti* v *Commission*, cited above, paragraph 134) and the financial capacity of Tetra Pak.

241 The Court finds that the criteria used by the Commission and set out in the Decision justified the high level of the fine imposed. In particular the Commission correctly took into account the exceptional duration (15 years or more) of certain infringements; the number and diversity of the infringements, which concerned all or almost all the group's products and some of which affected all the Member States; the particular gravity of the infringements which moreover formed part of a deliberate and coherent group strategy seeking by various eliminatory practices towards competitors and by a policy of retaining customers to maintain artificially or to strengthen Tetra Pak's dominant position on markets where competition was already limited; finally, the particularly harmful effects of the abuses in terms of competition and the benefit gained by the applicant from its infringements.

242 It must be emphasized that all the infringements found, which were set in the context of a totally autonomous production and distribution organization and a very active patents policy, lawful in themselves, contributed to a long-term global strategy throughout the Community which enabled Tetra Pak to partition national markets, to maintain its dominant position in the aseptic sector and to strengthen its leading position in the non-aseptic sector, in which its market share, which was approximately 40% in 1980, reached 50 to 55% in 1991. As the Commission stresses, the pricing policy implemented in Italy would in all probability have led to the elimination of Elopak from the Italian market had it been pursued after the complaint lodged by that company. Tetra Pak was thus able to maximize its profits on the aseptic markets to the detriment of its customers and its competitors in both the aseptic and non-aseptic sectors. In particular, by preventing its customers from obtaining supplies of aseptic cartons from competitors, the clauses tying sales of machines and cartons impeded access to the aseptic carton market by manufacturers of non-aseptic cartons by way of technical modifications which would have been technically feasible.

243 However, contrary to the applicant's allegations, only the infringements committed in the Member State or States where they had in fact been found were taken into account for the purposes of setting the amount of the fine. Although the Commission correctly assessed the gravity of each of those infringements in the context of Tetra Pak's overall commercial policy, it in no case used evidence relating to an infringement committed in one Member State as a basis for extrapolating the finding of that infringement to other States, or even to the Community as a whole. For the purposes of fixing the fine, the Commission thus took into account the geographical extent, the gravity and the duration of the various abusive contractual terms in force from 1976 to 1991, some of which, such as the tied-sale clauses and the exclusive-rights clauses, applied throughout the Community while others affected only one or more Member States. Similarly, it took into account the geographical extent, the gravity and the duration of the various discriminatory or predatory pricing practices found in the States which were members of the Community at the time when the abuses were committed. The applicant's complaints set out in paragraphs 225 to 227 must accordingly be rejected.

244 Furthermore, concerning in particular the infringements to be taken into consideration by the Court when assessing the amount of the fine after its review of the accuracy of the findings of abuse in the Decision, the following must be taken into account since they have been proved to the requisite legal standard by the Commission: the various abusive contractual clauses in force from 1976 to 1991; the prices discriminating between Member States from 1984 to 1986 for all machines and for aseptic cartons and from 1978 to 1984 for non-aseptic cartons; the prices discriminating between the various users in Italy from 1976 to 1986; the predatory prices of Tetra Rex cartons from 1976 to 1982 in Italy; the predatory prices from 1979 to 1986 for a number of machines in Italy; the predatory prices of cartons from 1982 to 1984 in the United Kingdom; and finally the various eliminatory practices identified in the Decision and previously examined (see above, paragraphs 212 and 213).

245 As for Tetra Pak's argument set out at paragraph 229 above to the effect that the Commission — which, in the applicant's view, could itself have curtailed the duration of the infringement by acting more consistently — should when fixing the amount of the fine have taken account of the applicant's cooperative conduct during the administrative procedure, it cannot be accepted. The length of the Commission's six-year investigation and then of the two-year administrative procedure is due to the complexity and the scale of the Commission's investigations, which concerned the entire commercial policy followed by Tetra Pak since 1976 in the Community. Furthermore, the applicant's allegations that it complied with the Commission's requirements at once in order to put an end to the infringements alleged against it during the administrative procedure cannot be accepted either. Suffice it to point out that the applicant did not abandon the contractual terms at issue until the beginning of 1991, although the statement of objections had been sent to it in December 1988. In those circumstances, only the efforts to cooperate actually evinced by the applicant, at the beginning of 1991, should have been taken into consideration by the Commission in fixing the amount of the fine. This was indeed the case, as is expressly stated in the reasoning in the Decision.

246 Finally, as the Commission emphasizes, the benefits to consumers from products developed by Tetra Pak cannot constitute a factor liable to reduce the amount of

the fine. The abuses found were not justified by specific requirements linked to the development and launching of those products. The applicant's argument set out in paragraph 231 above must therefore be rejected.

247 In the light of all the above factors, which emphasize the particular duration, extent and gravity of the abuses found, the amount of the fine imposed in the Decision is not disproportionate to the size of the applicant. According to the data provided by both parties, that fine of ECU 75 million corresponds to approximately 2.2% of the applicant's total turnover in 1990. It accordingly falls within the parameters laid down by Article 15(2) of Regulation No 17, according to which the amount of the fine may be up to 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement. The applicant's argument set out in paragraph 224 above to the effect that the fine is excessive and disproportionate is accordingly devoid of substance.

248 It follows that the claims relating both to the annulment of the Decision and to the amount of the fine cannot be allowed.

V — Costs

249 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 Commission has asked for the applicant to pay the costs and since the applicant has been unsuccessful, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Cruz Vilaça Briët Kalogeropoulos

Saggio Biancarelli

Delivered in open court in Luxembourg on 6 October 1994.

H. Jung J. L. Cruz Vilaça

Registrar President