JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
3 April 2003 *

In Case T-342/00,

Petrolessence SA, established in Nancy (France),

Société de gestion de restauration routière SA (SG2R), established in Nancy,

represented by F. Puel and M. Troncoso Ferrer, lawyers, with an address for service in Luxembourg,

applicants,

v

Commission of the European Communities, represented by W. Mölls, F. Siredey-Garnier and F. Lelièvre, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: French.

supported by

French Republic, represented by G. de Bergues and F. Million, acting as Agents, with an address for service in Luxembourg,

intervener,

APPLICATION for the annulment of the Commission decision of 13 September 2000 rejecting TotalFina Elf's proposal concerning approval of the applicants as transferees of six motorway service stations,

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

composed of: J.D. Cooke, President, R. García-Valdecasas and P. Lindh, Judges,

Registrar: B. Pastor, Deputy Registrar,

having regard to the written procedure and further to the hearing on 11 April 2002,

gives the following

Judgment

Facts

1 Petrolessence SA, which was formed in 1922, was a distributor and importer of petroleum products in Lorraine and the Paris region until the end of the 1980s. From the early 1970s it implemented a policy of diversification of its service station operations and offered catering services. In 1980 it formed a subsidiary specialising in highways restaurant management, Société de gestion de restauration routière SA (SG2R), whose establishments operate under the trading name 'Le Mirabellier'. In 1987 Petrolessence sold its petroleum business.

2 On 24 August 1999 the Commission was notified of a planned merger whereby TotalFina would acquire full control of Elf Aquitaine by way of a public takeover bid announced on 5 July 1999. TotalFina is a public limited company incorporated under French law, in business in the production of petroleum and gas, refining, distribution of petroleum products, petrochemicals and speciality chemicals. Elf Aquitaine is a public limited company incorporated under French law, in business in the production of petroleum and gas, refining, distribution of petroleum products, petrochemicals and speciality chemicals in the health-care sector. The business of both companies is worldwide.

3 By Decision 2001/402/EC of 9 February 2000 (Case COMP/M.1628 — TotalFina/Elf) (OJ 2000 L 143, p. 1, 'the decision of 9 February 2000'), adopted pursuant to Article 8(2) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1990 L 257, p. 13), the Commission declared the notified merger compatible with the common market and the functioning of the Agreement on the European Economic Area, provided that a number of commitments proposed by the notifying parties ('the commitments') and annexed to the decision were fully complied with (see Article 1 of the decision of 9 February 2000).

4 In the decision of 9 February 2000, the Commission identified several markets in issue, including that of the sale of fuel on motorways in France, which is the only relevant market in the present case. The Commission found that demand for fuel on motorways is distinct and different in nature from off-motorway demand and that the supply of fuels on motorways is not constrained by the supply of fuels off motorways. The significant and persistent price differences between fuels sold on and off motorways confirmed this and the relevant product market was therefore that for the sale of fuels on motorways (see paragraph 176). The current competitive situation on the market for motorway fuel sales was close to being one of dominance exercised either solely by TotalFina, or else jointly, with TotalFina in the role of leader (paragraph 216).

5 In the decision of 9 February 2000 the Commission also found that the merger in question would lead to the creation of a dominant position on the market for motorway fuel sales in France and that, after the merger, TotalFina Elf would have strong incentives to raise its prices and/or reduce the quality of its services (paragraphs 220 and 221 of the decision of 9 February 2000). The proposed commitments aimed to overcome the competition problems identified by the Commission.

6 According to point 1 of the proposed commitments, TotalFina was to divest itself of certain assets in order to maintain effective competition on the markets

affected by the merger. In particular, an undertaking was given to divest 70 Elf, Total and Fina service stations on French motorways within a specified time-limit (point 36 of the commitments).

7 The transferees of the service stations were to be approved by the Commission and to meet the conditions set out in paragraph 1 of the commitments. The conditions relevant to the present case are worded as follows:

'(b) the transferee(s) shall be viable operators, either potentially or currently active on the markets in question, capable of maintaining or developing effective competition'.

8 Point 2 of the commitments provides as follows:

'The notifying party shall submit to the Commission, as soon as possible:

(a) the draft information document(s) concerning the divestiture of each category of assets (refined product depots, interests in pipelines, motorway service stations, assets in the LPG sector), to be transferred to potential purchasers,

(b) the list of potential purchasers which the notifying party intends to contact.

If the Commission does not pronounce upon the documents in question within five working days from the date of their submission, such documents shall be deemed to be accepted by the Commission'.

9 Point 4 reads as follows:

'The selection of the transferee(s) shall be subject to the approval of the Commission. The request for approval of the transferee(s) shall include the necessary information to permit the Commission to verify that the proposed transferee(s) meet the conditions indicated in point 1. The Commission shall inform the notifying party of its approval or rejection of the proposed candidates for transferees within 10 days from the date of submission of the request for approval of the proposed transferee(s). The absence of a response from the Commission within 10 days shall be considered as an exceptional circumstance within the meaning of point 6'.

10 Point 5 of the commitments provides as follows:

'The notifying party undertakes to conclude irrevocable divestiture agreements related to the assets within... from the date of receipt of the Decision authorising the merger pursuant to Article 8(2) of Regulation No 4064/89 (hereinafter, the first time-limit). The transfer of the assets shall become effective within a maximum of... following the conclusion of the divestiture agreement (hereinafter, the second time-limit).'

11 Point 6 of the commitments provides as follows:

'In the event of exceptional circumstances which prevent the conclusion of the divestiture agreement or the effective divestiture, the first or second time-limit may be extended at the discretion of the Commission and upon the duly justified request of the notifying party'.

12 The substance and the special conditions for the implementation of the commitments relating to the market for motorway fuel sales are set out in points 36 and 37 of the commitments. Point 37(c) provides: 'in order to ensure the immediate re-establishment of effective and long-lasting competition, the notifying party undertakes to propose to purchasers of all or some of the divested service stations to transfer to them a sufficient number of administrative, commercial and accounting management personnel...'. Point 37(e) states, *inter alia*, that 'those operators intending to make a purchase offer... must be capable of showing their direct or indirect experience in the operation of a service station network of any type.'

13 In order to comply with that commitment, on 12 August 2000 TotalFina Elf lodged with the Commission a request for approval of purchasers for all the 70 service stations concerned. Among the proposed purchasers, TotalFina Elf had selected the applicants, under their trading name, for the transfer of six service stations. It had also chosen Agip for the transfer of 33 service stations. In that connection on 6 July 2000 the applicants had submitted to TotalFina Elf a firm offer to purchase a certain number of motorway petrol stations, indicating the name and the price of the stations in question. The applicants annexed to the offer a draft memorandum of agreement concerning distribution on motorways, point 3.2 of which observes that, pursuant to the decision of 9 February 2000, TotalFina Elf must submit the transferees of stations for the Commission's approval and point 3.3(b) of which specifies the circumstances under which the parties' commitments would lapse.

14 On 29 August 2000 the Commission received from TotalFina Elf the additional information deemed necessary by the Commission for it to be able to give a decision on the request for approval.

15 By decision of 13 September 2000 notified to TotalFina Elf ('the contested decision'), the Commission concluded that the applicants did not meet one of the conditions set out in point 1(b) of the commitments for obtaining the required approval since, in the context of the proposed group of purchasers, their application did not allow effective competition to be maintained and developed, in particular *vis-à-vis* TotalFina Elf (point 32 of the contested decision).

16 Accordingly, in rejecting TotalFina Elf's proposal concerning the applicants, the Commission stated as follows at points 18 and 19 of the contested decision:

'In the light of the information supplied by TotalFina Elf, it appears that Le Mirabellier will not be capable of effective competition. This operator's project is based mainly on its capacity to produce synergies between its current catering business and the distribution of fuels. Therefore the strategy which Le Mirabellier proposes to follow differs from that of the other operators on motorways.

However, this company will have to overcome considerable handicaps to have scope for competition. First of all, at present it does not have restaurants at the service stations which it proposes to acquire. The expected synergies will not therefore materialise immediately. Secondly, it is a new entrant without recent experience of the market for the retail sale of fuels. It is uncertain whether the overall volumes of fuels which will be sold give Le Mirabellier much negotiating strength in relation to the French refiners from whom it expects to obtain 70% of the supplies it needs. In this connection it must be observed that TotalFina Elf is

the leading refiner in the north of France where Le Mirabellier proposes to set up its business. Furthermore, the small number of service stations will limit the economies of scale and logistics from which its competitors benefit. The fact remains that this operator will from the very beginning of its operations have to follow a policy of loss-leader pricing to establish its credibility in the eyes of consumers. Overall, Le Mirabellier will not have the capacity to maintain and develop effective competition particularly with TotalFina Elf. Consequently Le Mirabellier does not meet the second criterion for approval in [point] 1(b) of the commitments.'

17 By the contested decision the Commission also rejected TotalFina Elf's proposal relating to Agip.

18 At point 32 of the contested decision the Commission added that, 'in the absence of any observations from TotalFina Elf within five working days, its proposal concerning [the applicants' candidacies was] therefore rejected'. The Commission also noted that it could give a final decision on the other candidacies only in the framework of a new global proposal.

19 By letter of 20 September 2000 the applicants sent the Commission additional information after studying the parts of the contested decision relating to them.

20 On 20 October 2000 TotalFina Elf submitted to the Commission for approval a new group of potential purchasers which included Agip but not the applicants. The Commission approved those purchasers on 7 November 2000 ('the decision of 7 November 2000').

Procedure

21 The applicants brought the present action by application lodged at the Registry of the Court of First Instance on 13 November 2000.

22 By separate document lodged at the Court Registry on the same day, the applicants applied for interim relief seeking, first, suspension of the operation of the contested decision in so far as it rejects TotalFina Elf's proposal concerning their approval as transferees of six motorway service stations and, secondly, an order requiring the Commission to instruct TotalFina Elf to suspend implementation of the commitment set out in point 36 of the commitments in relation to the six service stations in question.

23 By order of 17 January 2001 of the President of the Court of First Instance the application for interim relief was dismissed and the costs of the application were reserved.

24 By separate document lodged on 1 February 2001 the French Republic sought leave to intervene in the case in support of the form of order sought by the Commission in the present case.

25 The application was granted by order of 5 March 2001 of the President of the Fifth Chamber of the Court of First Instance.

26 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure.

27 The parties presented oral argument and replied to the questions put to them by the Court at the hearing on 11 April 2002.

Forms of order sought

28 The applicants claim that the Court should:

— declare the application admissible;

— annul the contested decision in so far as it finds that the applicants do not fulfil the requirements of point 1(b) of the commitments and in so far as it rejects their application to take over the six service stations;

— order the Commission to pay the costs.

29 The Commission contends that the Court should:

— declare the application inadmissible;

— alternatively, dismiss the action as unfounded;

— order the applicants to pay the costs.

30 The French Republic contends that the Court should:

— dismiss the application as unfounded;

— order the applicants to pay the costs.

Admissibility

The parties' arguments

31 The Commission submits that the application is inadmissible on the ground that the applicants have no interest in bringing an action. The Commission contends that it is impossible to show a connection of cause and effect between the contested decision and the elimination of the applicants in the framework of the subsequent commercial negotiations with TotalFina Elf. On the other hand, the Commission does not deny that the contested decision is of direct and individual concern to the applicants.

32 The Commission contends that the contested decision did not finally exclude the applicants as prospective transferees, but that it merely found that the candidacies of Agip and the applicants were not appropriate in the framework of the

'package' proposed by TotalFina Elf on 12 August 2000 (see points 18 and 32 of the contested decision). Therefore, notwithstanding the contested decision, TotalFina Elf could once again have selected the applicants' candidacy in relation to the new package which it was to negotiate with the prospective purchasers. The Commission observes that only then would it have had to give a decision on the candidacies selected in relation to the new package. The Commission points out that Agip, which, like the applicants, was excluded in connection with the initial package of 12 August 2000, was proposed again by TotalFina Elf and accepted by the Commission in the framework of the second package.

33 The Commission contends that it is also clear from the applicants' letter of 20 September 2000 to the Commission (see paragraph 19 above) that they were well aware that there was still a chance of having their candidacy reconsidered and even approved. The Commission observes that they wrote as follows in the last paragraph of the letter:

'We hope that this information will enable you to appreciate better our capacity to maintain effective and lasting competition.'

34 The applicants contend that the present application is admissible and that the contested decision is a definitive act producing binding effects capable of affecting their interests. They note that, at point 32 of the contested decision, the Commission stated: 'In the absence of any observations from TotalFina Elf within five working days, its proposal concerning [the applicants] is therefore rejected'. The applicants claim that, as a precaution, on 20 September 2000 they wrote a letter to the Commission, replying to each of the criticisms in the contested decision. In spite of those observations, the Commission adhered to its decision rejecting the applicants, which became final on 20 September 2000.

35 The applicants contend that they have an interest in bringing the present action because, as a result of the adoption of the contested decision, they are being

prevented from acquiring the service stations which TotalFina Elf had agreed to sell to them. They add that the decision considerably reduces their chances of success in connection with the invitations to tender which are to be issued after 2005 for the renewal of concessions for motorway service stations.

Findings of the Court

36 In this action the applicants seek the annulment of the decision contained in the Commission's letter of 13 September 2000 to TotalFina Elf, informing the latter that its proposal of 12 August 2000 relating to the approval of the transferees, including the applicants, of motorway service stations in France had been rejected.

37 It is settled case-law that measures which produce binding legal effects capable of affecting an applicant's interests by bringing about a significant change in his legal position are acts or decisions against which an action for annulment may be brought under Article 230 EC (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, and Case T-160/98 *Van Parys and Pacific Fruit Company* v *Commission* [2002] ECR II-233, paragraph 60). To ascertain whether an act or decision has effects of that kind, it is necessary to examine its substance. In that connection, the wording of the contested decision must be interpreted while taking into account the factual and legal context in which it was drawn up and notified to TotalFina Elf.

38 To determine whether the application is admissible, it must be observed, first, that compliance with all the commitments submitted to the Commission was a condition of the declaration that TotalFina Elf's merger proposal was compatible with the common market (see Article 1 of the decision of 9 February 2000) and that TotalFina Elf's selection of transferees was subject to the Commission's

approval (see point 4 of the commitments). In this connection, it is clear from points 18 and 19 of the contested decision that the applicants were not judged capable of effective competition on the market in question and that therefore they did not meet one of the conditions under point 1(b) of the commitments. It must be concluded that, in view of the terms of the contested decision, TotalFina Elf could not at that stage transfer the six service stations concerned to the applicants without calling into question the planned merger, in accordance with the commitments. It follows that the contested decision constitutes a refusal by the Commission to approve the applicants' candidacy, thus bringing about a significant change in their legal position.

39 Furthermore, the Commission cannot claim that its rejection of the applicants' candidacy was not final. In the contested decision the Commission expressly laid down that, in the absence of any observations from TotalFina Elf within five working days, the applicants' candidacy would be rejected (see point 32 of the contested decision and paragraph 18 above). No other act by the Commission was necessary to render its rejection of the applicants' candidacy final.

40 The draft memorandum of agreement concerning distribution on motorways, which was drawn up by TotalFina Elf and annexed to the applicants' firm offer of 6 July 2000, also shows that if, on the expiry of six months from the date of signature, the Commission did not approve the transfer in question, TotalFina Elf's commitment to sell and the applicants' commitment to purchase 'will lapse automatically by the mere supervening of the expiry date, without the need for any formality whatever and without compensation or payment of any sum whatever in any respect or on any ground whatever'. It is clear that the Commission's reservations in the contested decision concerning the applicants' candidacy had the effect of putting TotalFina Elf in a position, or even under an obligation, to withdraw from its undertaking to sell the six service stations to the applicants. The fact that TotalFina Elf could, in theory, have proposed the applicants once again on the basis of a new package of purchasers is not relevant because it had no contractual obligation to do so and, in fact, it decided not to do so.

41 It follows that the Commission's observations in the contested decision on the applicants' candidacy and its refusal to approve the sale of the six service stations in question caused the exclusion of the applicants in the framework of the commercial negotiations subsequently conducted by TotalFina Elf. The applicants therefore have an interest in bringing proceedings.

42 Consequently it must be concluded that the application is admissible.

The substance of the case

43 The applicants rely on two pleas in law in support of their application, the first alleging breach of point 4 of the commitments and the second alleging infringement of Articles 3(1)(g) EC and 211 EC, and also of Article 2(1)(a) of Regulation No 4064/89.

First plea in law: breach of point 4 of the commitments

Arguments of the parties

44 The applicants submit that the contested decision must be annulled for infringement of essential procedural requirements within the meaning of the second paragraph of Article 230 EC. In adopting the decision of 13 September 2000, the Commission exceeded the period of 10 working days, laid down in point 4 of the commitments, from the date of submission of the request for

approval, for the adoption of a decision approving or rejecting the candidate transferee(s) proposed by TotalFina Elf. In addition, the applicants contend that, in the absence of any exception to that time-limit, as provided for in the event of exceptional circumstances in point 6 of the commitments, the request for approval having been submitted on 12 August 2000, the Commission ought to have given a decision not later than on 28 August 2000. The applicants observe that, although point 4 of the commitments gives no details of the consequences of such default attributable to the Commission, the result of such default must be deemed to be an implied decision accepting the proposed candidate(s) on the basis of reasoning by analogy with point 2 of the commitments, which provides that if the Commission does not pronounce upon certain documents within five working days from the date of their submission, such documents are to be deemed to be accepted by the Commission.

45 In their reply, the applicants claim that it is a general principle of Community law that the Commission must act within a reasonable time in adopting decisions following administrative procedures relating to competition (see Case C-282/95 P *Guérin Automobiles* v *Commission* [1997] ECR I-1503). They maintain that the Commission's interpretation of the commitments disregards the safeguards allowed by the Community legal order in administrative procedures. Failure to acknowledge the legal effects of exceeding the 10-day limit required by point 4 of the commitments would, in practice, leave open the possibility of postponement of a decision by the Commission until an unspecified date (see Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669).

46 The applicants contend that there is no foundation for the argument of the French Republic that the 10-day period begins to run on the date on which the Commission is in possession of all the information necessary for it to give a decision. The Commission could not plead lack of information in order to postpone the starting point of the period in question. In that case, the length of the period would be at the Commission's sole discretion. They add that the fact that the period was only slightly exceeded cannot justify the absence of legal consequences.

47 The Commission claims that the fact that the effects of its failure to pronounce upon the documents in question within five days were in fact set out in point 2 of the commitments shows that the absence of a similar express statement in point 4 can under no circumstances mean that it tacitly accepted the proposed transferees. Moreover, the Commission contends that, as a matter of principle, reasoning by analogy cannot be permitted as the two provisions are completely independent of each other and they govern different situations. In addition, it is clear from point 3.2 of the draft memorandum of agreement concerning distribution on motorways, annexed to the applicants' firm offer of 6 July 2000, in which they stated that the Commission could extend the 10-day period 'at its discretion', that they were aware that the said period was not binding and, more importantly, that it had no legal effects with regard to the acceptance or rejection of the proposals in question. The Commission adds that the period of 10 working days from 29 August 2000 was exceeded by only one day and that it therefore acted with all due dispatch. Therefore the fact that the time-limit was exceeded has no effect on the legality of the contested decision.

48 The French Republic contends that the applicants are mistaken with regard to the starting point of the 10-day period, which was not 12 August 2000, the date on which the first list of applicants was submitted to the Commission, but 29 August 2000, when the Commission received the additional information from TotalFina Elf and was in possession of all the information necessary for forming an opinion [see, by analogy, Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101, paragraph 56, and Article 4 of Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time-limits and hearings provided for in Regulation No 4064/89, OJ 1998 L 61, p. 1]. The French Republic adds that examination of the case-law concerning infringement of essential procedural requirements shows that only infringements of a certain gravity may call into question the legality of a Commission decision on that basis (see Case C-291/89 *Interhotel* v *Commission* [1991] ECR I-2257, paragraph 17, and Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraphs 75 and 76). Accordingly, the French Republic contends that if a 10-day time-limit is slightly exceeded, that cannot amount to an infringement of an essential procedural requirement such as to entail the annulment of the contested decision.

49 The Commission contends that the applicants' submission concerning infringement of the principle of a reasonable time-limit is inadmissible because it is a new plea in law raised for the first time at the stage of the reply (see Case C-104/97 P *Atlanta* v *European Community* [1999] ECR I-6983). In any case, it is clear from points 4 and 6 of the commitments that the sole legal effect of exceeding the time-limit is a possible extension, at the discretion of the Commission and upon the duly justified request of the notifying party, of the time-limit for fulfilment of the commitments. In the present case, in the absence of a request from TotalFina Elf, that time-limit remained the time-limit originally specified in the decision of 9 February 2000, and consequently there was no postponement of the completion of the merger until an unspecified date.

Findings of the Court

50 The applicants' submission that exceeding the time-limit for a reply specified in point 4 of the commitments gave rise to an implied decision accepting the proposed transferee(s), by analogy with point 2 of the commitments, must be rejected.

51 Contrary to the applicants' argument, point 4 of the commitments provides for the consequences of the absence of a response from the Commission to a request for approval within 10 working days of such request, namely that the absence of a response must be deemed an exceptional circumstance within the meaning of point 6, from which it may be inferred that, in situations like that in point in the present case, the period in question may be extended by the Commission. Even if the wording of point 6 seems intended to cover situations where TotalFina Elf would be prevented from carrying out its contracts of sale within the time-limits laid down by the Commission, and not the absence of a response from the

Commission, the express reference in point 4 to point 6 must be interpreted as meaning that it permits a legitimate extension of the time-limit. Consequently the absence of approval by the Commission within the prescribed period cannot be treated as a decision of acceptance.

52 Furthermore, it must be observed that point 6 of the commitments aims to protect the interests of the notifying party, namely, in this case, TotalFina Elf. The reference in point 4 to point 6 therefore enables the notifying party alone, in the absence of a response from the Commission within the prescribed period, to request the Commission to extend the period, which did not happen here because TotalFina Elf took cognisance of the Commission's decision, which was given after the said period had expired. It follows that the applicants are not entitled to rely, as against the Commission, on the fact that it exceeded the time-limit.

53 In those circumstances it is unnecessary to examine the submission, in the applicants' reply, concerning the infringement of safeguards provided by the Community legal order in administrative procedures.

54 Consequently the applicants' first plea in law must be rejected.

Second plea in law: infringement of Articles 3(1)(g) EC and 211 EC and Article 2(1)(a) of Regulation No 4064/89

55 The applicants put forward two grounds in support of this plea in order to show that the contested decision is invalid. The first alleges application of a condition not provided for in the commitments and the second alleges erroneous assessment of their candidacy by the Commission.

First ground: application of a condition not provided for in the commitments

— Arguments of the parties

56 The applicants contend that the commitments do not require operators wishing to submit a purchase offer to be active in the petroleum sector, but that point 37(e) of the commitments requires them to have direct or indirect experience in the operation of a service station network. The statement in point 8 of the contested decision that the applicants are not 'active in the petroleum sector' is therefore a new fact which the Commission is trying to use as a basis for rejecting their candidacy. They also assert that, if that condition had been laid down originally by the Commission in its decision of 9 February 2000, they would not have invested so much time and human resources in presenting themselves to TotalFina Elf as credible purchasers.

57 In their reply, the applicants claim that the fact that, in the contested decision, the Commission took into account criteria not specified in the decision of 9 February 2000 is not consistent with the principles of legal certainty and legitimate expectation.

58 The Commission submits that it did not introduce a condition not provided for in the decision of 9 February 2000 in referring, in point 8 of the contested decision, to the fact that the applicants were not active in the petroleum sector. That reference is in reality merely descriptive. The Commission states that the contested decision is not based on the circumstance that the applicants did not meet that specific condition, but on the general condition concerning their ability, and that of Agip, to maintain or develop effective competition. The Commission adds that, in any case, recent experience on the market for the retail sale of fuels is

particularly relevant for evaluating a candidate's ability to maintain and develop effective competition, particularly in view of TotalFina Elf's quasi-dominant position on the market in question. Furthermore, the commitments do not include an exhaustive list of the factors to be taken into account in assessing a candidate's ability to maintain and develop effective competition.

59 The French Republic states that activity in the petroleum sector 'is not mentioned by the Commission in connection with the examination of candidacies, but in that of the presentation of the prospective purchasers'. According to the French Republic, 'the Commission did not therefore base itself on the absence of activity in the petroleum sector' in rejecting TotalFina Elf's proposal. The French Republic adds that, unless the applicants can prove that the chosen criteria are manifestly erroneous, they cannot validly contest the Commission's choice of criteria.

60 The Commission and the French Republic submit that the applicants' arguments concerning breach of the principles of legal certainty or legitimate expectation (see paragraph 57 above) are inadmissible by virtue of Article 48(2) of the Rules of Procedure of the Court of First Instance because they were put forward for the first time at the stage of the reply.

— Findings of the Court

61 As regards, first, the argument of the Commission and the French Republic concerning the introduction of a new plea in law (see paragraph 60 above), it must be observed that the references in the reply to the principles of legal certainty and legitimate expectation are a development of the applicants' argument, in the application, that they would not have invested so much time and

human resources in presenting themselves to TotalFina Elf as credible purchasers if the condition requiring activity in the petroleum sector had been stated by the Commission in the decision of 9 February 2000. Those arguments are closely linked to the argument in the reply and must therefore be held to be admissible.

62 As regards the applicants' argument concerning the application, in point 8 of the contested decision, of a condition not provided for in the commitments, it must be observed that this relates to the way in which the contested decision is worded and the interpretation of that wording.

63 It is clear from merely reading the contested decision that the Commission did not introduce an additional condition in point 8 of the decision. Points 1 to 8 of the decision are purely introductory in that they merely set out the background of TotalFina Elf's request for approval of 12 August 2000 and describe the transferees of the 70 service stations in question proposed by TotalFina Elf. In this connection, points 5, 7 and 8 of the contested decision contain a straightforward description of three of the transferees proposed by TotalFina Elf, namely Agip, Avia and the applicants. Point 8 gives a very brief description of the applicants and of their main activity and merely mentions, without making the slightest assessment, the fact that they were not active in the petroleum sector at that time, which in any case is not disputed.

64 On the other hand, points 18 and 19 of the contested decision contain an assessment of the applicants' candidacy by reference to the commitments. It must be noted, first, that the Commission, when evaluating their candidacy, found at point 18 of the contested decision that the applicants were not capable of effective competition on the market in question. In support of that finding, the Commission stressed at point 19 of the contested decision that they would have to surmount considerable handicaps, in particular because they were new entrants without recent experience of the market for the retail sale of fuels.

65 However, it must be noted that, although the criterion of actual activity in the petroleum sector is not expressly laid down as such by the commitments, point 1(b) provides that 'the transferee(s) shall be viable operators, either potentially or currently active on the markets in question, capable of maintaining or developing effective competition'. It must be observed that the Commission, when confronted with the need to determine whether a candidate is capable of ensuring effective and long-lasting competition [point 37(c) of the commitments] on the market in question, could rightly, and even should, take into account the fact that an applicant was a newcomer to the market for the retail sale of fuels, in spite of the fact that activity in the petroleum sector is not expressly required by the commitments (see, to that effect, paragraphs 117 to 120 below, concerning the Commission's assessment, at point 19 of the contested decision, of the fact that the applicants are new entrants to the market).

66 It follows that the first ground of the second plea in law is unfounded and must be rejected.

Second plea in law: the Commission's erroneous assessment of the applicants' candidacy

— Arguments of the parties

67 The applicants contend that the Commission's assessment of their candidacy at points 18 and 19 of the contested decision is manifestly erroneous. They challenge in four respects the Commission's remarks under those points in support of its conclusion that they are not capable of effective competition on the market in question.

68 First, the applicants contend that the Commission's argument that they do not have restaurants in the service stations which they propose to acquire, thus preventing the immediate creation of the anticipated synergies, cannot be accepted.

69 They observe that, in view of the experience of SG2R on the motorway catering market, where it is the third largest operator, and the experience of Petrolessence in the fuel distribution sector, the purchase of the six service stations from TotalFina Elf will take place in the framework of a close partnership between themselves with the object of implementing a joint marketing and management policy. They submit that the synergies between fuel distribution and the other services were recognised by the Commission at point 168 of the decision of 9 February 2000 and, in their case, are supported by figures. Whereas the motorway service stations have margins of more or less FRF 900 per cubic metre of fuel, the applicants anticipated margins of FRF 450 to 500 per m^3 of fuel in their offer to TotalFina Elf. They evaluate the margins produced by the shops/restaurants (related to m^3 of fuel) at FRF 300 to 350 per m^3. The aggregation of those margins, compared with the total expenses, showed a largely positive gross result.

70 The applicants add that, although it is true that four of the service stations which they wish to acquire do not have a restaurant, in their firm offer to TotalFina Elf they proposed to create restaurant units in order to produce the expected synergies. One restaurant was expected to be set up within 18 months to two years from the transfer of assets.

71 In their reply, the applicants state that they never claimed that the viability of their project depended only on the immediate creation of restaurants in the service stations which they wish to acquire. The synergies described in their firm offer should be considered in relation to the time factor. They add: 'Of the 70 service stations which [TotalFina Elf] should transfer, none had a restaurant unit belonging to Le Mirabellier. Therefore it is difficult to see how the choice of Le

Mirabellier in its application to [TotalFina Elf] could have related to those service stations'. In any case, the figures cited in paragraph 69 above show, according to the applicants, that the sale of fuels and motorway catering, when taken independently, are already fully profitable without the need for one activity to be subsidised by the other. That confidence is shared by the banks which gave their support to the applicants on the basis of those figures. Furthermore, the applicants note that, although four of the six service stations have no restaurant, they do have a shop for which they allow margins (related to m^3 of fuel) of FRF 300 to 350 per m^3 of fuel. Therefore, the margins which should be yielded by the restaurants during the period of their installation would be made up for by profits realised elsewhere. As regards the two other service stations with restaurants, the synergies expected by the applicants would arise immediately after the sale of the assets, in particular because the applicants were to transfer the restaurants to the trading name of Le Mirabellier, which is the third largest motorway catering operator in France and which is particularly likely to attract customers.

72 In their reply, the applicants observe that, in the decision of 9 February 2000, the Commission laid down a condition that the transferees should be capable of maintaining 'or' developing effective competition. However, at point 19 of the contested decision and in the Commission's defence, the Commission states that they should be capable of maintaining 'and' developing effective competition. According to the applicants, the difference is not irrelevant because if the two criteria are read as being both applicable, that would require from the applicants something not required by the decision of 9 February 2000.

73 Secondly, the applicants contend that the Commission's statement in point 19 of the contested decision that, in view of the global volumes of fuel which will be sold, they will be in a weak negotiating position for buying fuels from French refiners, from whom they anticipate obtaining 70% of their supplies, is manifestly unfounded.

74 They contend that examination of the market conditions shows that the disparities between the different purchasing prices on the fuel market in France are very small, so that price competition does not exist so far as the supplies from refiners are concerned. In those circumstances, it cannot be argued that an operator's capacity to purchase large volumes is decisive for enabling him to compete on prices. Therefore the difference between the purchase price for an operator with a large purchasing capacity and that for a solvent independent operator with only one service station is between FRF 5 and 20 per m^3 of fuel, namely a maximum of 2 centimes per litre at the pump.

75 The applicants submit that the fact that the banks have agreed to finance their project proves that the margins which they have estimated are credible. They add that there are only marginal differences between the wholesale prices charged in each of the French regions (see point 35 of the decision of 9 February 2000). In addition, after that decision, TotalFina Elf would continue to control the Mardyck refinery, which would put all the wholesale buyers in the zone where the six services stations in question were situated on an equal footing. The applicants add that they had moved closer to CPA (an independent import depot in Dunkirk), which had confirmed its interest in working jointly in the supply of fuel to the six service stations in question and that they had contacted other independent suppliers such as Martens.

76 The applicants also contend that the Commission's argument that they were exposing themselves to the risk of retaliation by French refiners if they were to follow an active pricing policy in relation to those refiners cannot validly be used as a basis for the contested decision. There is no principle of Community law which justified the Commission in refusing to approve an operator on the ground that he risks becoming a victim of a potential anti-competitive practice by another operator.

77 Thirdly, the applicants claim that the Commission's assertion at point 19 of the contested decision that they will not be able to achieve economies of scale because

of the small number of their service stations and they will have to follow a policy of 'loss-leader pricing' to establish their credibility in the eyes of consumers is manifestly unfounded. They contend that the Commission is implicitly giving preferential treatment to operators already established on the fuel distribution market, which is contrary to the decision of 9 February 2000.

78 The applicants submit that the Commission took no account of the compensation principle between fuel distribution and shop/restaurant activities. Economies of scale do not arise from the supply of fuels alone, but must be aggregated with the different services actually used by drivers on motorways. The Commission recognised those economies of scale at point 168 of the decision of 9 February 2000. Furthermore, contrary to what the Commission claims, the coordination costs of the major distribution networks are very high, which explains the use of franchise agreements as a way of minimising them. As for logistics costs, the transport of fuel by lorry in France reduces the price differentials between integrated operators and independent operators.

79 The applicants also claim that the contested decision takes no account of the compensation principle between the market for the distribution of fuels on motorways and that for distribution off motorways. They contend that the two markets are separate and that, whereas price competition is virtually non-existent on the former, it is relatively effective on the latter. Higher prices on motorways are explained not only by the virtual absence of operators other than the major integrated refiners on that market, but also by the need for the latter to compensate for the cost of fuels on motorways from the market for off-motorway fuel distribution. The fact of not having off-motorway service stations is therefore a factor which the applicants can put forward as an advantage over the other potential purchasers with off-motorway stations, and not a disadvantage, as the Commission describes it in the contested decision.

80 The applicants refer to their intention of developing a policy of 'loss-leader pricing' in order to establish their credibility in the eyes of consumers and to rely for that purpose on synergies between fuel distribution and other services. They contend that the practice of 'loss-leader pricing' ought to have persuaded the Commission to give priority to their candidacy. By refraining from doing so, the Commission made a manifest error of assessment of the market and of the potential competition which could be created by the applicants.

81 Fourth, the applicants maintain that the Commission's objection at point 19 of the contested decision that the applicants are new entrants to the market is totally inconsistent with its task of safeguarding effective competition on the market in question. In the decision of 9 February 2000 the Commission referred to the very concentrated nature of that market (see point 360) and to the difficulties encountered by new entrants (see points 207 to 211). However, in the decision of 7 November 2000, in which at least two service stations previously assigned to the applicants were thenceforward assigned to Shell and Esso, the Commission not only contributed to restricting access to the market for new entrants, but also gave preferential treatment to the major integrated oil companies by permitting them to double the number of service stations originally granted to them. The applicants claim that, with respect to the market for the sale of fuels on motorways in France, there are several economic factors which militate in favour of transferees who are not necessarily already active on that market for the purposes of developing or maintaining effective competition. In this connection, the applicants contend that companies competing among themselves on several markets are more likely to reach an understanding than where they are competing on a single market. It appears that the greater the financial resources of companies on a market, the greater the risk of collusion between them and that companies with an identical profile are more disposed to form a cartel.

82 With regard to the requirement of direct or indirect experience in the operation of a service station network [see point 37(e) of the commitments], which alone is consistent with the decision of 9 February 2000, the applicants claim that in any

case they have the requisite experience, as is showed by the history of Petrolessence. In particular, they observe that Petrolessence operated service stations in the 1980s.

83 Furthermore, the applicants contend that the contested decision does not give priority to the arrival of new operators, contrary to the logic of the decision of 9 February 2000. They state that the contested decision not only causes them immediate damage in that they will not be able to enter the market of motorway service stations, but that it will call into question their whole project for developing their activities in that sector when invitations to tender are issued in that market after 2005.

84 The Commission submits that the applicants' arguments are unfounded and must be rejected. It maintains that the purpose of the commitments concerning the transfer of service stations was to prevent TotalFina Elf from gaining a dominant position on the market for the sale of fuels on motorways in France (see points 157 to 221 of the decision of 9 February 2000).

85 The Commission and the French Republic add that most of the applicants' arguments in this case comprise an economic analysis opposite to that of the Commission. It has consistently been held that the Commission has a certain discretion which must be taken into account in the course of a judicial review (see Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraphs 223 and 224; Case T-102/96 *Gencor* v *Commission* [1999] II-753, paragraphs 164 and 165; Case T-221/95 *Endemol* v *Commission* [1999] ECR II-1299, and Case T-22/97 *Kesko* v *Commission* [1999] ECR II-3775, paragraph 142).

86 The Commission and the French Republic claim that the applicants were not in a position to introduce, with immediate effect, the expected synergies between their

activities as restaurateurs and as fuel distributors. The Commission notes that the aim of the commitments was to prevent the creation of a dominant position on the market in question and therefore it had to ensure that the group of purchasers proposed by TotalFina Elf was capable of providing effective competition with immediate effect.

87 The Commission and the French Republic state that the applicants, while not denying that their project and, in particular, their alleged capacity for active competition on the market in question, are based on the expectation of being able to generate synergies between those activities, admit that four of the six service stations sought do not at present have a restaurant unit and that it would take 18 months to two years to set them up. As regards the other two service stations with 'buffet bars', these are small-scale catering units where the turnover hardly reaches 50% of the potential of the service station. In addition, the applicants would need the consent of the motorway franchisee (SEMCA) for placing their trading name on those units. The Commission also submits that the applicants' presence on the fuel distribution and motorway catering markets adds nothing special by comparison with its competitors because all motorway service stations have a shop and many of them a small-scale catering unit. Consequently the applicants have no specific competitive advantage in that respect.

88 The Commission contends that the applicants' references to the possibility of acquiring other service stations in 2005 (see paragraph 83 above) must be interpreted as meaning that the expected synergies also depend on the additional acquisitions, which bears out the Commission's conclusions rather than calling them into question. As regards the applicants' argument that, of the 70 service stations which TotalFina Elf was to transfer, none had a restaurant unit belonging to Le Mirabellier and that it is difficult to see how the selection of the applicants in their offer to TotalFina Elf could have involved stations with a restaurant unit, the Commission claims that this argument, apart from being new, is also irrelevant. The Commission states that it obviously could not refrain from considering whether the applicants would be able to generate the synergies in question because it could cause them difficulties if they did not have restaurants at one or more of the 70 service stations in question.

89 The Commission contends that the applicants' assertion that they could venture to apply to the sale of fuels margins lower than those of other operators on motorways, because of their profitable catering activity, is totally irrelevant. The Commission adds it is necessary to distinguish between the possibility of cross-subsidies between two activities which are carried on simultaneously and the existence of a synergy between them which has a direct influence on the profitability of at least one of those activities by acting, for example, on the costs which it entails. Such synergies could provide the operator concerned with both the opportunity for, and an incentive to, active competition on prices. There is normally no advantage in committing funds from one activity in order to subsidise the lower profitability of another. The Commission also contends that the applicants' assertion that the banks consider that their projects are profitable is not relevant. The banks' approach, which is determined by a customer's solvency, differs considerably from the Commission's approach, which is concerned to preserve effective competition on the market in question.

90 The Commission regrets the clerical error at point 19 of the contested decision, as a result of which it required concurrent satisfaction of the conditions of 'maintaining and developing' effective competition. However, it contends that this wording in no way changes the requirement for immediate effective competition, as envisaged by the commitments in accordance with the spirit of Regulation No 4064/89.

91 The Commission contends that it was right to consider that the applicants' negotiating strength was very uncertain in view of the fact that, at the time when the contested decision was adopted, they had no written offer from Shell, the supplier whom they had envisaged for 70% of their needs. The Commission states: '[In] that connection, the applicants recognised that this uncertainty will not be removed while there is "competition over the current acquisitions", that is to say, while the applicants are seeking, simultaneously with Shell, to purchase the [six] stations'. The Commission adds that there is no doubt that an operator's capacity to purchase large volumes is decisive for enabling him to compete on prices. In addition, competition on the market in question is mainly price competition. Therefore even the price differences anticipated by the applicants, mentioned in paragraph 74 above, which appear limited, could play a decisive

part in an operator's competitiveness. The Commission also maintains that the applicants' calculations only show that they are viable, but give no details of the ability of the applicants' proposal to bring about a situation of effective competition.

92 The Commission also claims that it is erroneous to limit the comparison of negotiating strength between central purchasing agencies and the applicants to a price comparison. If the applicants have an active price policy in relation to French refiners, there is a risk of retaliation by the latter in the form of a rise in the price of supplies or the threat of non-renewal of supply contracts. The Commission contends that that finding can validly support its refusal to approve the applicants because the Commission must ascertain whether the candidacies of potential purchasers permit the achievement of the aim of the commitments, namely preventing the creation or strengthening of a dominant position. A candidate's inability to resist reprisals by the most powerful players, whose dominance must be prevented, is clearly a relevant factor in that connection.

93 The French Republic observes that the problem of 'retaliation' is not mentioned in the contested decision, which merely states that it is not certain whether the volumes of fuel sold to the applicants give them much negotiating power *vis-à-vis* French refiners. The Commission states that, contrary to what the applicants say, TotalFina Elf's control of the Mardyck refinery does not put all wholesale buyers in the north of France on an equal footing. The applicants have no means of exerting pressure, in relation to the supply conditions, on TotalFina Elf, on which they are likely to depend for some of their supplies. On the other hand, the central purchasing agencies and the other refiners are widely active on those markets and are capable of exerting pressure in order to obtain acceptable supply conditions from TotalFina Elf.

94 The Commission finds that the applicants, while not denying that the small number of service stations which they wish to acquire may not promote

economies of scale and logistics, claim that this criterion encourages the continuance of an oligopolistic situation. According to the Commission, there is no contradiction between, on the one hand, its decision of 9 February 2000 and the concerns it expresses with regard to the oligopolistic situation on the market and, on the other hand, its finding in the contested decision that the small number of service stations which the applicants wish to acquire will limit the economies of scale and logistics from which their competitors benefit. That criterion refers only to the existence (or absence) of economies of scale and logistics and was independent of the concept of a relevant market. The Commission claims that, 'in particular, it in no way refers to the applicant's presence in the market for the sale of fuels on motorways, which differs from the market for the sale of those products off motorways (points 157 to 176 of the decision of 9 February 2000).' The Commission observes that TotalFina Elf's proposal, accepted on 7 November 2000, includes the take-over of many service stations by operators who had not previously been present, or had been only marginally present, on French motorways. It adds that, at the same time, the number of stations transferred to each of the operators who had already been present on the market remains very limited.

95 The Commission contends that the mere hypothetical possibility that the applicants could subsidise their fuel sale activities thanks to their catering activities is not an economy of scale or logistics. Generally speaking, it does not make it more probable that the applicants will contribute to effective competition on the fuel sale market.

96 The Commission claims that the applicants' argument concerning compensation between the markets for the distribution of fuels on motorways and off motorways is irrelevant in the present context. It states that the applicants do not have the resources for a long-term policy of loss-leader pricing. The applicants on their own could not have been an engine of competition and could only have played a part as followers, and then in the context of a package with no other operators capable of acting as engines of competition.

97 The Commission contends that the applicants' argument concerning the fact that they are new entrants to the petroleum market must be rejected. It states that it could have legitimately based its assessment of the applicants' ability to fulfil the conditions laid down in point 1(b) of the commitments on the fact that the applicants were new entrants with no recent experience of the market for the retail sale of motor fuels.

98 The Commission contends that the applicants' assertion that it gave preferential treatment to the major oil companies (see paragraph 81 above) is unfounded. In reality, according to the terms of the decision of 7 November 2000, more than 85% of the transferred stations were transferred to other kinds of companies. Furthermore, the factors cited by the applicants as proof of their experience are either based on obsolete situations and were therefore invalid, or are irrelevant in view of the very strict requirements to which the Commission's approval is subject.

99 In addition, the Commission disputes the applicants' argument that the contested decision will call into question their projects in the sector in question when invitations to tender are issued in 2005. The Commission states that this argument is hypothetical and that there is nothing to indicate that the applicants' chances of success depend on their status as owners of six service stations.

— Findings of the Court

100 In essence, the applicants contend that the Commission's assessment of their candidacy, which was presented by TotalFina Elf, is manifestly erroneous. They submit that the contested decision takes no account of the true structure of the market in question or of the potential competition which they represent, so that the implementation in that way of the decision of 9 February 2000 will not lead

to the development of effective competition on the market of motorway service stations, contrary to Article 2(1)(a) of Regulation No 4064/89 and Articles 3(1)(g) EC and 211 EC.

101 It is settled case-law that the basic provisions of Regulation No 4064/89, in particular Article 2 thereof, which relates to the appraisal of concentrations, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature, and, consequently, when the exercise of that discretion, which is essential for defining the rules on concentrations, is under review, the Community Courts must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations (see *France and Others* v *Commission*, cited above, paragraphs 223 and 224, and *Gencor* v *Commission*, cited above, paragraphs 164 and 165; Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585, paragraph 64). It follows that review by the Community Courts of complex economic assessments made by the Commission in exercising the discretion conferred on it by Regulation No 4064/89 must be limited to ensuring compliance with the rules of procedure and the statement of reasons, as well as the substantive accuracy of the facts, the absence of manifest errors of assessment and of any misuse of power. In particular, it is not for the Court of First Instance to substitute its own economic assessment for that of the Commission.

102 In the context of the appraisal of concentrations, laid down by Regulation No 4064/89, the Commission must assess, using a prospective analysis of the relevant market, whether the concentration which has been referred to it leads to a situation in which effective competition in that market is significantly impeded by the undertakings involved in the concentration. In addition, the Commission may, pursuant to Article 8 of that regulation, attach conditions and obligations to its decision on the compatibility of a concentration. It is not disputed that such an approach warrants close examination in particular of the circumstances which, in each individual case, are relevant for assessing the effects of the concentration on competition in the market in question.

103 It follows that the applicants' present arguments can be accepted only if they show that the Commission's appraisal of their candidacy at points 18 and 19 of the contested decision is manifestly erroneous. However, it must be observed that the applicants have not established that the Commission's appraisal of those points is clearly mistaken and it must be concluded that the applicants' present arguments consist in inviting the Court of First Instance to substitute a different appraisal of their candidacy for that of the Commission.

104 In that connection, there are a number of relevant facts in this case which must be borne in mind, in particular the context and the purpose of the transfer of 70 service stations by TotalFina Elf. In the decision of 9 February 2000 the Commission found that the competitive situation on the market for motorway fuel sales was close to being one of dominance, even before the merger of TotalFina and Elf Aquitaine (see point 216). After the merger, TotalFina Elf would have strong incentives to raise its prices and/or reduce the quality of its services on the market in question, which would give it the means of punishing any competitor who did not follow, or who opposed, its policy (see point 220). The Commission therefore considered that the notified merger would result in the creation of a dominant position on the market in question and in further extensive degradation of the competitive structure of the market, when competition was already limited (see point 221 of the decision of 9 February 2000).

105 In the course of the administrative procedure relating to this merger, TotalFina Elf proposed certain commitments in order to eliminate the competition problems identified by the Commission, which accepted the commitments after amendment because they appeared to be 'of such nature that they will lead to the immediate restoration of effective and lasting competition on the market in question' (see point 362 of the decision). The Commission accordingly declared the merger compatible with the common market, provided that the commitments were fully complied with. In order to maintain effective competition on the market for the

sale of fuels on motorways in France, TotalFina Elf undertook to transfer 70 service stations to transferees who fulfilled certain conditions, including those set out in point 1(b) of the commitments,

106 It is clear from the contested decision and the commitments that the Commission considered that the aim of restoring effective and lasting competition on the market in question could only be achieved if the transferees of the 70 service stations in question were able to acquire them without interrupting their business activity and to make them immediately profitable and competitive [see, in particular, the references to the restoration of effective competition in point 1(c) of the commitments and the obligation imposed on TotalFina Elf in point 37(c) of the commitments not only to transfer the 70 service stations, but also to transfer the operating staff directly attached to the point of sale]. The Commission accordingly examined the candidacy of each transferee proposed by TotalFina Elf in the light of that aim and based its rejection of the applicants' candidacy on a number of factors taken as a whole.

107 At point 19 of the contested decision, the Commission observed in that respect that, at the date of adoption of the decision, the applicants did not have restaurants at the service stations which it proposed to acquire and drew the conclusion that the synergies expected by the applicants could not be set up immediately. The Commission pointed out that the applicants' ability to develop active competition on the market in question depended on the immediate establishment of restaurants in the service stations which they wished to buy. However, it is common ground that four of the six stations for which their candidacy had been selected by TotalFina Elf did not have restaurants and that at least 18 months to two years would be necessary to set them up. In addition, it is clear from the file that the two other stations had only small-scale catering units. However, the applicants contend that the synergies described in their firm offer must be examined in relation to time. They also try to show that the six service stations in question would be profitable during the period of construction of the restaurants. In addition, they assert that the four stations which do not yet have restaurants have shops with margins which are the same as those of a restaurant. The applicants add that the figures cited in paragraph 69 above show that the sale

of fuels and catering on motorways are profitable, when considered independently.

108 It must be observed that the commitments require the transferees to be capable of effective and lasting competition on the market in question. On this point, it must be noted that the applicants expressly based their offer to purchase the service stations on the possibility of generating synergies between the sale of fuels and catering. It is common ground that those synergies can only be achieved within a certain period, namely 18 months to two years. It is clear that the Commission did not exceed its margin of discretion on this matter, in view of the purpose of the commitments, by taking into account, when evaluating the applicants' candidacy, the fact that they would be capable of fulfilling that forecast only in the medium term at best. In that connection, the Commission cannot be required to find that a wait of 18 months for that forecast to come true is not prejudicial. In any case, even assuming that the applicants' proposal in their firm offer shows a profit within the specified period, that would not be decisive because the purpose of the commitments is not to seek viable transferees. The applicants' arguments concerning the expected synergies must be rejected.

109 The applicants also complain that the Commission made it a condition that the transferees should be capable of maintaining 'and' developing effective competition on the market, although those conditions were expressed as an alternative in the decision of 9 February 2000. It thus introduced a condition not required by that decision.

110 That complaint is unfounded. Regardless of whether both conditions are to be fulfilled or whether they are alternatives, the transferees are still required to establish effective competition on the market. As found in paragraph 121 below, the Commission did not make a manifestly erroneous assessment in concluding that the applicants do not fulfil that requirement.

111 At point 19 of the contested decision the Commission found that 'it is uncertain whether the overall volumes of fuels which will be sold give [the applicants] much negotiating strength in relation to the French refiners from whom [they expect] to obtain 70% of the supplies [they need]'. The applicants contend that that finding is manifestly unfounded because there is no price competition with regard to obtaining supplies from the refiners. The applicants state that an operator's capacity to purchase large volumes is not decisive for enabling him to compete on prices because the price difference between operators with large capacity and an operator with only one service station is 'minimal'.

112 The Commission's argument that the price differences described in paragraph 74 above may play a decisive part in an operator's ability to compete because most competition on the market in question is by means of prices must be accepted. At point 191 of the decision of 9 February 2000, which concerns the sale of fuels, the Commission observes: 'companies compete essentially by means of prices. There is little room for manœuvre as regards the other factors of competition. Fuels are homogeneous products with a low degree of technical innovation.' Furthermore, contrary to what the applicants assert in paragraph 76 above, it must be found that the Commission can validly use as a basis for the decision rejecting the applicants' candidacy the argument that the applicants would be incapable of resisting reprisals by French refiners if they, the applicants, were to follow an active pricing policy. A prospective analysis by the Commission can be challenged as vitiated by a manifest error of assessment only on the basis of concrete evidence adduced by the applicants, which is lacking in this case.

113 Moreover, the applicants' argument that the banks consider the project to be profitable (see paragraph 75 above) is not relevant in this case. The banks' approach concentrates on the applicants' solvency, whereas that of the Commission is based on the aim of maintaining effective competition on the market in question.

114 At point 19 of the contested decision, the Commission also found that, in view of the limited number of stations which the applicants proposed to purchase, they would not be able to benefit from economies of scale like their competitors and would have to follow a policy of 'loss-leader pricing' to establish their credibility in the eyes of consumers. It appears from the file that the term 'loss-leader pricing' means that the applicants must charge low prices to attract customers. The Commission adds that the applicants do not have the resources for such a policy in the long term (see paragraph 96 above). The applicants contend that the viability of this practice could not be questioned, particularly in the light of the figures given in paragraph 69 above, which show, according to the applicants, that even if they obtain lower margins on fuel prices than their competitors, the aggregation of those margins with the catering margins, when compared with the total expenses, shows a broadly positive gross result.

115 In that connection, it must be observed that the applicants do not deny that they have to use 'loss-leader pricing' in order to attract customers, as the Commission maintained at point 19 of the contested decision. In actual fact, they are trying to cast doubt on the Commission's assertion that they cannot benefit from economies of scale by other means. In particular, they state once again that the Commission implicitly favours the operators already established in the market in question to the detriment of new entrants, which is in breach of the decision of 9 February 2000. They contend that economies of scale do not arise solely from the supply of motor fuels, but that they must be aggregated with the different services actually used by drivers on motorways. However, apart from the fact that the Court considers that the argument concerning economies of scale had been examined and disposed of in paragraph 108 above, it must be observed that, contrary to the applicants' submissions, the mere hypothetical possibility of subsidising their motor fuel business from their catering activities cannot amount to an economy of scale. As for the applicants' argument concerning favouritism shown to operators already established in the market in question, it must also be rejected for the reasons given in paragraph 118 below. Furthermore, the fact that the applicants used 'loss-leader pricing', a practice which apparently promotes competition, cannot in itself be sufficient proof of their ability to develop effective

and lasting competition on the market in question. Similarly, the Commission cannot favour the applicants' candidacy merely because they do not have off-motorway service stations, as that would risk compromising the purpose of the commitments, namely to maintain effective competition on the market and thus to prevent TotalFina Elf from gaining a dominant position.

116 In addition, it cannot be denied that the applicants had no other service stations on or off motorways, that they offered to purchase only 10 from TotalFina Elf and that their candidacy was accepted by TotalFina Elf for only six stations. It follows that the Commission did not exceed its margin of discretion in citing, in particular, the absence of economies of scale as a basis for its finding that the applicants would not be capable of developing effective competition on the market in question.

117 In that connection, it must be observed that it has been held in paragraph 65 above that recent experience of the market for the retail sale of motor fuels is a particularly relevant aspect of a candidate's ability to achieve the express purpose of the commitments, namely to maintain or develop effective and long-lasting competition, particularly in view of TotalFina Elf's position of virtual dominance on the market in question even before the present operation, and that the Commission may legitimately take account of the fact that a transferee would be a new entrant to the market in order to justify a refusal to approve its candidacy.

118 It must be concluded that, although the decision of 9 February 2000 refers to the very concentrated nature of the market in question and the difficulties for new entrants (see points 207 to 210), the Commission, in assessing the candidacy of the applicants, cannot be criticised for taking account of the fact that they are new entrants without recent experience of the market for the sale of motor fuels. It would be inconsistent with the objective of the commitments to favour a candidate merely because he is a new entrant if, having regard to all the circumstances, he is incapable of attaining that objective. As regards the

applicants' argument that the contested decision favours the major oil companies, it must be observed that the Commission's assertion, in paragraph 98 above, that more than 85% of the total stations transferred were allocated to transferees other than those companies is not denied by the applicants. Furthermore, they criticise the Commission for the fact that TotalFina Elf sold to Shell and Esso two service stations which had originally been allocated to the applicants. The Court finds that this alone cannot lead to the conclusion that the Commission favours the major oil companies. It follows that this argument must be rejected.

119 As regards the applicants' argument that, even if they were not active in the market in question, they have the experience required by the Commission, as their history shows, it must be observed that, as they themselves have said, they left that market 'at the end of the 1980s as a result of changes in the French market'. It follows that the Commission, in assessing the candidacy of the applicants, cannot be criticised for taking account of the fact that they had no recent experience of the market in question, recent experience being considered necessary by the Commission to create a counterbalance to TotalFina Elf's virtually dominant position on the market. In addition, the fact that the applicants were new entrants to the retail motor fuel market is only one factor in the Commission's evaluation and, in so far as that factor, considered in isolation, cannot be sufficient for rejecting the applicants' candidacy, it may legitimately be taken into account by the Commission together with other factors for the purpose of that evaluation.

120 In the same way, with regard to the applicants' argument (see paragraph 83 above), concerning the possibility of acquiring in 2005 other service stations on sites where they already have restaurants, that argument must be rejected because, as the Commission maintains in paragraph 99 above, it is purely hypothetical and is based only on the applicants' projects. In any case, although

the possibility of improving competition on the market in question in the relatively distant future, namely 2005 at the earliest, is a factor which the Commission is entitled to take into account in certain circumstances, that is not the case here, where the candidate is rather weak and its future success, at least as an engine or stimulus of effective competition, is relatively uncertain.

121 It follows that the applicants have not shown that there was a manifest error of assessment by the Commission in taking the view that the applicants would not have been able, either alone or even jointly with other transferees, to maintain or develop effective competition in the market, as required by the commitments.

122 It follows from the foregoing considerations that the applicants' second complaint must be rejected as they have not established that there was a manifest error of assessment by the Commission in this case.

123 It follows that the application must be dismissed in its entirety.

Costs

124 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicants have been unsuccessful, they must be ordered to pay the costs, including those relating to the application for interim relief, as applied for by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the application as unfounded;**

2. **Orders the applicants to bear their own costs and pay those of the Commission, including the costs relating to the application for interim relief.**

Cooke García-Valdecasas Lindh

Delivered in open court in Luxembourg on 3 April 2003.

H. Jung R. García-Valdecasas

Registrar President