JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

14 December 2005 *

In Case T-210/01,

General Electric Company, established in Fairfield, Connecticut (United States), represented by N. Green QC, C. Booth QC, J. Simor, K. Bacon, Barristers, S. Baxter, Solicitor, L. Vogel and J. Vogel, lawyers, and, initially, by M. Van Kerckhove, lawyer, and subsequently by J. O'Leary, Solicitor, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by R. Lyal, P. Hellström and F. Siredey-Garnier, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

supported by

Rolls-Royce plc, established in London (United Kingdom), represented by A. Renshaw, Solicitor,

and by

Rockwell Collins, Inc., established in Cedar Rapids, Iowa (United States), represented by T. Soames, J. Davies and A. Ryan, Solicitors, and P.D. Camesasca, lawyer,

interveners,

APPLICATION for the annulment of Commission Decision 2004/134/EC of 3 July 2001 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case No COMP/M.2220 — General Electric/Honeywell) (OJ 2004 L 48, p. 1),

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

composed of J. Pirrung, President, V. Tiili, A.W.H. Meij, M. Vilaras and N.J. Forwood, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 27 May 2004,

gives the following

Judgment

Legal context

1 Article 2(2) and (3) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1990 L 395, p. 1, corrected version in OJ 1990 L 257, p. 13), as last amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1) (hereinafter, as corrected and amended, 'Regulation No 4064/89'), provides as follows:

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

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

Facts

2 General Electric Company ('GE' or 'the applicant') is a diversified industrial undertaking active in the following fields: aircraft engines, domestic appliances, information services, power systems, lighting, industrial systems, medical systems, plastics, broadcasting, financial services and transportation systems.

3 Honeywell International Inc. is an undertaking active in, inter alia, the following markets: aeronautical products and services, automotive products, electronic materials, speciality chemicals, performance polymers, transportation and power systems as well as home and building controls and industrial controls.

4 On 22 October 2000, GE and Honeywell entered into an agreement under which GE would acquire Honeywell's entire share capital ('the merger'), Honeywell becoming a wholly-owned subsidiary of GE.

5 On 5 February 2001, the Commission formally received notification of the merger pursuant to Article 4 of Regulation No 4064/89.

6 On 1 March 2001, taking the view that the merger fell within the scope of Regulation No 4064/89, the Commission decided to initiate proceedings under Article 6(1)(c) of that regulation and under Article 57 of the Agreement on the European Economic Area (EEA) ('the decision to initiate proceedings').

7 On 15 March 2001, GE and Honeywell jointly submitted to the Commission their observations on the decision to initiate proceedings.

8 On 8 May 2001, the Commission sent a statement of objections ('SO') to GE, to which it replied on 24 May 2001.

9 On 29 and 30 May 2001, GE and Honeywell took part in an oral hearing before the Commission.

10 On 14 and 28 June 2001, GE and Honeywell jointly proposed two sets of commitments designed to render the merger acceptable to the Commission.

11 On 3 July 2001, the Commission adopted Decision 2004/134/EC (Case No COMP/M.2220 — General Electric/Honeywell) (OJ 2004 L 48, p. 1) declaring the merger incompatible with the common market and the EEA Agreement ('the contested decision').

The contested decision

12 The operative part of the contested decision states as follows:

'*Article 1*

The concentration by which General Electric Company acquires control of the undertaking Honeywell International Inc. is declared incompatible with the common market and with the EEA Agreement.

Article 2

This Decision is addressed to:

[GE].

...'

13 The grounds of the contested decision may be summarised as follows.

14 According to the Commission, GE was itself already in a dominant position on the world market for jet engines for large commercial aircraft (hereinafter also referred to as 'large commercial jet aircraft engines') and on the world market for jet engines for large regional aircraft (hereinafter also referred to as 'large regional jet aircraft engines') (recitals 45 to 83 and 84 to 87 of the contested decision, and recitals 107 to 229). Its strong market position, combined with the commercial leverage represented by its financial strength and vertical integration into aircraft leasing were among the factors that led to the finding of GE's dominance in these markets. The investigation also showed that Honeywell was already the leading supplier of avionics and non-avionics products (recitals 241 to 275), as well as of engines for corporate jets (recitals 88 and 89) and of engine starters, in particular for large commercial jet aircraft engines (a key component in the manufacturing of jet engines) (recitals 331 to 340).

15 The combination of the two companies' activities would have resulted in the creation or strengthening of dominant positions on a number of markets. The Commission found in particular that GE's existing dominant position on the worldwide market for large commercial jet aircraft engines would be strengthened on account of the 'vertical' effects of the merger resulting from the integration of GE's activity as a manufacturer of those engines with Honeywell's activity as a manufacturer of starters for those engines (recitals 419 to 427 of the contested decision). It also concluded that dominant positions would be created on the various world markets for avionics products and non-avionics products, on which Honeywell already enjoyed strong positions prior to the merger, as a result of two types of conglomerate effects. In the Commission's view, those effects were, first, those resulting from a process known as 'share shifting', consisting in the extension to those markets of the financial power of GE Capital, a company belonging to the applicant's group, and the commercial advantages deriving from the business of aircraft purchase and leasing, in the main by GE Capital Aviation Services (GECAS) (another company in the applicant's group) (recitals 342 to 348 and 405 to 411). Second, the Commission foresaw effects arising in future from the merged entity's use of bundling practices — pure, technical and mixed — through offers incorporating both aircraft engines from the former GE, on the one hand, and avionics products and non-avionics products from the former Honeywell, on the other (recitals 349 to 404). The Commission held that in the future the practice of bundling would also strengthen GE's pre-existing dominant position on the market for large commercial jet aircraft engines.

16 In addition, the Commission concluded that GE's pre-merger dominance on the world market for large regional jet aircraft engines would be strengthened and that a dominant position would be created for the merged entity on the world market for corporate jet aircraft engines, in particular because of 'horizontal overlaps', given the presence on those markets of both GE and Honeywell prior to the merger (recitals 428 to 431 and 435 to 437 of the contested decision). It also took the view that a dominant position would be created, in particular on account of a horizontal overlap between the two parties to the merger on the world market for small marine gas turbines (recitals 468 to 477).

17 Thus, having deemed the commitments proposed by the parties to the merger to be insufficient to resolve the competition problems arising as a result of the transaction (recitals 500 to 533 and 546 to 563 of the contested decision), the Commission concluded, at recital 567 of the decision, that the merger would lead to the creation or strengthening of a number of dominant positions, as a result of which effective competition in the common market would be significantly impeded, and that the merger should therefore be declared incompatible with the common market pursuant to Article 8(3) of Regulation No 4064/89.

Procedure

18 By application lodged at the Registry of the Court of First Instance on 12 September 2001, the applicant brought the present action. On the same day, Honeywell also brought an action against the contested decision (Case T-209/01).

19 By documents lodged at the Registry of the Court on 11, 15 and 16 January 2002 respectively, Rolls-Royce Plc, Rockwell Collins Inc. ('Rockwell') and Thales SA sought leave to intervene in the present case in support of the Commission.

20 The applicant requested that certain information contained in its written submissions and in the Commission's submissions be kept confidential from the interveners.

21 By order of 26 June 2002, the President of the First Chamber of the Court of First Instance granted Rolls-Royce and Rockwell leave to intervene. By the same order he granted the confidential treatment requested by the applicant, subject to observations by the interveners. In accordance with Article 116(6) of the Rules of Procedure of the Court of First Instance, Thales was granted leave to intervene during the oral procedure on the basis of the report for the hearing.

22 Upon a change in composition of the Chambers of the Court pursuant to the Court's decision of 13 September 2004 (OJ 2004 C 251, p. 12), the Judge-Rapporteur was transferred to the Second Chamber, to which the present case was then allocated.

23 Pursuant to Article 14 of the Rules of Procedure and on the proposal of the Second Chamber, the Court of First Instance, having heard the parties in accordance with Article 51 of those rules, assigned the case to a chamber sitting in extended composition.

24 By letter lodged at the Registry of the Court on 2 February 2004, Thales stated that it wished to withdraw its intervention. By order of 23 March 2004, after hearing the other parties, the President of the Second Chamber (Extended Composition) of the Court took formal note of that withdrawal.

25 By letter of 17 March 2004, the applicant requested that the present case be joined with Case T-209/01. The President of the Second Chamber (Extended Composition) referred that decision to that chamber in accordance with Article 50 of the Rules of Procedure.

26 Upon hearing the Report of the Judge-Rapporteur, the Court decided to open the oral procedure and put questions to the parties by way of measures of organisation of the procedure under Article 64 of the Rules of Procedure. It also asked the Commission to produce certain documents before the hearing. The parties complied with those requests.

27 The parties presented oral argument and their answers to the questions of the Court at the hearing on 27 May 2004. At the end of the hearing, the oral procedure was closed.

28 By letter of 8 June 2004, the applicant lodged at the Court Registry an application for the reopening of the oral procedure, together with supplementary observations on certain aspects of the case, to which a number of further documents were annexed. By order of 8 July 2004, the Court decided to reopen the oral procedure in accordance with Article 62 of the Rules of Procedure.

29 After hearing the parties, the Court adopted a measure of organisation of the procedure under Article 64 of the Rules of Procedure by which it placed on the file the documents and observations lodged by the applicant on 8 June 2004. The observations of the Commission and of the interveners regarding the relevance of those items were also placed on the file.

30 At the Court's request, the parties lodged observations and supplementary documents relating to the questions raised by the applicant in its initial observations. Those items were also placed on the file.

31 The oral procedure was then closed once more on 23 November 2004.

Forms of order sought

32 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

33 The Commission, supported by Rolls-Royce and Rockwell, contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

34 In its pleadings, the applicant raises a series of questions concerning the scope of its action, the scope of the Court's power of review and the overall criteria applied by the Commission in the contested decision. The questions will be addressed as a preliminary issue.

35 The applicant challenges the finding made by the Commission in the contested decision, which serves as a cornerstone for other aspects of its analysis of competition, that prior to the merger the applicant had a dominant position on the market for large commercial jet aircraft engines. That issue will be examined first.

36 The applicant also disputes the Commission's conclusions on the vertical overlap, conglomerate effects and horizontal overlaps to which the merger would give rise. Those questions will be examined in turn, in second, third and fourth place.

37 Finally, the applicant relies on procedural irregularities vitiating the contested decision. Those matters will be examined last.

A — *Preliminary issues*

1. *The application for joinder*

38 It is appropriate to note that the fact of joining two cases brought by different applicants cannot alter the scope of the application lodged separately by each of them; otherwise there would be a risk of impairing the independence and autonomy of their separate actions (Joined Cases C-280/99 P to C-282/99 P *Moccia Irme and Others* v *Commission* [2001] ECR I-4717, paragraphs 61 to 68, in particular paragraph 66).

39 In the Court's view there is no reason to join the present case with Case T-209/01, given, in particular, the difference in scope of the two actions. The application for joinder made by the applicant in its letter of 17 March 2004 is therefore rejected.

2. *The relationship between the various pillars on which the Commission's finding as to the incompatibility of the merger with the common market is based*

(a) Arguments of the parties

40 The applicant points out that, in its defence, the Commission stated that the elements of reasoning in the contested decision reinforce one another and that it would therefore be artificial to analyse each of them in isolation. Hence, it is not possible in this instance to apply by analogy the approach adopted in Case T-310/01 *Schneider Electric* v *Commission* [2002] ECR II-4071, namely that errors vitiating the Commission's analysis of certain markets investigated do not provide sufficient grounds for annulment of a decision where the decision is also based on an analysis of other markets which proves to be well founded. At the hearing the applicant submitted in that connection that the Court cannot substitute its own appraisal of the merger for that of the Commission. Thus, if it were held that some of the grounds relied on in the contested decision were unfounded whilst others were not, it would not be for the Community judicature to assess whether the well-founded elements of reasoning are a sufficient basis for the Commission's conclusion that the notified transaction was incompatible with the common market.

41 The Commission observes that the contested decision is based on a combination of elements of fact and law which are complementary, encompassing horizontal effects,

vertical effects and conglomerate effects. However, the Commission emphasises that each of those elements on its own justifies the prohibition of the concentration.

(b) Findings of the Court

42 The Court observes, first of all, that where some of the grounds in a decision on their own provide a sufficient legal basis for the decision, any errors in the other grounds of the decision have no effect on its operative part (see, by analogy, Joined Cases C-302/99 P and C-308/99 P *Commission and France* v *TF1* [2001] ECR I-5603, paragraphs 26 to 29).

43 Moreover, where the operative part of a Commission decision is based on several pillars of reasoning, each of which would in itself be sufficient to justify that operative part, that decision should, in principle, be annulled only if each of those pillars is vitiated by an illegality. In such a case, an error or other illegality which affects only one of the pillars of reasoning cannot be sufficient to justify annulment of the decision at issue because that error could not have had a decisive effect on the operative part adopted by the Commission (see, by analogy, Case T-126/99 *Graphischer Maschinenbau* v *Commission* [2002] ECR II-2427, paragraphs 49 to 51, and the case-law cited).

44 That rule applies in particular in the context of merger control decisions (see, to that effect, *Schneider Electric* v *Commission*, paragraph 40 above, paragraphs 404 to 420).

45 It must be recalled in that regard that the Commission must prohibit a concentration where the latter satisfies the criteria in Article 2(3) of Regulation No 4064/89. It follows from Article 2(1)(a) of that regulation that the Commission must take account, in the course of its appraisal of a concentration, of, inter alia, the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned. Thus, the Commission's appraisal of whether a transaction creates or strengthens one or more dominant positions as a result of which effective competition would be significantly impeded must be carried out by reference to the conditions on each of the markets liable to be affected by the merger notified. Therefore, if it finds that the criteria are satisfied with regard to just one of the markets concerned, the concentration must be declared incompatible with the common market.

46 In the present case, the Commission stated at recital 567 of the contested decision that '[f]or all those reasons, it should be concluded that the proposed merger would lead to the creation or strengthening of a dominant position on the markets for large commercial jet aircraft engines, large regional jet aircraft engines, corporate jet aircraft engines, avionics and non-avionics products, as well as small marine gas turbine[s], as a result of which effective competition in the common market would be significantly impeded'.

47 The contested decision does not create a hierarchy between the competition problems found on each of the markets which the Commission examined and then listed in its conclusion as set out in the previous paragraph. On the contrary, in the light, inter alia, of the wording of Article 2 of Regulation No 4064/89, that conclusion can only be understood as meaning that, on each of the markets listed, the merger would have led to the creation or, as the case may be, the strengthening of a dominant position on that market as a result of which effective competition would be significantly impeded in the common market.

48 In the light of the foregoing, it must be held that the contested decision can be annulled only if it is found not only that certain of its grounds are vitiated by illegality, but also that those grounds which are not so vitiated do not provide a sufficient legal basis for the merger to be declared incompatible with the common market. This finding does not, however, remove the need to consider whether certain factors pertaining to competition, identified by the contested decision, reinforce each other, as the Commission contends in its defence, and that it would therefore be artificial to analyse each of them in isolation.

3. *The commitments proposed*

49 First of all, as regards the validity of the second set of commitments dated 28 June 2001, it is common ground that the parties to the merger submitted, on 14 June 2001, a first set of commitments (see recitals 485 to 533 of the contested decision). The applicant does not dispute the Commission's contention that 14 June 2001 was the last possible day on which commitments could be proposed, in accordance with Article 18(2) of Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 (OJ 1998 L 61, p. 1). The parties to the merger nevertheless proposed the second set of commitments on 28 June 2001 (see recitals 534 to 566 of the contested decision), indicating that those commitments replaced those proposed on 14 June 2001.

50 The only differences between the two sets of commitments concern the behavioural commitments relating to GECAS and the structural commitments relating to the proposed divestment of certain of Honeywell's activities on the various markets for avionics and non-avionics products. The potential effect of those differences will be considered below in the examination of the merits of the case on conglomerate effects.

51 Having challenged in its application the Commission's refusal to take into account the behavioural commitments, the applicant also contended at the hearing that, by that refusal, the Commission had tainted the entire administrative procedure and deprived the parties to the merger of the opportunity to propose commitments capable of resolving the other competition problems resulting from the horizontal overlaps identified by the Commission. Given its overarching scope, it is necessary to consider that contention in this preliminary section.

52 The Commission clearly set out, in its SO of 8 May 2001 in the present case, the objections pertaining to all the anti-competitive consequences of the merger, particularly those concerning horizontal and vertical effects deriving from the merger which were subsequently included in the contested decision (see, in particular, points 118 to 122, 124 to 126, 459 to 468, 469 to 471, 473, 474, 578 to 586 and 612 to 633 of the SO). In order to address the objections raised by the Commission in the SO, the applicant proposed on 14 June 2001, among others, structural commitments which the Commission examined but rejected on the ground that practical considerations would have prevented their being put into effect. The applicant has put no evidence or arguments before the Court to explain in what specific regard the rejection of those commitments was illegal or unjustified (see, in particular, paragraphs 487, 555 et seq., 564 in fine and 610 below). The Commission is not responsible for technical or commercial gaps in the commitments in question (which led it to conclude that they were insufficient to permit it to approve the merger at issue); nor, more specifically, can those gaps be attributed to any unwillingness on its part to accept that other commitments, of a behavioural nature, might be effective. It was for the parties to the merger to put forward commitments which were comprehensive and effective from all points of view and to do so in principle before 14 June 2001.

53 In the observations which it submitted following the reopening of the oral procedure, the applicant corrected its answer to a question put at the hearing and acknowledged that the Commission had in fact informed it, on 22 June 2001, of the reasons why its commitments, submitted on 14 June 2001, had to be rejected. However, it went on to claim that the Commission had given it the impression that if

it enhanced its commitment concerning GECAS's future conduct, the transaction would be declared compatible with the common market. In support of its argument, the applicant produced, at this late stage in the proceedings, two press releases of 14 and 18 June 2001 and an article of 11 February 2002 reporting an interview with the Member of the Commission responsible for competition at that time. In substance, the applicant claims that the Commission gave it assurances which gave rise to a legitimate expectation on its part.

54 It should first be noted that the applicant requested the reopening of the oral procedure in relation to the commitments, solely in order to allow it to correct the factual error mentioned in the previous paragraph. Thus, to the extent that it now seeks to rely on its contacts with the Commission, those observations are out of time and therefore inadmissible. Furthermore, the line of argument relating to legitimate expectations, advanced for the first time at the hearing, constitutes a new plea in law and must be rejected pursuant to Article 48(2) of the Rules of Procedure.

55 In any event, the right to rely on the principle of the protection of legitimate expectations extends to any person in a situation in which it is apparent that the Community authorities have caused that person to entertain justified hopes (Case 265/85 *Van den Bergh en Jurgens* v *Commission* [1987] ECR 1155, paragraph 44, and Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 26). In this instance, the contacts on which the applicant relies, which took place between itself and the Commission following the submission of its first set of commitments on 14 June 2001 and which concerned the possibility that a further set of commitments differing in some respects from the first set might be submitted, could not give rise to such hopes nor, therefore, to a legitimate expectation.

56 It follows from the foregoing that the Court must reject the arguments, relating to the commitments, that were advanced by the applicant at the hearing and in the context of the reopening of the oral procedure.

4. *The standard of proof and the scope of the Community judicature's power of review*

(a) Arguments of the parties

57 The applicant maintains that conglomerate mergers, such as the merger notified in this case, only rarely result in the creation or strengthening of a dominant position, unlike horizontal or vertical mergers. Therefore, any assertion to the contrary requires a particularly convincing demonstration of a specific mechanism by which competition is harmed.

58 In its observations on the statements in intervention and at the hearing, the applicant relies on the judgment in Case T-5/02 *Tetra Laval* v *Commission* [2002] ECR II-4381 as authority that proof of conglomerate effects calls for a precise examination, supported by convincing evidence, that particular care must be taken when taking future conduct into account and that the Commission's analysis must be particularly plausible with regard to effects that will emerge after a certain lapse of time. It also stated that, according to that judgment, the Commission must take into account the deterrent effect for an undertaking of the prohibition on abuse of a dominant position set out in Article 82 EC.

59 According to the Commission and the interveners, neither Regulation No 4064/89 nor the case-law requires a higher standard of proof in the case of a conglomerate merger.

(b) Findings of the Court

General considerations

60 It must be observed first that the Commission has a margin of assessment with regard to economic matters for the purpose of applying the basic provisions of Regulation No 4064/89, in particular Article 2 thereof. It follows that the Community judicature's power of review is restricted to verifying that the facts relied on are accurate and that there has been no manifest error of assessment (Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission (Kali & Salz)* [1998] ECR I-1375, paragraphs 223 and 224, and Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraph 38).

61 Moreover, Regulation No 4064/89 does not establish a presumption as to the compatibility or incompatibility with the common market of a transaction which has been notified. It is not the case that the Commission must find in favour of a concentration falling within its jurisdiction in a case in which it might entertain doubts but rather that it must always make an actual decision one way or the other (see, to that effect, *Tetra Laval* v *Commission*, paragraph 58 above, paragraph 120).

62 As to the nature of the Community judicature's power of review, it is necessary to draw attention to the essential difference between factual matters and findings, on the one hand, which may be found to be inaccurate by the Court in the light of the arguments and evidence before it, and, on the other hand, appraisals of an economic nature.

63 Although it must be recognised that the Commission has a margin of assessment when applying the substantive provisions of Regulation No 4064/89, that does not mean that the Community judicature must refrain from reviewing the Commission's

legal classification of economic data. The Community judicature not only must establish, inter alia, whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (*Commission* v *Tetra Laval*, paragraph 60 above, paragraph 39).

64 Although those principles apply to all appraisals of an economic nature, effective judicial review is all the more necessary when the Commission carries out a prospective analysis of developments which might occur on a market as a result of a proposed concentration. As the Court stated in its judgment in *Commission* v *Tetra Laval*, paragraph 60 above, paragraphs 42 and 43, a prospective analysis of the kind necessary in merger control must be carried out with great care since it does not entail the examination of past events — for which many items of evidence are often available to enable their causes to be understood — or even of current events, but rather a prediction of events which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted (see, to that effect, *Tetra Laval* v *Commission*, paragraph 58 above, paragraph 155). A prospective analysis consisting in an examination of how a concentration might alter the factors determining the state of competition on a given market, in order to establish whether it would give rise to a serious impediment to effective competition, makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely.

Treatment of conglomerate effects

65 Conglomerate-type concentrations do not give rise to horizontal overlaps between the activities of the parties to the merger or to a vertical relationship between the parties in the strict sense of the term. Even though, as a general rule, such concentrations do not produce anti-competitive effects, they may none the less have such effects in some cases (*Tetra Laval* v *Commission*, paragraph 58 above,

paragraph 142). In a prospective analysis of the effects of a conglomerate-type concentration, if the Commission is able to conclude that by reason of the conglomerate effects a dominant position would, in all likelihood, be created or strengthened in the relatively near future and would lead to effective competition on the market being significantly impeded as a result of the concentration, it must prohibit the concentration (*Tetra Laval* v *Commission*, paragraph 58 above, paragraph 153, and the case-law cited).

66 In that regard, as the Court of Justice also pointed out in its judgment in *Commission* v *Tetra Laval*, cited at paragraph 60 above, conglomerate-type concentrations give rise to certain specific problems, in particular inasmuch as, first, the assessment of such a transaction may involve a prospective analysis covering a period of time stretching well into the future and, second, the specific conduct of the merged entity may determine to a great extent what effects the concentration has. Thus, the chains of cause and effect following a merger may be dimly discernible, uncertain and difficult to establish. That being so, the quality of the evidence produced by the Commission in order to form a sound basis for a decision declaring a concentration incompatible with the common market is particularly important, since that evidence must support the Commission's conclusion that, if such a decision were not adopted, the economic changes envisaged by it would be plausible (*Commission* v *Tetra Laval*, paragraph 60 above, paragraph 44; see also, to that effect, *Tetra Laval* v *Commission*, paragraph 58 above, paragraph 155).

67 In this instance, the Commission found in the contested decision that the merger would entail, in the first place, direct vertical integration between the manufacture of engine starters and engines, in the second place, conglomerate effects and, in the third place, horizontal overlaps on certain markets.

68 It is apparent from the description of conglomerate effects in the contested decision that, in the Commission's view, the merger would immediately, or at the very least within a very short time, alter the conditions of competition on certain markets as a result of those effects, and would thereby result in the creation or the strengthening

of dominant positions on those markets because of the power and commercial opportunities resulting from the dominant position already held on the first market (see paragraphs 325 et seq. and 399 et seq. below). However, it must be pointed out that those consequences would have only followed from the merger in so far as the merged entity had adopted certain behaviour after the merger, which the Commission considered to be likely. That behaviour, in the Commission's view, was the foreseeable extension to new markets, following the transaction, of certain commercial practices harmful to competition which the Commission had identified on the part of one or other of the parties to the merger, before the merger took place.

69 In those circumstances, the Commission had the onus to provide convincing evidence to support its conclusion that the merged entity would probably behave in the way foreseen. If it did not behave in that way, the combination of the positions of the two parties to the merger on neighbouring but distinct markets could not have led to the creation or strengthening of dominant positions, since those respective positions of the parties would not have had any commercial impact on one another.

Treatment of factors which might deter the merged entity from behaving in the ways predicted in the contested decision

70 In its judgment in *Tetra Laval* v *Commission*, paragraph 58 above, the Court held that, although it is appropriate to take account of the objective incentives to engage in anti-competitive practices which a merger creates, the Commission must also consider the extent to which those incentives would be reduced, or even eliminated, owing to the illegality of the conduct in question, in particular in the light of the prohibition on abuse of a dominant position laid down in Article 82 EC, of the likelihood of their detection, of action taken by the competent authorities, both at Community and national level, and of the financial penalties which could ensue (paragraph 159 of the judgment). In its observations on the statements in

intervention, the applicant invoked that decision in support of its argument that certain of the practices considered by the Commission to be likely to create or strengthen dominant positions would not in fact take place.

71 In its judgment in *Commission* v *Tetra Laval*, paragraph 60 above (paragraphs 74 to 78), the Court of Justice held that the Court of First Instance was right to consider that the likelihood of the adoption of certain future conduct had to be examined comprehensively, that is to say taking into account both the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful.

72 However, the Court of Justice also held that it would run counter to the preventive purpose of Regulation No 4064/89 to require the Commission to examine, for each proposed merger, the extent to which the incentives to adopt anti-competitive conduct would be reduced, or even eliminated, as a result of the unlawfulness of the conduct in question, the likelihood of its detection, the action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue. Consequently, it held that the Court of First Instance had erred in law in so far as it rejected the Commission's conclusions as to the adoption by the merged entity of the anti-competitive conduct at issue in that case (*Commission* v *Tetra Laval*, paragraph 60 above, paragraphs 76 and 77).

73 It follows from the foregoing that the Commission must, in principle, take into account the potentially unlawful, and thus sanctionable, nature of certain conduct as a factor which might diminish, or even eliminate, incentives for an undertaking to engage in particular conduct. That appraisal does not, however, require an exhaustive and detailed examination of the rules of the various legal orders which might be applicable and of the enforcement policy practised within them, given that an assessment intended to establish whether an infringement is likely and to ascertain that it will be penalised in several legal orders would be too speculative.

74 Thus, where the Commission, without undertaking a specific and detailed investigation into the matter, can identify the unlawful nature of the conduct in question, in the light of Article 82 EC or of other provisions of Community law which it is competent to enforce, it is its responsibility to make a finding to that effect and take account of it in its assessment of the likelihood that the merged entity will engage in such conduct (see, to that effect, *Commission* v *Tetra Laval*, paragraph 60 above, paragraph 74).

75 It follows that, although the Commission is entitled to take as its basis a summary analysis, based on the evidence available to it at the time when it adopts its merger-control decision, of the lawfulness of the conduct in question and of the likelihood that it will be punished, it must none the less, in the course of its appraisal, identify the conduct foreseen and, where appropriate, evaluate and take into account the possible deterrent effect represented by the fact that the conduct would be clearly, or highly probably, unlawful under Community law.

76 Accordingly, in the following sections of this judgment, it is necessary to consider whether the Commission founded its prospective analysis of the likelihood of conglomerate effects on sufficiently convincing evidence, and whether it took due account of the principles mentioned above.

5. *Failure to show effective competition would be significantly impeded*

(a) Arguments of the parties

77 The applicant submits that according to Article 2(2) and (3) of Regulation No 4064/89, in order to prohibit a merger, the Commission must establish, first, that the merger creates or strengthens a dominant position and, secondly, that that

dominant position significantly impedes effective competition in the common market. The cumulative nature of those conditions is confirmed by the *travaux préparatoires* of Regulation No 4064/89, from which it is apparent that the second condition was introduced at the suggestion of the Economic and Social Committee and at the request of the French Government. Their cumulative nature has been confirmed by the Court of First Instance, in particular in Case T-2/93 *Air France* v *Commission* [1994] ECR II-323, paragraph 79, and in *Tetra Laval* v *Commission*, paragraph 58 above.

78 The Commission must show that each of those conditions has been satisfied. In particular, the Commission must establish that there is a high probability that anti-competitive effects will occur and not merely that they might occur, it must quantify those effects and show that they will result from the merger rather than from pre-existing market conditions. That requirement is particularly important in cases such as the present, in which the merger is conglomerate, since it is accepted that such mergers rarely have anti-competitive effects.

79 According to the applicant, the Commission failed in the contested decision to consider whether the merger resulted in any significant impediment to effective competition. In fact, with regard to each of the markets in which the Commission considers that a dominant position would be created or strengthened, it merely concludes, by vague, unquantified assertions, that competitors will be foreclosed in those markets and that there will be a negative effect on competition.

80 The only mention in the contested decision of the second limb of the test in Article 2 of Regulation No 4064/89 appears in the overall conclusion at recital 567. It is evident that the Commission merely assumed that the alleged creation or strengthening of dominant positions in the relevant markets automatically entailed the anti-competitive effects required by the second condition in Article 2 of that regulation.

81 Moreover, the Commission cannot contend that the satisfaction of the second condition was implicitly established in the course of the examination of whether dominant positions were created or strengthened. It is not sufficient to 'recycle' the facts used for a finding of dominance and use them, without further analysis, to substantiate a conclusion that competition was significantly impeded. The inevitable consequence of such a failure in the analysis is that the contested decision must be annulled. The applicant submits that the contested decision must stand alone. Therefore, no account can be taken of evidence put forward by the Commission and the interveners subsequent to that decision.

82 The absence of any reasoning concerning the application of the second condition in Article 2 of Regulation No 4064/89 is also a blatant infringement of the obligation to state reasons inasmuch as the applicant was not informed of the grounds on which the Commission considers that the merger in fact gives rise to a significant impediment to effective competition.

83 The Commission acknowledges that there is an academic dispute as to whether Article 2 of Regulation No 4064/89 contains a single or two-fold test but considers it to be of little importance. It submits that it is necessary to focus on whether a dominant position has been created or strengthened, and to treat the distortion of competition as a consequence of that. In any event, assuming that the test is a two-fold one, the Commission and Rockwell submit that, in the present case, the probable effects of the merger were examined extensively and in great detail in the decision.

(b) Findings of the Court

84 It follows from well-established case-law of the Court of First Instance that Article 2 (2) and (3) of Regulation No 4064/89 lays down two cumulative conditions, relating, first, to the creation or strengthening of a dominant position and, second, to the fact that competition will be significantly impeded in the common market as a result

(see, to that effect, *Air France* v *Commission*, paragraph 77 above, paragraph 79; Case T–290/94 *Kaysersberg* v *Commission* [1997] ECR II-2137, paragraph 156; and *Tetra Laval* v *Commission*, paragraph 58 above, paragraph 146). Accordingly, a concentration can be prohibited only if the two conditions laid down by Article 2(3) of the regulation are both met.

85 It is appropriate to bear in mind in that regard that the dominant position referred to in Article 2(2) and (3) of Regulation No 4064/89 concerns a situation where one or more undertakings have economic power which would enable them to prevent effective competition from being maintained in the relevant market, by giving them the opportunity to act to a considerable extent independently of their competitors, their customers and, ultimately, of consumers (Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraph 200).

86 It must also be recalled that, in relation to abuse of a dominant position within the meaning of Article 82 EC, the Court of Justice has held that abuse of a dominant position may occur if an undertaking in a dominant position strengthens such a position in such a way that the degree of dominance reached substantially impedes competition, that is to say that only undertakings remain in the market whose behaviour depends on the dominant one (Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 26). It follows from that decision that the strengthening of a dominant position may in itself significantly impede competition and do so to such an extent that it amounts, on its own, to an abuse of that position.

87 It follows, a fortiori, that the strengthening or creation of a dominant position, within the meaning of Article 2(3) of Regulation No 4064/89, may amount, in particular cases, to proof of a significant impediment to effective competition. That finding does not mean that the second condition laid down in Article 2 of

Regulation No 4064/89 is, from a legal perspective, subsumed within the first, but merely that it may be apparent from a single factual analysis of a given market that the two conditions are met.

88 The factors which may be invoked by the Commission in order to establish that an undertaking's competitors lack freedom of action to the degree necessary for a finding that a dominant position has been created or strengthened with regard to that undertaking are often the same as those which are relevant in an appraisal of whether, as a result of such creation or strengthening, competition will be significantly impeded in the common market. Indeed, a factor which significantly affects the freedom of competitors to determine their commercial policy independently is also liable to result in effective competition being impeded.

89 It follows that, where it is apparent from the recitals to a decision finding a notified concentration to be incompatible with the common market — including those recitals dedicated to analysing whether a dominant position has been created or strengthened — that the transaction will produce significant anti-competitive effects, the decision should not be regarded as unlawful merely because the Commission has not expressly, and specifically, linked its description of those matters to the second condition in Article 2 of Regulation No 4064/89; and this is so irrespective of whether the lawfulness of the decision is being considered from the point of view of the requirement to state reasons laid down in Article 253 EC, or of the substance of the case. Indeed, any other approach would impose a purely formal obligation on the Commission, requiring it to repeat some of the same recitals, firstly in its analysis of whether a dominant position is created or strengthened in a given market and, a second time, in relation to the analysis of significant impairment of competition in the common market.

90 In this instance, the Commission expressly stated, at recital 567 of the contested decision, that '[f]or all those reasons' the proposed merger would lead to the creation or strengthening of a dominant position on a number of different markets

as a result of which effective competition in the common market would be significantly impeded (for the full citation, see paragraph 46 above). Contrary to the applicant's claim in that regard, and consistently with the contentions advanced by the Commission before the Court, in particular at the hearing, it is clear from that general conclusion that the Commission considered that the two conditions in Article 2 of Regulation No 4064/89 were satisfied in relation to each of the markets expressly mentioned, and not merely by reason of the cumulative effect of the findings relating to all those markets (see paragraph 47 above).

91 Moreover, the Commission expressly stated in certain passages of the contested decision that the creation or strengthening of a dominant position for the merged entity on certain markets would substantially impede competition. In particular, the specific findings made in the contested decision on the immediate effects of the merger on the market for large regional jet aircraft engines suffice to establish that the strengthening of the applicant's dominant position on that market would result in effective competition being significantly impeded in the common market (see recital 428 et seq. of the contested decision).

B — *Pre-existing dominance on the market for large commercial jet aircraft engines*

1. *Introduction*

92 In the contested decision, the Commission held that prior to the merger the applicant was dominant on the market for large commercial jet aircraft engines, a finding which is disputed by the applicant. The Commission bases that conclusion, in essence, on (i) the size of the applicant's market share, aggregated for these purposes with that of the CFMI joint venture in which it participates with Snecma (recitals 45 to 83 of the contested decision), (ii) the commercial advantages deriving from the vertical integration of the manufacture of large commercial jet aircraft engines with the financial strength of GE Capital and the aircraft purchasing and

leasing activity of GECAS (recitals 107 to 145), (iii) an analysis of the state of competition on the market (recitals 163 to 170) and, lastly, (iv) the lack of competitive and commercial constraints from the applicant's competitors and customers (recitals 173 to 228). The applicant's pre-merger dominant position is a cornerstone of the Commission's analysis, since a number of the limbs of the reasoning in the contested decision, in particular those listed in the following paragraph, are based on it.

93 First, the vertical overlap resulting from the applicant's purchase of Honeywell's engine-starter manufacturing activities would lead, in the Commission's view, to the strengthening of the applicant's pre-merger dominance on the market for large commercial jet aircraft engines. Second, the Commission's analysis concerning the creation of a dominant position on the various markets for avionics and non-avionics products, as a result of the influence which the applicant can exercise through its subsidiaries, turns on the existence of its dominant position on the market for large commercial jet aircraft engines. Third, the opportunity for bundling, which the Commission claims would exist in the future, hinges on the existence of that dominant position and would lead, inter alia, to the strengthening of that position.

94 It is therefore necessary to review separately (i) the merits of the contested decision as regards the applicant's dominant position on the market for large commercial jet aircraft engines (in the present section) and (ii) the merits of the three limbs of the contested decision referred to in the previous paragraph (later on in the judgment).

2. *Arguments of the parties*

95 In the applicant's submission, the Commission was wrong to conclude that GE was, prior to the merger, dominant in the market for large commercial jet aircraft engines

(that is to say, aircraft with more than 100 seats, a range of more than 2 000 nautical miles and a cost in excess of USD 35 million). GE observes that a dominant position arises from the strength of an undertaking, which enables it to act independently on the market. The situation obtaining on the relevant market, as described in recent Commission decisions in the aeronautical sector, shows that GE is not in a position to act independently and that its main competitors, in particular Rolls-Royce and Pratt & Whitney ('P&W'), are not at risk of being foreclosed from the market. The Commission's entire analysis collapses owing to the absence of pre-merger dominance on the part of GE.

96 As regards the Commission's use of the market-share figures cited in the contested decision, the applicant submits that market shares are of limited utility in assessing dominance in a bidding market. As the Commission's practice in the aeronautical sector shows, the market for aircraft engines is a bidding market in which suppliers compete for infrequent high-value contracts. For each new aircraft platform, airframe manufacturers opt for one or several engines specially developed for that platform. Consequently, irrespective of past wins, each competitor with a product to offer has strong incentives to bid at the next round of competitions. Thus, historical market figures do not accurately reflect the actual competitive intensity that exists in the market, as is illustrated by the recent history of that industry. The applicant rejects the assessment that a 50% share of the market for large commercial jet aircraft engines is sufficient to establish dominance.

97 Second, the calculation of the applicant's market shares in the contested decision is artificial, since the Commission arbitrarily chose to use certain market share measurements rather than others. In particular, the Commission and Rolls-Royce err by basing their calculations on figures for engines on aircraft still in production, since such a definition not only excludes P&W engines on aircraft no longer in

production, but also takes no account of engine orders for aircraft not yet in service, the latter being the most important factor in the assessment of competition on the market.

98 The applicant also maintains that the Commission was wrong to add its relatively small market share to that of the CFMI 50/50 joint venture (recital 15 of the contested decision; see also recitals 45 and 46) formed by the applicant and the French undertaking Snecma. Furthermore, as the United States' Department of Justice has observed, GE's allegedly high market share is essentially accounted for by the fact that CFMI is the exclusive engine supplier for a single type of aircraft, the Boeing B737, the most successful commercial aircraft in aviation history. Therefore the Commission is wrong to attribute to the applicant all future revenue streams from that market share. Furthermore, the Commission cannot properly combine the market share of CFMI with its mixed bundling theory given that Snecma has no interest in approving a pricing strategy that would favour Honeywell products. Finally, the Commission's approach is at variance with the approach taken by the Commission in Decision No 2000/182/EC of 14 September 1999 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case IV/36.213/F2 — GEAE/P&W) (OJ 2000 L 58, p. 16; 'the Engine Alliance decision'), in which it treated the applicant and CFMI as separate undertakings.

99 Third and finally in relation to market shares, the importance of those historical market shares is overestimated by the Commission, which incorrectly takes the view that the applicant would be able to build on them in the future. In that regard, the applicant rejects the Commission's argument that airlines' fleets are being standardised, as a result of which those airlines tend to purchase their engines from a single engine manufacturer in order to reduce the costs associated with maintenance of their aircraft engines. GE states that commonality is very limited even within one engine family and that, in addition, the success of the CFM56 engine on the Boeing B737 produces no incentive to purchase the CF6 or GE90 engine families. The responses of airline companies to the Commission confirm that standardisation is a secondary factor in engine selection.

100 Furthermore, as regards the finding that the applicant could act independently on the relevant market, the applicant complains that the Commission has failed to cite any significant change in the aeronautical industry to explain why its findings in the contested decision directly contradict those which it made in 1999 in the Engine Alliance decision. The applicant has been a Fortune 500 company for decades and GECAS has been speculatively purchasing aircraft on a preferential basis since 1996 without competition being marginalised as a result.

101 The contested decision contains numerous examples which show that the applicant has not been able to act independently. The Commission acknowledges that alternative engine sources are often available on large commercial aircraft platforms, which enables customers to take advantage of competition. Hence, in order to obtain the contract to equip the Boeing B777X, the applicant was forced to grant substantial discounts, its engines having been less competitive than those of P&W or Rolls-Royce on the classic version of that platform. The applicant had to do the same for an airline with regard to the Airbus A330 in order to compensate for the poorer technical reputation of one of its engines compared to those of its rivals. As a result it had to develop a new engine. Such discounting, offered by all competitors, demonstrates that effective competition exists. The applicant invokes in that regard the judgment in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 71.

102 Furthermore, the applicant challenges the Commission's claims that before the merger it had a position of financial strength which enabled it to offer discounts, thereby leading to the foreclosure of its competitors. The Commission failed to show how those discounts reflected dominance or led to weakening or foreclosure of competitors.

103 As regards the role allegedly played by GECAS on the market for large commercial jet aircraft engines, the Commission's theory of 'share-shifting', advanced late in the procedure, is not credible in view of the small market share (less than 10%) held by

GECAS. In that regard, the applicant points out that another leasing company, ILFC, is a much larger purchaser of large commercial aircraft than GECAS. The Commission did not take into account the fact that other leasing companies offset GECAS' preference for GE or CFMI engines in order to take account of user preferences. By stating that it cannot 'replicate' GECAS, Rolls-Royce fails to respond to the argument that it and other competitors remain competitive despite the existence of GECAS.

104 That unorthodox theory is unsupported by the facts. The Commission and Rolls-Royce erroneously consider GECAS to be a launch customer and GECAS's alleged launch orders to have been decisive in the airframers' selection of GE engines. That conclusion disregards the evidence submitted by the airframers themselves (Bombardier, Embraer, BAe, Airbus, Fairchild Dornier and Boeing).

105 The only piece of factual evidence put forward by the Commission is based on the finding that GE's engine sales to leasing companies increased by 60% following the creation of GECAS, whereas the sale of those engines to airlines dropped by only 10%. However, that finding does not by itself show a change in GE's overall share in those markets: still less does it demonstrate the role played by GECAS in that regard.

106 The Commission also contradicts the findings in the Engine Alliance decision that P&W and Rolls-Royce were credible competitors and had the capacity to develop new engines. The applicant states that the Engine Alliance decision included an extensive investigation of the market for engines for large commercial aircraft and the Commission has never advanced any reasons to explain why it diverged from its assessment in that decision. Consequently, the Commission has failed to satisfy the requirement in *Europemballage and Continental Can* v *Commission*, cited at

paragraph 86 above, that in order to find that a dominant position exists, it must put forward legally sufficient reasons to support its finding that the remaining competitors are not in a position to provide a sufficient counterweight.

107 The Commission's analysis of the competition situation also contradicts certain of its recent decisions in the aeronautical sector, namely Commission Decision 2001/417/EC of 1 December 1999 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (Case COMP/M.1601 — AlliedSignal/Honeywell) (OJ 2001 L 152, p. 1; 'the AlliedSignal/Honeywell decision') and the Commission Decision of 11 May 2000 declaring a concentration to be compatible with the common market (Case COMP/M.1745 — EADS) (OJ 2000 C 307, p. 4; 'the EADS decision'), in which the Commission held that both airframers and airlines wielded significant buyer power. The mutual dependence of suppliers and buyers gives buyers a real countervailing power, which is an important factor for competition. In addition, the Commission had evidence, in particular statements by Airbus and IAE (the joint venture between P&W and Rolls-Royce), confirming that such buyer power existed. In that regard, the fact that the airframers did not oppose the merger is significant.

108 Furthermore, the Commission provides no data or evidence showing how, why and when Rolls-Royce, P&W and IAE would fail to compete effectively either at present or in the future. The principal factor determining the intensity of competition in the aircraft engine market is the credibility and vigour of those three companies. In response to the SO, the applicant submitted a report of expert consultants which established that neither GE, nor P&W, nor Rolls-Royce had the ability to operate independently of each other. Rolls-Royce merely submits that it does not have the applicant's financial strength but not that its own financial strength or access to capital is insufficient. Moreover, one expert, Professor Shapiro, confirmed that it is financially healthy. With regard to Rolls-Royce's argument concerning [...],[1] that factor is a sign of health.

1 — Confidential data omitted.

109 The only economic evidence substantiating the Commission's argument concerning the future demise of Rolls-Royce and P&W was Professor Choi's economic model, commissioned by Rolls-Royce through the consultancy Frontier Economics ('the Choi model'), which has, however, been abandoned by the Commission. Furthermore, the Commission has not refuted the analyses submitted by rival experts who reached the opposite conclusion. Moreover, neither Rolls-Royce nor P&W suggested in the course of the administrative procedure that they would leave the market following the merger.

110 The Commission refers to the definition of dominance in the case-law and contends that it rightly concluded that there was pre-merger dominance on the relevant market. It is supported in that regard by Rolls-Royce.

111 The Commission states that GE is by far the leading supplier of jet engines and displays the highest growth rate in the market. GE's relative advantage should increase still further in the light of order backlog figures.

112 What is more, the fact that a significant part of GE's market share results from a single platform, the B737, does not render it irrelevant for the assessment of GE's market power.

113 For the Commission and Rolls-Royce, the presence of discounts for the purchase of certain engines is not indicative of beneficial competition because the purchase price does not reflect the overall cost of engines, maintenance included. In particular, the example of the B777X is not an example of healthy competition but rather an illustration of the commercial means at GE's disposal, resulting in particular from the strength of GE Capital and GECAS, in comparison with its competitors.

3. *Findings of the Court*

(a) Preliminary observations

114 It is appropriate to observe *in limine* that, by virtue of settled case-law, a dominant position exists where the undertaking concerned is in a position of economic strength which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers (see, for example, Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 30; Case T-65/98 *Van den Bergh Foods* v *Commission* [2003] ECR II-4653, paragraph 154). It should be noted at the outset that, in order to establish that a dominant position exists, the Commission does not need to demonstrate that an undertaking's competitors will be foreclosed from the market, even in the longer term.

115 Furthermore, although the importance of market shares may vary from one market to another, very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position (*Hoffmann-La Roche* v *Commission*, paragraph 101 above, paragraph 41; Case T-221/95 *Endemol* v *Commission* [1999] ECR II-1299, paragraph 134). The Court of Justice held in its judgment in Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 60, that that was so in the case of a 50% market share.

116 Furthermore, as the applicant has stated, it is clear from the judgment in *Hoffmann-La Roche* v *Commission*, paragraph 101 above (paragraph 71), that the fact that an undertaking is compelled by the pressure of its competitors' price reductions to lower its own prices is in general incompatible with that independent conduct which is the hallmark of a dominant position.

117 However, even the existence of lively competition on a particular market does not rule out the possibility that there is a dominant position on that market, since the predominant feature of such a position is the ability of the undertaking concerned to act without having to take account of this competition in its market strategy and without for that reason suffering detrimental effects from such behaviour (*Hoffmann-La Roche* v *Commission*, paragraph 101 above, paragraph 70, and Case 27/76 *United Brands* v *Commission* [1978] ECR 207). Thus, the fact that there may be competition on the market is indeed among the relevant factors for the purposes of ascertaining whether a dominant position exists, but it is not in itself a decisive factor in that regard.

118 In that connection, when the Commission takes a decision on the compatibility of a concentration with the common market on the basis of a notification and a file pertaining to that transaction, an applicant is not entitled to call the Commission's findings into question on the ground that they differ from those made previously in a different case, on the basis of a different notification and a different file, even where the markets at issue in the two cases are similar, or even identical. Thus, in so far as the applicant relies in this instance on assessments made by the Commission in its previous decisions, in particular in the Engine Alliance decision, those parts of its arguments are irrelevant.

119 Even supposing that those complaints could be classified instead as allegations of an infringement of the principle of the protection of legitimate expectations, economic operators have no grounds for a legitimate expectation that a previous practice in taking decisions that is capable of being varied will be maintained (see, to that effect, Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 368; and Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraphs 254 to 255, 292 and 293). A fortiori, they cannot plead such an expectation to challenge findings or assessments made in a given set of proceedings by invoking findings or assessments made in the context of just one previous case.

120 In any event, neither the Commission nor, a fortiori, the Court of First Instance is bound in this instance by the findings of fact or economic assessments in the Engine Alliance decision. Even supposing that the analysis in the two decisions differs without any objective justification for that difference, the Court ought to annul the contested decision here only if satisfied that that decision, as opposed to the Engine Alliance decision, is vitiated by error.

121 Next, a distinction must be drawn, when considering the lawfulness of the Commission's assessment of pre-merger dominance, between (i) the material accuracy of the facts found and (ii) the legal classification of those facts, its being remembered that the Commission enjoys a margin of assessment in determining whether, on the basis of duly established facts, it could properly conclude that an undertaking was dominant on a particular market (see paragraph 60 et seq. above).

122 In the present case the Commission provided reasons for its conclusion as to GE's pre-merger dominance on the market for large commercial jet aircraft engines, first, by reference to its market share (see recitals 38 to 83 of the contested decision) and, second, by reference to a number of other factors (recitals 107 to 229 of the contested decision). The applicant does not challenge the Commission's definition in the contested decision of the worldwide market for jet engines for those aircraft (see recital 10 of the contested decision and paragraph 95 above). Instead it submits that the Commission wrongly considers it to have been dominant on the market for large commercial jet aircraft engines prior to the merger.

123 It is therefore necessary to examine the evidence on which the Commission relied in the contested decision in order to substantiate its conclusion on the dominant position in question, in the light of the arguments put forward by the applicant to refute that conclusion. The Court will examine (i) the factors relating to the

applicant's market share, (ii) the factors relating to the applicant's vertical integration and (iii) the factors relating to the state of competition on the market for large commercial jet aircraft engines.

(b) Market shares

124 The Commission sets out, at recital 41 of the contested decision, the reasons why 'the installed base and the order backlog of aircraft still in production is the best proxy to measure and to interpret the position of competitors in this industry'. It also states that the applicant and CFMI should be regarded as a single entity for both commercial and competitive purposes and that in those circumstances it was appropriate to attribute all of CFMI's market share to GE when assessing GE's dominance (recitals 65 and 66 of the contested decision).

125 Thus, at recital 70 of the contested decision, the Commission states that GE/CFMI's market share for the installed base of engines on large commercial aircraft still in production is 51% for narrow-body aircraft, 54% for wide-body aircraft and 52.5% overall, whilst P&W/IAE have 26.5% and Rolls-Royce/IAE have 21%. It also explains at recitals 74 to 76 of the contested decision that the evolution of the installed base has been favourable to GE over the last five years. As to the order backlog for aircraft still in production, the Commission sets out a table, at recital 77 of the contested decision, from which it appears that, by this criterion, the applicant had a 65% market share using that measurement.

126 It is therefore necessary to consider, first, whether the Commission could properly attribute CFMI's market share to the applicant and, second, whether its other findings relating to market share, and the conclusions which it drew from them, were well founded.

Attribution of CFMI's market share to the applicant

— Introduction

127 The applicant complains that the Commission has aggregated the applicant's own market share with all of CFMI's share (see recitals 46 to 66 of the contested decision).

128 The applicant states, in that regard, that its own market share was only [...]% and that of CFMI [...]% (figures based on the order backlog in 2000) and that if the Commission had attributed half the joint venture's share to it instead of its entire share, as it did in the case of the joint venture of its competitors Rolls-Royce and P&W, its market share would have been [...]%, well under the 40% level.

129 Given that the Commission concluded, at recitals 65 and 66 of the contested decision, that GE and CFMI 'should be viewed as a single entity for both commercial and competitive purposes' and that it was therefore appropriate to attribute CFMI's market share to GE when assessing its position on the relevant markets, it is necessary to examine, first, whether the Commission's findings concerning the internal organisation of the joint venture warranted the conclusion that those undertakings constituted a single entity 'for commercial purposes' and, second, whether its findings with regard to the conduct of GE, CFMI and Snecma on the market warranted the conclusion that GE and CFMI constituted a single entity 'for competitive purposes'.

130 It should be observed on this point that the correctness of the assertions in the contested decision concerning the operation of the CFMI joint venture, the relations between its shareholders and its behaviour on the market are questions of fact, whilst the question as to whether CFMI's market share could properly be attributed to the applicant fell within the Commission's margin of assessment.

— Analysis of CFMI's internal organisation

131 The Commission states that the way in which the joint venture is organised as regards the technological and financial division (recitals 53 to 55 of the contested decision) and the sales and marketing of CFMI engines (recitals 57 and 58) indicates that GE plays the leading role within the joint venture.

132 The applicant challenges that analysis and submits, in particular, that the Commission's argument, set out at recital 82 of the contested decision, that it is likely that CFMI's revenue will be re-invested in the development of new engines lacks a factual basis, in particular since CFMI does not retain funds to invest them in the development of future engines but instead regularly distributes its profits to GE and Snecma.

133 The Commission does not dispute that assertion, made by the applicant before the Court, and it must be held that the Commission made an error of fact in that regard in the contested decision. That error is relevant for the present purposes since it underlines that the relationship between GE and Snecma in their joint venture CFMI is one of interdependence, whereas the Commission contends that the applicant's influence is predominant. Given that CFMI's revenue is distributed to its

shareholders, CFMI's capacity to develop is dependent on the decisions jointly taken by its shareholders.

134 It is also appropriate to note that the Commission itself accepts, at recital 56 of the contested decision, that the President and Chief Executive Officer of CFMI has in practice always come from Snecma. The description in the contested decision of those aspects of the operation of CFMI indicates that, although the involvement of each of the partners in the operation of CFMI may not strictly reflect the 50/50 division of shares in all domains, CFMI is truly a joint venture and not a quasi-subsidiary of the applicant.

135 In that connection, the Commission was right to point out in the contested decision that commercial cooperation between the applicant and Snecma within CFMI was very close and that the same was true of commercial cooperation between the applicant and CFMI, in particular in relation to the marketing of CFMI engines (recitals 57 and 58 of the contested decision). It would be very difficult for Snecma to maintain a presence on the market for jet engines for large commercial aircraft other than through its current holding in the joint venture. Furthermore, it is apparent from the contested decision's analysis of how CFMI operates that any increase in CFMI's market share was always in the commercial interests of GE and Snecma, a finding which the applicant did not challenge before the Court. Thus, the factual error described at paragraph 133 above and the finding concerning the person appointed as President and Chief Executive Officer of CFMI are considerably tempered by the high degree of commercial integration which in fact existed as between CFMI and its shareholders.

136 Nevertheless, since CFMI'S other shareholder, Snecma, an undertaking independent of the applicant, also plays a significant role in CFMI's management and receives a proportion of its revenue, CFMI remains outside the GE group and cannot be regarded as wholly subsumed within the applicant's undertaking. In the light of the foregoing, it must be held that the Commission to some extent overstated the role

played by the applicant within the CFMI joint venture when finding that the latter, together with the applicant, formed a single entity for commercial purposes.

— Analysis of the competitive positions of GE, CFMI and Snecma

137 The Commission found, in the contested decision, and has not been challenged by the applicant on this point, that Snecma does not currently supply large commercial jet aircraft engines independently of CFMI, that it is not likely to do so even in the future and that CFMI's and GE's engines do not compete with each other (recitals 50 to 52 and 59 to 61 of the contested decision).

138 Moreover, the Commission stated at recital 64, and the applicant has not disputed, that under its preferential 'GE-only' purchasing policy, examined in detail at paragraph 191 et seq. below, GE's subsidiary, GECAS, whenever possible, purchases solely GE and CFMI engines (recital 121 et seq. of the contested decision, in particular recital 132). The fact that GECAS treats CFMI engines in the same way as GE engines lends support to the Commission's case.

139 Finally, the Commission points out, without being contradicted by the applicant, that GE has itself aggregated its market share with that of CFMI in its annual reports since 1995 and that leading financial analysts do the same (recital 65 of the contested decision and footnotes 22 and 23 thereof).

140 On the basis of those findings of fact, which have not been disputed in these proceedings, the Commission was entitled, without making a manifest error, to conclude that the applicant and CFMI acted as a single entity on the market with regard to their competitors and their customers.

— Summary and conclusion on the attribution of CFMI's market share to the applicant

141 It is appropriate to observe, first of all, that the attribution of CFMI's market share to the applicant was made principally in the course of assessing whether there was dominance in the market for large commercial jet aircraft engines, and only secondarily in the assessment of other aspects of the merger, such as conglomerate effects.

142 In so far as that attribution is used in the assessment of dominance, it forms part of an analysis intended to establish the structure of competition on the market rather than identify other aspects of the commercial relationships between the undertakings on that market.

143 For the purposes of that specific exercise, the Commission's conclusion that CFMI and the applicant form a single entity for competitive purposes (see paragraph 129 above) is of prime importance. By contrast, the precise nature of the internal relationship between CFMI's shareholders and their degree of commercial integration are of only secondary importance in the general scheme of that part of the contested decision, in particular since the Commission's finding of a high degree of integration between the applicant and CFMI remains substantially correct.

144 Furthermore, the applicant's suggested method of assessing market share, which is to regard half of CFMI's share, namely [...]% of the market, as not attributable to GE, would give a false impression of GE's position on the market. Conversely, the Commission's attribution of CFMI's market share to GE on the ground that, unlike

its partner Snecma, GE is also an independent manufacturer of jet engines for large commercial aircraft reflects the competitive realities of the market, which have been correctly stated in the contested decision.

145 In any event, in treating the market share of the joint venture IAE (in which the applicant's competitors Rolls-Royce and P&W have a holding) in analogous fashion, ascribing half of IAE's market share to each of Rolls-Royce and P&W on the ground that they are the only shareholders of IAE which are independent suppliers of jet engines on the market (recital 67 of the contested decision), the Commission's approach to the attribution of the market share of joint ventures is consistent and does not appear manifestly erroneous.

146 In those circumstances, neither the error of fact mentioned above concerning the treatment of CFMI's revenue (paragraph 133 above) nor the relative overstatement of the applicant's role in the management of CFMI (paragraph 134 above), taken together or in isolation, is such as to call into question the Commission's statement that the applicant and CFMI must be regarded as a single entity. Consequently, in the light of all of the foregoing, it is not established that the Commission made a manifest error of assessment of the facts of the present case when it decided, with regard to both the installed base and the order backlog, to attribute CFMI's market share to the applicant for the purposes of its broader assessment of whether the applicant was dominant on the market for jet engines for large commercial aircraft.

147 However, in so far as that attribution of market share is relevant to other aspects of the case, the applicant is right to point out that Snecma has no interest in making financial sacrifices in order to allow the merged entity to promote Honeywell's avionics products and non-avionics products. That argument will be taken into account in the examination below of the sections of the contested decision dealing with those other aspects of the case, in particular those relating to conglomerate effects. Indeed, in so far as the circumstance thus noted by the applicant is capable of having an impact on the economic and competition analysis of those other aspects

of the case, the Commission was required to take it into account (see, in particular, the analysis of the 'Cournot effect' at recital 374 et seq. of the contested decision).

The market shares relied on by the Commission in assessing the power of the manufacturers on the market for large commercial jet aircraft engines

— Considerations concerning the nature of the market for large commercial jet aircraft engines

148 The applicant maintains that it was inappropriate in the contested decision to rely on market share to establish dominance in the market for large commercial jet aircraft engines because of the very nature of the market, which is a bidding market.

149 The Court holds that market shares as at a given date are less significant for the analysis of a market such as the market for jet engines for large commercial aircraft than, for example, for the analysis of a market for everyday consumer goods. Although not formally accepting that the market for large commercial jet aircraft engines is a 'bidding market', the Commission accepted before the Court that one characteristic of the market is the award of a limited number of high-value contracts. On such a market the fact that a particular company has had a number of recent 'wins' does not necessarily mean that one of its competitors will not be successful in the next competition. Provided that it has a competitive product and

that other factors are not heavily weighted in the first company's favour, a competitor can always win a valuable contract and increase its market share considerably at one go.

150 However, such a finding does not mean that market shares are of virtually no value in assessing the strength of the various manufacturers on a market of that kind, especially where those shares remain relatively stable or reveal that one undertaking is tending to strengthen its position. In this instance, the Commission rightly inferred from the figures set out in the contested decision and referred to at paragraph 125 above that, over the five-year period preceding the contested decision, 'GE has not only succeeded in maintaining its leading supplier position, but has also displayed the highest market share growth rate' (recital 74 in the contested decision).

151 Even on a bidding market, the fact of a manufacturer maintaining, or even increasing, its market share over a number of years in succession is an indication of market strength. A time must come when the difference between one manufacturer's market share and that of its competitors can no longer be dismissed as a function of the limited number of competitions that constitute demand on the market. Consequently, the upwards trend represented by the recent increase in GE's market share is a particularly convincing element of the Commission's analysis and there are no grounds for holding that the Commission made a manifest error of assessment.

— Considerations relating to aftermarket services

152 The Commission found that engine manufacturers are increasingly recouping their investment by the supply of aftermarket services and the sale of spare parts, rather

than through the profit margins initially made on the sale of the engine (recitals 79 to 82 and 90 to 106 of the contested decision). That finding of fact by the Commission, which the applicant does not challenge and which is even based on the statements of the parties themselves (recitals 39 and 95), suffices to establish that an engine manufacturer's current revenue hinges to a large extent on its past sales.

153 The applicant is admittedly right in stating that, in so far as a large part of the market share attributed to it relates to sales of CFMI engines, the revenue accruing to it from those sales is less than if the sales were directly attributable to it (see paragraph 147 above). For that reason, the financial strength which the applicant derives from its market share measured in terms of the installed base of jet engines is less significant than appears from the raw figure for market share adopted by the Commission in the contested decision. Nevertheless, since Snecma and the applicant both have an interest in ensuring CFMI's future success, the proportion of CFMI's revenue which is distributed to Snecma should not be entirely left out of account. Finally, that line of argument has no bearing on the applicant's high market share measured in terms of the order backlog, particularly in light of the fact, noted at paragraph 140 above, that CFMI and the applicant form a single entity for competitive purposes vis-à-vis third parties, competitors and customers.

154 The Commission also states, at paragraph 104 of the contested decision, without being contradicted in this respect by the applicant, that GE provides aftermarket services for engines on its competitors' products to a greater extent than its competitors do. Given the importance (noted above) of the revenue stream from aftermarket services, that factor is significant because it follows from it that GE's market share for the installed base of engines under-estimates, to some extent, its power on the market for large commercial jet aircraft engines at the aftermarket level.

— Considerations relating to the notion of 'commonality' on the market for large commercial jet aircraft engines

155 The Commission also puts forward the idea of 'commonality', by virtue of which, in substance, if an airline equips all the aircraft in its fleet with the same engine type, or at least the same engine series, economies can be made (recitals 41 and 146 to 162 of the contested decision). It states in that regard that '... benefits from engine commonality arise from different levels of an airline's activities and as such constitute an undeniable factor that operators take into account when placing aircraft orders' (recital 161 of the contested decision).

156 It must be held that these benefits underline the advantage which an engine manufacturer can derive from its incumbent position on a large number of platforms, or on platforms in respect of which engine sales are high, with regard to further sales of those same engines in the future. The size of that advantage for an engine manufacturer is necessarily related to the installed base of its engines, particularly on aircraft which are still in production. Commonality is thus a particularly relevant aspect of the Commission's analysis and justifies the use of figures relating to the applicant's market share for the purpose of establishing its commercial strength. However, the applicant questions the reality of the benefits to which commonality gives rise (paragraph 99 above).

157 In its analysis of GECAS's role, at recital 135 of the contested decision, the Commission cited a passage from GE's 1999 Annual Report, according to which '... we [GECAS] made significant progress on our commitment to help our customers meet their fleet and balance sheet objectives. For example, at China Eastern, one of the largest Chinese airlines, GECAS helped the airline reduce its short-term capacity, standardise its fleet around CFM[I]-powered Airbus narrow-bodies and generate hard currency'. That example is a relevant and telling indication that

engine commonality can in reality have positive effects. In its report, the applicant appears to take it for granted that standardising its fleet has certain financial advantages for an airline.

158 Contrary to the applicant's submission, most of the answers received from the airlines on this issue are not at variance with the Commission's argument (paragraph 99 above, last sentence).

159 Lufthansa states that the effect of commonality is negligible in its case because its engines are maintained by third parties but it notes that commonality within a fleet is important for operational reasons. United Airlines states plainly that commonality is one of the important factors when it selects engines and Alitalia recognises that average total cost can be reduced as a result of purchasing the same type of engines because of the reduction in maintenance costs, even though certain other benefits may arise from having a mixed fleet. US Airways confirms that it tries to ensure commonality in its fleet but that in the past it selected its engines by reference to other factors and that, as a consequence, commonality in its current fleet is low and does not at the moment have a very significant impact on its selection of engines. In Iberia's view, it cannot be said in general terms that commonality is a decisive factor since, if the choice of an engine is clear in economic, technical and financial terms and in terms of risk assessment, commonality is not an important factor. However, it confirms that, all other things being equal, it appreciates the advantages of engine commonality. Finally British Airways' response, annexed to the application, concerns exclusively avionics products but in general lends support to the idea that standardisation of equipment allows economies to be made. Thus, it does not follow from reading the responses referred to by the applicant that engine commonality within a fleet has no bearing on an airline's choice of engines.

160 It must also be noted that in the contested decision the Commission put forward, in particular at recitals 154 and 155, a number of specific instances in which airlines expressly chose one engine over another on the ground that the first type of engine was already used in its fleet. It has not been alleged, far less established, that those instances did not occur and they must therefore be held to substantiate the Commission's case.

161 It must be emphasised that the Commission did not assert in the contested decision that commonality is always decisive in the choice of an engine, since it states, at recital 148, that '[w]hile engine commonality is only one factor that aircraft operators take into account when purchasing aircraft, the Commission's investigation has indicated that the organisation of the airline's maintenance activities is an important element that will influence an airline when making engine purchase decisions'. To that extent, the Commission did not make an error of fact in holding that there are benefits arising from commonality in a fleet, at least within one engine family, and that they may encourage, as a general rule, purchases by airlines of engines which they already use in their fleets in preference to engines which they have never purchased before. Nor did the Commission make a manifest error of assessment in concluding that this phenomenon is another factor contributing to GE's dominance.

— The measure of market share used by the Commission in assessing the applicant's strength on the market for large commercial jet aircraft engines

162 The Commission excluded from its analysis of the applicant's market share, in terms of the installed base, aircraft which are no longer in production on the ground that they 'constitute a less significant source of revenue for engine suppliers than aircraft still in production' (recital 42 of the contested decision). It observes, in particular, which the applicant has not denied, that older engines are less complex than modern engines, that they therefore generate less aftermarket revenue and that they are

being progressively phased out of airlines' fleets. In the light of that explanation, the Commission did not make a manifest error of assessment in deciding not to take into account that part of the installed base, for the purpose of assessing the current strength of the various manufacturers on the market for large commercial jet aircraft engines.

163 As regards the figures for the order backlog, the applicant observes that the Commission did not take account, in relation to large commercial aircraft, of orders for aircraft which are not yet in service, whereas it did take them into account for large regional aircraft (recital 85 of the contested decision). The applicant refers in that regard to a table in Annex 8 to its application ('GE's and Honeywell's slides presentation at oral hearing', file 8/14, tab 3, table on the ninth page entitled 'Backlog of Engine Sales for Aircraft not Yet in Service'), according to which orders for aircraft not yet in service show a market share of 38% for GE, 21% for P&W and 40% for Rolls-Royce.

164 First, regarding the fact, to which the applicant refers, that figures relating to the order backlog for aircraft not yet in service were relied on by the Commission in assessing the situation on the market for jet engines for large regional aircraft, the Court notes that the applicant did not challenge their use in that context and that it is therefore unnecessary to consider whether their use was appropriate in relation to that market (paragraph 540 below). In any event, the fact that those figures were taken into account can be justified in relation to the market for jet engines for large regional aircraft by the rapid growth in that market, referred to at paragraph 552 below, which is not the case of the market for jet engines for large commercial aircraft for the reasons explained at paragraph 165 et seq. below. Thus, the fact that the order backlog for aircraft not yet in service was treated differently on those two markets is not indicative of any contradiction in the Commission's approach and still less of a manifest error of assessment on its part.

165 It is clear from the information provided by the two main parties at the hearing that the figures in the table mentioned at paragraph 163 above and those in the table at recital 77 of the contested decision concerning the engine order backlog on large commercial aircraft still in production both relate to the total numbers of engines. From this it can be seen that the number of engines ordered for aircraft not yet in service, 936 according to the applicant's table, is very low in comparison with the number of engines ordered for aircraft still in production (5 466). Thus, the fact that Rolls-Royce has slightly more orders than the applicant for aircraft not yet in service has only a marginal impact on the assessment of the competition between them if all the orders are taken into account.

166 If the table mentioned at paragraph 163 above and the table at recital 77 of the contested decision are combined, the applicant's share of the order backlog is 60.9% (3542 + 360 = 3902 engines ordered), P&W's share is 17.0% (887 + 200 = 1087 engines ordered) and Rolls-Royce's share is 22.1% (1037 + 376 = 1413 engines ordered).

167 It must be held that the figures produced when the two tables are combined are sufficiently close to those on which the Commission relies at recital 77 of the contested decision for the conclusion to be drawn that the marginal difference between the figures does not affect the Commission's finding that the applicant's market share in terms of engines ordered (order backlog) was indicative of a dominant position.

168 In addition, the Commission contended at the hearing, in response to a written question put by the Court, that the figures for aircraft not yet in service do not give a representative or reliable picture of the state of competition on the market. In that regard, it should be noted, as regards multi-source platforms (large commercial aircraft on which two or more different engines have been certified by the airframe manufacturer) not yet in service, that, since the final selection of the engine is made by the airline, the provisional market shares of the various manufacturers of engines

certified for that platform may subsequently change quite considerably if the platform is at an early stage in its marketing cycle. Unlike corporate aircraft or large regional aircraft, which are always single-sourced in that just one engine type is certified for each platform, large commercial aircraft can be single-sourced or multi-sourced.

169 The Commission observed, on that point, that the table mentioned at paragraph 163 above (which the applicant cited in respect of engines for the A318-100), showed P&W's market share as 69% (200 out of 290 orders), whereas it is now no more than [...]%, whilst the applicant's share in the same period has moved to [...]%. Moreover, the Commission maintains that Rolls-Royce's market share of [...]% of orders for the A380, as shown in the table, does not reflect the subsequent evolution of the market given that the applicant's share of orders in respect of that aircraft was allegedly [...]% as at March 2004. The Court finds that although those figures have no direct impact on the analysis in the contested decision since they relate to a period after it was adopted, they support the Commission's contention that it was not appropriate for it to take into account the order backlog in respect of large commercial jet aircraft not yet in service.

170 The applicant did not challenge the veracity of those examples in its response to that argument. It merely stated that [...] for the A318-100 [...], which explained the fall in its market share on the platform concerned, and that the Commission had used selective figures in this context, given, in particular, that 'Rolls-Royce's market share had risen from [...]% to [...]% in March 2004'. The applicant did not specify to which engines the cited figure of [...]% related. On the assumption that it relates to engine orders for aircraft not yet in production at the date of the hearing (which seems to be the case in view of the context), it does not undermine the Commission's case since the point which is clear from the examples which the Commission gave at the hearing is that figures relating to an engine manufacturer's provisional market share in terms of the equipping of a multi-sourced platform are, as a general rule, relatively unreliable in that they are likely to change dramatically at a later stage.

171 As to [...] for the A318-100, that argument, put forward by the applicant, lends support, by way of example, to the Commission's proposition that figures based on the order backlog for multi-sourced aircraft not yet on the market are liable to give a false picture of the ultimate relative strengths of the engine manufacturers on that market. Thus, in the light of the purpose for which the Commission cited the examples in question (to explain why orders for future platforms were not taken into account), the applicant's counter-arguments do not undermine the reasoning set out in the previous paragraph.

172 In the light of all the foregoing, it must be held that the Commission's analysis was not distorted by the fact that it did not take account, in the contested decision, of firm orders in respect of aircraft which had not yet come into service and that it did not therefore make a manifest error of assessment in that regard by virtue of having excluded those figures from its calculations.

— The treatment of the Boeing 737

173 The applicant also advances an argument concerning specifically the Boeing 737. It submits that, as the United States Department of Justice noted, GE's high market share is essentially attributable to the fact that CFMI is the sole engine supplier for just one aircraft, i.e. the second and third generation Boeing B737, the most successful commercial aircraft in civil aviation history.

174 In substance, the applicant's argument reiterates its more general claim, examined above, that market shares are irrelevant in the assessment of the state of competition on a bidding market. However, for all the reasons set out above and in the light, in particular, of the fact that the installed base of engines made by an engine

manufacturer has a bearing on its current and future revenue, the direct and indirect effects of a commercial success on such a market subsist notwithstanding the passage of a considerable period of time.

175 GE's supply of the engine for the B737 can therefore be regarded as relevant here because it increases the applicant's market share and enables it to continue to benefit from additional revenue streams and from the positive commercial effects which incumbent engine manufacturers derive from the advantages for airlines of standardising their fleets.

176 The applicant contended at the hearing that Professor Vives, the economist appointed by the Commission to advise its officials during the administrative procedure, had, in an e-mail produced by the Commission on 26 April 2004 in response to a written question put by the Court, described the fact that the applicant had won the contracts relating to equipping the B737 as '... more a case of luck (with tremendous impact) than a case of market share inertia'. Professor Vives had no special status in the administrative procedure and the fact that he expressed a point of view which might be regarded as incompatible with the position finally adopted by the Commission in the contested decision does not cast doubt on the validity of the decision. On the contrary, that fact shows that the Commission was willing to listen to different points of view.

177 In any event, the Commission does not assert in the contested decision that the applicant was in a dominant position at the time when the contracts in question were awarded in the early 1980s and 1990s. What is relevant for the present purposes is the fact that its past commercial success continues in itself to have an impact on the applicant's current competitive position, as has been described above.

178 Although the applicant's success in the bid to equip the B737 'distorts' the figures relating to the market shares of the various engine manufacturers inasmuch as it significantly boosts the applicant's market share, the Commission could properly take the view that the applicant's large market share, which in part resulted from that success, was liable to alter the state of competition on the market itself in a way favourable to the applicant. Moreover, if the Commission had excluded the bid won by the applicant, which represented the biggest commercial success on the market in question, that could undoubtedly have distorted its analysis.

179 The fact, put forward by the applicant, that the United States Department of Justice apparently took the view that it was appropriate to exclude sales of engines accounted for by sales of the B737 when assessing the applicant's strength in this sector is irrelevant for the purposes of these proceedings. That the competent authorities of one or more non-member States determine an issue in a particular way for the purposes of their own proceedings does not suffice per se to undermine a different determination by the competent Community authorities. The matters and arguments advanced in the administrative procedure at Community level — and the applicable legal rules — are not necessarily the same as those taken into account by the authorities of the non-member States in question and the determinations made on either side may be different as a result. If one party considers the reasoning underpinning the conclusion of the authorities of a non-member State to be particularly relevant and equally applicable to a Community procedure, it can always raise it as a substantive argument, as the applicant has done in this instance; but such reasoning cannot be conclusive.

180 In the light of the foregoing, the Commission did not make a manifest error of assessment in taking into account engine sales for the B737.

Conclusion on market shares

181 The Court must conclude, taking account of the foregoing analysis, that the facts relied on by the Commission in its analysis of the applicant's market share are in

essence established. The Commission did not make a manifest error of assessment in holding that the applicant's market share could, in the circumstances of this case, be indicative of pre-merger dominance on the market for large commercial jet aircraft engines. It should also be recalled that in the contested decision the Commission based its conclusion that the applicant had a dominant position prior to the merger on other factors, and those factors are considered below.

(c) Vertical integration — GE Capital and GECAS

Introduction

182 In its analysis of GE's position on the market for large commercial jet aircraft engines, the Commission, in concluding that there was dominance, also relies in the contested decision on the financial and commercial strength of two of GE's subsidiaries, GE Capital and GECAS. At recitals 107 to 120, the Commission sets out the reasons why it takes the view that GE Capital's financial power strengthens the applicant's dominant position and, at recitals 121 to 139, it sets out the reasons why it is of the view that the existence of GECAS and its commercial strategy also contribute to GE's dominance. Then, at recitals 140 to 145, the Commission states that it would be impossible for the applicant's competitors to replicate strength comparable to that of GECAS. Finally, at recitals 163 to 172, under the heading 'GE's dominance', the Commission also puts forward a number of examples and other matters relating to the influence of GE Capital and GECAS.

183 The applicant criticises that analysis, maintaining inter alia that it is unorthodox, in particular in so far as, with regard to GECAS, it is founded on the alleged exercise of

market power as a buyer by a player whose share of purchases is less than 10% (paragraphs 103 and 104 above). The Commission's theory is not founded on an economic analysis capable of substantiating it. Inasmuch as the Commission puts forward certain examples in support of its theory, the applicant submits that the actions taken by its subsidiaries with the aim of promoting its engines are indicative of fierce competition.

184 It must be borne in mind that the fact that there is a degree of competition on a market does not preclude there being a dominant position on the same market (*Hoffmann-La Roche* v *Commission*, paragraph 101 above, paragraphs 39 and 70; and *United Brands* v *Commission*, paragraph 117 above, paragraph 113). Here, the Commission indeed found that there was competition between the different manufacturers of engines for large commercial aircraft. However, it also found that, unlike its competitors, the applicant had means at its disposal, through its subsidiaries, which allowed it to exercise dominance in particular cases by winning contracts which it would not necessarily have been able to win solely on the basis of technical and price competition. Thus, the fact that there were competing bids, a fact to which the applicant refers, is not incompatible with the Commission's case as to the relevance of those other means of exercising influence.

185 Nevertheless, the mere existence of GE Capital and the fact that the GE Group enjoys AAA credit rating (recital 142 of the contested decision) are not factors which are indicative per se of the applicant's dominance on the market for large commercial jet aircraft engines. The applicant rightly states in that regard that competition law does not impose penalties on undertakings merely on account of their size or their financial resources.

186 Similarly, the fact that GECAS is active in the purchase, financing and leasing of large commercial aircraft is not in itself harmful to competition. The mere fact that

an undertaking, through one of its subsidiaries — in this instance GECAS — is one of the main customers of its own customers, in this instance Boeing and Airbus, is not sufficient to give it market power amounting to dominance.

187 However, it must be noted that in the contested decision the Commission does not rely on an economic argument to the effect that a purchaser of engines with an 8 to 10% share of all purchases has, for that reason alone, economic power enabling it to eliminate one or more engine manufacturers on that market. Nor does it assert that the fact that one of the manufacturers of jet engines for large commercial aircraft is more financially powerful than its rivals means in itself that they can be ousted by that manufacturer. Indeed, it does not even assert that the combination of those two factors produces that end result in a situation where the aircraft purchaser and the engine manufacturer are within the same corporate group.

188 By contrast, the Commission contended, in its analysis of the applicant's pre-merger dominance, that the applicant makes 'strategic' use of its subsidiaries' financial strength in order to increase the strength it already has on the market for jet engines as a result of its volume of sales. It is clear from the contested decision that that finding is founded, as regards large commercial jet aircraft engines, not on an economic analysis of whether such behaviour was both effective and objectively in the applicant's commercial interests but rather on factual information gathered during the administrative procedure, which indicates that such behaviour was actually engaged in and that in practice it furthers sales of the applicant's engines over those of its competitors.

189 The Commission concluded from its finding of strategic behaviour that the applicant's vertical integration with its subsidiaries, GE Capital and GECAS, contributed to its pre-merger dominance on the market for jet engines and, in particular, on the market for jet engines for large commercial aircraft (see, respectively, recital 107 et seq. and recital 121 et seq. of the contested decision).

190 It is the task of the Court to ascertain against that background whether the Commission made errors of fact in its findings of strategic behaviour, as described above, and, further, whether it made a manifest error of assessment when it concluded that that behaviour contributed to the applicant's pre-merger dominance on the market for jet engines for large commercial aircraft. The two issues are closely linked, in particular as regards the specific examples cited, and will be examined together below in the analysis of (i) GECAS's commercial influence, (ii) GE Capital's financial strength, (iii) considerations relating to the exercise by GECAS and GE Capital of their influence on GE's customers and (iv) considerations relating to the figures concerning the changes in the applicant's market share following the creation of GECAS within its group.

GECAS's commercial influence

— GECAS's 'GE-only' policy

191 It is not disputed that GECAS has a 'GE-only' purchasing policy consisting in buying exclusively GE-powered aircraft. The only exception to that strategy is the purchase of eight B757s (out of 1 040 aircraft, see recitals 122 and 132 of the contested decision), an aircraft for which GE has no engine on offer. As a consequence, aircraft powered by engines of the applicant or the joint venture, CFMI, form more than 99% of the GECAS fleet.

192 The applicant submits that the Commission has no grounds for holding that this factor contributes to its dominant position. In that regard, the applicant refers to a report by Lexecon appended to its application, according to which it is not surprising that a leasing company integrated with an engine manufacturer should purchase the latter's engines because (i) to do otherwise could give the impression

that the group lacked confidence in its own engines, (ii) certain costs related to the purchase will be lower and (iii) it is difficult for a leasing company to obtain competitive terms from undertakings in direct competition with a company forming part of its own group.

193 It should be noted in that regard that, in order to establish that its case regarding the effect of GECAS's behaviour on the market for large commercial jet aircraft engines is well founded, the Commission is not required to show that GECAS's behaviour in that regard is not natural, nor even to demonstrate that the applicant's objective in entering the leasing market was to promote sales of its own engines. If it is established that GECAS's exclusive purchasing policy furthers the sale of the applicant's engines on the market, that finding is sufficient for the Commission legitimately to have treated that factor as contributing to the applicant's dominance. It follows that the argument to the effect that GECAS's behaviour is natural is irrelevant in the present case.

194 In any event, the arguments referred to at paragraph 192 above are not particularly persuasive since the fact that GECAS only enters into transactions involving the applicant's engines must represent a certain commercial disadvantage for it. For any purchaser voluntarily to limit its sources of supply as a matter of principle rather than by reference to objective commercial criteria necessarily imposes a cost on it, other than in exceptional cases where the products to which it limits itself are consistently better and cheaper than the alternatives. Conversely, the alleged disadvantages, to which the applicant refers, of GECAS's adoption of a neutral purchasing policy are vague and speculative, particularly inasmuch as they are, in essence, based on the commercial approach which would be adopted by third-party operators in the event that GECAS were to adopt such a policy.

195 Since those arguments can therefore be discounted, if the applicant's contention that GECAS's preferential policy does not increase overall sales of GE's engines were correct, its own commercial policy in respect of GECAS would cease to make any sense. The virtually absolute character of GECAS's preference for GE engines, of which GECAS makes no secret, is itself a strong indication of the strategic nature of the policy.

— GECAS's commercial position

196 The applicant contends that ILFC is a much larger purchaser of large commercial aircraft than GECAS. Specifically, it maintains that, as of 1 March 2001, ILFC had nearly twice as many large commercial aircraft on order as GECAS, namely 529 to GECAS's 268. However, in the contested decision, the Commission states that GECAS is the largest purchaser of aircraft in the world and that it is twice the size of ILFC in terms of the number of aircraft in its fleet, with 1 040 aircraft in total as against ILFC's [400 to 500]. The Commission also cites global figures for all jet aircraft, according to which GECAS had placed 796 orders at the end of 2000, whilst ILFC had placed 535. It should be noted that the last-mentioned figures include jet engines for large regional aircraft as well as large commercial aircraft, which explains the difference in relation to the figures put forward by the applicant.

197 In view of the size of the GECAS fleet, the fact that ILFC is larger according to other parameters does not mean that the Commission made an error of fact or a manifest error of assessment either in considering GECAS to be the largest leasing company or in considering it to be the largest purchaser of aircraft in the world in the years leading up to the merger.

198 It should be added that the soundness of the Commission's reasoning is not dependent upon knowing whether GECAS's exact share of purchases of large commercial aircraft (and accordingly of the engines powering them) was 10%, as the Commission asserts at recital 122 of the contested decision, or 7 to 8%, as the applicant maintains. The difference between those figures does not affect the Commission's analysis in any significant way. What is important for these purposes is whether GECAS was actually in a position, as a result of its aircraft purchasing and leasing activities, to exercise a significant influence on the choice of engines made by airframers and airlines.

199 In that regard, the fact that the applicant had a market share of 7 to 10%, which was de facto reserved for it because of GECAS's preferential purchasing policy, represented in itself a not inconsiderable advantage for it. Even supposing that GECAS's preferential purchases were offset in practice, at least to some extent, by those of other leasing companies, the applicant, unlike its competitors, could predict a certain proportion of its sales with a high degree of certainty, whilst from the point of view of the other engine manufacturers any offsetting purchases by the other leasing companies constituted at most potential sales until they actually took place.

200 Moreover, at recitals 140 to 145 of the contested decision, the Commission explains that it was impossible for the applicant's competitors to replicate a leasing company equivalent to GECAS and, at recitals 209 and 210, it states that Pembroke, the leasing company in which Rolls-Royce has a 50% shareholding, is not comparable to GECAS and does not have a policy of purchasing exclusively Rolls-Royce engines. The applicant does not dispute those findings of fact but maintains that competitors are in a position to compete with the applicant despite the existence of GECAS. It must therefore be held that the recitals in question are accurate and relevant in that they establish the foreclosure of one of the possible routes by which the applicant's competitors could compete with it.

GE Capital's financial strength

201 The Commission affirmed, without being challenged by the applicant, that the financial strength of GE Capital is advantageous to the entire group of companies of which it forms part, in particular since they have the benefit of an 'AAA' credit rating which allows them to have easier access to the financial markets than their competitors (see the contested decision, recital 142 and footnote 32).

202 The Court must therefore take formal note of that circumstance.

Considerations relating to the exercise by GECAS and GE Capital of their influence on the applicant's customers on the market for large commercial jet aircraft engines

203 In the course of its reasoning the Commission analyses two distinct situations, first, that in which the airframe manufacturer selects a single make of engine to power a new platform and, second, that in which the final choice of engine is made by the airline from the different engines certified for a multi-source platform. In the Commission's view, in the first situation, it is the influence which the applicant's subsidiaries have over the airframe manufacturer which comes into play, whilst in the second situation it is their influence with the airlines which is more relevant.

204 The applicant rejects that reasoning in its entirety, arguing, in particular, that from the standpoint of economic theory it is not accepted that a purchaser representing less than 10% of the purchases on a given market can wield significant commercial

influence on that market. Therefore, it submits that the various arguments and examples which the Commission puts forward in this respect are wholly irrelevant.

— GE's exercise of the influence deriving from the power of its subsidiaries over airframe manufacturers

205 As regards the power of GE Capital and GECAS over airframe manufacturers, the Commission relies, inter alia, in relation to large commercial aircraft, on an example concerning the Boeing B777X (the 'stretched' version of the B777). The Commission states, at recital 166 of the contested decision, that the applicant obtained this exclusivity thanks to a combination of factors which its competitors could not match, although they were all technically capable of supplying the engine. It refers in that connection to internal GE documents which confirm that the winning offer combination included [...].

206 In particular, two documents dated 12 May 1999 bearing numbers 120 CID 000168 and 120 CID 000166 contain the following passages respectively: '[...]' and '[...]'.

207 At the hearing the applicant acknowledged that GECAS 'did play a part' in the selection of the engine for that aircraft platform but submits that the contract concluded by the applicant and Boeing in October 1999 did not reflect the statements in those documents, particularly since the orders from GECAS were not treated as launch orders and were to be subject to subsequent negotiations. The contract in question was none the less not produced before the Court. However, the Commission contended in its defence, without challenge from the applicant, that Boeing announced in July 2000 that GECAS had [...], which corroborates the information in the two abovementioned internal documents.

208 In view of all the foregoing, it is sufficiently established that before the launch of the Boeing B777X GECAS undertook, whether in a legally binding manner or simply by way of a commercial commitment, [...] and that that commitment was of assistance to the applicant in winning the contract to be the sole supplier of the engines needed to equip the platform in question.

209 As regards [...], the applicant stated at the hearing that GE Capital played no part in the negotiations for that project, [...]. That circumstance is not incompatible with the Commission's case, since the Commission did not maintain in the contested decision that it was GE Capital which [...]. The identity of the legal person within the GE Group which [...] is immaterial, given that it is not disputed that [...].

210 The Commission also states, at recital 160 of the contested decision, in relation to that example, that GE 'was indeed lagging behind [Rolls-Royce] but closely trailing P&W in terms of engine orders for the classic version of [the B777]' but that it remedied that 'potential commonality advantage limitation' by securing the exclusive engine supply for the B777X. According to the Commission, the events which culminated in Boeing choosing the applicant's engine for the B777X show that the applicant was in a position, thanks to the commercial contribution of its subsidiaries, to secure the contract to be the exclusive engine supplier, despite the fact that in some regards there were weaknesses in its product, whose existence is not disputed by the applicant.

211 On that point, the applicant itself confirms that it was obliged to grant substantial discounts on equipping the B777X as its engine had been less competitive than those of P&W or Rolls-Royce on the classic version of that platform. It concludes from that example that there is intense competition on the market for large commercial jet aircraft engines.

212 The applicant claims that it was obliged to grant discounts in order to win the competition relating to the B777X. However, [...] an engine supplier [...] (see paragraph 205 above) is not the same as the grant of discounts. [...].

213 It must be held that the applicant's ability to offer commercial terms such as those offered to Boeing in this instance reflects its independence vis-à-vis its competitors for the purposes of the case-law cited at paragraph 117 above. Indeed, its failure to develop an engine which was the objective equal of those of its competitors did not prevent it from winning that contract. In a competition which it could well have lost if the quality of its product and the price payable on delivery had been the only relevant criteria, GE was able to take a decision to reverse the outcome by recourse to instruments external to the relevant market.

214 It follows that, so far as that vital aspect of its commercial policy is concerned, the applicant was able to act independently. Therefore, the Commission lawfully held in the contested decision (see, in particular, recitals 121 et seq., 162 et seq. and 229) that the fact of the applicant making those sacrifices — unlike its competitors or, at the very least, to a greater extent than they did — is an expression of its commercial independence. The various commercial options available to it shelter it to a considerable degree from the effects of the immediate commercial pressure of competition from P&W and Rolls-Royce. It can therefore allow itself to [...], without, however, suffering any damage as a result.

215 However, it must be borne in mind in this respect that the judgment in *Hoffmann-La Roche* v *Commission*, paragraph 101 above, concerns markets for everyday consumer goods, whilst the present case concerns products which are sold through bidding processes which take place periodically, each of which concerns high-value sales and which are characterised by protracted negotiations. In such a context, the bidders

will necessarily make financial concessions in one form or another, since such concessions are an integral part of such a negotiating process. Thus, the mere fact that the applicant offered discounts in order to win certain bids does not in itself, in this context, preclude it having a dominant position.

216 It must be held, in view of the foregoing, that the Commission did not make a manifest error of assessment in holding that the fact that the applicant won the bid to be the exclusive supplier of engines for the B777X, thanks to the commercial contribution of its subsidiaries, was indicative not of the healthy state of competition but of the applicant's market power.

217 The applicant also challenges the Commission's assertion that GECAS acted as a 'launch customer' or 'boost customer' (recitals 133 and 193 of the contested decision), in particular for [...], and maintains that if GECAS did not act in that capacity, the Commission's case concerning the importance of GECAS's commercial influence would thereby be vitiated. The applicant claims that evidence from [...] and from [...] and [...], confirm that GECAS does not act as a launch customer. In the applicant's view, a launch customer places early orders on which the airframe manufacturer relies in determining whether it will commence manufacture of a given aircraft. Leasing companies are not in general regarded as launch customers. The Commission describes [...]'s attitude in this regard as 'curious'. It states that [...] initially indicated that it had acted as a launch customer for a number of [...] and [...] aircraft but that [...] appears to have subsequently changed its definition of that term and formally recognised that [...] had acted as a launch customer, as opposed to merely being involved in the launch, only for the [...].

218 It should first be observed that the references in the contested decision to 'boost customers' add nothing to its reasoning. Although the fact that GECAS subsequently places orders for aircraft may increase the number of aircraft powered

by GE engines in airlines' fleets, such subsequent orders are placed too late to influence the airframe manufacturer's choice directly. It is when an aircraft is initially launched that its manufacturer decides which engine will equip it or, as the case may be, which engines will be available on that platform. It follows, in principle, that GECAS can influence the manufacturer's choice of engine or engines only at the stage when the platform is launched.

219 It must be noted, however, that whether the label 'launch customer' is appropriate, and whether the term 'boost customer' is helpful, in relation to the role played by leasing companies in general, and by GECAS in particular, vis-à-vis airframe manufacturers is of minimal importance in the wider context of the Commission's reasoning. What is important there is whether GECAS is in a position to influence the airframers' choice of engine to actually power specific platforms. The example of the B777X, examined above, shows in concrete terms that GECAS's involvement played a significant part in Boeing's decision to give the applicant engine exclusivity. In those circumstances, it must be held that GECAS in fact wields the influence found by the Commission and there is no need to determine whether the airframe manufacturers regarded it as a 'launch customer' or a 'boost customer'.

— GE's exercise of the influence deriving from the power of its subsidiaries over airline companies

220 As regards the power of the applicant's subsidiaries over airlines, the Commission states that GECAS's influence extends well beyond the simple fact that it purchases around 10% of large commercial aircraft sold worldwide, since it purchases GE-powered aircraft on a speculative basis at a stage before there is a specific final

customer for those aircraft (recital 123 of the contested decision) and as a result can 'seed' smaller airlines with GE engines, which creates, maintains and strengthens GE's position, owing, in particular, to the commonality issues examined above (see recital 125 of the contested decision).

221 In that regard, the Commission cites, at recital 135 of the contested decision, the case of China Eastern, described at paragraph 157 above in relation to the effects of commonality. It is clear from the passage from GE's 1999 Annual Report, cited at recital 135, that GECAS helped that company in a number of respects, including with standardisation of its fleet 'around CFM[I]-powered Airbus narrow-bodies'. Such standardisation of a fleet thanks to GECAS's involvement reflects the 'seeding' phenomenon described by the Commission because GECAS promotes the creation of a situation in which commonality makes it advantageous for a given airline to purchase the applicant's engines in the future. Therefore, the passage at issue supports the Commission's case concerning the existence of 'seeding'.

222 At recital 136 of the contested decision, and more specifically in footnote 45 of the decision, the Commission mentions an example relating to [...], which it describes in detail at recital 192 in the section of the contested decision analysing P&W. It appears from a GE internal e-mail, referred to at recital 192 of the contested decision, that: [...]. The author of the communication in question also congratulated himself on the fact that the success had [...]. He also observed that '[...]'.

223 It is clear from those specific examples that the applicant itself is of the view that in some cases the leasing services which GECAS is able to offer airlines have played an important part in enabling the applicant to win contracts to supply the engines for an airline's aircraft.

224 Another item, GECAS's internal document No 702 CID 000080, produced to the Court by the Commission in order to rebut the applicant's claim that GECAS did not have the strategic objective of promoting the applicant's engines, is worded as follows: '[...]'. That document shows that GECAS does in fact have such a strategic objective.

225 As regards GE Capital's strategic contribution in relation to airlines, the Commission (at recital 117 of the contested decision) also cites an article which it states was written by the applicant's Chairman and Chief Executive at the material time, Jack Welch:

'And what does [GE] Capital give GE? Valuable customers, for one thing: [GE] Capital provides financing for the customers of GE divisions like Aircraft, Power Systems, and Automotive, which helps smooth the way for those divisions to land large contracts. One of the more notable instances of a possible link came when Continental Airlines was struggling in bankruptcy in 1993. Loans from GE Capital helped put Continental back in the air. Next came a big order from Continental for new planes — most with GE engines. Says consultant Tichy: "[GE] Capital is part of the arsenal for GE's industrial side to beat the competition".'

226 The applicant notes, in relation to a quotation from the same article in the defence, that the article was written by a journalist from *Fortune* magazine. However, the applicant has not disputed the Commission's assertion, made inter alia in the contested decision at footnotes 37 and 38, that the applicant had itself posted the article in question on its web site. That electronic publication shows that the applicant did not challenge, indeed that it adopted, the analysis there set out.

227 The Commission goes on to state at recitals 118 to 120 of the contested decision that, since receiving the financial assistance described in the quotation, Continental Airlines has chosen the applicant's engines every time that it has bought large commercial aircraft in respect of which that choice was available. The Commission infers from this that GE Capital's financial backing of Continental Airlines appears to have been conditional upon the latter's adopting a preferential policy with regard to the applicant's engines.

228 The applicant does not dispute the facts of those examples as such. It makes no comment on the example concerning China Eastern, and, so far as the example examined at paragraph 222 above is concerned, it points out that it was also stated in the e-mail in question that the commercial campaign in question had been 'very arduous'. The applicant submits that Continental Airlines is an isolated case and claims that the Commission does not seek to assess the importance or the impact of the practice which it describes. The Court considers, however, that those arguments do not undermine the Commission's case, since it provided an adequate explanation in the contested decision of the relevance of those examples in relation to the role played by GECAS and GE Capital in promoting the applicant's engines for large commercial aircraft to airlines.

— Conclusion on GE's exercise of the influence deriving from the power of its subsidiaries

229 In the light of all the foregoing and in view, in particular, of the specific examples cited by the Commission to attest to GE's exercise of the influence deriving from the commercial strength of its subsidiaries, the accuracy and relevance of which has not been put in doubt in these proceedings, the Court must reject the applicant's claim that there was no such influence. In particular, the arguments based on the allegedly unorthodox nature, in terms of economic theory, of the Commission's case cannot prevail over the convincing evidence adduced by the Commission.

Considerations relating to the figures concerning the changes in the applicant's market share after GECAS began purchasing and leasing aircraft

230 At recital 138 of the contested decision, the Commission compares the applicant's market position before GECAS began to engage in speculative purchases (1988 to 1995) with its position after that date (1996 to 2000). It notes that, while GE's engine sales to leasing companies, including GECAS, increased by over 20 share points (or over 60%), direct purchases of GE engines by the airlines dropped by less than 5 share points (or less than 10%). The Commission concludes from this that purchases by other leasing companies and airlines have not counter-balanced the effects of GECAS's preferential engine purchases and that GECAS's activity has thus entailed a net shift of market share to GE.

231 The applicant rightly states that the above reasoning does not mean that the size of the market segment represented by leasing companies' purchases is comparable with that represented by direct purchases by airlines. It follows that the Commission has not shown, by means of those statistics, that GECAS improved the applicant's overall share of the market for large commercial jet aircraft engines.

232 The applicant also states that the figures which it has put forward, in particular those in one of the annexes to its application (Professor Nalebuff's report at Annex 7.4), relating to the purchases of all leasing companies including GECAS, show that GECAS's activity had no positive impact on the applicant's sales and that in fact an 'offsetting' effect occurred whereby the other leasing companies reacted to GECAS's preferential purchasing policy and purchased engines from manufacturers other than GE. The applicant relies in that connection on the Commission's statement in

the rejoinder that the applicant's sales declined to only [...]% instead of to [...]% thanks to GECAS's purchases to show the error of the Commission's case that the increase in the applicant's market share was attributable to GECAS.

233 It must be noted that the figures given in Professor Nalebuff's report relate only to multi-source platforms in respect of which there is a choice between a CFMI/GE engine and another type of engine. Those figures thus exclude all aircraft for which only one engine has been certified, in particular the B737 for which engines are supplied exclusively by the applicant. Thus, the applicant's contention that the Commission itself accepts that its market share has fallen is based on a statement taken out of context, as it relates to just one part of the market for large commercial jet aircraft engines.

234 The Commission also criticises Professor Nalebuff's treatment of statistics, in particular his assumption that past choices made by end users for a limited number of aircraft would be mirrored in future choices for other aircraft ordered by leasing companies for which an engine has not yet been selected. It must be observed that, for the most recent years, the figures used by Professor Nalebuff did indeed include a particularly high number of orders in respect of which no engine had yet been selected, which is inevitable but which makes those figures far less reliable. Given that it was by comparing the three most recent years, 1998, 1999 and 2000, with an earlier period, 1991 to 1997, that Professor Nalebuff reached the conclusion that the other leasing companies had reacted against GECAS's preferential policy, that lack of reliability also weakens his conclusion.

235 It should be pointed out that some increase in the proportion of engines manufactured by the applicant's competitors which are acquired by leasing companies is inevitable, unless the view is taken that the share shifting resulting from GECAS's purchases is completely effective in the sense that each GE engine acquired by GECAS represents one additional sale in comparison with the sales which would have been made in the absence of GECAS. There is bound to be a

demand for engines made by the applicant's competitors, given, in particular, the commonality benefits noted above, since certain airlines have chosen those engines in the past. As GECAS has taken a significant share of the leasing market and does not, in principle, purchase aircraft with engines manufactured by the applicant's competitors, demand for other engines will inevitably be satisfied by the other leasing companies.

236 The applicant's argument that other leasing companies will consciously react to GECAS's bias in order to promote other engines can only be relevant to the extent that those companies themselves choose the engine equipping the aircraft. However, the Commission points out in the contested decision that, in relation to recent orders placed by ILFC, the engine selection was left in the vast majority of cases 'to be determined', in contrast to GECAS's GE-only policy, which thus allowed ILFC's future airline customers a role in engine selection (recital 137 of the contested decision). That circumstance is borne out by the figures advanced by the applicant itself in Professor Nalebuff's report.

237 As has been noted above, the Commission found in the contested decision that the applicant's market share, calculated in terms of the installed base of engines, has increased since the end of 1995 (recitals 74 to 76 of the contested decision and Annex I thereto). However, the applicant contends that the increase in its installed base of engines since 1995 cannot be attributed to GECAS given that, of that increase of [...] engines, only [...] engines are attributable to orders placed by GECAS. The Commission does not dispute those figures but points out that orders placed after the commencement of GECAS's activity have a delayed effect in terms of the installed base of engines, since the latter is a measure of market share which depends upon the actual delivery of the aircraft, together with the engines which power it. It also notes that the applicant's installed base of engines increased sharply as of 1999, the year in which GECAS's impact started to make itself felt.

238 It must therefore be held that, although the engines purchased by GECAS contributed to some degree to the increase in the applicant's installed base of engines, referred to in the contested decision, and although that contribution appears to be becoming increasingly significant, it remains minimal. Nevertheless, that does not establish that GECAS did not have a significant impact on the relative strengths of the players on the market for large commercial jet aircraft engines. Indeed, particularly in view of the points noted in the previous paragraph, it is premature to assess the scale of GECAS's impact by reference to figures relating to changes in the installed base of engines. In those circumstances, although it appears from the contested decision that the commencement of GECAS's purchasing activity coincided with the increase in the applicant's market share in terms of the installed base, the Commission has not proved in the contested decision that there is a relationship of cause and effect between those two events.

239 In view of all the foregoing, it must be held that the Commission has not established, as a fact, that GECAS's purchasing activity increased the applicant's overall share of the market for large commercial jet aircraft engines. Conversely, the applicant has not succeeded in establishing that GECAS had no positive impact on the applicant's overall market share or that the other leasing companies countered GECAS's bias by adopting a bias in favour of its competitor's engines.

240 Taking account of those findings, the Court must conclude that neither of the parties wins the statistical argument considered above. The fact that the Commission's reasoning is not confirmed by the statistical evidence must be taken into account when assessing the validity of its reasoning as a whole. However, account must also be taken of the fact that the applicant's counter-argument that GECAS's activity had no impact on the market is also not established by the figures.

Conclusion on vertical integration

241 On the basis of the evidence referred to above, the Commission could legitimately conclude that the applicant had at its disposal, as a result of its subsidiaries'

activities, commercial means which it had exploited, at least in some cases, to win contracts which it probably would not have won without them. In some cases GECAS and/or GE Capital played a decisive role in the airframe manufacturer's or airline's choice of engine. Furthermore, the documents cited by the Commission establish that the applicant does have a commercial policy of using that power to increase its strength on the market for large commercial jet aircraft engines.

242 The fact that the Commission did not succeed in the contested decision in establishing, by reference to statistical evidence, that the applicant's use of that power had a positive influence on its overall share of the market for large commercial jet aircraft engines does not undermine its case on the commercial influence wielded by GECAS. Since the Commission showed by reference to specific incidents that the applicant deliberately exploited the commercial opportunities arising from GECAS's activity and from the financial strength of GE Capital in order to promote its engines and that that policy met with success, it has sufficiently established its case that the use of those commercial levers contributes to its dominance.

(d) State of competition on the market for large commercial jet aircraft engines

243 The applicant challenges the Commission's assertion that the applicant had the ability to eliminate all effective competition from P&W and Rolls-Royce on the market for large commercial jet aircraft engines (recital 163 of the contested decision and paragraph 109 above). It is sufficient to note in this connection that, in order to establish that the applicant's position was one of dominance, the Commission was not required to show that the elimination of that competition would be the consequence of the applicant's dominance on that market (see paragraph 114 above). Although such a consequence would be the most obvious

indicator of dominance, it would not be a necessary consequence of such dominance. Thus, the applicant's argument on this point does not undermine that part of the Commission's case.

244 It must also be noted that in the contested decision the Commission indicated, at recital 164, that the applicant had succeeded in placing its products on 10 of the last 12 platforms for which airframe manufacturers offered exclusive positions. In its defence the Commission stated that the applicant won all the competitions in which it participated for platforms. The applicant challenges that assessment, asserting, on the contrary, that there is keen competition on the market concerned.

245 The applicant rightly states that a number of those platforms were not platforms for large commercial aircraft but rather platforms for large or small regional aircraft. Since the Commission defined three distinct markets corresponding to those three categories of aircraft for the purposes of assessing dominance, the figure on which the Commission relies is in itself meaningless with regard to each individual market, thus including the market for large commercial jet aircraft engines.

246 Likewise, the example cited by the applicant to show that it did not win all the competitions for exclusive positions in which it took part relates to a small regional aeroplane, the ERJ-145. That example is therefore irrelevant to the present case, since the Commission did not analyse that market in the contested decision.

247 At the hearing the applicant analysed the four most recent engine competitions for large commercial aircraft. Initially only one engine, P&W's, was certified for the Airbus A318, a CFMI engine also being certified subsequently. Following abortive negotiations between GE and Airbus relating to the supply of the engine for the

A340 500-600, Airbus selected Rolls-Royce as the exclusive engine supplier. Two engines are certified on the A380, Rolls-Royce's and Engine Alliance's, and, finally, the applicant won the bid relating to the B777X despite fierce competition from Rolls-Royce. The applicant concludes from those examples, taken together, that it is not in a dominant position on the market for large commercial jet aircraft engines.

248 As regards specifically the example relating to the supply of the engine for the A340 500-600, the Commission considered the bid in question at recital 170 of the contested decision, in which it pointed out that [...]. The applicant does not dispute that fact but submits that [...]. However, [...] that argument does not undermine the Commission's conclusion that this example reflects GE's dominance.

249 More generally, the four bids dealt with by the applicant at the hearing do not establish that the Commission made a manifest error of assessment in relation to the applicant's dominance. Those examples do in fact show that there was competition on the market for large commercial jet aircraft engines. However, as has been stated above, the mere existence of competition on the market does not preclude one of the competitors having the means to act to a significant extent independently of its competitors. A dominant position is not synonymous with a monopoly: therefore the fact that the dominant undertaking's competitors won some contracts is not sufficient in itself to invalidate the conclusion that the undertaking is in a dominant position.

250 Similarly, the findings at paragraphs 244 and 245 above as to the irrelevance of certain statements in the contested decision are not decisive in the general scheme of the analysis of the applicant's pre-merger dominance on the market concerned.

They do not therefore invalidate the Commission's conclusion as to pre-merger dominance.

(e) Lack or weakness of commercial or competitive constraints

Constraints exercised by competitors

251 So far as the applicant's competitors on the market for large commercial jet aircraft engines are concerned, the Commission observes, in the contested decision, that P&W's share of the market for large commercial jet aircraft engines has been steadily declining (recitals 174 to 195 of the contested decision) and that Roll-Royce, although a formidable competitor from a technical perspective, [...], given in particular its small size compared with the applicant (recitals 196 to 223).

252 The applicant submits that in the Engine Alliance decision, the Commission considered P&W and Rolls-Royce to be serious and credible competitors. However, it must be borne in mind in this regard that neither the Commission nor, a fortiori, the Court itself is bound in this case by findings in the Engine Alliance decision (see paragraphs 118 and 120 above and the case-law cited).

253 It must also be remembered that the assessment of the relative strengths of the various undertakings competing on a market is as a general rule part of a complex economic assessment in respect of which the Commission has a margin of assessment (see, in particular, paragraph 60 et seq. above and the case-law cited).

254 In this instance, the Commission does not deny that there is some competition on the market for large commercial jet aircraft engines from P&W and Rolls-Royce.

— P&W

255 With specific regard to P&W, the Commission puts forward documents and figures from which it is clear that the engines manufactured by P&W mainly power aircraft which are no longer in production and that is has been losing market share.

256 That relative decline is reflected, in particular, by the fact that its market share in terms of the installed base of engines on aircraft no longer in production is higher than its market share of the installed base of engines on aircraft still in production (recital 81 of the contested decision). Moreover, its share of the installed base of engines on aircraft still in production (26.5%) is higher than its market share of the engine order backlog, which is only 16%.

257 The Commission mentions, in particular, statements made by the Chairman of UTC, P&W's parent company, on 22 September 1999 and reported by an employee of the applicant in an internal memorandum, according to which more P&W engines are currently being withdrawn from service than those of other manufacturers and that half of the 450 parked aircraft in 1999 were P&W powered (recital 177 of the contested decision). According to UTC's 2000 Annual Report, P&W's revenue fell by USD 202 million (3%) in 1999 as compared with 1998, which reflects a decline in civil and military shipments and a drop in commercial spare-parts volumes, partially offset by increases in the commercial overhaul and repair business (recital 181). The Commission also states, at recital 183 of the contested decision, that [...].

258 The Commission goes on to state at recitals 185 to 187 of the contested decision that it appears that [...]. The Commission concludes that P&W's independent business will in future essentially be focused on engine markets other than the market for large commercial jet aircraft engines.

259 The applicant does not directly challenge the facts put forward by the Commission but it submits that P&W is continuing to invest in order to improve its engines and cooperated with the applicant in the Engine Alliance to develop a completely new engine for the A380 and the B747-400. It also states that sales of P&W's engine powering the A318 outstrip those of CFMI's alternative engine on that platform. The Court finds that these factors, although they do indeed indicate that P&W continues to be active on the market for large commercial jet aircraft engines, none the less do not undermine the Commission's case.

260 It is true, as the applicant points out, referring to the quotation at recital 192 of the contested decision [...], that there is competition between it and P&W on certain markets, which may even on occasion be intense. However, the trend and the size of P&W's market share underscore the limited extent of that competition, and the fact, mentioned above, that, despite commonality considerations, the applicant none the less won the bid in question, thanks in particular to GECAS's involvement, is more telling than the fact that there was competition for the contract. As the author of the e-mail message cited at recital 192 of the contested decision pointed out '[...]', and that example specifically illustrates that it is possible for a degree of competition to exist but for one of the competitors to have overwhelming strength.

261 In the light of all the foregoing, the Commission could legitimately conclude at recital 194, on the basis of figures and documents which it specifically referred to in the contested decision, that P&W was no longer an effective direct independent competitor to GE for much of the market for large commercial jet aircraft engines.

— Rolls-Royce

262 The Commission explains in the contested decision that Rolls-Royce's position as the applicant's competitor is affected by [...] (recital 196 et seq.).

263 The Commission mentions, inter alia, an e-mail message sent by the President of GECAS, in which he stated, [...] (recitals 200 and 204 of the contested decision).

264 The Commission also refers to an internal [...] document, [...] (recital 205).

265 In the Commission's submission, [...] Rolls-Royce was obliged to have recourse to external financing in order to develop new engines, using Risk and Revenue Sharing Partner programmes ('RRSP'). It refers in that regard to comments from financial analysts at Schroder Salomon Smith Barney from which it is clear that those programmes have become very significant for Rolls-Royce. According to Deutsche Bank's research, it is a matter of concern that around 60% of the growth of Rolls-Royce's earnings before interest and taxes comes from RRSP programmes whose predictability is limited and it shows that the expected change in capital flows under those programmes will place growing strain on Rolls-Royce's long-term business as inflows are expected to decline after 2001 (recitals 201 to 203 of the contested decision).

266 The Commission points out that [...] (recitals 211 to 214).

267 Finally, the Commission states in this context that the applicant is the 'incumbent supplier' to a large number of airlines, that is to say that its engines represent at least 60% of the installed base of engines of aircraft currently in production (recitals 215 to 217 of the contested decision). It cites, at recital 218 of the decision, a statement from Rolls-Royce itself from which it is clear that [...].

268 The applicant claims that Rolls-Royce is a very strong competitor from a technical point of view and points out that in the Engine Alliance decision the Commission noted that Rolls-Royce 'has an increasing market share and a good capacity for developing new engines and derivatives of existing ones'. The applicant submits that it is absurd to rely on the fact that [...]. On the contrary, that state of affairs reflects Rolls-Royce's considerable commercial success.

269 It must be held, in view of the findings made in the contested decision and the arguments which the applicant has advanced in this regard, that Rolls-Royce's large commercial aircraft-engine-manufacturing business is in fact in good commercial health and is encountering no immediate commercial or financial difficulties. Moreover, it is correct that the fact that [...] is, in principle, a sign of commercial success and evidence of financial stability.

270 However, in the contested decision, the Commission did not deny Rolls-Royce's commercial success. In particular, it did not hold that the fact [...] was a sign of commercial weakness as the applicant alleges. What it found was that, despite its merits, Rolls-Royce [...] and, accordingly, could not be regarded as a sufficient counterweight on the market for large commercial jet aircraft engines in general so as to prevent the applicant from behaving, to a great extent, independently.

271 The Commission found in the contested decision that, [...] (recitals 211 to 213 of the contested decision). In its pleadings the applicant does not dispute the correctness of the elements on which that analysis is based, merely stating [...]. It must be held, however, that the above reasoning substantiates the Commission's specific conclusion at recital 214 of the contested decision that [...].

272 As regards Rolls-Royce's financial situation, it follows from the Commission's reasoning referred to at paragraphs 263 to 265 above, [...] and that the way in which it has financed its most recent projects, namely by recourse to RRSPs, will have a negative impact on its inflows in the coming years. The Commission relies, in support of this part of its reasoning, on the statements of independent financial analysts specifically concerning the impact which that method of project finance has had on Rolls-Royce. By contrast, the applicant merely observes that Rolls-Royce is generally in good commercial health but does not explain how the Commission's analysis of [...] Rolls-Royce's [...] is wrong.

273 It follows from the foregoing that the Commission did not make a manifest error of assessment in finding, at recital 196 of the contested decision, that '[a]lthough a very capable supplier from a technical perspective, [Rolls-Royce] can therefore not be considered as a credible bidder for all engines across all markets and in particular in winning engine exclusivity'.

Constraints exercised by buyers

274 Finally, the Commission sets out in the contested decision the reasons why there is no countervailing buyer power from Boeing or Airbus, which are the only two manufacturers of large commercial aircraft, or from airline companies (recitals 224 to 228).

275 In essence, the Commission states that a large number of airlines depend on the applicant because it is the incumbent supplier in their fleet. In addition, demand from airlines which are the engines' end users is dispersed since no single company accounts for more than 5% of purchases (recital 226).

276 The Commission states that the applicant has a considerable influence on airframe manufacturers through their customers as a result of its share of the installed base of those customers' fleets. It recalls here that GECAS can 'seed' demand for aircraft powered by the applicant's engines in airlines and that GE Capital and GECAS have even influenced their choice of engine directly (recital 228), a finding which is not contested by the applicant.

277 The applicant puts forward two criticisms in this regard. First, it states that, in the AlliedSignal/Honeywell decision, the Commission held that Boeing and Airbus had strong buyer power and that in both that decision and the EADS decision it held that airlines had significant buyer power. It is sufficient to find here, as the Commission does, that the buyer power referred to in the decisions in question existed vis-à-vis companies other than the applicant and in respect of other products. Given that the Commission relies, in that regard, on advantages peculiar to the applicant and on its particular situation on the markets for jet engines, that argument is irrelevant in this instance.

278 Second, the applicant submits that neither Boeing nor Airbus opposed the merger. The lack of such opposition has no relevance to the issue of whether the applicant was in a dominant position prior to the merger. The lack of opposition could be explained by a number of different reasons, including the possibility, advanced by the Commission at the hearing, that Boeing and Airbus do not have a marked interest in reducing the price of engines inasmuch as the relatively high level of

prices affects them both equally. Moreover, giving significant weight to a lack of opposition would be tantamount to holding that an undertaking's customers can determine, by means of a kind of private merger control, whether their supplier is in a dominant position on a given market.

279 Accordingly, the arguments put forward by the applicant on this point must be rejected. In those circumstances and in the light of the various findings made above in relation to the applicant's position of strength on the market for large commercial jet aircraft engines, the Commission has not made an error of fact or a manifest error of assessment in finding that the degree of commercial constraint exerted by Boeing, Airbus and other airlines on the applicant is not such as to undermine the Commission's conclusion that the applicant had a dominant position.

(f) Conclusion on dominance

280 In the light of all of the foregoing, the Commission did not make a manifest error of assessment in concluding, at recital 229 of the contested decision, that prior to the merger GE was in a dominant position on the market for large commercial jet aircraft engines.

C — *Vertical overlap*

1. *Arguments of the parties*

281 In relation to the pillar of the contested decision dealing with the vertical overlap which would result from the bringing together of Honeywell's engine starters and

GE's engines, the applicant submits that the Commission ignored the fact that Honeywell supplies its engine starters to GE's rival engine manufacturers. The Commission did not produce any evidence that the merger would result in foreclosure of the merged entity's competitors, in particular in the light of the fact that an engine starter represents only 0.2% of the price of the engine.

282 In its reply to the statements in intervention of Rolls-Royce and Rockwell, and at the hearing, the applicant added that the Commission should have taken account of the obligations to which the merged entity was subject under Article 82 EC, in accordance with the judgment in *Tetral Laval* v *Commission*, paragraph 58 above.

283 As regards the commitments relating to engine starters, GE proposed the divestment of Honeywell's engine starters business. The objections raised in the contested decision in respect of that commitment are entirely without foundation.

284 The Commission, supported by Rolls-Royce, observes that, in light of the market situation, Honeywell is the only credible independent engine-starter supplier for large commercial aircraft and that its incorporation into the same undertaking as the dominant engine supplier would allow the merged entity to behave independently, which was not possible beforehand. The Commission also observes that the applicant's criticisms of the rejection of the commitments relating to this market are mere assertions.

285 Rolls-Royce stresses that engine starters are essential components of any jet engine and that the merged entity would, in the wake of the merger, be able to purchase those components on more favourable terms than it could. It would be financially and technically difficult for Rolls-Royce to opt for a supplier other than Honeywell.

2. *Findings of the Court*

286 At recitals 331 to 340 of the contested decision, the Commission described Honeywell's position on the various markets for a number of engine accessories and controls. In particular, it stated that Honeywell had a market share of [50-60]% on the market for one of those products, engine starters, Hamilton Sundstrand, a sister company of P&W, being the second largest manufacturer with a market share of [40-50]% in terms of production volume (recitals 337 and 338 of the contested decision).

287 It is necessary to note that the Commission did not hold in the contested decision that the merger would result in a dominant position being created or strengthened for Honeywell on that market.

288 On the other hand, the Commission held, at recital 419 of the contested decision, that '[q]uite apart from the effects of product package offers, the proposed merger will strengthen GE's dominant position on the market for large commercial aircraft engines as a result of the vertical foreclosure of the competing engine manufacturers that will result from the vertical relationship between GE as an engine manufacturer and Honeywell as a supplier of engine starters to GE and its competitors'. In its view, '[f]ollowing the proposed merger, the merged entity would have an incentive to delay or disrupt the supply of Honeywell engine starters to competing engine manufacturers, which would result in damaging supply, distribution, profitability and competitiveness of GE's engine competitors. Likewise, the merged entity could increase the prices of engine starters or their spares, thereby increasing rival engine manufacturers' costs and reducing even further their ability to compete against the merged entity' (recital 420 of the contested decision).

289 The Commission went on to reject the various arguments put forward by the applicant to cast doubt on that analysis. It stated, inter alia, that Hamilton Sundstrand at present manufactures engine starters exclusively for P&W engines and contended that it had no commercial interest in selling its engine starters to other engine manufacturers, even if there were to be a price increase (recitals 338 and 421). Consequently, the Commission took the view that Hamilton Sundstrand was not to be considered a competitor of Honeywell (recital 338). The Commission stated that no other competitor was capable of exerting effective competitive constraints on Honeywell on the market and that the barriers to entry were significant and that therefore the possibility of new market entry was not a real constraint either (recitals 422 and 423).

290 Furthermore, the Commission considered the argument, advanced during the administrative procedure, that various contracts concluded by Honeywell effectively preclude the risk of Honeywell's refusing to supply its starters to certain customers, and even of its withdrawing from the market as a supplier to third parties. It rejected the argument that those constraints were effective, contending that, notwithstanding those contractual arrangements, a refusal to supply on Honeywell's part would give rise to disruption and significant costs for GE's engine competitors, particularly as 'such tight contractual controls limiting the possibility of either party to foreclose without just reason are typical for recent engine programmes while older programmes do not include [such] contractual arrangements' (recital 424).

291 The Commission also rejected the argument that, despite Honeywell's share of the market for air turbine starters, there has been no foreclosure of competitors from that market up until now, pointing out in that connection that these small engines are sole-sourced and therefore the incentives to foreclose competitors from that market are markedly less strong than the incentives which the merged entity would have in respect of platforms for large commercial aircraft, on which several engines may be certified (recital 425 of the contested decision). Finally, as regards the argument that engine starters can also be directly supplied to airframe manufacturers and that any refusal to supply engine manufacturers could be

circumvented by airframe manufacturers ordering engine starters directly, the Commission observed that most engine starters are sold to the engine supplier for inclusion in engine packages delivered to the airframe manufacturer (recital 426 of the contested decision).

292 It must be noted that the applicant has not put in doubt before the Court the Commission's rejection, on the grounds set out in the contested decision and summarised in the preceding paragraphs, of the arguments that it put forward in the administrative procedure. For the purposes of the present proceedings, those reasons should, in principle, be deemed to justify that rejection. However, it is necessary to consider the applicant's arguments summarised at paragraphs 281 to 283 above.

293 The Commission's case with regard to the strengthening of the applicant's pre-merger dominant position on the market for large commercial jet aircraft engines is founded, in particular, on the finding that, following the concentration, the merged entity would have an incentive 'to delay or disrupt the supply of Honeywell engine starters to competing engine manufacturers' and that it would be in a position to increase prices. It also pointed out, in the course of rejecting the arguments concerning contractual constraints that precluded Honeywell from refusing to supply, that such a refusal would in practice create a significant amount of disruption and cost for competing engine manufacturers.

294 It is common ground that Honeywell's engine accessories and controls, which include its starters, are used in a significant number of its competitor's engines, in particular those of Rolls-Royce. Given the commercial strategy of the applicant's main competitor (Hamilton Sundstrand) not to sell its starters on the market, which is not disputed by the applicant, Rolls-Royce would in future be dependent on Honeywell, and Honeywell's market share of [50-60]% thus does not adequately reflect the scale of the commercial influence which it would wield over Rolls-Royce.

The Commission also stated, at recital 425, that the fact that there is often a choice of engine for large commercial aircraft, in contrast with aeroplanes powered by air turbine engines, gives rise to a particular incentive for engine manufacturers to foreclose competitors in the immediate future, an incentive which is not present in other sectors of engine manufacture.

295 The effects of the merger at issue in this part of the judgment are not conglomerate effects inasmuch as they result from a direct vertical relationship of supplier and customer. However, it is clear from the above description, in particular from paragraph 293 above, that the Commission's case concerning the anti-competitive effects of the merger that would result from that relationship hinges on the merged entity's future behaviour, without which this aspect of the merger would not have any harmful effect. The onus was thus on the Commission to produce convincing evidence as to the likelihood of that behaviour (see, by analogy, *Tetra Laval* v *Commission*, paragraph 58 above, and paragraph 65 et seq. above).

296 In some cases, such evidence may consist of economic studies establishing the likely development of the market situation and demonstrating that there is an incentive for the merged entity to behave in a particular way. As the applicant points out, the Commission has not produced any such evidence in this case.

297 It should be observed, however, that, since in Community law it is an overriding principle that the evaluation of evidence should be unfettered (see, to that effect, the Opinion of Judge Vesterdorf acting as Advocate General in Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, 869 and 954, and the case-law cited), the absence of evidence of that type is not in itself decisive. In particular, in a situation in which it is obvious that the commercial interests of an undertaking militate predominantly in favour of a given course of conduct, such as making use of an

opportunity to disrupt a competitor's business, the Commission does not commit a manifest error of assessment in holding that it is likely that the merged entity will actually engage in the conduct foreseen. In such a case, the simple economic and commercial realities of the particular case may constitute the convincing evidence required by the case-law.

298 In this instance, the Commission found, first, that there is a high degree of supply-side concentration on the engine-starter market rendering the applicant and its competitors, in particular Rolls-Royce, dependent, to a great extent, upon Honeywell and, second, that a vertically integrated commercial structure would be created as a result of the merger, combining the manufacture of an essential component (engine starters) with the manufacture of the finished product sold on a downstream market where there was already a dominant position. Leaving aside at this stage any potential legal constraints capable of having an impact in that regard, it was on the basis of those market conditions that the Commission held that it would be in the commercial interest of the merged entity to use its power as the unavoidable supplier, in certain cases, of a relatively low-cost component, which is however essential for the operation of an engine, as a means of disrupting its competitors' engine production.

299 The Commission's analysis in this regard is persuasive, even in the absence of economic studies, because it is clear that the conduct foreseen, allowing the merged entity to harm its competitors' interests significantly, would have been in its commercial interests. The parties agree that an engine starter represents only a tiny fraction of the cost of the engine, 0.2% according to the applicant's observations on the statements in intervention. Consequently, the profits which the merged entity could make by selling that product to Rolls-Royce and P&W are necessarily minimal in comparison with those which it could make by increasing its share of the market for large commercial aircraft engines at the expense of Rolls-Royce and P&W.

300 In that regard, the Commission specifically states in the contested decision, in the course of its analysis of the possibility that Hamilton Sundstrand might resume selling its engine starters on the open market, that '... the expected profits in the upstream market, stemming from selling engine starters to Rolls-Royce, could not outweigh the profit loss that P&W might face in the downstream market for engines' (recital 338 of the contested decision; see also recital 421). That commercial logic also bears out, *mutatis mutandis*, the Commission's case that there would be an incentive for the merged entity to limit or disrupt supplies to its competitors of starters for large commercial aircraft engines.

301 As regards the possibility that legal constraints of a contractual nature could effectively preclude the behaviour foreseen by the Commission, it should be observed, first, that for the reasons explained at paragraphs 290 to 292 above, in particular the applicant's failure to dispute certain matters before the Court noted at paragraph 292 above, it has not been established in these proceedings that the contractual arrangements intended to preclude refusals to supply would prevent the merged entity from engaging in the harmful anti-competitive conduct foreseen by the Commission.

302 However, the applicant also relies in this connection on an argument based on the findings made by the Court in its judgment in *Tetra Laval* v *Commission*, paragraph 58 above, delivered after the application was lodged in this case, according to which the Commission should have taken account of the obligations to which the merged entity would be subject under Article 82 EC (paragraphs 156 to 160 of the judgment). In its submission, on the assumption that the Commission's analysis of the commercial and competitive situation on the markets concerned is correct, the behaviour foreseen by the Commission, by which the merged entity would deliberately disrupt its competitors' engine-manufacturing activity, would clearly amount to an abuse of the pre-merger dominant position found by the Commission on the market for large commercial jet aircraft engines. Since the Commission has not examined the deterrent effect which might result in this case were Article 82 EC to apply, its analysis regarding the incentive for the merged entity to act in the way foreseen is distorted.

303 It is appropriate to recall in this connection that the Court of Justice held in its judgment on appeal in *Commission* v *Tetra Laval*, paragraph 60 above (paragraphs 74 to 78) that the Court of First Instance, in its judgment in *Tetra Laval* v *Commission*, paragraph 58 above, had been right to hold that the likelihood of the adoption of certain conduct must be examined comprehensively, that is to say, taking account both of the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful. However, the Court of Justice also held that it would run counter to the preventive purpose of Regulation No 4064/89 to require the Commission to examine, for each proposed merger, the extent to which the incentives to adopt anti-competitive conduct would be reduced, or even eliminated, as a result of the unlawfulness of the conduct in question, the likelihood of its detection and the action taken by the competent authorities (see paragraph 72 et seq. above).

304 It follows that the Commission must, as a rule, take into account the potentially unlawful, and thus sanctionable, nature of certain conduct as a factor which might diminish, or even eliminate, incentives for an undertaking to engage in particular conduct (see paragraph 74 above). However, it is not required to establish that the conduct foreseen in the future will actually constitute an infringement of Article 82 EC or that, if that were to be the case, that infringement would be detected and punished, the Commission being able to limit itself in that regard to a summary analysis based on the evidence available to it.

305 In the present case, the Commission has predicted future conduct on the engine-starter market the object and — were it to prove effective — effect of which would be to strengthen the dominant position on the market for large commercial jet aircraft engines specifically by weakening the merged entity's competitors on that market. The conduct in question, namely interrupting the supply of engine starters to competitors, even refusing to sell them, and price increases, would produce an effect on the market for large commercial jet aircraft engines only in so far as it significantly harmed the jet-engine manufacturing activities of the merged entity's competitors.

306 It should be recalled that, even if the fact that an undertaking is in a dominant position cannot deprive it of its right to protect its own commercial interests, it follows from established case-law that such conduct is unlawful if its object is specifically to strengthen this dominant position and abuse it (*United Brands* v *Commission*, paragraph 117 above, paragraph 189; Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraph 117 et seq.; see also Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie maritime belge transports and Others* v *Commission* [1996] ECR II-1201, paragraph 149). Thus, for example, a refusal by an undertaking in a dominant position to sell an essential component to its competitors in itself constitutes an abuse of that position (see, to that effect, Joined Cases 6/83 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 25).

307 As to the possibility of the merged entity increasing the price of its engine starters, it should be observed that, in order to have a tangible effect on Rolls-Royce's competitiveness on the market for large commercial jet aircraft engines, such an increase would have to be so large that it would clearly amount to abuse. A possible 50% increase in the price of engine starters, without any apparent commercial justification, would represent only a 0.1% increase in the price of a jet engine and would therefore have virtually no effect on the jet-engine market. Moreover, if a price increase for engine starters were applied in a non-discriminatory way, it would be liable adversely to affect some of the merged entity's customers, and accordingly would have harmful commercial effects for it. Such an increase could, in particular, affect its relations with airlines, which are customers for engine starters both indirectly as purchasers of aircraft and directly on the aftermarket for services and which are also likely to be customers of the merged entity for both engines and avionics and non-avionics products. Conversely, if such an increase were applied in a discriminatory way vis-à-vis its competitors, it would be clear that the object of the increase was to foreclose those competitors from the market and it would therefore constitute abuse.

308 Likewise, a disruption of supplies by the merged entity following the merger would adversely affect its own customers if the disruption was general and would clearly constitute abuse if the disruption was discriminatory, in particular with regard to Rolls-Royce.

309 It follows from the foregoing that the conduct predicted by the Commission in this instance is liable to amount to an abuse of a dominant position. In the present case, the more convincing the Commission's case as to the effectiveness of the conduct in question and thus the clearer the commercial incentive to engage in it, the greater the likelihood of the conduct being classified as anti-competitive. It is precisely the most extreme forms of the conduct foreseen by the Commission which would be both the most effective for the purposes of harming competitors' businesses and the most likely to constitute visible and obvious — and therefore the most likely to be penalised — abuses of the merged entity's dominant position.

310 In that regard, the fact that the abuse takes place on a particular market (in this instance the engine-starter market) does not mean that the relevant market for the purposes of appraising dominance cannot be the related downstream market (in this instance the market for large commercial jet aircraft engines), given that the conduct foreseen by the Commission on the first market is specifically intended to maintain or strengthen the undertaking's dominant position on the second market (see, to that effect, *AKZO* v *Commission*, paragraph 115 above, paragraphs 40 to 45; and Case T-219/99 *British Airways* v *Commission* [2003] ECR II-5917, paragraphs 270 to 300).

311 Thus, in view of its finding that the applicant was in a dominant position on the market for large commercial jet aircraft engines prior to the merger (see paragraph 280 above), the Commission necessarily had available all the evidence required in this case to assess, without the need to carry out a detailed investigation in that regard, to what extent the conduct which it itself anticipated on the engine-starter

market would constitute infringements of Article 82 EC and be sanctioned as such. It therefore made an error of law in failing to take into account the deterrent effect which that factor might have had on the merged entity.

312 It is also clear that, if the deterrent effect had been taken into account, it could materially have influenced the Commission's appraisal of how likely it was that the conduct in question would be adopted. In these circumstances, it is not for the Court to substitute its own appraisal for that of the Commission, by seeking to establish what the latter would have decided if it had taken into account the deterrent effect of Article 82 EC. Accordingly, the Commission's analysis of this aspect of the case, since it did not include any consideration of the deterrent effect of Article 82 EC — notwithstanding its relevance —, is necessarily vitiated by a manifest error of assessment.

3. *Conclusion*

313 The Court therefore holds that the pillar of the contested decision relating to the strengthening of the applicant's pre-merger dominant position on the market for large commercial jet aircraft engines, resulting from the vertical overlap between its engine-manufacturing business and Honeywell's manufacture of starters for those engines, is not sufficiently established.

314 There is thus no need to consider in these proceedings arguments relating to the validity of the Commission's rejection of the commitment proposed by the parties to the merger in relation to engine starters.

D — *Conglomerate effects*

1. *Financial strength and vertical integration*

(a) Arguments of the parties

315 As regards the pillar of the contested decision relating to the financial strength and vertical integration resulting from the combined effect of GE Capital (GE's financing company) and GECAS and GE Capital Corporate Aviation Group (GECCAG) (GE's aircraft leasing companies), the applicant submits that the Commission does not show how those companies' activities would create or strengthen dominance on any of the engine markets or on any of the markets for avionics and non-avionics products.

Financial strength

316 According to the applicant, as regards GE Capital, the Commission's contentions regarding the anti-competitive effects of the combination of the alleged financial strength of GE Capital with Honeywell have no legal, economic or factual basis. In view of the unusual nature of its case from the point of view of economic analysis, the onus was on the Commission to present a rigorous legal and economic analysis.

317 The Commission points to the objective factors, set out at recital 107 of the contested decision, which contribute to GE's dominance. However, it submits that it has not penalised GE for its large size in terms of market capitalisation but took that

financial strength into account in the specific context of the aeronautical sector. The magnitude and the long-term nature of investment in that sector make financial capacity a critical aspect of competitiveness. GE's capacity for financing is unmatched by any of its competitors.

318 Those objective factors, which contribute to GE's pre-merger dominance inasmuch as that financial strength can be used to support GE's commercial and industrial strategy on the aircraft-engines markets, would have helped the merged entity to achieve dominance on the markets for various avionics and non-avionics products as well.

319 Rockwell submits in that regard that GE Capital acts as an internal banker and also as a direct financier to the applicant's customers. Rolls-Royce states that it provided the Commission with numerous examples in which GE used its financial strength to obtain exclusivity in engine supply.

Vertical integration

320 As regards GECAS and GECCAG, the applicant claims that the Commission's case on 'share-shifting' is unfounded: according to that theory, GECAS and GECCAG would promote the purchase of Honeywell's products to the detriment of those of its competitors. Even assuming that GECAS's activity did have such an effect on the markets for jet engines prior to the merger, nothing proves that such profitable effects would accrue to Honeywell post-merger, especially on the different markets for avionics and non-avionics products. The applicant contended at the hearing that the Commission did not analyse the situation market by market but instead merely made general assertions that took no account of the differences between the markets.

321 The Commission submits that GECAS is the largest purchaser of large commercial aircraft, with a 10% market share, and that this factor already contributes to the applicant's dominance on the markets for large commercial jet aircraft engines.

322 As to the effects in respect of Honeywell which would arise from vertical integration, the Commission refers to the contested decision and maintains, as does Rockwell, that it is likely that GE would extend its practices to Honeywell products. It notes, in particular, that SFEs (supplier-furnished equipment) are selected on an exclusive basis by the airframe manufacturer and guarantee a long-term source of revenues. According to the Commission and Rockwell, following the merger Honeywell would immediately benefit from GE Capital's ability and incentive to secure exclusive supply positions for its products through GECAS.

323 The Commission does not contend that GECAS would purchase only 'all-Honeywell' aircraft but that GECAS would be used as a lever to induce airframe manufacturers and airlines to select Honeywell products or to grant it exclusivity. In that regard, the Commission notes the unequal relationship between the merged entity and its customers in terms of the large proportion of an aircraft that it would be in a position to supply. The Commission and Rockwell assert that Honeywell's competitors would be progressively marginalised and would be forced to become niche players limited to those sectors where Honeywell was not present.

324 As far as GECCAG is concerned, the Commission acknowledges that in the past that company had no interest in a speculative purchasing policy. That situation would be radically transformed by the arrival of Honeywell, a major supplier of equipment and services for corporate aircraft following the merger.

(b) Findings of the Court

Introduction

325 It should first be noted that, for the reasons set out above at paragraph 182 et seq., the Commission was correct in holding that GECAS's activities and the commercial lever represented by the strength derived by the applicant from GE Capital's financial position contributed to the applicant's pre-merger dominance on the market for large commercial jet aircraft engines.

326 However, as the applicant rightly submits, it does not necessarily follow from those findings that, after the merger, the merged entity would have employed the same practices as those it was found to have employed in the past on the market for large commercial jet aircraft engines in order to promote its avionics and non-avionics products, with the result that a dominant position would have been created or strengthened on the markets for those products.

327 In accordance with the judgment in *Tetra Laval* v *Commission*, paragraph 58 above, upheld in that respect by the Court of Justice in its judgment in *Commission* v *Tetra Laval*, paragraph 60 above, it was for the Commission to establish not only that the merged entity had the ability to transfer those practices to the markets for avionics and non-avionics products but also, on the basis of convincing evidence, that it was likely that the merged entity would engage in such conduct. Furthermore, the Commission was required to establish that those practices would have created, in the relatively near future, a dominant position, at the very least on some of the markets for the avionics and non-avionics products concerned (see, to that effect, *Tetra Laval* v *Commission*, paragraph 58 above, paragraphs 146 to 162, upheld in this respect by the Court of Justice in *Commission* v *Tetra Laval*, paragraph 60 above, paragraphs 37 to 45, and see paragraph 60 et seq. above). These two aspects of the analysis which was required of the Commission will be examined in turn below.

The likelihood of the future conduct foreseen by the Commission

328 The Commission's case, as to the way in which 'vertical' conglomerate effects resulting from the process of 'share-shifting' would be produced, differs according to whether the avionics and non-avionics products concerned are (i) SFE-standard (standard supplier-furnished equipment offered on an exclusive basis) (recitals 342 to 348) or (ii) BFE (buyer-furnished equipment, 'selected' or 'furnished' by the buyer) or SFE-option (buyer choosing between two or more SFEs on offer) (recitals 405 to 411 of the contested decision). A final choice of SFE-standard products is made by the airframe manufacturer when the aircraft is under development, whilst the final selection of BFE equipment and, at least as between two pre-selected products, the selection of SFE-option equipment is made by the airline when it places its order.

— SFE-standard products

329 As regards SFE-standard avionics and non-avionics products, the Commission, having recalled its conclusion as to the applicant's ability to secure engine exclusivity on platforms (recital 343 of the contested decision), contends that following the merger Honeywell will immediately benefit from that ability. The Commission maintains in that regard that airlines are relatively indifferent towards avionics and non-avionics component selection and that in consequence 'the benefits of a non-GE offer for airframe manufacturers would become less significant than the benefits they could achieve in the form of additional aircraft purchase by GECAS' (recital 344 of the contested decision).

330 According to the contested decision, '[b]y leveraging its financial power and vertical integration on the launch of new platforms (for example, through financing and/or through orders placed by GECAS), the merged entity will be able to promote the

selection of Honeywell's SFE products, thereby denying competitors the possibility to place their products on such new platforms' (recital 344) and that, in addition, 'Honeywell will, following the merger, be in a position to benefit from GE's financing surface and ability to cross-subsidise its different business segments' (recital 345). The Commission therefore anticipates that Honeywell's competitors will be seriously weakened by the merger (recitals 347 and 348) and that 'GE's strategic use of GECAS's market access and GE Capital's financial strength to favour Honeywell's products will position Honeywell as the dominant supplier on the markets for SFE avionics and non-avionics products where it already enjoys leading positions' (recital 346).

331 Thus, in the abovementioned recitals the Commission contended that the merged entity would have the ability to influence airframe manufacturers' choice of SFE components and to give them an incentive to choose Honeywell's products. However, its description of the process by which the commercial strength of the applicant's subsidiaries would, in its view, create a dominant position for the merged entity does not disclose the reasons for holding that 'strategic' behaviour by the merged entity which would give rise to those consequences was foreseeable with a sufficient degree of probability.

332 The Commission was required to establish, on the basis of convincing evidence, that such a likelihood existed. Given that this involved establishing, before the merger had taken place, how the merged entity would behave after the merger on markets where, prior to the merger, there was no scope for behaviour of the type foreseen by the Commission, such evidence cannot, as a general rule, consist exclusively of evidence of past conduct. It follows that the Commission's findings, confirmed above in relation to the role played by GECAS and GE Capital on the market for large commercial jet aircraft engines, are not sufficient on their own to satisfy that requirement, even though they may play a part in doing so.

333 That said, convincing evidence could, in principle, consist of documents attesting to the settled intention of the board of directors of the applicant and/or Honeywell to exploit commercially the strength of GECAS and GE Capital on the avionics and non-avionics markets after the merger, in the same manner as described above in relation to the market for large commercial jet aircraft engines, or an economic assessment showing that such behaviour would objectively have been in the merged entity's commercial interests. Since the Commission failed to put forward any evidence capable of establishing that there was such an intention to transpose GE's practices on the market for large commercial jet aircraft engines to the markets for avionics and non-avionics products after the merger, it is necessary to consider whether the contested decision establishes that such a transposition would have been in the merged entity's commercial interests.

334 The applicant submits that it is not in the merged entity's commercial interests to insist that airframe manufacturers select SFE avionics and non-avionics products from the former Honeywell. It points out that there is a huge difference in price between jet engines manufactured by the applicant for large regional aircraft and large commercial aircraft and each avionics and non-avionics product. It therefore submits that the merged entity would have had no commercial interest in promoting avionics and non-avionics products in that way.

335 The economic analysis on which the Commission relied in the contested decision admits the possibility of some competition on the market for large commercial aircraft engines. In particular, the Commission invoked, in its description of the engine competition for the Boeing B777X, the fact that the applicant had been able, by [...], to influence Boeing's choice of engine (paragraph 205 et seq. above).

336 In that context, it was the fact that the applicant was able to make some short-term commercial sacrifices in order to place its engine that was important in the assessment of the applicant's pre-merger dominance. It is important to note that the

practices in question entail, or may entail, some cost to the applicant, at least in the short term, represented in the case of the B777X by [...]. Such a cost may be warranted by the future revenue generated by aftermarket services for engines.

337 In the present context, the merger might have had an effect on the situation on the market for avionics and non-avionics products but only to the extent that the merged entity persuaded airframe manufacturers to select the former Honeywell's products in situations in which they would not have selected them in the absence of such commercial pressure. Given that the applicant's securing of the exclusive engine supply for the B777X involved some commercial 'cost', it cannot be ruled out that an airframe manufacturer could have demanded [...] if the merged entity had also insisted on the selection of SFE avionics and non-avionics products; the Commission did not, however, examine that possibility. There is no guarantee that such cost would have been covered by additional future revenue. At all events, the Commission had no grounds for presuming that in that hypothetical situation there would be no additional cost for the merged entity.

338 Consequently, to extend the practices at issue to the markets for SFE-standard avionics and non-avionics products would have been rational commercial behaviour following the merger only in so far as the revenues which the merged entity was likely to derive from those practices would have offset that potential cost. It follows that the Commission was not entitled to regard it as logical or inevitable that the merged entity would extend those practices to the markets for avionics and non-avionics products.

339 It follows, in the absence of any economic studies comparing, at least on the basis of reasonable estimates, any such cost with any such revenues, that the Commission has not established in the present case what the likely commercial consequences would have been had the applicant's practices been so extended. The contested decision does not address the question whether, if the merged entity had insisted on

its SFE products being selected, that would have involved an additional commercial cost for it nor, indeed, the question whether the revenue deriving from the airframe manufacturers' selection of those products would have outweighed that possible cost. In the absence of such information, it is impossible in the circumstances of this case to determine whether the merged entity would have chosen to extend the practices concerned to the markets for SFE-standard avionics and non-avionics products if the merger had taken place.

340 It follows that the Commission has not established on the basis of convincing evidence, and with a sufficient degree of probability, that the merged entity would have used GECAS's commercial strength and the financial strength of the group resulting from GE Capital's position to promote the former Honeywell's SFE avionics and non-avionics products in the future.

— BFE and SFE-option products

341 As regards BFE and SFE-option avionics and non-avionics products, the Commission takes the view that 'the combination of Honeywell with GE's financial strength and vertical integration in financial services, aircraft purchasing and leasing, as well as in aftermarket services, will contribute to the foreclosure effect already described for SFE avionics and non-avionics' (recital 405 of the contested decision). It states that 'GE will also have the incentive to accelerate the ongoing trend of airframe manufacturers to change BFE products into SFE products since it could later target those products and achieve exclusive positions by deploying the set of business practices described in the previous paragraphs' (recital 408 of the contested decision).

342 The Commission also maintains that 'Honeywell's BFE product range will benefit from GE Capital's ability to secure exclusive positions for its products with airlines (see the Continental Airlines example) and GECAS's instrumental leverage ability to

foster the placement of GE products through the extension of its GE-only policy to Honeywell products' (recital 406 of the contested decision). Furthermore, 'Honeywell's BFE products will also benefit from GE's range of products and services to target competitors' components on the occasion of replacements, upgrades and retrofits through GECAS's ability to favour GE products vis-à-vis airlines' (recital 407 of the contested decision).

343 The Commission concludes on the basis of that reasoning that 'GE's strategic use of GECAS and GE Capital's financial strength will thus position Honeywell as the dominant supplier of BFE avionics and non-avionics products where it already enjoys leading positions' and it anticipates that competitors will progressively reconsider whether to remain active on those markets (recital 409 of the contested decision).

344 As regards the elements of reasoning summarised at paragraph 341 above indicating the relevance to the markets for BFE avionics products of the reasoning developed in the course of the analysis of the situation on the markets for SFE avionics and non-avionics products, it should be borne in mind that the Court has already held the latter analysis to be insufficient. In any event, given that the purchasers of BFE and SFE-option products are airlines whilst it is airframe manufacturers who purchase SFE-standard products, the same commercial logic cannot apply in both cases. As to the possibility that the merged entity might promote the extension of the SFE-product range, the Court's rejection of the Commission's case concerning those products renders that hypothesis, even were it to prove accurate, wholly irrelevant.

345 As to the reasons cited at paragraph 342 above concerning specifically the markets for BFE and SFE-option products, the Commission was entitled to predict that GECAS would itself have a strong preference for the former Honeywell's products following the merger, given that both companies would thereafter belong to the same group. The applicant rightly points out that that preference could not be

absolute, since Honeywell does not manufacture all the BFE and SFE-option avionics and non-avionics products required on an aircraft and that no aircraft could therefore be 'all-Honeywell'. That argument does not, however, undermine the Commission's argument because GECAS's preferential policy does not necessarily need to be absolute in the way the applicant indicates in order to be effective, inasmuch as GECAS selects the former Honeywell's products whenever it is able to do so.

346 On the other hand, the Commission noted, at recital 396 of the contested decision, that the parties to the merger observed in the course of the administrative procedure that the proposed merger would not appreciably change GECAS's purchasing behaviour because [...], pursuant to an agreement [...]. The Commission, at recital 397 of the contested decision, rejects the applicant's argument on the ground that the merger 'internalises' the agreement in question and that, unlike that agreement, the merger therefore brings about a structural change in the marketplace. Furthermore, it states that the agreement [...]. It also states that [...] (recital 396).

347 The Court finds that, although the points made by the Commission partially address the arguments raised by the parties to the merger on this issue, the existence of the contract in question none the less significantly weakens the Commission's case in relation to BFE products. If it is evident that, after the merger, not many additional sales of BFE and SFE-option products would have been made on account of GECAS's preferential policy, it must be concluded, whatever the legal or commercial reason explaining that phenomenon, that the merger would have had only a negligible impact on the markets in question.

348 In the absence of [...], it might have been supposed in this instance, as Rockwell submits in its statement in intervention, that, as a result of the natural transfer of GECAS's preference for products manufactured within the applicant's group, the

applicant's acquisition of Honeywell would automatically bring about an increase of around 5% in Honeywell's market share for BFE products where it already has a 50% share of that market, since GECAS accounts for around 10% of all aircraft purchases.

349 However, the existence of the agreement [...].

350 Accordingly, the Commission failed to assess in the contested decision to what extent [...]. That omission undermines the reliability of its reasoning in respect of those products and in respect of GECAS's ability to 'seed' airlines with the former Honeywell's BFE and SFE-option products.

351 Furthermore, as far as BFE products are concerned, the Commission acknowledges, at recital 410 of the contested decision, the existence of customer preferences and commonality effects. It does not consider these to be significant in this case because 'the airlines are, due to their limited profit margins, not in a position to reject commercial offers that represent short-term cost savings' and that 'for the airlines short-term cost reduction outweighs the possibility of longer-term reduction in competition'. The Commission, however, puts forward no proof in support of its assertion as to the financial weakness of airlines. Nor does it put forward any specific evidence capable of supporting its assessment that preferences and cost reductions resulting from BFE-component commonality within an airline's fleet are less important factors in determining the airline's choices of BFE products than 'short-term cost savings' represented by the purchasing or leasing terms which will, according to its argument, be offered by GECAS. In the absence of an economic appraisal, or at the very least an estimate, of the advantage represented by such terms, it is impossible to assess how plausible is the Commission's case in that regard.

352 Thus, as with SFE-standard products, the Commission's case is based on the notion that GECAS will offer favourable terms to airlines as an incentive to them to accept aircraft equipped with the merged entity's BFE products, which they would not have chosen had they been able to make an independent choice. The creation of such an incentive is liable to entail some 'cost' to the merged entity inasmuch as an airline will not, as a general rule, accept equipment or, as the case may be, a pre-equipped aircraft already purchased by GECAS, unless the merged entity's overall offer is sufficiently attractive for that choice to be in the airline's commercial interests.

353 Since the Commission has recognised that airlines have preferences for certain products, the merged entity would, in such cases, have to overcome the obstacle represented by an airline's preference for another manufacturer's avionics and non-avionics products. It might be the case that the cost concerned is negligible in relation to the revenues accruing to the merged entity from the sale of the BFE components in question, in which case that course of action would be rational commercial behaviour on the part of the merged entity. However, it was for the Commission to examine that issue, in the light of the circumstances of the present case.

The creation of future dominant positions on the markets for avionics and non-avionics products

354 Even assuming that the Commission had sufficiently established (which, as the above analysis shows, is not the case) that the merged entity would have used its subsidiaries' strength on the markets for avionics and non-avionics products, it still had to establish that doing so would create a dominant position on the relevant markets. The case advanced by the Commission in the contested decision is that Honeywell was the leader on those markets without being in a dominant position before the merger, but that the transaction would have strengthened its power in such a way that it would be dominant after the merger (recitals 241 to 243 and 341

of the contested decision). It should be noted in that regard that the Commission found in the contested decision that there was a distinct market for each avionics and non-avionics product (recital 242 and footnote 89) and that it further distinguished, for each of those avionics products, between the market for products intended for large commercial aircraft, on the one hand, and that for products intended for regional and corporate aircraft, on the other (recital 231).

355 It is to be noted that the Commission's analysis of the merged entity's subsidiaries does not take account of the differences between the activities of the applicant and its subsidiaries in relation to each category of aircraft. In the contested decision, the Commission found that, prior to the merger, GE was in a dominant position on the market for large commercial jet aircraft engines and large regional jet aircraft engines, that it was also present to some degree on the market for corporate jet aircraft engines and that GECAS purchased large commercial and large regional aircraft speculatively. However, the contested decision contains no information concerning the activities of those entities on the market for small regional aircraft. Another of the applicant's subsidiaries, GECCAG, which did not purchase aircraft speculatively, was active as a purchaser on the market for corporate aircraft.

356 Thus, for example, the influence which GECAS might have been able to exercise on the markets for avionics products destined for regional and corporate aircraft would have been substantially diminished by the fact that, in principle, it purchased aircraft on only one of the three sectors, namely that for large regional aircraft. Since the Commission took no account of the various considerations resulting from differences between the markets concerned, or of the factors which might affect those considerations after the merger, the Commission did not sufficiently establish that dominant positions would have been created on those markets.

357 It should also be noted that, although the Commission drew a distinction — at recital 239 of the contested decision — between SFE-standard products, which are

definitively selected by the airframe manufacturer, and SFE-option products, for which the airframe manufacturer obtains certification and the airline makes the final selection between two, or even three, possible products, the contested decision did not indicate which of the SFE avionics products examined in the contested decision fell into each of the two categories. As has been noted above, the Commission's analysis of the mechanism by which the influence of the applicant's subsidiaries can have an effect is very different depending on whether the final selection of the avionics product is made by the airframe manufacturer or by the airline (see paragraph 328 above). Consequently, it is not clear from the contested decision which part of the Commission's analysis relates to each specific SFE-product market.

358 Similarly, the Commission did not state in the contested decision which of the non-avionics products considered are sold as SFE, SFE-option or BFE. Thus, once again, it is not possible to ascertain, from reading the contested decision, which part of the Commission's analysis relates to the market for a given product.

359 In response to a written question put by the Court, the Commission and Rockwell indicated, for each of the avionics and non-avionics products at issue, whether it falls within the category of SFE-standard products or that of SFE-option products or, for non-avionics products, that of BFE products. However, if the Court were to take account of those answers in order to allocate those products between the three abovementioned categories so as to determine which customer would select the product and, consequently, which part of the Commission's analysis applies to that product, the Court would be going beyond a mere interpretation of the contested decision and would in effect be substituting its own reasoning.

360 In any event, it is apparent from the answers provided by the Commission and Rockwell, mentioned at paragraph 359 above, that it is not always easy to ascertain in which product category (SFE-standard, SFE-option, BFE) each product must be placed, since their respective answers differ in relation to certain products. It is also clear from those answers that certain avionics products, and especially non-avionics products, are mixed products, sold sometimes as SFE-standard and sometimes as

SFE-option, depending on the platform in question. Consequently the information which is lacking in the decision in relation to the categorisation of individual products is not necessarily common knowledge even for specialists in the aeronautical sector.

361 It should also be noted that the Commission analysed each of the relevant avionics and non-avionics markets very briefly in the contested decision, at recitals 245 to 275. In essence, it set out in respect of each product the nature of that product, the different manufacturers of the product and the market share of those manufacturers, in the case of avionics products, on each of the two markets defined by reference to the size of the aircraft equipped with the product.

362 The Court holds that it is not possible to determine either from the specific descriptions in the contested decision of each market prior to the merger or from the general descriptions, examined above, which deal respectively with the exercise by the applicant's subsidiaries of their commercial power (i) on the SFE-standard markets and (ii) on the SFE-option and BFE markets, what would have been the likely impact of this aspect of the merger on each of the relevant markets. It is clear from the contested decision that the state of competition is different on each of those markets, the relative positions and even the identity of the competitors concerned varying according to the market at issue.

363 Accordingly, the Commission has not sufficiently established that, even supposing that they had been put into effect, the practices contemplated in the contested decision would have created a dominant position on one or other of those markets, let alone on those markets as a whole.

Conclusion

364 It follows from the foregoing that the Commission has not established to a sufficient degree of probability that, following the merger, the merged entity would have

extended to the markets for avionics and non-avionics products the practices found by the Commission on the market for large commercial jet aircraft engines, by which the applicant exploited the financial strength of the GE group attributable to GE Capital and the commercial lever represented by GECAS's aircraft purchases in order to promote sales of its products. In any event, the Commission has not adequately established that those practices, assuming that they had been put into effect, would have been likely to create dominant positions on the various avionics and non-avionics markets concerned. Consequently, the Commission made a manifest error of assessment in holding that the financial strength and vertical integration of the merged entity would bring about the creation or strengthening of dominant positions on the markets for avionics or non-avionics products.

365 In the light of the foregoing, there is no need to examine the Commission's treatment of the commitments relating to this aspect of the case, in particular the commitment concerning GECAS's future behaviour.

2. *Bundling*

(a) Arguments of the parties

Preliminary observations

366 The applicant claims that the Commission's pillar of reasoning relating to the ability of, and incentive for, the merged entity to engage in bundling is not supported either by any factual evidence or by any economic model whatsoever.

367 In its submission, a distinction must be drawn, in particular from the point of view of their effects, between the different types of bundling, namely 'mixed bundling', 'pure bundling' and 'technical bundling'.

368 Pure bundling and technical bundling when practised by an undertaking in a dominant position are, according to the applicant, generally regarded as anti-competitive where the undertaking ties purchases of products or services on a market in which it is strong (the tying market) to purchases of products or services in a second market (the tied market), either for purely commercial reasons — but without offering a financial incentive to the customer — or for technical reasons.

369 Conversely, mixed bundling where a package of products is offered at a lower price is generally regarded as pro-competitive. The applicant explains that mixed bundling may only, exceptionally, be anti-competitive where it leads to competitors being permanently excluded or marginalised. In order to prove that such effects would occur, a detailed economic analysis is required.

370 The applicant maintains that in its defence the Commission has put forward a new theory on conglomerate effects, namely 'leveraging' by which power on one market is used strategically to exclude competitors on another market. Even if that theory could be linked to findings in the contested decision, it cannot be relied on before the Court because it was not raised in the SO.

371 However, the bundling theory put forward in the SO and based on the Choi model is not covered by leveraging. Likewise, the contested decision does not address, at least

not adequately, the possibility of leveraging, relying instead on an analysis of the predicted anti-competitive effects which is explicable only in terms of the Choi model, despite the purported abandonment of that model.

372 Furthermore, predatory pricing is not mentioned in the contested decision and the Commission has not proved that GE would have had an incentive to engage in that practice. Nor has the Commission explained the import of the references in the contested decision to the alleged anti-competitive effects arising from cross-subsidisation.

373 The Commission, Rolls-Royce and Rockwell contend that the contested decision contains convincing evidence of the existence of bundling and of the new possibilities which would be open to the merged entity in that regard.

374 The Commission sets out the principal features of the market that led it to conclude that the merged entity would have the incentive and ability to foreclose competition. Those characteristics include the market share of each of the parties to the merger, the complementary nature of aircraft engines and avionics and non-avionics products, the high barriers to entry of the markets in question, the significant cost of research and development, the long break-even periods and the lack of countervailing customer power and of significant competitive constraint from competitors.

375 The combination of a broad range of complementary products enables the merged entity to grant discriminatory discounts to customers, financed by cross-subsidisation, in order to promote the purchase of the whole product range. Although, in the short term, such a practice would have a downward impact on price levels, it would lead to the foreclosure of competitors in the medium to long term.

376 The Commission contends that throughout the procedure it took the view that, unlike its competitors, the merged entity would have the ability and incentive to engage in bundling by offering discounts on the GE and Honeywell products comprising the package. That analysis is not new since those issues were central even at the stage of pre-notification discussions. The Commission and Rolls-Royce point out that the leveraging theory was referred to in the contested decision (recital 415).

377 The Commission also stresses that bundling would result in only temporary price reductions for certain combinations of products, especially since no appreciable efficiencies would result from the merger. Ultimately, that practice would eliminate competition on merit on a number of markets.

378 The contested decision clearly lists the different types of bundling. The merged entity would have the ability to exploit its existing market power, financial strength and extensive range of products, in particular by engaging in cross-subsidisation.

The existence of pure or technical bundling

379 According to the applicant, although the Commission refers, at the start of its analysis in the contested decision, to pure and technical bundling, it makes no further reference to pure bundling and mentions technical bundling only twice without adducing any factual or economic evidence of the existence of such bundling.

380 The More Electrical Engine ('MEE') concept is not mentioned in the SO and it remains very hypothetical. The example submitted by Rockwell concerning the Primus Epic avionics system is not related to the merger and was not taken into account in the contested decision.

381 The Commission reiterates that the merged entity will have the ability to make the sale of Honeywell's avionics and non-avionics products conditional on the sale of GE engines and vice-versa and thus to engage in pure bundling. The Commission states that the merger would have brought about an unprecedented concentration on the supply side, and specifically mentions Honeywell's EGPWS (Enhanced Ground Proximity Warning System) in this connection. Rockwell cites two examples to illustrate Honeywell's integration capability and its use of locked interfaces. Rockwell also cites Honeywell's Primus Epic system as an example of bundling by Honeywell.

382 The Commission notes that the contested decision states that explicit integration of aircraft engines and other systems has not yet occurred. The MEE concept illustrates Honeywell's integration capability and demonstrates its value as an independent supplier for the development of that concept.

The existence of mixed bundling

383 According to the applicant, since mixed bundling is generally considered to be pro-competitive, the Commission has a duty to prove, first, that the merged entity would engage in the practice and, secondly, that the practice would lead to competitor foreclosure or marginalisation. The contested decision proves neither.

384 The applicant submits that the Commission explicitly states that it is not necessary to rely on any one of the models put forward, in order to conclude that the packaged deals which the merged entity would be able to offer would foreclose competitors from the engines and avionics or non-avionics markets (contested decision, recital 352). In particular, the Commission abandoned its reliance on the Choi model. By contending that no economic model was necessary to support its conclusions, the Commission failed to take proper account of the evidence put forward by GE, based on the work of Professors Nalebuff, Rey and Shapiro, even though that evidence was well founded.

385 The applicant claims that the interveners' observations on non-strategic bundling are inconsistent with the Commission's position whereby it purportedly rejected the static Choi model. The *ex post facto* justification of the contested decision by the strategic behaviour theory must be held inadmissible, because it is not mentioned in the SO, which was exclusively based on the Choi model (*Schneider Electric* v *Commission*, paragraph 40 above). Moreover, the Commission cannot legitimately combine CFMI's market share and its mixed bundling theory since Snecma has no interest in approving a pricing policy that benefits Honeywell's products.

386 In any event, the key elements for leveraging are not established, either in relation to mixed bundling or in relation to alternative theories concerning cross-subsidisation or predatory pricing. The Commission did not analyse the relevant markets; nor did it take into account the fact that the value of engines far exceeds that of avionics and non-avionics products or the fact that mixed bundling is impossible when there is already a contract between the supplier and the airframe manufacturer, requiring the latter to purchase a specific product at a fixed price.

387 Similarly, there were no specific indications to the effect that conglomerate effects would materialise in the relatively near future. The Commission did not take into account the deterrent effect of Article 82 EC in that regard.

388 In its reply to the statements in intervention, the applicant submits that, even if the Commission's theory concerning strategic behaviour (leveraging) were admissible, the Commission did not comply with any of the conditions set out in *Tetra Laval* v *Commission*, paragraph 58 above.

389 The only example in the contested decision of mixed bundling of engines with other components relates to a bid Honeywell made for one particular platform (recital 368). However, the Commission made no mention of discounts in that case. Moreover, the manufacturer rejected Honeywell's offer of additional systems, which demonstrates the ability of airframe manufacturers to combine the offers of different suppliers.

390 The Commission observes that the economic models that were submitted to it were the object of controversy. In addition to its own analysis, the Commission assessed the Choi model and included it in the SO to serve as a basis for debate. It was unable to rely on that model to the extent that it contained confidential financial information that could not be disclosed to the parties to the merger. It neither adopted nor rejected the Choi model, which was used only to identify short-term profit maximisation incentives. However, its actual assessment differed from that model since the latter did not take into account either the strategic intent of the merged entity or pre-existing dominance. That failure to take account of strategic behaviour is indeed common to both the Choi and Nalebuff models, which are static models. Those two models examine the question whether bundling increases an undertaking's profits in the short term and, at the same time, lowers its competitors' profits and that consequently the undertaking will have an incentive to engage in the practice.

391 The Commission contends that, on a dynamic view of the market, bundling is also attractive to the merged entity, even where it entails a sacrifice of profits in the short term. The Commission and Rockwell assert that, taking into account the value of engines, the merged entity would have an unmatchable capability to engage in cross-

subsidisation, which is a form of strategic behaviour. Furthermore, the Commission considers that the merged entity would have the capability and the incentive to engage in predatory pricing. That practice was mentioned in the contested decision, at recital 369.

392 The Commission observes that it examined in the contested decision whether the characteristics of the industry would render exclusionary practices such as bundling possible and profitable. Those characteristics show that GE would be able to extend its dominant position in respect of engines into Honeywell's leading positions on the markets for corporate jet engines and avionics and non-avionics products. The Commission never deviated from that well-established economic theory.

393 The Commission contends that in the contested decision, specifically at recitals 359 to 386, it responded to the objections set out in the Shapiro report, in particular by referring to past examples. Thus it fully analysed the various arguments that the parties put forward.

394 Rolls-Royce submits that the bundling theory is not a novel theory and has already been used by the Commission. Despite the lack of clarity of GE's criticism of the economic model used, Rolls-Royce contends that the Frontier Economics report shows either that the Commission is in agreement with the Choi and Nalebuff models, or that those models are themselves in agreement, or that the Commission has relied on sufficient empirical evidence.

395 The Commission also submits that it took the AlliedSignal/Honeywell decision fully into account but that the conclusions in that decision cannot simply be transposed to the present case. The present case is distinguishable on the basis of GE's strength and the range of products concerned.

396 Rolls-Royce considers that the tendency to engage in bundling in the industry is amply demonstrated and that the merger would create further opportunities and incentives in that regard.

397 Regarding the lack of a causal link between the bundling practices alleged and the merger, the Commission submits that the merger would enable the scope of those practices to be expanded owing to the range of products which the merged entity would acquire and because of GE's strength. The merged entity would, through its dominant position in engines, be able to extend that market power into Honeywell's complementary product markets where it is not yet dominant and to foreclose its competitors. The market characteristics would allow at least partial foreclosure.

398 The Commission also points to the series of examples of bundling cited in the contested decision.

(b) Findings of the Court

Preliminary observations

399 The Commission stated in essence in the contested decision that, following the merger, the merged entity would have the ability, unlike its competitors, to offer its customers packages for large commercial aircraft, large regional aircraft and corporate aircraft, encompassing both engines and avionics and non-avionics products. It also held that such behaviour would clearly be in the commercial interests of the merged entity and would thus probably be engaged in after the merger had taken place (recitals 350 to 404, 412 to 416, 432 to 434, 443 and 444 and

445 to 458). As a consequence, a dominant position would have been created for Honeywell on the markets for avionics and non-avionics products and GE's dominant positions would have been strengthened, particularly on the market for large commercial jet aircraft engines (recital 458 of the contested decision).

400 The Commission's case is based on the fact that jet engines, on the one hand, and avionics and non-avionics products, on the other, are complementary, since all these products are indispensable in the construction of an aircraft. The final customer, the operator of the aircraft, must therefore purchase all of them, directly or indirectly, from their manufacturer. The Commission held in the contested decision that on the whole the customers are essentially the same for all those products and that the latter could therefore be bundled. The Commission also observes that the applicant's group is financially very strong, both compared with its main competitors on the engines markets and with its competitors on the markets for avionics and non-avionics products (see, as regards the latter, recitals 302 to 304, 323 and 324 of the contested decision; see also recital 398 et seq.). The merged entity would thus be in a position to reduce its profit margins on avionics and non-avionics products with a view to increasing its market share and making larger profits in the future.

401 It should be noted, as a preliminary point, that the way it is predicted that the merged entity will behave in the future is a vital aspect of the Commission's analysis of bundling in the present case. It follows from the fact that the applicant had no presence on the markets for avionics and non-avionics products prior to the merger, together with the fact that Honeywell had no presence on the market for large commercial jet aircraft engines before the merger, that the merger would have had no horizontal anti-competitive effect on those markets. Thus, the merger would, prima facie, have had no effect whatsoever on those markets.

402 Moreover, in so far as the Commission predicts, at recitals 443 and 444 of the contested decision, that bundling will have an impact on the market for engines for corporate jet aircraft, it should be noted that the applicant's pre-merger share of that market was only [10-20]%, in terms of the installed base, whilst Honeywell's was [40-50]%, and only [0-10]%, in terms of the installed base on those aircraft still in production, as compared with Honeywell's [40-50]% share (recital 88 of the contested decision). In those circumstances, even if it were shown that the merged entity would bundle those engines with avionics and non-avionics products after the merger, there would be no causal link between the merger and the bundled offers, except in the small minority of cases in which the engine was a product of the former GE. Moreover, it is not suggested in the contested decision that either of the parties to the merger manufactures engines for small regional aircraft. It follows that any bundling which might be engaged in by the merged entity on the market for regional aircraft would in any event concern only large regional aircraft.

403 The Commission held in the contested decision that each avionics product for regional and corporate aircraft constitutes a market in itself and that there is a market for each non-avionics product for all types of aircraft, including large commercial aircraft. Accordingly, its reasoning with regard to the creation, by means of bundling, of dominant positions on the markets for the different avionics products cannot be accepted in relation to the markets for each of the various avionics products for corporate and regional aircraft. Indeed, on the assumption that it actually becomes a reality after the transaction, any bundling attributable to the merger will affect only one segment of those markets, the large regional aircraft segment. In the same way, the Commission's reasoning is undermined (albeit to a lesser degree) in relation to non-avionics products, for which the Commission defined an individual market for each specific product, irrespective of the size and other features of the aircraft equipped.

404 It is therefore, in principle, in the sector for large commercial aircraft, for which the Commission has defined distinct markets both for jet engines and for each

avionics product, that the Commission's case on bundling could conceivably be sustained.

405 In relation to the possible impact of the merger on (i) the markets for jet engines for large commercial aircraft and large regional aircraft, (ii) those for avionics products for large commercial aircraft and (iii) those for non-avionics products, the Court must determine whether the Commission has established that the merged entity would not only have the capability to engage in the bundling practices described in the contested decision but also, on the basis of convincing evidence, that it would have been likely to engage in those practices after the merger and that, in consequence, a dominant position would have been created or strengthened on one or more of the relevant markets in the relatively near future (*Tetra Laval* v *Commission*, paragraph 58 above, paragraphs 146 to 162).

406 It is also necessary to distinguish, as the applicant rightly states, between three distinct practices: pure bundling (where sales are tied by means of a purely commercial obligation to purchase two or more products as a bundle); technical bundling (where sales are tied by means of the technical integration of the products); and mixed bundling (where a number of products are sold as a package on more favourable terms than if the products are purchased separately). The Commission's analysis of each of those three types of bundling is considered under separate headings below. It is none the less appropriate to examine, first, certain practical limitations affecting the Commission's reasoning on bundling as a whole, and which emerge from the contested decision.

Bundling in general

407 One practical problem with the Commission's analysis of bundling is that the final customer for the various engines, avionics products and non-avionics products is not always the same.

408 Where an airframer selects an engine on an exclusive basis and consequently the platform is sole-source, the airframer is in essence the manufacturer's customer and the same is true as regards SFE-standard avionics and non-avionics products. In that situation, the only choice left to the airline is, logically, whether or not to purchase the aircraft.

409 By contrast, in cases in which the airframe manufacturer approves a number of engines for its platform (to make it a multi-source platform), it is the airline that selects the engine from those available, and it does the same in relation to BFE and SFE-option avionics and non-avionics products. It follows from the foregoing that, logically, bundling is possible, in the case of airframe manufacturers, only between GE engines and Honeywell SFE-standard products on sole-source platforms and, in the case of airlines, only between GE engines and Honeywell BFE/SFE-option products on multi-source platforms.

410 Those findings preclude, in principle, the possibility of pure bundling in cases other than those mentioned above: i.e. it is precluded in cases in which the customer who selects the engine and the customer who selects the avionics or non-avionics product concerned are not one and the same person.

411 Moreover, as regards the promotion of SFE-standard avionics and non-avionics products on multi-source platforms through mixed bundling, the contested decision does not address the problem noted at paragraph 408 above. The Commission merely states, at recital 349 of the contested decision that '[t]he complementary nature of the GE and Honeywell product offerings coupled with their respective existing market positions will give the merged entity the ability and the economically

rational incentive to engage in bundled offers or cross-subsidisation across product sales to both categories of customers', referring for the remainder to its analysis of SFE-option and BFE products at recital 350 et seq.

412 Difficulties also exist with regard to the merged entity's ability to promote its BFE and SFE-option products through mixed bundling on sole-source platforms, since, in the normal course of events, it will be committed, vis-à-vis the airframe manufacturer, to supply its engine at a given price, whatever choice the airlines may make in respect of BFE avionics and non-avionics products.

413 Although it appears from recital 391 of the contested decision that the fact that a price is set in advance for an engine does not necessarily make mixed bundling impossible, that factor none the less reduces significantly the scope for mixed bundling which includes that engine and thus makes it more difficult for the merged entity to engage in such bundling.

414 Furthermore, in the course of the administrative procedure, the parties to the merger submitted that there are also practical problems on account of the fact that engines for a platform are, as a general rule, selected at an earlier stage in the design process of a new aircraft than avionics and non-avionics products, even when these are SFE products (see recital 371 of the contested decision). In response to those criticisms, the Commission cites, in the contested decision, examples of cases in which the engines and avionics and non-avionics products were selected at about the same time (recital 372) and concludes that 'it cannot therefore be contended that the systems selection process cannot be adapted to a timeline enabling bundling to take place' (recital 373).

415 It follows from those observations, which the Commission made in the contested decision and which the applicant did not specifically challenge before the Court, that bundling is not rendered impossible by the selection timeline for the various products. However, it is nevertheless the case that the commercial practices in question do not fit naturally into the usual *modus operandi* of the relevant markets: consequently an undertaking which wishes to impose such practices on its customers will have to make an additional commercial effort.

416 Although those practical problems admittedly do not make bundling impossible, the fact nevertheless remains that they make it more difficult to put it into practice and, accordingly, make it less likely that bundling will occur.

Pure bundling

417 So far as pure bundling is concerned, the Commission anticipates that the engine or one of the avionics products or non-avionics products could be the tying product, that is to say the vital component, or component of choice, which the merged entity would refuse to sell independently of its other products (recitals 351 and 415 of the contested decision).

418 Given that for the reasons set out above, in particular at paragraphs 408 to 410, pure bundling is conceivable only where the customers are the same for each product, it should also be noted that, in cases in which a platform is multi-source as to its engine and the avionics products concerned are BFE or SFE-option products, the scope for pure bundling is very limited. It would only be where, for technical or other reasons, an airline had a marked preference for the merged entity's engine that such a strategy might conceivably drive it to purchase a BFE avionics or non-

avionics product from the merged entity. It must be noted that, in the contested decision, the Commission did not carry out a specific examination to ascertain for which platforms and/or particular products such a commercial strategy could have proved effective.

419 It is also appropriate to recall in this connection the lack (noted above, in particular at paragraph 362) of any analysis of the effects of the merger on the individual markets for avionics and non-avionics products defined by the Commission. Moreover, given that preferences for a product are, more often than not, relative rather than absolute, account should also have been taken, in the course of such an analysis, of any harmful commercial effects which pure bundling might have. Indeed, such an approach could deter a potential purchaser of one of the merged entity's engines, notwithstanding its preference — which might only be slight — for that engine. Since the Commission failed to carry out a detailed examination of that kind in the contested decision, it did not establish that it would have been viable for the merged entity to engage in pure bundling in cases in which one of its engines on a multi-source platform was the tying product.

420 With regard to the possibility of tying the sales of an engine on sole-source aircraft and of SFE-standard avionics and non-avionics products, the Commission did not put forward any concrete examples of how the future behaviour foreseen by it would operate. Again, the lack of any specific analysis of the markets means that its reasoning is not sufficiently precise to substantiate the conclusion which it reaches. Although the Commission concluded that there was a dominant position on the market for large commercial jet aircraft engines, it still found there to be a degree of residual competition on that market. Therefore if the merged entity were to 'compel' an airframe manufacturer to select its SFE avionics and non-avionics products, that could have harmful commercial consequences for it in that an airframer might be prompted to choose another manufacturer's product in certain cases. Since the Commission failed to consider that possibility in the contested decision, it did not establish that pure bundling would have made it possible to place SFE products on large commercial aircraft platforms.

421 As regards the possibility that either the avionics products or the non-avionics products of the former Honeywell could act as a tying product and compel customers to purchase the merged entity's engines, the Commission puts forward, at recital 415 of the contested decision, a single concrete example as to where pure bundling might be possible. It states that 'the merged entity will have the ability to render the sale of products where Honeywell has 100% market share (such as EGPWS for example), conditional on the sale of its engine. In order to obtain such products, airlines will have no other choice than to buy the engine offered by the merged entity.' In relation to the possibility of exerting similar pressure on airframe manufacturers, the Commission is less categoric, merely stating, at recital 416, that 'GE may strengthen its dominant position through package offers or tying vis-à-vis airframers'.

422 It should be observed that the Commission's case in this regard assumes that the merged entity would be able to engage in a type of commercial blackmail vis-à-vis its customers by refusing to sell them a relatively inexpensive but vital avionics product, unless the customers agreed to purchase its engines. Although the power of the applicant's customers on the market for large commercial jet aircraft engines (both airframers and airlines) to stand up to the applicant may be limited (see paragraph 274 et seq. above and recitals 224 to 228 of the contested decision), and would be even more limited vis-à-vis the merged entity following the merger, the Commission did not establish in the present case that customers would have lost all residual power to hold out against the imposition of such a practice.

423 As for the specific product to which the Commission refers, the EGPWS, it is apparent from recitals 253 to 256 that there were other products which could be substituted for the former Honeywell's device. The Commission notes that none of those products has been sold in significant quantities on the market and observes that, according to Thales, the fact that its product does not have an established reputation has proved to be a major barrier to market entry. However, if the merged entity were to adopt the extreme commercial stance represented by pure bundling, which is tantamount to a threat to refuse to supply, customers might prefer to use another product, even an inferior one, instead of the former Honeywell's EGPWS,

rather than accept an engine which is not their engine of choice. In any event, it was for the Commission to examine that possibility. In particular, it did not consider and reject the possibility that customers might select Universal Avionics' TAWS system (Terrain Avoidance Warning System), as Airborne did in January 2001, merely noting that, according to Rockwell, Universal Avionics did not team up with it in order to win that bid (recital 256). The latter fact is not relevant to the question whether Universal Airborne's product is a viable alternative to Honeywell's.

424 Finally, in accordance with the judgment in *Tetra Laval* v *Commission*, paragraph 58 above, upheld in this respect by the Court of Justice on appeal in its judgment in *Commission* v *Tetra Laval* (paragraph 60 above), the Commission was also required to take account of the possible impact, on the markets in question, of the potentially deterrent effect of the prohibition on abuses of a dominant position laid down in Article 82 EC.

425 Given the extreme nature, from a commercial perspective, of the behaviour described above, which would have been necessary in this instance for the merged entity to implement a strategy based on pure bundling, it was incumbent on the Commission to take into account the effect which the Community-law prohibition on abuses of a dominant position might have had on the merged entity's incentive to implement such practices. Since the Commission failed to do that, it made an error of law, as a result of which its analysis is distorted and, accordingly, vitiated by a manifest error of assessment.

426 In the light of the foregoing, it must be held that the Commission has not sufficiently established that the merged entity would have engaged in pure bundling following the merger, and its analysis is vitiated in that regard by a number of manifest errors of assessment.

Technical bundling

427 In relation to technical bundling, the Commission relies on the integration between the various avionics products and on the future development of the More Electric Aircraft Engine project (see recital 291 of the contested decision), whilst itself admitting that 'explicit integration of the engine and systems has not occurred yet'. It submits that such integration is likely to take place 'in the near future' as part of that project but it does not provide any details about the project and does not indicate a date by which that integration is in its view foreseeable. Nevertheless, it relies exclusively on the future development of that project to conclude that Honeywell's elimination as a potential innovation partner will further strengthen the applicant's dominant position on the market for large commercial jet aircraft engines (recitals 417 and 418 of the contested decision).

428 That basic description of the way the market might evolve, without even a brief account of those specific aspects of the project which would make such evolution likely, is not sufficient to establish that the Commission's case on this point is well founded.

429 According to the judgment in *Tetra Laval* v *Commission*, paragraph 58 above (paragraph 155 et seq.), upheld by the Court of Justice on appeal in this regard in its judgment in *Commission* v *Tetra Laval*, paragraph 60 above, paragraph 39 et seq.), the Commission's task is to show in relation to the future development of the market, on the basis of convincing evidence and with a sufficient degree of probability, not only that any conduct foreseen by it will take place in the relatively near future but also that the conduct will result in the creation or strengthening of a dominant position in the relatively near future; this the Commission has not done. The lack of any detailed analysis of the technical integration which might be achieved as between engines, on the one hand, and avionics and non-avionics products, on the other, and of the likely influence of such integration on the way the different markets concerned might evolve, also makes the Commission's case less credible. It is not enough for the Commission to put forward a series of logical but

hypothetical developments which, were they to materialise, it fears would have harmful effects for competition on a number of different markets. Rather, the onus is on it to carry out a specific analysis of the likely evolution of each market on which it seeks to show that a dominant position would be created or strengthened as a result of the merger and to produce convincing evidence to bear out that conclusion.

430 In view of the foregoing, the Commission has not adequately established that the merged entity would actually have the capability, immediately after the merger, or indeed in the relatively near future, to tie sales of its avionics products and/or its non-avionics products to sales of its engines by means of technical constraints.

Mixed bundling

431 So far as mixed bundling is concerned, it should be observed that, subject to the findings at paragraphs 408 to 411 above concerning the requirement that the customers be one and the same person and those at paragraphs 414 and 415 concerning the timeline for ordering the various components of an aircraft, the merged entity could, in some cases and in respect of certain products, have offered lower prices for a range of products subject to the requirement that all the products were selected. Indeed, an economic operator can, as a general rule, always offer a package encompassing a number of products which are normally sold separately.

432 However, such an offer will have economic effects on the market only in so far as customers accept it and, in particular, do not demand that the offer is unbundled product by product. The onus was thus on the Commission to show that the merged entity would have been able to insist that the package it was offering its customers was not unbundled. Furthermore, as has been held above, the Commission was required to establish that there was a likelihood of the merged entity actually exploiting the possibility of engaging in mixed bundling.

433 It must be borne in mind that in *Tetra Laval* v *Commission*, paragraph 58 above, the Court expressed itself in relatively strict terms in relation to the question of the evidence which the Commission must produce if it relies, as part of its analysis, on the fact that an undertaking will adopt a given course of conduct in the future and that as a result a dominant position will be created, holding that it is incumbent upon that institution to produce 'convincing evidence' in such a case (see, in particular, paragraph 154 et seq. of the judgment). As the Court of Justice held, approving that part of the judgment on appeal, the Court of First Instance by no means added a condition relating to the requisite standard of proof when expressing itself in such terms but merely drew attention to the essential function of evidence, which is to establish convincingly the correctness of an argument or, as in the present case, of a merger decision (*Commission* v *Tetra Laval*, paragraph 60 above, paragraph 41).

434 In this instance, the Commission in effect employed three distinct lines of reasoning in the contested decision in order to establish the likelihood that the merged entity would actually engage in mixed bundling.

435 First, it claimed that practices analogous to those which it anticipates have already been used in the past on the relevant markets, in particular by Honeywell (see, inter alia, recitals 361 to 370 of the contested decision). It should also be noted, in this context, that the Commission regarded as relevant here 'Honeywell's strength in products integration' (recitals 289 to 292 of the contested decision) and 'Honeywell's strength in packaged deals' (recitals 293 to 297 of the contested decision).

436 Second, it argued that it follows from well-established economic theories, particularly the 'Cournot effect' (see, inter alia, recitals 374 to 376 of the contested decision), that the merged entity would have an economic incentive to engage in the practices foreseen by the Commission and that there was no need to rely on a specific economic model in that regard.

437 Third, the Commission alleged that the merged entity's strategic objective would be to increase its power on the different markets on which it is present and that, given that intention, bundling would be economically rational behaviour on its part and, therefore, likely behaviour (see, in particular, recitals 353, 379, 391 and 398 of the contested decision). In response to a written question put by the Court, the Commission stated at the hearing that it was relying on the combined effect of the incentive arising, in its submission, from the applicant's commercial situation and from the merged entity's strategic choices.

438 The three lines of reasoning employed by the Commission in this part of the contested decision are examined in turn below.

— Previous practice

439 It must first be noted that the examples of previous practices put forward by the Commission relate in essence to alleged bundling offered by Honeywell of avionics and non-avionics products (see, in particular, recitals 362 to 365 and 367 of the contested decision). Even assuming that those examples are sufficiently established, they are of little relevance for the purpose of establishing that after the merger the merged entity was likely to have the ability to bundle engines sales with sales of avionics and non-avionics products and that it was likely to have the commercial incentive to do that. It is not disputed that the price of the engine is markedly higher than that of each avionics or non-avionics component and that therefore the commercial dynamic of a mixed bundle is very different depending on whether it consists (i) solely of avionics and non-avionics products or (ii) of those products and an engine. Thus, it cannot be established, on the basis of examples relating to avionics and non-avionics products alone, that mixed bundling covering engines as well would have been viable and commercially advantageous for the merged entity following the merger.

440 The only concrete example which the Commission gives of bundling involving both an engine and avionics/non-avionics products relates to the [...], a corporate jet aircraft (see recital 368 of the contested decision). However, the Commission itself admits, in the last sentence of recital 368, that the airframe manufacturer in question [...]. Thus, that example, as presented in the contested decision, does not establish that Honeywell could have successfully engaged in bundled sales including engines for corporate jet aircraft and avionics/non-avionics products. Quite to the contrary, the fact that [...] is the outright negation of the Commission's argument on this point.

441 The Commission also states at recitals 366 and 367 of the contested decision that Honeywell's ability to engage in extensive bundled deals, including engines and avionics/non-avionics products, arose only recently, in particular after the merger of Honeywell and AlliedSignal in 1999. Even though that factor might explain why the Commission could find only one example of such bundling, it cannot make up for the absence of convincing examples on the basis of which the Court might ultimately conclude that previous practice shows that there is a likelihood of similar practices occurring in future.

442 Furthermore, there are significant differences between the large commercial aircraft sector, where the merger would in future allow the merged entity to offer bundled sales for the first time, and the corporate aircraft sector, notably in so far as large commercial aircraft are sometimes multi-source platforms as regards engines, where the engine manufacturer's customer is the airline, whilst corporate aircraft are always sole-source platforms, where the customer is the airframer.

443 In the light of the above, the examples put forward by the Commission relating to Honeywell's previous practice do not establish that it was likely that after the merger the merged entity would have engaged in mixed bundling including the former GE's

engines, on the one hand, and the former Honeywell's avionics and non-avionics products, on the other hand.

— Economic analyses

444 In relation to the second line of reasoning employed by the Commission concerning economic models, the applicant submits that the Commission relied in the SO on the Choi model, according to which an undertaking such as the merged entity with a significant portfolio of products would have the capability and the incentive to engage in mixed bundling. It also maintains that the Commission went on to abandon that model in the contested decision. The Commission, on the other hand, stated before the Court that it neither adopted nor abandoned the Choi model, taking the view that the merged entity's incentive to engage in bundling after the merger is in any event apparent from the terms of the contested decision (see, in particular, recitals 374 to 376 of the contested decision on the Cournot effect).

445 It should be observed in that regard that the Commission maintained, at recital 352 of the contested decision, that reliance on one or other of the models submitted during the administrative procedure was unnecessary. In addition, the Hearing Officer stated in his report that the Commission was no longer relying on the Choi model in its draft decision.

446 Furthermore, the Commission did not refer in the contested decision to the Choi model, except indirectly, where it is stated, at recital 352, that '[t]he various economic analyses have been subject to theoretical controversy, in particular as far as the economic model [of mixed bundling], prepared by one of the third parties, is concerned'. By contrast, as the applicant observes, the Commission had in the SO given a detailed account of the Choi model and had expressly relied on that model as evidence substantiating its case on the merged entity's future conduct and the

economic consequences thereof. In those circumstances, although the Commission has not acknowledged that the Choi model had no probative value, it did not actively rely on that model in the contested decision. It must therefore be held, for the purposes of these proceedings, that the contested decision is not supported by any economic model which analyses, on the basis of data specifically related to the present case, the likely consequences of the notified transaction.

447 It is therefore necessary to consider whether, in the absence of such an economic model, the Commission established that the merged entity would, following the merger, have had an incentive to engage in mixed bundling.

448 At recitals 349 to 355 of the contested decision, in which the Commission explains the mechanism by which bundling would create dominant positions on the markets for avionics and non-avionics products, the Commission in essence confines itself to explaining the reasons why, in its view, the merged entity would be in a position to engage in bundling after the transaction. Thus, it refers, as regards SFE-standard products, to 'the new entity's ability to offer product packages to the airframe manufacturers' (recital 349). As to BFE and SFE-option products, it states that the merged entity 'will be able to offer a package of products that has never been put together on the market prior to the merger and that cannot be challenged by any other competitor on its own' (recital 350), that it may 'promote the selection of Honeywell's BFE and SFE-option products by selling them as part of a broader package comprising engines and GE's ancillary services' (recital 350) and that 'it will be able to price its packaged deals in such a way as to induce customers to buy GE engines and Honeywell BFE and SFE-option products over those of competitors ...' (recital 353).

449 Wherever the Commission refers, at recitals 349 to 355, to the incentive, as opposed to the mere ability, which the merged entity would have to engage in those practices,

no evidence or analysis is put forward which is such that it might establish that there was a real likelihood of such an incentive existing after the merger. Thus, at recital 349, the Commission merely states that '[t]he complementary nature of the GE and Honeywell product offerings coupled with their respective existing market positions will give the merged entity the ability and the economically rational incentive to engage in bundled offers or cross-subsidisation across product sales to both categories of customers', but does not explain why those factors are sufficient to give rise to that incentive. At recital 354, it states that '[t]he incentives for the merged entity to sell bundles of products may change over the short to medium term, for instance when new generations of aircraft platforms and aircraft equipment are developed' but does not explain what would give rise to those incentives nor what the differences would actually be between those incentives before and after the predicted change.

450 Accordingly, the account at recitals 349 to 355 does not establish that the merged entity would have had an incentive to engage in mixed bundling after the merger. However, the Commission puts forward other considerations under the heading '(2) The parties' arguments in relation to [bundled] offers'. In particular, one section under that heading is, in turn, entitled 'The Cournot effect of bundling'. The Cournot effect is an economic theory dealing, in substance, with the advantages which a firm that sells a wide range of products, in contrast to its competitors whose range is more restricted, may derive from the fact that, if it offers discounts on all the products in the range, thereby reducing its profit margin on each, it none the less benefits overall from that practice because it sells a larger quantity of all the products in its range.

451 At recitals 374 to 376, which appear under that heading, the Commission replies, in essence, to the contention of the parties to the merger that 'their incentives to reduce the prices of their respective products are low in that the demand for aircraft is relatively inelastic to the price of engines and components and also that the overall price of an aircraft is only one of many factors going into an airline's decision whether to purchase additional aircraft'.

452 Having stated, at recital 375, that it does not consider demand for aircraft equipment and components to be completely inelastic, the Commission then goes on to assert, at recital 376, that in any event, the demand for the products of each individual entity is in fact elastic. It concludes from this that 'even if bundling were not to affect the aggregated volume of the demand for aircraft or engines and components, bundling would lead to a re-allocation and therefore to a shift of market shares in favour of the merged entity'.

453 It follows from that reasoning that, according to the Commission, the merged entity would have had an incentive to engage in mixed bundling following the merger on account of the Cournot effect, irrespective of whether demand, at the level of the market for each item of aircraft equipment, is elastic or not. However, as Frontier Economics, the consultancy commissioned by Rolls-Royce in the present case, acknowledges in its newsletter of August 2001, submitted as an annex to the application, the establishment of such a case on the basis of the Cournot effect requires detailed empirical analysis — both of the size of the price cuts and the shifts in sales that would be expected, as well as the costs and the profit margins of the various market participants.

454 It must also be noted that the Commission itself seems to have considered, at the stage of the administrative procedure, that such an economic analysis was necessary for it to make out its case. Points 526 to 528 of the SO are identical to recitals 374 to 376 of the contested decision, except in that in footnote 175 in the SO, which is referred to at the end of point 528 of the SO, the Commission states that Professor Choi had developed a model analysing the situation in which demand for the products concerned was inelastic, which showed that bundling was liable to have anti-competitive effects.

455 Furthermore, the applicant cites the reports of other economists, in particular those of Professors Nalebuff, Rey and Shapiro, appended to the reply to the SO and to the application, which indicate, in substance, that the merged entity was not likely to have had an incentive, following the transaction, to engage in mixed bundling, at

least to any significant degree, contrary to Professor Choi's conclusion. In particular, Professors Nalebuff and Rey criticise Professor Choi's underlying assumptions about the nature of the market and Professor Rey observes, in particular, that the Choi model was capable of producing (validly on its own calibration conditions) different results depending on the range of starting parameters used.

456 It may therefore be concluded — without a detailed assessment in these proceedings of either the merits of the conclusions reached by the various economists or of the relative weight of the respective analyses of Professors Nalebuff, Rey and Shapiro in comparison with that of Professor Choi — that the question as to whether the Cournot effect would have given the merged entity an incentive to engage in mixed bundling in the present case is a matter of controversy. The Commission's conclusion as to the likelihood of there being such an incentive is thus certainly not a direct and automatic consequence of the economic theory of Cournot effect.

457 Moreover, there is a further consideration relating to the implementation of bundled sales which indicates that in this instance the Commission's case cannot be established by reference to the Cournot effect.

458 In this regard, the applicant rightly pointed out, both during the administrative procedure and before the Court, that Snecma would have had no interest in sacrificing a part of its profits by granting discounts in order to promote the former Honeywell's profits, and that therefore mixed bundling including CFMI engines would have been impossible. The Commission did not take due account, in the contested decision, of the commercial impact which that circumstance would necessarily have had on the merged entity's incentive after the merger to engage in bundling when, at recital 393 of the contested decision, it observed that there is no reason why Snecma, which does not compete with GE as an independent engine manufacturer, should not favour that course of action.

459 If Snecma were to agree to reduce the sale price of a CFMI engine in order to increase the sale of a package by bundling that engine with avionics and non-avionics products manufactured by the merged entity, it would profit from that practice only to the extent to which sales of its engines would be increased. There would thus be no Cournot effect operating to increase Snecma's profits over a whole range of products. Even if the Cournot effect constitutes, according to the Commission's case, proof of an incentive to engage in bundling, it must be held that that reasoning does not justify its conclusion, at recital 393 of the contested decision, that, in that respect, Snecma would have had the same commercial interests as the merged entity.

460 Consequently, discounts on engine prices offered to customers as part of a mixed bundle including a CFMI engine would, in principle, have to be financed exclusively by GE. In other words, an amount representing the absolute value of such a discount would have had to be deducted from roughly half of the price of a CFMI engine due to GE by virtue of its participation in the joint venture, since Snecma would not have a comparable commercial interest to that of GE in contributing to any significant degree to the financing of such a discount. Thus, the merged entity's 'lever' on the market for large commercial jet aircraft engines to promote its bundled sales would, in principle, be smaller in the case of CFMI engines than it would be in the case of engines manufactured by GE alone.

461 Consequently, mixed bundling including CFMI engines would have been markedly less profitable commercially from the merged entity's standpoint than it would have been if the applicant were the sole manufacturer of those engines. Even supposing that the Cournot effect could have been found to exist here for mixed bundles including the former GE's engines, the Commission would have needed to carry out a separate analysis, which took account of the factor noted in the previous paragraph, in order to ascertain whether such an effect existed in the case of mixed bundling including CFMI engines.

462 Bearing in mind all of the foregoing, in the absence of a detailed economic analysis applying the Cournot effect theory to the particular circumstances of the present case, it cannot be concluded from the Commission's brief mention of that theory in the contested decision that the merged entity would have been likely to engage in mixed bundling after the merger. The Commission could produce convincing evidence within the meaning of the judgment in *Tetra Laval* v *Commission*, paragraph 58 above, by relying on the Cournot effect only if it demonstrated its applicability to this specific case. Accordingly, by merely describing the economic conditions which would in its view exist on the market after the merger, the Commission did not succeed in demonstrating, with a sufficient degree of probability, that the merged entity would have engaged in mixed bundling after the merger.

— The strategic nature of the behaviour foreseen

463 Third, the Commission argued before the Court that its description of bundling and of the likelihood that it would actually occur must be read in the light of the fact that the merged entity will use its ability to offer bundled deals strategically as a 'lever' specifically in order to marginalise its competitors. The applicant submits that that construction of the contested decision is 'inadmissible' on the ground that it is an interpretation advanced for the first time before the Court. In essence, it criticises the Commission for attempting to remedy deficient reasoning at the stage of the judicial proceedings. In this connection it is sufficient to point out that the Commission did maintain in the contested decision that the merged entity would use its ability to offer bundled sales strategically in the future in order to oust its competitors, in particular by the use of cross-subsidisation (see, in particular, recitals 353, 379, 391 and 398). Accordingly, it is necessary to examine the other arguments advanced by the applicant.

464 In that regard, it should first be observed that, in its judgment in *Commission* v *Tetra Laval*, paragraph 60 above, the Court of Justice held, as had the Court of First

Instance, that when the Commission relies on future conduct which it contends will be engaged in by a merged entity following a merger, it is required to establish, on the basis of convincing evidence and with a sufficient degree of probability, that the conduct will actually occur (see, also, paragraph 64 above).

465 In this instance, it has already been held, at paragraph 462 above (see also paragraph 432) that the Commission did not establish, by reference to the objective commercial and economic circumstances of the case, that it would necessarily have been in the interests of the merged entity to engage in mixed bundling following the merger. Thus, from the commercial standpoint, various strategies would have been open to the merged entity after the merger. Although the strategic choice anticipated by the Commission would certainly have been among the options available to it, the short-term maximisation of profits by obtaining the largest possible profit margin on each individual product would also have been an option.

466 Therefore, and given that it had not been sufficiently established that the merged entity had an economic incentive, the onus was on the Commission to put forward in the contested decision other evidence suggesting that the merged entity would make the strategic decision to sacrifice profits in the short term with a view to reaping larger profits in the future. By way of example, internal documents showing that the applicant's Board of Directors had that objective on the launch of their bid to acquire Honeywell could, depending on the circumstances, have constituted such evidence. The Court cannot but note, concurring with the applicant's submissions to that effect, that the Commission did not put forward any evidence of such a nature that it might establish that the merged entity would in fact make that strategic decision. It merely asserts in the contested decision that the merged entity would have had the ability to price its proposed bundled deals strategically and to engage in cross-subsidisation, and that it would have actually employed those practices, but does not put forward the reasons which justify that assertion (see, in particular, recitals 353, 379, 391 and 398). However, the fact that the merged entity could have made a strategic decision to such effect is not sufficient to establish that it would in fact have done so, and that dominant positions would have been created on the various avionics and non-avionics markets as a result.

467 Finally, before the Court of First Instance, the Commission claimed that the strategic purpose of the applicant's anticipated future conduct had itself to be taken into account when assessing the likelihood of that conduct. Although such an argument might explain why the Commission did not rely on a specific economic model, once again it cannot make up for the lack of evidence as to the likely adoption by the applicant of a commercial policy with such strategic purpose.

468 It is appropriate to add that, according to the judgment in *Tetra Laval* v *Commission*, paragraph 58 above, the Commission should indeed have taken into account the deterrent effect which the possibility of penalties imposed for an abuse of a dominant position under Article 82 EC might have on a merged entity (see paragraph 70 et seq. above). The failure to take that factor into account in the contested decision further undermines its assessment with regard to mixed bundling.

469 In view of the foregoing, the Court must conclude that the Commission's reasoning based on the future adoption of a 'strategic' commercial policy cannot be accepted, since convincing evidence attesting to the likelihood of that hypothesis has not been adduced.

Conclusion

470 It follows from all the foregoing that the Commission has not sufficiently established that, following the merger, the merged entity would have engaged in bundling including both the former GE's engines and the former Honeywell's avionics and non-avionics products. In the absence of such sales, the mere fact that the merged entity would have had a wider range of products than its competitors is not sufficient to justify the conclusion that dominant positions would have been created or strengthened for it on the different markets concerned.

471 In view of the conclusion in the previous paragraph, there is no need to examine the applicant's argument concerning the foreclosure of competitors from the market, alleged by the Commission, since the Commission's conclusions on bundling are in any event not sufficiently established.

472 Nor is there any need to consider the Commission's treatment of the commitments relating to this aspect of the case, and in particular the Commission's rejection of the behavioural commitment relating to bundling. Moreover, given that it is not necessary either to examine the structural commitments affecting Honeywell's activities on the various markets for avionics and non-avionics products or the commitment relating to GECAS's future conduct (paragraph 365 above), the question as to which of the two sets of commitments the Commission was to take into account becomes moot. As was held at paragraph 50 above, the two sets of commitments differed only in relation to those two aspects of the commitments offered by the parties to the merger.

473 It must therefore be concluded that the Commission made a manifest error of assessment in finding that the merged entity's future use of bundling would lead to the creation or strengthening of dominant positions on the markets for avionics or non-avionics products, or to the strengthening of GE's pre-merger dominant position on the markets for large commercial jet aircraft engines.

E — *Horizontal overlaps*

474 The applicant submits, with regard to the reasons in the contested decision concerning horizontal overlaps between the merging parties' products for large regional jet aircraft engines, corporate jet aircraft engines and small marine gas

turbines, that the Commission was wrong to conclude that dominant positions would be created with anti-competitive effects.

1. *Jet engines for large regional aircraft*

475 In the applicant's submission, the Commission's analysis of the horizontal overlap relating to large regional jet aircraft engines is vitiated by two fundamental errors: (i) the finding that the applicant's large regional jet aircraft engines and those of Honeywell are in the same market and, in any event, (ii) the failure to assess correctly the impact of the merger on the market for those engines.

(a) Arguments of the parties

Market definition and the existence of pre-merger dominance on the relevant market

476 According to the applicant, it was not in a dominant position on the market for large regional jet aircraft engines prior to the merger.

477 It points out that a proper definition of the relevant market is a necessary precondition for any assessment of the effect of a concentration on competition (Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR

I-1375). According to the Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5, point 13; 'the notice on market definition'), the main factors to take into account in market definition are demand-side substitutability and supply-side substitutability, which must be established on the basis of empirical evidence. The Commission did not apply the notice in the present case.

478 As regards aircraft engines, as the Commission held in the Engine Alliance decision, each engine 'family' broadly represents a unique set of thrust, weight, and other performance characteristics which make it suitable for a particular platform. GE engines are far more powerful, heavier and more complex than Honeywell's engines.

479 The sole basis for concluding that GE's and Honeywell's engines might be substitutable is the fact that some purchasers of the Avro, which is powered by a Honeywell engine, might purchase other aircraft powered by GE engines. Where it seeks to invoke such indirect 'second level' substitutability, the Commission needs to explain that novel methodology, why such second level substitution is significant and how it would lead to the foreclosure of competitors. Further, according to the notice on market definition, the Commission is required to produce empirical evidence of such substitution — which it did not do in the present case.

480 The applicant submits that, in any event, market shares are of limited use in assessing dominance in a bidding market — such as the market for large regional jet aircraft engines. It submits that it was not in a dominant position on that market prior to the merger, since it was not able to act independently of its competitors prior to the merger.

481 The Commission recalls the decision's conclusion that, in terms of engines installed and the engine order backlog for large regional aircraft, GE occupies a dominant position. GE and Honeywell together would have a 100% market share in engines for aircraft not yet in service and [90-100]% of installed engines. Such a monopoly or quasi-monopoly cannot be challenged in the foreseeable future, particularly in the face of pure or technical bundling practices.

The impact of the merger on the relevant market

482 According to the applicant, even supposing that there is only one market for large regional jet aircraft engines, the Commission acknowledged that, as regards existing platforms, 'the increase in market share resulting from the merger is rather small' (recital 429 of the contested decision). However, the Commission maintains — inconsistently — that the merger would prevent price competition. It does not provide a single example of competition between GE and Honeywell engines, or any evidence as to the impact of the merger on the market, whilst the Avro's production amounts to no more than 20 Honeywell-powered units per year.

483 The applicant claims that the evidence on which the Commission relies is irrelevant. The revenues generated from that market position are negligible owing to the low level of Avro production. By relying here on the existence of GE Capital and GECAS, the Commission is taking as its basis the same evidence used to show that there was a dominant position in order to show, in addition, that such dominance was strengthened.

484 With respect to future platforms, the Commission provides no evidence that competition will be weakened. First, GE and Honeywell do not currently compete with one another. Second, Rolls-Royce and P&W are credible competitors, as is

illustrated by examples concerning the aircraft of Embraer and Fairchild Dornier and AI(R) aircraft. The Commission merely repeats its arguments in relation to mixed bundling, cross-subsidisation and vertical integration.

485 According to the Commission, the principle of engine exclusivity on the market under consideration does not prevent competition between engine manufacturers in relation to end purchasers. Engine manufacturers have incentives to promote platforms powered by their engines, in particular by means of engine performance, attractive offers on spare engines and aftermarket engine products and services. It is this type of competition that would be lost as a result of the merger. Avro's low order backlog does not mean that all second-level competition would in any event be eliminated on the market.

486 Finally, as indicated in the contested decision, the financial strength and vertical integration of the merged entity would result in the foreclosure of Rolls-Royce and P&W from the relevant market by reducing their incentives to enter a market on which they are not currently present.

Rejection of the structural commitment relating to jet engines for large regional aircraft

487 The applicant points out that, even though they disagreed with the Commission, the parties to the merger proposed the divestment of Honeywell's activities in engine production on current and future Avro models. Thus, the objections raised by the Commission in that regard in the contested decision are entirely without foundation.

488 The Commission observes that, in the present context in particular, GE's criticisms in relation to the rejection of commitments are mere assertions from which no conclusion can be drawn as to the validity of the contested decision.

(b) Findings of the Court

Market definition

489 It should first be observed that the question whether, on the basis of facts which have been duly established or which have not been challenged, an undertaking is in a dominant position on a given market is a question of economic appraisal within the meaning of the case-law cited at paragraph 62 et seq. above, in respect of which the Commission enjoys a broad margin of assessment. In that respect, the Court's role is confined to a review of whether that appraisal is free of manifest errors.

490 By contrast, the Commission has no margin of assessment in relation to questions of fact. It should also be noted in that regard that, where the applicant has challenged a finding of fact in the contested decision, no objection can be made where the Commission responds to that challenge by producing, before the Court, evidence that the statement at issue is well founded, provided that the factual background described in the contested decision is not altered as a result.

491 The Court must therefore examine the applicant's arguments calling into question the definition of the market for large regional aircraft engines used by the Commission in the contested decision, with a view to determining whether those arguments are sufficient to establish that there are errors of fact or a manifest error of assessment.

492 At recital 9 of the contested decision, the Commission observes, in the course of its description of the structure of the engine markets in general, that competition takes place at two different levels. Engine manufacturers first compete in order to be certified on a particular platform which is under development ('first-level competition') and, second, when airlines buying the aircraft platform select one of the available certified engines or when airlines choose between aircraft equipped with different engines ('second-level competition'). In the first case, engines compete on technical and commercial grounds to power the specific platform, and it should be noted that whether such competition exists depends in essence on whether there is supply-side substitutability. In the second case, engines also compete on technical and commercial grounds to be selected by the airline and therefore the competition instead depends on whether there is demand-side substitutability.

493 In the present case, it is not in dispute that each type of aircraft regarded by the Commission as belonging to the market for large regional aircraft is available with only one model of engine and consequently the final purchaser of the aircraft has no direct and independent choice between engines, since the choice of engine is inseparable from the choice of aircraft. In those circumstances, the second-level competition referred to in the previous paragraph can exist only indirectly on the relevant market, as a result of the competition between aircraft powered by different engines.

494 In that regard, the Commission notes, at recital 9, that aircraft and their engines are complementary products, since the purchase of one is for obvious reasons of no value without the purchase of the other. It states that it is therefore necessary when defining the engines markets to take into account competition on the aircraft markets. The Commission consequently defined the different markets for aircraft engines by reference to the different markets for the aircraft which the engines power, the latter markets being defined, in turn, by reference to the mission profile for which the aircraft are designed (recital 10 of the contested decision).

495 For that purpose, the Commission took into account three key characteristics of an aircraft: number of seats, flying range and price. It first defined regional aircraft as those with '30 to 90+' seats with a range of under 2 000 nautical miles and a cost of up to USD 30 million (recital 10 of the contested decision). Next, it defined two distinct markets within that category: the market for small regional aircraft with 30 to 50 seats and the market for large regional aircraft capable of carrying 70 to 90+ passengers. It drew that distinction on the ground that 'owing to their different seating capacity, size, flying range and the resulting operating costs (i.e. seat-mile cost), these two types of regional jets serve distinct mission profiles and are not substitutable with one another' (recital 20 of the contested decision).

496 The applicant claims, and is not challenged on this point by the Commission, that the thrust of its engines is so different from that of Honeywell's engines that any direct first-level competition to supply the engine for a single projected platform is precluded, since its own engines are suitable for use on two-engine aircraft, whilst those of Honeywell can be used only on four-engine aircraft.

497 It must none the less be noted that, although it is true that an airframe manufacturer has no further choice as to engine supplier once it has selected either a two-engine platform or a four-engine platform, it is clear from the contested decision that those two options did actually exist on the market for large regional aircraft as defined by the Commission. Given that this choice existed, there was necessarily some degree of supply-side substitutability between the applicant's engines and those of Honeywell, subject to the limitation that an airframe manufacturer wishing to develop a new platform was obliged to make his choice at an early stage in the platform's development. In any event, the Commission at no point maintained, either in the contested decision or before the Court, that there was direct first-level competition between the applicant and Honeywell to supply the engine for the same proposed platform. Accordingly, even if the applicant's argument concerning the absence of any direct first-level competition is accepted, that argument does not affect the legality of the contested decision.

498 It is therefore necessary to consider whether the applicant has established that the Commission made an error of fact or a manifest error of assessment as a result of relying on the notion of indirect second-level competition mentioned above (competition between aircraft equipped with GE's engines or Honeywell's engines respectively) in reaching its finding that the parties' engines were in competition.

499 The applicant puts forward two distinct lines of argument to challenge the Commission's case that engines are in indirect second-level competition on that market. First, it submits that the case is outside the ambit of the accepted theory of substitutability. Accordingly, the Commission should have set out its novel methodology and explained why this second-level substitutability is significant and how it would foreclose competition. Second, even if this second-level competition exists, the Commission has failed to prove in the contested decision that, at the material time, aircraft powered by GE engines were in competition with aircraft powered by Honeywell engines.

500 It must be held that the description at recital 9 of the contested decision (see paragraphs 492 and 494 above) provided an adequate description of the Commission's thesis in the circumstances of the present case. The Commission stated that engines compete at the second level 'on technical and commercial grounds to be selected by the airline'. It is self-evident that if the technical performance of an essential component of an aircraft (such as the engine powering it) is markedly superior to the performance of the equivalent component on other types of aircraft of the same category, the first aircraft will, as a general rule, enjoy a competitive advantage over the others.

501 Likewise, the price of the engine can affect the overall aircraft price and the Commission expressly stated, in its description of the impact of the merger on competition in relation to the market for large regional jet aircraft engines (at recital

429 of the contested decision), that the merger of GE and Honeywell 'will prevent customers from enjoying the benefits of price competition (such as in the form of discounts) between suppliers'.

502 The applicant disputes that there is any scope for price competition between the engine manufacturers on the market for large regional jet aircraft engines, observing that it is the airframer that ultimately sets the overall platform/engine price. However, in the contested decision, in the first sentence of recital 391, which is in the section of the contested decision dealing with bundling in relation to both large regional aircraft and large commercial aircraft, the Commission stated that, even where there is no choice as to the engine for a particular platform, which is always the case with large regional aircraft, an engine manufacturer will be able to discount the price of the engine or associated aftermarket services with a view to promoting sales of the platform/engine package.

503 In answer to one of the written questions put by the Court with a view to ascertaining whether there was scope for the discounting referred to at recital 391 to occur, the Commission produced at the hearing three internal GE documents bearing references 120-CID-000167, 334-DOC-000827 and 321-DOC-000816. The Court finds that the three documents support the Commission's case that there was second-level competition between engines.

504 In particular, document 321-DOC-000816 indicates, specifically in relation to one of the large regional aircraft powered by a GE engine, that it was [...]. Accordingly, it must be held that second-level competition, in particular price competition, as described by the Commission at recital 9 of the contested decision, was a reality on the engines markets in general and on the market for large regional jet aircraft engines in particular, despite the fact of engine exclusivity on each platform.

505 The Court must also reject the arguments on this point advanced by the applicant in its application of 8 June 2004 for the reopening of the oral procedure and repeated in its observations of 21 July 2004, to the effect that the three documents mentioned at paragraph 503 above are inadmissible evidence. First, the Court notes that the applicant did not challenge the production of the documents at the hearing and that no objection was made as such to their being placed on the file. Moreover, as the Court of Justice has held, where the Court of First Instance takes into account answers given by a party to questions put by way of measures of organisation of procedure on the basis of Article 64(3) of the Rules of Procedure of the Court of First Instance, and where the other party has had, where appropriate, the opportunity of stating its views on those matters at the hearing, there is no infringement of Article 48 of the Rules of Procedure (see, to that effect, Case C-259/96 P *Council* v *De Nil and Impens* [1998] ECR I-2915, paragraph 31). In the present case, the *audi alteram partem* rule was observed, since the applicant was able to state its views on those documents not only at the hearing but also in writing following the reopening of the oral procedure which it had itself requested.

506 The applicant submits, however, that the documents were not included in the Commission's file to which it was given access and cites the judgment of the Court of Justice in Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraphs 22 to 25, in order to conclude that those documents must consequently be excluded. The Court observes in this regard that, in its observations of 17 September 2004, the Commission indicated the page numbers from the file at which each of the documents appears and produced, as an annex, extracts of the lists of documents to which access was given. It also stated that two of the documents, bearing references 120-CID-000167 and 321-DOC-000816, were actually explicitly mentioned in the SO. In those circumstances the applicant's argument that the three documents were not included on the administrative file must be rejected.

507 Moreover, that reasoning is not undermined by the argument advanced by the applicant in its final observations, of 15 October 2004, concerning the fact that the Commission indicated, by marking them with the letter 'P', that those documents had been provided to the Commission by the parties to the merger themselves, whilst in fact they must have been sent to the Commission by the United States

Department of Justice. The Commission submits that the parties to the merger did not ask it to forward copies of the documents to them. It is to be observed that the applicant could have asked for the production of those documents had it wished, since they were entered on the list of documents forming part of the administrative file, to which the parties were entitled to have access.

508 In any event, the three documents are GE internal documents of which the applicant cannot fail to be aware. It would be illogical to find there to be an infringement of the rights of the defence or to prevent the Commission from producing certain internal documents of a party before the Court on the ground that the Commission had not provided that party with copies of its own documents.

509 In so far as the Commission relies on those three documents in relation to a question of a purely factual nature, that is to say whether the airframer sets the price of the aircraft independently of the price of the engine or whether, as the Commission maintained in the contested decision, the engine manufacturer will still be able to offer discounts in order to promote sales of the aircraft and, consequently, of his engine, which powers it, it must be concluded that the Commission was entitled to produce those documents before the Court in order to respond to the applicant's challenge of the facts at issue (see, in that regard, paragraph 490 above).

510 In the light of the foregoing, the Commission did not make an error of fact or a manifest error of assessment in so far as it relied, in the course of defining the market for large regional aircraft, on the existence of second level competition between engines as a result of competition between the aircraft powered by those engines.

511 As part of its second line of argument mentioned at paragraph 499 above, the applicant submits that the margin of assessment which the Commission enjoys when defining markets is limited (i) by its own practice in earlier decisions, in

particular in the Engine Alliance decision, and (ii) by the notice on market definition which it published on this subject. The reasoning by which the Commission concluded that aircraft powered by GE engines and those powered by Honeywell engines are in competition on the same market is, in the applicant's submission, incompatible with those measures.

512 In this regard, it is appropriate to bear in mind that, by virtue of settled case-law, economic operators have no grounds for a legitimate expectation that a previous practice in taking decisions that is capable of being varied when the Community institutions exercise their discretion will be maintained (see paragraphs 118 and 119 above and the case-law cited).

513 In so far as the applicant relies in this regard on paragraph 15 of the judgment in Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395 in support of its argument that the Commission is subject to a special requirement to state reasons when it departs from its practice in earlier decisions, it is sufficient to observe that paragraph 15 of that judgment (and paragraph 31 of the judgment in Case 73/74 *Fabricants de papiers peints* v *Commission* [1975] ECR 1491) relate to the exception — in cases where the Commission extends the ambit of a practice — to the usual rule that the Commission may give a summary account of the reasons for a decision which follows a well-established line of decisions. Although the Commission is required to give an explicit account of its reasoning for such a decision, it does not follow from those cases that the Commission must, in addition to stating the reasons for its decision by reference to the case-file to which the decision relates, specifically set out its reasons for reaching a different conclusion than in a previous case concerning similar or identical situations or the same market participants.

514 Accordingly, in the present case, the applicant cannot maintain a plea of legitimate expectation on the ground that the Commission had defined markets in a particular way in a previous decision, notably in so far as it took account of engine thrust in the

Engine Alliance decision. Neither the Commission nor, a fortiori, the Court itself is bound by the findings made in the Engine Alliance decision.

515 In any event, the Commission rightly points out that, in the Engine Alliance decision, it was considering an agreement whose aim was to enable GE and P&W to develop jointly an engine intended to power platforms which were themselves under development, namely the Airbus A380 and the stretched version of the Boeing 747-400. In those circumstances, only first-level competition (as is described at recital 9 of the contested decision), namely competition between engine manufacturers to obtain certification on a platform, was relevant in the Engine Alliance case. That explanation is a logical and sufficient answer to the arguments put forward by the applicant on this point.

516 As regards the alleged failure to apply the notice on market definition, it is appropriate to observe at the outset that the Commission may not depart from rules which it has imposed on itself (Case 148/73 *Louwage* v *Commission* [1974] ECR 81, paragraph 12; Case 81/82 *Commission* v *Council* [1973] ECR 575, paragraph 9; Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 53, upheld on appeal by the Court of Justice in Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, and the case-law cited). Thus, to the extent that the notice on market definition lays down in mandatory terms the method by which the Commission intends to define markets in the future and does not retain any margin of assessment, the Commission must indeed take account of the provisions of the notice.

517 The applicant submits that, according to the notice on market definition, demand-side substitutability is one of the primary factors to be taken into account and that there is no such substitutability in this case (see paragraph 496 above). It is sufficient to observe on this point that, having identified demand-side substitutability, supply-side substitutability and potential competition as the three main sources of

competitive constraints on undertakings, the notice on market definition states, in point 13: '[f]rom an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions.' In those circumstances, it does not follow from the terms of the notice on market definition that the absence of direct supply-side substitutability in the present case between the applicant's engines and those of Honeywell undermines the definition of the market used by the Commission in the contested decision, inasmuch as the Commission properly concluded that there was demand-side substitutability.

518 The applicant complains that the Commission did not establish demand-side substitutability by reference to empirical evidence or economic studies, as is required by the notice on market definition. It must be observed in this regard that, in point 25 of the notice, under the heading 'Evidence relied on to define relevant markets', the Commission states as follows:

'There is a range of evidence permitting an assessment of the extent to which substitution would take place. In individual cases, certain types of evidence will be determinant, depending very much on the characteristics and specificity of the industry and products or services that are being examined. The same type of evidence may be of no importance in other cases. In most cases, a decision will have to be based on the consideration of a number of criteria and different items of evidence. The Commission follows an open approach to empirical evidence, aimed at making an effective use of all available information which may be relevant in individual cases. The Commission does not follow a rigid hierarchy of different sources of information or types of evidence.'

519 It must be held that, where the Commission expresses itself in a notice in terms which allow it the scope to choose, from the types of evidence or approaches which may in theory be relevant, those which are the most appropriate in the

circumstances of a given case, it retains great freedom of action (see, by analogy, Case T–48/00 *Corus UK* v *Commission* [2004] ECR II-2325, paragraphs 179 to 182 and the case-law cited). Thus, in the present instance, it should be noted that the Commission did not undertake, in the notice on market definition, to use one particular specific method in the assessment of demand-side substitutability. Instead, it stated that the approach which it will take has to vary depending on the circumstances of each individual case and it retained a large part of its margin of assessment in order to be able to deal with each individual case in an appropriate way.

520 It is in the light of the broad margin of assessment retained by the Commission that the Court must examine the arguments which the applicant seeks to base on other points in the notice in market definition.

521 Point 36 of the notice on market definition, on which the applicant relies, is worded as follows:

'An analysis of the product characteristics and its intended use allows the Commission, as a first step, to limit the field of investigation of possible substitutes. However, product characteristics and intended use are insufficient to show whether two products are demand substitutes. Functional interchangeability or similarity in characteristics may not, in themselves, provide sufficient criteria, because the responsiveness of customers to relative price changes may be determined by other considerations as well. For example, there may be different competitive constraints in the original equipment market for car components and in spare parts, thereby leading to a separate delineation of two relevant markets. Conversely, differences in product characteristics are not in themselves sufficient to exclude demand[-side] substitutability, since this will depend to a large extent on how customers value different characteristics.'

522 Next, in points 37 to 43 of the notice on market definition, the Commission sets out the various sources of information which it anticipates using to establish whether there may be substitution.

523 It must be noted that, if point 36 et seq. of the notice on market definition were to be interpreted as meaning that, in each competition case that it examines, the Commission is required to gather, and take account of, certain specific types of evidence, there would be an obvious contradiction between that requirement and the margin of assessment, referred to at paragraphs 518 and 519 above, which the Commission has in determining the possibility of substitution in each individual case by reference to the specific features of that case.

524 In any event, inasmuch as point 36 of the notice on market definition states that '[f]unctional interchangeability or similarity in characteristics may not, in themselves, provide sufficient criteria, because the responsiveness of customers to relative price changes may be determined by other considerations as well ...', it follows from that citation, a contrario, that in certain cases, indeed as a general rule (save where particular circumstances indicate otherwise, such as those mentioned in the example relating to spare parts given later in point 36), products which are functionally interchangeable and which have similar characteristics are substitutes.

525 In the contested decision, the Commission found that during the administrative procedure the applicant had raised two specific objections in relation to its definition of the market (recital 23 of the contested decision). First, it argued that the type of aircraft manufactured by BAe Systems and powered by Honeywell engines, the Avro, is not a fully-fledged competitor on the market for large regional aircraft since it is a niche product. Second, it maintained that the market should also include the small Airbus and Boeing narrow-bodied aircraft, the A318 and the B717.

526 Although the Commission did not cite any specific examples of instances of competition between the four-engine large regional aircraft powered by Honeywell and the two-engine large regional aircraft powered by GE, it none the less, in its response to the first of the objections mentioned in the previous paragraph, mentioned specific cases of functional interchangeability between those aircraft, referring to the use made of the Avro by the airline Sabena, among others. The Commission concluded, at recital 25 of the contested decision, that '[t]he market investigation has suggested that, although airlines may appreciate the special capabilities of the Avro, they in fact operate the Avro in the same manner as any other large regional aircraft and do not limit its flight operability to niche environments alone. In this sense, the Honeywell-powered Avro is an existing competing alternative to the other GE-powered large regional jets.' It must therefore be noted that the Commission, far from restricting itself to a theoretical analysis defining the market by reference to an abstract mission profile, examined whether there was in truth any real interchangeability between the Avro and aircraft powered by the applicant. To that extent, its conclusion on the definition of the market for large regional aircraft is in fact founded on empirical evidence relating to specific examples.

527 As to the second objection mentioned at paragraph 525 above, the Commission rejected it at recitals 27 to 29 of the contested decision, on the ground that the purchase price of the two aircraft platforms to which the applicant referred is markedly higher than that of other aircraft considered to be large regional aircraft.

528 Before the Court, the applicant did not challenge the factual findings, based on the Commission's market investigation, relating to the interchangeability of the Avro and other large regional aircraft. Nor did it rely on the argument that the A318 and the B717 are large regional aircraft. It merely drew attention in that regard to the absence of any specific examples of substitutability or economic studies put forward by the Commission, arguing that the Commission had itself decided that such evidence should be used.

529 It should be held that, by pointing to that absence without specifically explaining in what way it considers the Commission's definition of the market to be wrong, the applicant does not discharge the burden of proof and thereby place the onus on the Commission to produce examples in order to establish that its market definition is well founded. In the present case, given that the Commission had, prima facie, set out an account of its reasons which was sufficient to found its definition of the market in question, in particular by putting forward criteria relating to aircraft mission profiles, it was for the applicant to show that those criteria were not appropriate for the purposes of defining the market for large regional aircraft in the present case.

530 In those circumstances, the Commission could, without making a manifest error of assessment, rely on its analysis of the mission profiles of the various platforms for the purpose of defining the market for large regional aircraft in this case. The Court therefore holds that the Commission provided sufficient reasons for its conclusion on the definition of the market for large regional aircraft.

531 It should furthermore be noted, to the extent that it may be relevant, that, on the basis of the arguments and facts submitted to the Court, it is apparent that aircraft from the Avro family were, not only in theory but also in practice, in competition with the large regional aircraft powered by GE engines.

532 The Commission maintained before the Court, without being challenged by the applicant on this point, that BAe Systems' large regional aircraft were the first to be launched on the market, around 1994. Consequently, aircraft with Honeywell engines were necessarily in competition with the new GE-powered models at the time when the latter were launched. Subsequently, those other models were apparently so successful that BAe Systems' market share was considerably reduced, which was why it launched the new Avro, the Avro RJX, which was to be powered by a new Honeywell engine, the AS 900. In those circumstances, it would be irrational

to consider Avro aircraft and large regional aircraft powered by GE engines not to be in competition, since Avro platforms lost their strong market position because of the later market entry of large regional aircraft with GE engines, and thus by reason of the competition which the latter represented.

533 In that regard, it should also be noted that the Commission produced evidence, in three documents annexed to the rejoinder, that Avros were in fact in competition with other large regional aircraft. Although that evidence cannot be relied on for the first time before the Court as a direct means of providing a proper foundation for the Commission's finding in the contested decision, the Commission is entitled to refer to it for the purpose of responding, on the facts, to the applicant's argument that the Commission was not able to produce examples of competition between Avros and other large regional aircraft because none existed. It is therefore appropriate to examine briefly the content of those documents.

534 The first of the three documents is a press release from BAe Systems dated 16 February 1999, in which it describes its new aircraft, the Avro RJX whose engine was supplied by AlliedSignal (a company which subsequently merged with Honeywell), as 'low risk for suppliers and potential customers compared with the ambitious, all new USD 1 billion-plus airframe programmes which other manufacturers are proposing'.

535 The second document consists of a series of short articles on BAe Systems' large regional aircraft taken from a newsletter called *Smiliner* for the year 2001. It is clear, particularly from one of those articles, dated 29 January 2001, that, according to the magazine *Flight International*, a European airline had issued a request for proposals for large regional aircraft which could amount to as many as 100 aircraft and was considering the Avro RJS (for which Honeywell supplied the engine) as well as the

Bombardier CRJ 700/900, the Embraer 170/190 and the Fairchild Dornier 728JET/928JET (all powered by GE engines). Another article, dated 30 October 2001, suggests, inter alia, that the Embraer 170 'will compete directly with the Avro RJX-70 (which has yet to attract any orders) and with the earlier BAe-100 and Avro RJ70'.

536 The third document also consists of a set of short articles taken from *Smiliner* from 1999. One of them states that '[w]hile BAe Regional Aircraft completes final design on the re-engined Avro RJX in anticipation of a formal launch decision, competitors have poached two of its high-profile customers'. The article goes on to describe two large orders made by airlines, one for Fairchild Dornier 728 JETs and the other for Embraer ERJ-170s and ERJ-190/200's.

537 It is clear from those three documents taken together that, in fact, aircraft from the Avro family, powered by Honeywell engines, were in competition with Embraers, Fairchild Dorniers and Bombardiers, powered by GE engines. Consequently, it must be concluded that the applicant's allegation that there was no competition between Avros and other large regional aircraft was not only unsubstantiated by any evidence produced by the applicant itself but was also rebutted by the evidence which the Commission produced before the Court.

538 In the light of all the foregoing, it is not established in the present case that the Commission made an error of fact in finding four-engine large regional aircraft powered by Honeywell engines to be in competition with two-engine large regional aircraft powered by GE engines. Nor is it established that the Commission made a manifest error of assessment in applying its method of defining the market by

reference to the mission profile for which each aircraft is adapted, and then concluding that engines manufactured by Honeywell and engines manufactured by GE were within the same market for engines for large regional aircraft.

The applicant's pre-merger dominance

539 Having thus defined the market for large regional aircraft, the Commission found that the applicant was dominant on that market and that its dominance would be strengthened as a result of the merger. To support that finding, it states that, as regards the installed base of engines on aircraft in that category, the merger would allow GE to move from a market share of [40-50]% to [90-100]% for those aircraft overall and from [60-70]% to 100% for only those aircraft still in production (recital 84 of the contested decision). In relation to the engine order backlog on aircraft not yet in service, the applicant would move from a [90-100]% market share to 100% of the market (recital 85 of the contested decision).

540 It is sufficient to observe, in relation to the existence of the applicant's pre-merger dominance in the present case, that, according to settled case-law, although the importance of the market shares may vary from one market to another, very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position (*Hoffmann-La Roche* v *Commission*, paragraph 101 above, paragraph 41, and *Endemol* v *Commission*, paragraph 115 above, paragraph 134). The fact, noted by the applicant in relation to its pre-merger dominance, that the large regional jet aircraft engine market is a bidding market on which historic market shares are less significant than on other markets does not undermine that conclusion, account being taken of the overwhelming nature of GE's market share for aircraft which were not yet in service when the contested decision was adopted, namely [90-100]%. The applicant does not challenge, in the context of large regional aircraft, the use of figures pertaining to aircraft which are not yet in service and

makes specific reference to them in the context of its own arguments concerning the impact of the merger on that market. It must be noted that reliance on those figures was, in any event, particularly warranted in the case of the market for large regional aircraft, given the rapid growth of the market for large regional aircraft noted at recital 431 of the contested decision.

541 As regards the applicant's arguments that P&W and Rolls-Royce were credible competitors on the market for large regional aircraft, it is sufficient to note that those engine manufacturers were not making any engine sales on the market for large regional aircraft at the time when the contested decision was adopted. Their participation in competitions to supply the engines for certain large regional aircraft did not, apparently, meet with any success. The Commission was thus entitled to conclude, without making a manifest error of assessment in that regard, that, despite the fact that the market for large regional aircraft engines is a market characterised by infrequent competitions, any potential future competition from engine manufacturers which were not making any sales on that market at the material time did not constitute a serious and current constraint such as to warrant the conclusion that the applicant was not dominant on that market.

542 In view of the applicant's overwhelming market share prior to the merger, the Commission could properly find, at recitals 86 and 87 of the contested decision, that the applicant was dominant on the relevant market and there is no need for the Court to examine the influence of the various other factors which, in the Commission's view, contributed to the applicant's pre-merger dominance (recitals 107 to 229 of the contested decision; see, also, on this point, paragraph 114 et seq. above).

The strengthening of a dominant position

543 The applicant submits that, in any event, the strengthening of a pre-existing dominant position resulting from the addition of a market share of [10-20]% for

existing platforms currently in production, measured in terms of orders, is of little significance, relying in this regard on the fact that the Commission itself recognised, at recital 429 of the contested decision, that the increase was 'rather small'. It must first be observed that the increase in market share of [30-40]% of the market in terms of the installed base of engines on aircraft still in production is considerably higher than the abovementioned figure of [10-20]%. Further, the increase in market share of around [10-20]% of the market in terms of the order backlog for existing platforms in production must be regarded as significant, since it takes the merged entity's market share to 100% (see recitals 428 and 429). The same is true of the increase of [0-10]% of the market found in relation to the order backlog for aircraft not yet in service (paragraph 539 above). In any event, the notion of de minimis strengthening is covered, under Article 2 of Regulation No 4064/89, by the second, broader, condition relating to the fact that the creation or strengthening of a dominant position must result in effective competition being significantly impeded in the common market or a substantial part of it. So far as large regional aircraft are concerned, that condition will be examined below under the heading 'Impact on competition'.

544 In the light of the foregoing, it is appropriate to conclude that the Commission did not make an error of law or a manifest error of assessment in holding, in the present case, that the merger would strengthen the applicant's pre-merger dominance on the market for large regional aircraft.

The impact of the strengthening of the dominant position on competition

545 To the extent that the applicant complains that the Commission failed to examine the impact of the merger on the market for large regional aircraft engines, in accordance with the requirements stemming from the second condition laid down in Article 2(3) of Regulation No 4064/89 (see paragraphs 84 to 91 above), it should

first be noted that the Commission specifically found, as regards horizontal overlap on the market for large regional jet aircraft engines, that this overlap would have an immediate anti-competitive effect on existing platforms. In particular, it found, at recital 429 of the contested decision that, 'although the increase in market share resulting from the merger was rather small ([10-20]% on the basis of the order backlog)', customers would be prevented from enjoying the benefits of price competition on engines for the large regional aircraft currently available on the market. Since the Commission had already noted, at recitals 84 to 87 of the contested decision, that the merged entity would have a 100% market share for engines on platforms currently in production, measured in terms of the installed base, as well as for engines on platforms for which the engine had already been selected but which were not yet in service, that finding meant that the removal of the benefits of such competition would be absolute.

546 As was stated at paragraph 502 et seq. in relation to the definition of the large regional aircraft market, the Court must reject the applicant's argument that all price competition between engines is impossible in practice, since engine supply is exclusive on each platform and the price of the aircraft is already set. In fact, it appears from documentary evidence (see, in particular, paragraph 504 above) that, even in a situation where only one engine model has been selected for an aircraft type and the price of the engine has been set by the airframer, the engine manufacturer may still offer price concessions, in particular on aftermarket services and spares, in order to promote sales of the aircraft and, accordingly, of its engines (see also recital 391 of the contested decision). Consequently, contrary to the applicant's contention, the Commission did not make an error of fact in finding there to be a real possibility of indirect price competition between engines for large regional aircraft already on the market, which would have been lost if the merger had taken place.

547 Moreover, the Commission noted at recital 9 of the contested decision that second-level competition on the different engines markets took the form of engines competing 'on technical and commercial grounds to be selected by the airline'. The

Commission submitted before the Court that, prior to the merger, Honeywell had every reason to attract customers to the Avro RJ and RJX by ensuring that its engine, both as regards price and technological advances, was in as competitive a position as possible in relation to the large regional aircraft powered by GE engines but that that incentive would be lost as a result of the merger. Accordingly, it is clear from the contested decision that, as well as the impact on price competition noted at recital 429 of the contested decision, the horizontal overlap on the market for large regional jet aircraft engines also had a wider negative impact on competition on that market.

548 The Court must reject the applicant's argument that the impact of the merger on the relevant market would not have been significant. In that regard, if the increase in market share is relatively small by comparison with the market share already held by the applicant, that is so precisely because the applicant already had a very large market share and consequently enjoyed the very high degree of pre-merger dominance described above and because Honeywell was the only competitor selling engines on that market at the time when the contested decision was adopted. The fact, rightly noted by the Commission, that the merger would, in the immediate future, have eliminated all price competition, as a result of the merged entity obtaining a monopoly in relation to aircraft currently in production and aircraft not yet in service but for which the airframer had already selected the engine, meant that the impact of the merger on that market would have been more pronounced than that which would normally follow an increase in market share of [10-20]% of the market starting from a lower market share. Honeywell's elimination from the market as an independent engine manufacturer would have altered not only the relative strengths on the market but also the very essence of competition on it by altering the structure of the market on a lasting, or even permanent, basis. The only, purely potential, residual competition would be competition to equip future platforms for large regional aircraft and would come from engine manufacturers currently making sales solely on distinct neighbouring markets. Taking account of the length of a new aircraft's development process, such competition could only have produced positive effects for the purchasers of large regional aircraft a number of years after the date on which the contested decision was adopted.

549 It must also be observed that, according to settled case-law concerning the application of Article 82 EC, a finding that an undertaking is in a dominant position is not in itself a finding of fault but simply means that, irrespective of the reasons for which it holds such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market (see, for example, *Michelin* v *Commission*, paragraph 114 above, paragraph 57, and Joined Cases T-191/98, T-212/98 and T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 1109). In addition, the concept of an abuse, within the meaning of Article 82 EC, is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (*Hoffmann-La Roche* v *Commission*, paragraph 101 above, paragraph 91).

550 In a situation such as that which existed in this case, in which the only immediate competition on a given market is indirect and already relatively weak, the acquisition by an undertaking of the only competitor which is still making sales on that market is particularly harmful. The abovementioned principles developed in the context of the prohibition on abuses of a dominant position are applicable, by analogy, to the related legal field of merger control, by holding that the greater the dominance of an undertaking, the greater is its special responsibility to refrain from any conduct liable to weaken further, a fortiori to eliminate, competition which still exists on the market.

551 Therefore, it will normally be appropriate to reject arguments to the effect that, because a dominant undertaking's only current competitor on a market is already in a weak position on the market and because the competition it provides is purely indirect, i.e. second level, the acquisition by the dominant undertaking of that competitor would not strengthen its dominance in such a way that effective competition would be significantly impeded in the common market. In such

circumstances, it is for the parties to the merger to produce evidence demonstrating that no effective competition existed on the market prior to the merger. In the absence of such evidence, the Community judicature cannot conclude that the Commission made a manifest error of assessment in taking the elimination of the last remaining competitor as a basis for its finding that effective competition would be significantly impeded in the common market.

552 At recital 431 of the contested decision, the Commission pointed out that there was strong growth in the large regional aircraft market and noted the importance of that market for the future of commercial aviation. It also found in that connection, at recital 20, that large regional aircraft accounted for 14% of the European fleet in 1992 and 33% in 1998. It is clear that such growth in the aircraft market has a direct bearing on the market for the engines which power the aircraft. In holding that the merger would have significant harmful effects on competition in the common market, the Commission was entitled to note and take into account, in the broader context of the markets for aircraft and engines in general, the increasing importance of the specific market on which a monopoly would be created by the merger.

553 Taking account of all the foregoing, the Court finds that the Commission gave an adequate account, in the contested decision, of the anti-competitive effects which the merger would have had on the market for large regional aircraft engines, above all in the immediate future, by reason of the horizontal overlap between the activities of the parties to the merger on that market. In that respect, the contested decision is not therefore vitiated either by an error of law concerning the application of the two conditions set out in Article 2(3) of Regulation No 4064/89 or by a failure to state reasons. Nor did the Commission commit an error of fact or a manifest error of assessment in concluding that competition on that market would have been significantly impeded as a result.

554 There is therefore no need to examine recitals 432 to 434 of the contested decision, which deal with the effects — in particular the conglomerate effects — of the merger

on future competitions on the relevant market. Since in the contested decision the Commission established separately that the two conditions of Article 2(3) of Regulation No 4064/89 were met in relation to the market for large regional aircraft engines because of the immediate impact of the horizontal overlap resulting from the merger, such an examination would be otiose in these proceedings.

The Commission's rejection of the commitment relating to large regional aircraft

555 It must be noted that under Regulation No 4064/89 the Commission has power to accept only such commitments as are capable of rendering the notified transaction compatible with the common market (see, to that effect *Gencor* v *Commission*, paragraph 85 above, paragraph 318). It must be held in that regard that structural commitments proposed by the parties will meet that condition only in so far as the Commission is able to conclude, with certainty, that it will be possible to implement them and that the new commercial structures resulting from them will be sufficiently workable and lasting to ensure that the creation or strengthening of a dominant position, or the impairment of effective competition, which the commitments are intended to prevent, will not be likely to materialise in the relatively near future.

556 In this case, the Commission noted, at recital 519 of the contested decision, that if the divestment of Honeywell's engine-manufacturing business for large regional aircraft, proposed by the parties, could be put into practice, it would, on the face of it, be sufficient to remove the competition problem identified in relation to that market.

557 However, it concluded that it would be difficult to put the divestiture into practice, essentially because [...] opposes it for practical and commercial reasons relating in particular to the fact that the undertaking which would emerge from the divestment would not be viable [...].

558 The Commission noted in that regard, at recital 520 of the contested decision, that [...] and that therefore it was uncertain whether the proposed remedy was in fact capable of eliminating the competition problem identified. It also noted that the commitment did not provide for an alternative to the divestiture. At recital 522, the Commission set out, apparently in the alternative, a number of practical problems which the commitment did not in any event adequately resolve.

559 Given that the applicant merely asserted before the Court that the difficulties to which the Commission alleged that the commitment gives rise were entirely without foundation, it must be held that the applicant has produced neither specific arguments nor evidence that could call into question the correctness of the Commission's finding as to the unworkable nature of the proposed divestment.

560 Particular attention should be drawn to the fact, noted by the Commission, at recital 520 of the contested decision, and which has not been challenged by the applicant, that [...]. It is clear from point [...] of the document setting out the commitments proposed on 14 June 2001 that [...]. It follows that, if [...], the merged entity would have been released from its obligation to the Commission although the divestment had not taken place, provided only that [...].

561 It follows from the foregoing that the Commission could properly hold that the commitment, in the form proposed, could not be accepted. Therefore, there is no need to take that commitment into account in the context of the present proceedings.

Conclusion on the horizontal overlap affecting the market for large regional jet aircraft engines

562 With regard to the Commission's statement that the elements of reasoning in the contested decision reinforce one another and that it would therefore be artificial to analyse each of them in isolation (see paragraphs 40 and 48 above), it should be noted that, in any event, that general statement has no bearing on the matters considered in this section of the judgment. In particular, to the extent that the Court has found above that the Commission's findings concerning the vertical overlap between engine starters and large commercial jet aircraft engines were vitiated by errors, as were the findings concerning the various conglomerate effects, none of those errors has any effect on its finding that the applicant's dominant position on the market for large regional jet aircraft engines would be strengthened by virtue of the horizontal overlap resulting from the merger, with the result that effective competition would be significantly impeded in the common market.

563 It must therefore be held, in the context of these proceedings, that the pillar of the contested decision concerning the strengthening of the applicant's dominance by virtue of the horizontal overlap on the market for large regional jet aircraft engines between the manufacturing activities of the two parties to the merger, as a result of which competition on that market would have been significantly impeded in the common market, is sufficiently established.

2. *Engines for corporate jet aircraft*

(a) Arguments of the parties

564 The applicant submits that the Commission's analysis pertaining to the definition of the market for engines for corporate jet aircraft is vitiated by the same errors as the

analysis concerning large regional jet aircraft engines. GE's and Honeywell's engines are not substitutable because of differences in thrust and conception: that is the case now and will remain so in the future. The Commission's case is therefore based on the effects — which have not been established — of vertical integration in relation to GECCAG. Moreover, the Commission was wrong to reject the commitments concerning the market for corporate jet aircraft engines.

565 The Commission refers, *mutatis mutandis*, to its analysis concerning large regional jet aircraft engines and repeats that the merger would create a dominant position on the market for corporate jet aircraft engines notably because of the gap between the market shares of the merged entity and those of its competitors. The Commission also points out that the applicant's criticisms of the rejection of the commitments relating to that market are mere assertions which do not put in doubt the validity of the contested decision.

(b) Findings of the Court

566 In the present case, the Commission identified a single market encompassing all corporate aircraft, whilst finding, at recital 32 of the contested decision, that 'from the demand-side, the three classes of aircraft [heavy, medium and light] cannot be substituted for one another. This is due to the difference in price and operating cost as well as to the different mission profiles that each class may serve.' Although the Commission divides the market into three classes (segments), it makes clear that it is not necessary to take a final position on the question as to whether the three classes are distinct markets since the assessment of competition will not be affected.

567 At recital 436 of the contested decision, the Commission rejects the arguments of the parties to the merger on market definition, pointing out that they rely on

competition on a platform by platform basis. The Commission remarks that '[h]owever, this is not the way product markets have been defined in the case of corporate jets since this is not consistent with market definition principles, in so far as it disregards supply and demand-side substitutability'.

568 The applicant's principal argument before the Court amounts to a restatement of the same criticisms that it put forward in relation to the definition of the market for large regional aircraft, relating in essence to the fact that the Commission defined the engines markets by reference to the aircraft which they power and not by reference to their own characteristics. As pointed out above at paragraph 492 et seq. in the context of large regional aircraft, the Commission set out, at recital 9 of the contested decision, the reasons why competition between aircraft had to be taken into account when defining the markets for the engines which power them.

569 It should be noted that the applicant did not put before the Court any specific allegation relating to the definition of the market for corporate jet aircraft. Since the substantive scope of the review carried out by the Community judicature is determined, in principle, by the pleas in law and arguments advanced by the applicant in its application, there is no need to examine that issue here. In the absence of any concrete evidence calling into question the application to corporate jet aircraft of the Commission's analysis of second-level competition, it must be held, for the purposes of these proceedings, that the Commission did not make an error of fact nor a manifest error of assessment when defining the market for corporate jet aircraft engines. To the extent that the applicant cross-refers in a general way to the arguments which it advanced in respect of the definition of the market for large regional jet aircraft engines, the Court rejects those arguments here for the same reasons, mutatis mutandis (see paragraph 492 et seq. above).

570 Regarding the creation of a dominant position on the market for corporate jet aircraft engines, the Commission relies exclusively, at recital 435 of the contested

decision, on the figures relating to the merged entity's market share and concludes that a dominant position will be created on the market. It notes in that recital that '[t]he immediate effect of the proposed merger on the market for corporate jet aircraft engines is to create a horizontal overlap that will lead to the creation of a dominant position'. It relies in this connection on the figure of [50-60]% (GE: [10-20]%, Honeywell [40-50]%) for the overall installed base of engines on that market and the figure of [80-90]% (GE [10-20]%, Honeywell [70-80]%) for the installed base of engines on just medium corporate aircraft currently in production, that measure of market share being appropriate, in the Commission's view, to assess the commercial strength of the engine manufacturers on that market.

571 It must also be noted on this point that the figure of [50-60]% for the overall installed base of engines on the market for corporate jet aircraft is, prima facie, indicative of dominance. According to settled case-law, although the importance of the market shares may vary from one market to another, very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position (*Hoffmann-La Roche* v *Commission*, paragraph 101 above, paragraph 41, and *Endemol* v *Commission*, paragraph 115 above, paragraph 134). Furthermore, the Court of Justice held, in its judgment in *AKZO* v *Commission*, paragraph 115 above (paragraph 60), that that was so in the case of a 50% market share.

572 The applicant has not shown, or even alleged, that there are 'exceptional circumstances' within the meaning of the judgment in *AKZO* v *Commission*, paragraph 115 above, in relation to the corporate jet market, which might undermine the conclusion on the creation of dominance on that market which the Commission reached in the contested decision, by taking as its basis the market share which the merged entity would have had in terms of the overall installed base of engines.

573 The Court notes, to the extent that it may be relevant, that the figure of [80-90]% indicated at recital 88 of the contested decision for the installed base of engines for medium corporate jets that are still in production (in the Commission's view, a

particularly appropriate proxy for measuring the commercial strength of an engine manufacturer — recital 41 of the contested decision) clearly indicates that the merged entity would have dominated this sector following the merger. Since the Commission did not categorise that class of aircraft as a distinct market, that finding does not establish that there was a dominant position as such on a distinct market for the purposes of Article 2 of Regulation No 4064/89. However, that market share indicates that, on certain segments of the relevant market, the merged entity would have been even stronger than on the market in general, which lends support to the Commission's conclusion that after the merger the merged entity would be dominant on the market, viewed as a whole.

574 In the light of the foregoing, the Court finds that it has not been shown, in the context of these proceedings, that the Commission made a manifest error of assessment in concluding that the merger would have created a dominant position as a result of the horizontal overlap between the applicant's business manufacturing engines for corporate jet aircraft and that of Honeywell.

575 As to its remaining arguments, the applicant specifically criticises the Commission's reasoning in relation to the market for corporate jet aircraft, so far as it concerns the influence which GECCAG is alleged to have as a purchaser by reason of a preferential purchasing policy. It should be noted that the basic empirical evidence which underpins the Commission's analysis in relation to the past conduct of GECAS (recital 121 et seq. of the contested decision and paragraph 182 et seq. above) is lacking in so far as GECCAG is concerned. In the absence of any thorough analysis in the contested decision showing that it would have been in the commercial interests of the merged entity for GECCAG to adopt a speculative aircraft-purchasing policy, with a strong preference for, or even an exclusive purchasing policy towards, aircraft powered by its own engines and that, accordingly, it was likely that such a policy would be adopted, the Court must here hold that this limb of the Commission's reasoning is unfounded.

576 Regarding the analysis, at recitals 443 and 444 of the contested decision, of bundling affecting corporate jet aircraft — which is also criticised by the applicant —, the Court notes that such sales were already possible before the merger, as well as afterwards, since Honeywell already had a strong position on the market for corporate aircraft as well as on a number of markets for avionics and non-avionics products for those aircraft. Conversely, GE's market share in relation to corporate jet aircraft engines before the merger was weak. Thus, even if it were demonstrated that bundling were likely in the corporate aircraft sector in the future, it is not established that the merger would be the primary cause of that phenomenon or that it would give rise to any significant effects in that regard.

577 In any event, it should be noted that, for the reasons set out above at paragraph 399 et seq., the Commission did not assemble convincing evidence of such a kind as to establish that the merged entity would have been likely to engage in such practices. Therefore, the Court must find that this part of the Commission's case, concerning future bundling affecting corporate jet aircraft, cannot be held to be a consequence of the merger which would have played a part in creating the merged entity's dominant position on that market.

578 It is apparent without ambiguity from the section of the contested decision analysing the impact on competition on the market for corporate aircraft (recitals 435 to 444), and in particular from the wording of recital 437, that each of the three distinct sections dealing respectively with horizontal overlap (recitals 435 to 437), vertical integration (recitals 438 to 442) and bundling (recitals 443 and 444) was, in the Commission's analysis, autonomous and sufficient on its own to form a proper basis for the Commission's conclusion that a dominant position would be created on that market as a result of the merger. Accordingly, the finding at paragraph 574 above to the effect that the Commission's analysis on horizontal overlap on that market is well founded is not invalidated by the findings at paragraphs 575 to 577 above.

579 As to whether the dominant position thus created would result in effective competition being significantly impeded in the common market, it is sufficient to note that, although the applicant stressed in abstract terms the autonomous nature of the second condition (see paragraph 84 et seq. above), it has not put forward any specific argument to challenge the finding that the impact on the market of the horizontal overlap described above would be significant.

580 In any event, it follows from the general conclusion at recital 567 of the contested decision, which specifically mentions each of the markets affected by the merger, that the Commission held not only that a dominant position would be created or strengthened on each of those markets but also that, as a result, 'effective competition in the common market would be significantly impeded' (see paragraph 90 above). In view of the wording of that recital, the Commission drew the necessary conclusion that the creation of a dominant position on the market for corporate aircraft, by virtue of the merged entity having a [50-60]% market share in terms of the installed base of engines (recital 88 of the contested decision), would result in effective competition being significantly impeded in the common market. In the absence of any specific arguments or any evidence suggesting that there was no such impairment, it must be held, for the purposes of these proceedings, that the conclusion is not vitiated by a manifest error of assessment.

581 As to the commitments proposed by the applicant on 14 June 2001, it should be noted that the commitment providing for the divestment of Honeywell's business manufacturing the ALF502/507 engines is also relevant to the appraisal of the market for corporate aircraft, as the two principal parties indeed confirmed prior to the hearing in response to a written question put by the Court, since those engines power not only BAe Systems' large regional aircraft but also a corporate aircraft [...].

582 It is sufficient to note on this point that the applicant has again merely asserted that the Commission's objections to the commitment in question in the contested decision are without foundation. Thus, for the same reasons as set out at paragraph 555 et seq. above, the Commission was entitled to reject that commitment.

(c) Conclusion on horizontal overlap affecting the market for corporate jet aircraft engines

583 It should be noted that, despite the Commission's statement that the elements of its decision reinforce one another and that it would therefore be artificial to analyse each of them in isolation (see paragraphs 40 and 48 above), that general statement in any event has no bearing on the matters considered in this section of the judgment. In particular, to the extent that the Court has found above that the Commission's findings concerning the vertical overlap between engine starters and large commercial jet aircraft engines were vitiated by errors, as were the findings concerning the various conglomerate effects, none of those errors has any effect on its finding that a dominant position would be created for the merged entity on the market for corporate jet aircraft engines by virtue of the horizontal overlap resulting from the merger, with the result that effective competition would be significantly impeded in the common market.

584 Accordingly, the Court concludes, in the context of these proceedings, that the pillar of the contested decision concerning the creation of a dominant position for the merged entity resulting from the horizontal overlap on the market for corporate aircraft engines between the manufacturing activities of the parties to the merger, as a result of which competition on that market would have been significantly impeded in the common market, is sufficiently established.

3. *Small marine gas turbines*

(a) Market definition

Arguments of the parties

585 In the applicant's submission, the Commission's finding that a dominant position would be created in this sector is vitiated by an erroneous market definition. GE's turbines and those of Honeywell are not substitutable. The Commission advanced no evidence of any instances of competition between GE and Honeywell.

586 The Commission recalls that it has already responded to the applicant's arguments on this point at recitals 472 to 474 of the contested decision and maintains that the applicant's arguments do not reflect reality. The Commission contends that the markets for gas turbines should be defined solely by reference to output power, in this case less than 10/15 megawatts (MW), and to their industrial or marine applications. The market identified cannot be segmented further and the merger would have given rise to a market player much bigger than its nearest competitor.

Findings of the Court

587 It should be recalled at the outset that the substantive scope of the review carried out by the Community judicature is determined, in principle, by the pleas in law and arguments advanced by the applicant in its application. The only element of the Commission's reasoning concerning small marine gas turbines challenged in the application is its definition of the market. The Court must consider whether the arguments which the applicant advances in this respect establish that the Commission made an error of fact or a manifest error of assessment in relation to its definition of the relevant market.

588 However, in so far as the applicant sought, in its letter of 21 July 2004, to broaden the scope of the case by commenting on aspects of this limb of the Commission's reasoning other than the definition of the relevant market, its observations amount to a new plea in law within the meaning of Article 48(2) of the Rules of Procedure, as the Commission rightly contended in its observations of 17 September 2004, and are consequently inadmissible.

589 In the contested decision, the Commission sets out, at recitals 460 to 467, the reasons which led it to consider the relevant market to be the worldwide market for small gas turbines, that is to say in the 0.5 to 10 MW range, intended for marine applications. Then, at recitals 472 to 474, it explains why the specific arguments raised by the parties to the merger during the administrative procedure do not invalidate that conclusion.

590 The applicant submits that its and Honeywell's turbines are not substitutable and that their turbines do not compete because the two undertakings do not bid in the same competitions.

591 To substantiate its case, the applicant refers, in footnote 185 of its application, to Annex 22 to its reply to the SO, that reply, together with all its annexes, forming part of the annex to the application.

592 In so far as the applicant refers to that annex to its application, the Court must observe that, according to well-established case-law, in order to ensure legal certainty and the sound administration of justice, if an action is to be admissible, the essential matters of fact and law on which it is based must be stated, at least in summary form, coherently and intelligibly in the application itself (Case C-178/00 *Italy* v *Commission* [2003] ECR I-303, paragraph 6; Case T-195/95 *Guérin automobiles* v *Commission* [1997] ECR II-679, paragraph 20; Case T-145/98 *ADT Projekt* v *Commission* [2000] ECR II-387, paragraph 66; the order of 25 July 2000 in

Case T-110/98 *RJB Mining* v *Commission* [2000] ECR II-2971, paragraph 23, and the case-law cited; Case T-195/00 *Travelex Global and Financial Services and Interpayment Services* v *Commission* [2003] ECR II-1677, paragraph 26; Case T-157/01 *Danske Busvognmænd* v *Commission* [2004] ECR II-917, paragraph 45; see also, to that effect, Joined Cases 19/60, 21/60, 2/61 and 3/61 *Fives Lille Cail and Others* v *High Authority* [1961] ECR 281, and Case C-330/88 *Grifoni* v *Commission* [1991] ECR I-1045, paragraphs 17 and 18). In that regard, whilst the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the abovementioned provisions, must appear in the application (order of 21 May 1999 in Case T-154/98 *Asia Motor France and Others* v *Commission* [1999] ECR II-703, paragraph 49). Thus, inasmuch as the complaints advanced by the applicant in the document in question could be regarded as independent pleas directed against aspects of the analysis in the SO other than the definition of the relevant market, those pleas are not to be taken into account.

593 Moreover, at the hearing the applicant challenged the reliability of the figures for the applicant's market share which the Commission used in the contested decision, alleging that the figure of [10-20]% for a market which was defined by reference to a 0.5 to 5 MW range, mentioned at recital 470 of the contested decision, is impossible to reconcile with the figure of 25 to 30% for a broader market with a 0.5 to 10 MW range (recital 470, last sentence), since the applicant manufactures just one turbine, the LM 500, which, at 4.5 MW, is within both those markets.

594 It is sufficient to note that this argument is distinct from the plea raised in the application which challenges the definition of the small gas turbines market, and that it is not to be found even in embryonic form in the application. It therefore constitutes a separate plea in law. That plea, raised for the first time at the hearing, is thus inadmissible under Article 48(2) of the Rules of Procedure, which prevents the

parties from raising new pleas in law in the course of the proceedings. In any event, the Commission does not contradict itself at recital 470 of the contested decision, since it specifically attributes to Honeywell's competitors the statement concerning the 25 to 30% share of the market in the 0.5 to 10 MW range.

595 By contrast, the matters raised in Annex 22 to the reply to the SO which do relate to market definition can be relied on in order to support and supplement the plea raised in the application with regard to that market.

596 In order to challenge the market definition used by the Commission in the SO, the parties to the merger drew attention, in Annex 22 of their reply to the SO, to the differences in price, size, weight and output between GE's turbine, the LM 500, and Honeywell's turbines.

597 It follows from recital 473 of the contested decision that the Commission relied, in particular, on its market investigation to reject the applicant's arguments relating to the differences between the turbines of the parties to the merger. In particular, it states the following, at recital 473:

'However, the market investigation has clearly shown that both GE and [Honeywell] compete in the market as defined above. The market investigation has not indicated that the differences between GE's and [Honeywell's] small (below 10 MW) marine gas turbines are sufficiently relevant to distinguish different product markets.'

598 Given that the conclusion based on that investigation is challenged in these proceedings, it is for the Court to verify that the Commission has not made an error of fact or a manifest error of assessment in concluding, from the results of its

investigation, that those differences would not invalidate its definition of the market. To that end, the Court requested the Commission, by means of a measure of organisation of procedure, to produce the documents on its file to which the applicant had had access and which support, or were otherwise relevant to, the two sentences cited in the previous paragraph.

599 The Commission produced three documents in response to that question: the responses of Rolls-Royce, UTC and Solar Turbines. It maintains that those responses are 'representative' of the results of its market investigation, since they reflect the view of the three main competitors to the merging parties on the relevant market. The applicant did not challenge the representative nature of those responses, merely pointing out certain differences between them and disputing their probative value. In particular, it did not point to responses of other competitors that could undermine the Commission's findings.

600 Rolls-Royce's response, at least in the non-confidential version produced to the Court, is ambiguous inasmuch as it indicates, in response to question No 38 in that document, that only the applicant and Roll-Royce itself are present on the relevant market. However, it is common ground that Honeywell was present on, indeed that it had a large market share of, the market for small marine gas turbines. Rolls-Royce has thus clearly made an omission. As to its answer to question No 40 in the same document, this indicates that the applicant and Honeywell compete solely on the market for small industrial gas turbines. It must be held that Rolls-Royce's answers to those two questions do not resolve the issue as to whether the applicant and Honeywell were in competition on the market for small marine gas turbines.

601 However, it also emerges from Rolls-Royce's answers to the Commission's questions Nos 32, 34 and 36 that the Commission's proposed definition of a market for small marine gas turbines with a range of 0.5 to 10 MW was reasonable and that in Rolls-Royce's view no 'other factors' or 'other elements' were relevant for defining the

market concerned. Those parts of Rolls-Royce's answers therefore corroborate the Commission's case on market definition.

602 The response of UTC, P&W's parent company, supports the Commission's case in that it confirms that there was competition between the parties to the merger. In response to question No 50, it expressly states that the applicant and Honeywell compete against each other both directly and indirectly in industrial and marine gas turbines in the range of 0.5 to15 MW.

603 As to the appropriate definition of the market, UTC indicates in response to question No 43 that industrial turbines cannot be used in marine applications and, in response to question No 44, that, although the dividing line between large and small marine gas turbines would be relatively subjective and somewhat arbitrary, a figure of about 13 MW has sometimes been used. In response to question No 46 concerning other elements which may be important for defining the market, it states that the criteria described by the Commission relating to end use and power range are appropriate for defining the market. Accordingly, those responses substantiate the distinction between small marine gas turbines and industrial gas turbines and confirm the appropriateness of a distinction between small and large marine turbines on the basis of their power, an appropriate dividing line being slightly above 10 MW.

604 Finally, the response of Solar Turbines is at variance with the definition of the market used by the Commission, inasmuch as Solar Turbines is of the view that no distinction can be drawn between marine gas turbines and industrial gas turbines (page numbered 03812) nor any distinction made by reference to turbine power (page numbered 03809). However, it must be noted that, inasmuch as Solar Turbines advocates a very broad market definition, its view is also incompatible with the applicant's, according to which the differences in size and weight between the applicant's small turbines and those of Honeywell mean that the products are not in the same market.

605 Moreover, Solar Turbines confirmed, in response to the Commission's question No 8, that the applicant and Honeywell competed against each other in the sale of gas turbines for use in marine and industrial applications. As regards the applicant's contention, advanced at the hearing, that in listing the merging parties' different turbines, Solar Turbines left out the applicant's only small marine gas turbine, the LM 500, it is sufficient to note that that list of products was expressly stated not to be exhaustive since it concluded with the words 'among other products'. Thus, it cannot be concluded from that omission that, contrary to its express statement, Solar Turbines was referring exclusively to other turbines than those classified by the Commission as small marine gas turbines.

606 It is also clear from Annex 22 to the SO that the applicant and Honeywell have submitted bids in the same competition on one occasion in the past five years, although the applicant's bid was rejected because it did not meet the technical requirements. It must be noted in this connection that there are very few competitions on the relevant market, since, again according to Annex 22, Honeywell took part in six competitions in total during that same period and won two of them. Therefore, the fact that the parties submitted bids for the same competition on only one occasion is not in itself such as to indicate in this context that their respective products are not within the same market.

607 In the light of the three responses examined above, considered in their entirety, and of the document in Annex 22 to the reply to the SO, it has not been established that the Commission made a manifest error of assessment in holding, on the basis of the evidence in its case-file, that there was a worldwide market for marine gas turbines with a power output between 0.5 and 10 MW and that the applicant and Honeywell were both active on that market.

608 Following a question put by the Court at the hearing and a written exchange in the context of the re-opening of the oral procedure, it became apparent that the sole

EEA customer of each party to the merger on the worldwide market for small marine gas turbines had not been questioned by the Commission despite having been mentioned by the applicant on the notification form CO. However, that fact, to which the applicant drew attention after the hearing, does not invalidate the conclusion in the previous paragraph, since it is not established, or even alleged by the applicant, that the failure to consult either its or Honeywell's customer might have distorted the definition of the market on which the Commission relied in the contested decision.

609 In the present case, it is not established that the Commission made a manifest error of assessment by reason of the way in which it carried out its investigation in order to define the market for small marine gas turbines.

(b) The commitments

Arguments of the parties

610 The applicant proposed the divestment of Honeywell's stake in Vericor, the undertaking which markets Honeywell's turbines. Before the Court, it merely asserted in its application that the objections made by the Commission in the contested decision were entirely without foundation. However, it did not explain why those objections were unfounded and put forward no evidence on the point.

611 The Commission observes that GE's criticisms of the rejection of the commitments are mere allegations from which no conclusion as to the validity of the contested decision can be drawn.

Findings of the Court

612 As pointed out at paragraph 555 above, structural commitments proposed by the parties can be accepted only in so far as the Commission is able to conclude, with certainty, that it will be possible to implement them.

613 As regards small gas turbines, the parties to the merger proposed, in the first set of commitments of 14 June 2001, to sell Honeywell's 50% interest in Vericor, the joint venture through which Honeywell sells its small marine gas turbines and in which MTU holds the remaining 50% (see recital 494 of the decision).

614 Since the objections raised by the Commission in relation to that commitment are exclusively practical in nature, it should be noted that the Commission implicitly accepts, at recital 518 of the contested decision, that Honeywell's transfer to MTU of exclusive control of the company which markets its turbines would prevent a dominant position being created on the market with harmful effects for competition. In that regard, the arguments put forward by the Commission at the hearing, according to which the commitment would not eliminate the horizontal overlap on that market, do not alter that interpretation of the decision itself.

615 However, the Commission noted, at recital 518 of the contested decision, that the transfer provided for by the commitment was subject to 'all necessary approvals' in the context of the United States export control rules. Accordingly, the Commission concluded that it could not accept the commitment in the form proposed because, if the competent United States authorities were to refuse authorisation, the commitment would have been complied with because the merged entity would have done everything that it was required to do, notwithstanding the fact that the divestiture would not have taken place. The Commission also notes that the

commitment does not indicate the nature of the rules governing the grant of the authorisation in question, in particular whether the rules are mandatory or discretionary. It adds that there is also a problem in relation to 'the expected increase of input costs for the divested business if the purchaser does not produce helicopter engines', as does Honeywell.

616 Since the applicant merely asserts before the Court that the alleged difficulties to which this commitment gives rise, according to the Commission, are entirely without foundation, it should be observed that it has not advanced concrete arguments or any evidence such as could call into question the basis for the Commission's finding relating to the feasibility of carrying out the proposed divestment.

617 In particular, it must be held that the Commission was entitled to reject the commitment proposed by the parties to the merger, on the basis that the commitment had no practical value since it was hypothetical, its realisation being wholly dependent on a decision of the authorities of a non-Member State. If the applicant was not able to guarantee that the requirement would be met, it should have proposed an alternative commitment in case the divestment proved impossible to carry out.

618 In the light of the foregoing, it has not been established in the present case that the Commission made a manifest error of assessment in holding that the commitment, in the form in which it was proposed by the parties to the merger, could not be accepted in the circumstances of this case. Therefore, there is no need to take that commitment into account and the fact that it was proposed thus has no effect on the Commission's analysis in the contested decision of the market for small marine gas turbines.

(c) Conclusion on the horizontal overlap affecting the market for small marine gas turbines

619 It should be noted that, despite the Commission's statement that the elements of its decision reinforce one another and that it would therefore be artificial to analyse each of them in isolation (see paragraphs 40 and 48 above), that general statement has in any event no bearing on the matters considered in this section of the judgment. In particular, to the extent that the Court has found above that the Commission's findings concerning vertical overlap between engine starters and large commercial jet aircraft engines were vitiated by errors, as were the findings concerning the various conglomerate effects, none of those errors has any effect on its finding that a dominant position would be created for the applicant on the market for small marine gas turbines by virtue of the horizontal overlap resulting from the merger, with the result that effective competition would be significantly impeded in the common market.

620 The Court concludes that, in the context of these proceedings, the pillar of the contested decision concerning the creation of a dominant position for the merged entity resulting from the horizontal overlap on the market for small marine gas turbines between the manufacturing activities of the parties to the merger, as a result of which competition on that market would have been significantly impeded in the common market, is sufficiently established.

F — *The pleas based on procedural irregularities*

621 The applicant raises four separate pleas in these proceedings concerning (i) alleged infringement of its right of access to certain documents, (ii) the fact that access to

certain documents was granted too late, (iii) the fact that it was afforded insufficient time to reply to the SO and (iv) alleged procedural irregularities relating to the hearing officer's terms of reference.

1. *Preliminary considerations*

(a) Arguments of the parties

622 The applicant observes first that, according to Community legislation, case-law and the European Charter of Fundamental Rights (OJ 2000 C 364, p. 1; 'the Charter'), respect for the rights of the defence is a fundamental principle of Community law, which must be guaranteed in all proceedings, including merger proceedings before the Commission. The observance of those rights requires that the affected undertaking be afforded the opportunity during the administrative procedure effectively to make known its views on the truth and relevance of the facts, allegations and circumstances relied on by the Commission.

623 Access to the file is one of the procedural safeguards designed to ensure effective exercise of the right to be heard. The principle of equality of arms requires that the undertaking concerned has knowledge of the file equal to that of the Commission; it is not for the Commission to decide whether documents are potentially of use to the defence.

624 Procedural guarantees are of utmost importance in merger proceedings. First, merger proceedings call into question the fundamental right to property. Secondly, the Commission decision is effectively final in its effects owing to the limited effectiveness of recourse to the courts on account of the length of proceedings and

because in practice the Commission's decision determines the success or failure of a merger. Thirdly, by suspending the merger, merger proceedings adversely affect the parties' interests. Fourthly, the parties to a merger are vulnerable to the objections of competitors seeking to defend their own individual interests. Fifthly, losses as a result of the unlawful prohibition of a merger cannot be fully recovered. Sixthly, no interim measures with practical value are available since companies cannot merge on an interim basis.

625 Decisions taken in contravention of those essential procedural guarantees must be annulled if the parties have suffered any potential prejudice (Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931); failure so to act would constitute a breach of Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). First, as regards mergers, the Commission cannot be considered independent and impartial since it is the legislator, the executive, the plaintiff and the judge in its own cause. Secondly, procedural irregularities cannot be regularised before the Court of First Instance, since its role is limited to judicial review (Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775, paragraph 98).

626 In response to the Commission's defence, the applicant emphasises that the particular nature of merger proceedings may require that there be a different level of protection, but not necessarily that it be greater or less than the level offered in infringement proceedings. In particular, the Commission did not correctly assess the competing interests in question with regard to the time when directly interested third parties must be heard and the balance which needs to be struck in respect of the protection of business secrets.

627 The Commission acknowledges the importance of rights of the defence in merger proceedings but states that the applicant seems more concerned with the merger

control procedure itself and with the procedure for judicial review than with the Commission's management of the administrative procedure in the present case.

628 According to the Commission, the applicant erroneously relies on Article 6 of the ECHR. First, the principles set out in the ECHR are guaranteed by the general principles of Community law. Secondly, the right to merge is not a fundamental right and, if a distinction must be made, such a right would not require a greater standard of protection than that offered in proceedings resulting in sanctions.

(b) Findings of the Court

629 It should be noted as a preliminary point that the procedure for access to the file in competition cases is intended to allow the addressees of a statement of objections to examine evidence in the Commission's files so that they are in a position effectively to express their views on the conclusions reached by it in its statement of objections on the basis of that evidence. The right of access to the file is justified by the need to ensure that the undertakings in question are able properly to defend themselves against the objections raised in that statement (*Endemol* v *Commission*, paragraph 115 above, paragraph 65).

630 However, access to certain documents can be denied, in particular to (i) documents or parts thereof containing other undertakings' business secrets, (ii) internal Commission documents, (iii) any information enabling complainants to be identified where they wish to remain anonymous, and (iv) information disclosed to the Commission subject to an obligation of confidentiality (*BPB Industries and*

British Gypsum v *Commission*, paragraph 306 above, paragraph 29, upheld on appeal by the Court of Justice in Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraphs 26 and 27).

631 On the other hand, the Court of First Instance has previously held that, although undertakings have a right to protection of their business secrets, that right must be balanced against safeguarding the rights of the defence (Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847, paragraph 98). Thus, the Commission may be required to reconcile the opposing interests by preparing non-confidential versions of documents containing business secrets or other sensitive information (*ICI* v *Commission*, paragraph 103). The Court considers the same principles to be applicable to access to the files in merger cases examined under Regulation No 4064/89, even though their application may reasonably be adapted to the necessity for speed, which characterises the general scheme of that regulation (*Kaysersberg* v *Commission*, paragraph 84 above, paragraph 113; and *Endemol* v *Commission*, paragraph 115 above, paragraphs 67 and 68). Contrary to the applicant's submission, the rights of the defence are not to be applied with a standard of protection which is different or more extensive in merger control cases than in proceedings involving infringements of Community competition law.

632 Furthermore, it follows from the case-law that the rights of the defence are infringed by reason of a procedural irregularity only in so far as the irregularity has a concrete effect on the ability of the undertakings to defend themselves (see, to that effect, Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission (Cement)* [2000] ECR II-491, paragraphs 852 to 860). Consequently, non-compliance with rules in force whose purpose is to protect the rights of the defence can vitiate the administrative procedure only if it is shown that the latter could have had a different outcome if the rules had been observed (see, to that effect, *Hercules Chemicals* v *Commission*, paragraph 516 above, paragraph 56, and *Atlantic Container Line and Others* v *Commission*, paragraph 549 above, paragraphs 340 and 430).

633 In so far as the infringements of the rights of the defence pleaded in the present case relate to those pillars of the Commission's reasoning which the Court has found above not to be sufficiently established, they cannot have any effect on the outcome of these proceedings. Even supposing that such infringements of the rights of defence were established, they could undermine only those pillars of the Commission's reasoning to which they relate but which the Court has already rejected on other grounds. It is therefore necessary to determine which aspect of the Commission's reasoning is concerned by each specific allegation put forward by the applicant.

2. *Access to certain documents*

(a) Arguments of the parties

634 According to the applicant, the Commission withheld critical documents, or certain parts of such documents, on the ground that they were confidential. It based the contested decision on undisclosed documents or withheld documents which were potentially useful to the applicant's defence (*AEG* v *Commission*, paragraph 506 above, paragraphs 24 to 30; and the *Cement* judgment, paragraph 632 above). The Commission is required to prepare a full list of documents obtained. However, in spite of the applicant's requests, the Commission never certified that the file was complete. It is not permissible for the Commission to grant access only to those documents on which it relies and to withhold documents that could be of potential use to the defence.

635 In particular, first, the Commission did not mention the existence of complaints until after the submission of the SO, and then granted access to the content of those complaints only through an 11-line summary of certain airlines' complaints, but not of those of 'other industry players'. That summary of — allegedly adverse — anonymous complaints did not enable the applicant to dispute their content or the

use to which they were put. The crucial role of those complaints in the final decision is clear from the Commission's public statements and from recital 391 of the contested decision. Furthermore, those complaints could have contained material of potential use to the applicant's defence. The applicant states that it is impossible for it or for the Court to determine the precise role that such evidence played in the contested decision. Consequently, the contested decision should be annulled on that ground alone (*Solvay* v *Commission*, paragraph 625 above, paragraph 93 et seq.).

636 Second, the applicant had no access to observations made to the Commission by third parties, in particular by Rolls-Royce on 2 April 2001 and UTC on 30 January, 21 February and 22 March 2001. It seems that other third parties sent such observations to the Commission without the applicant's being informed of them.

637 Third, the Commission granted blanket confidentiality in relation to a number of third-party observations that were so heavily redacted as to make it virtually impossible for the applicant to scrutinise or assess the documents properly. Of particular concern are Rolls-Royce's reply to the Commission's letter of 21 March 2001, UTC's observations of 24 April 2001 and ILFC's observations. It is highly doubtful that much of that deleted information could in fact be classified as business secrets.

638 Fourth, the applicant did not have full access to Professor Choi's report, which was the basis of the Commission's theory on mixed bundling. The fact that the Commission eventually withdrew that model does not excuse such behaviour. First, in the contested decision (recitals 349 to 355) the Commission maintained the conclusions deriving from that model even though it provided no alternative evidence for those conclusions. Secondly, as a result of its limited access, the applicant, whilst able to convince the Commission to withdraw the model, was not able to convince the Commission of the inapplicability of the mixed bundling theory, which is essential to the contested decision. Thirdly, the Choi model served as the basis for questions sent to third parties.

639 In spite of repeated requests and the suggestion that its economists be bound by a confidentiality agreement, the applicant never received a full analysis of the data used in that model, owing to the refusal of Rolls-Royce, which had commissioned the model, to release the data. However, the Commission was obliged, in accordance with its notice on the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles [81] and [82] of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Regulation No 4064/89 (OJ 1997 C 23, p. 3; 'the notice on access to the file'), in particular paragraphs I.A.2, II.A.1.3 and I.B thereof, to override Rolls-Royce's request for confidentiality in order to guarantee the rights of the defence.

640 Moreover, the applicant was unable to obtain information as to the identity of external economists appointed by the Commission to investigate the Choi model or on their reports, which are clearly referred to in footnote 175 and paragraphs 567 and 568 of the SO. In response to a question put by the Court, the Commission produced, among its replies of 26 April 2004, the report of an economist, Professor Vives, appointed by it to advise it in the administrative procedure in this case, as well as an exchange of e-mail messages between Professor Vives and Commission officials, and the contract on the basis of which Professor Vives was hired by the Commission. The applicant submitted at the hearing that it could have used those documents in its defence, in particular in so far as Professor Vives criticised certain aspects of the Commission's reasoning.

641 The Commission repeatedly refused to grant the applicant access to the data (or market investigation) resulting from questions put to competitors based on the Choi model that apparently underlie paragraphs 567 and 568 of the SO, or even to provide access to data setting out sensitive information within a certain range of figures.

642 Fifth, the applicant was unable to exercise its right to request access in relation to documents classified as internal. Out of the 96 documents that the Commission classified as not accessible on that basis, 10 are described as faxes from third parties and thus it was unlawful to keep them confidential. The Commission produced, on

18 May 2004, in response to a question put by the Court, 11 non-confidential documents and non-confidential summaries of three confidential documents which had wrongly been classified as internal documents. The applicant referred to some of these documents at the hearing and submitted that the fact that it had not had access to them during the administrative procedure was an unacceptable infringement of its rights of defence which should lead to annulment of the contested decision.

643 Sixth, the applicant was unable to comment on the observations submitted by third parties during the market test, on the basis of which the Commission rejected the structural commitments, in particular those relating to large regional jet aircraft engines, small marine gas turbines and engine starters. It notes in that regard that all divestments were rejected on the basis of allegations made by its competitors.

644 The Commission contends that the applicant was in a position to know all the objections made against it by the Commission, as a result, in particular, of the SO, which was, moreover, sufficient to allow it to defend itself effectively in the present case.

645 The applicant was informed of the substance of complaints received by the Commission. The Commission notes that, in any event, it can rely only on evidence mentioned by it. Disclosing the identity of the authors and the full text of the complaints would not have added anything of significance to the parties' knowledge of the case and to their ability to defend themselves. That is especially true as regards the mention of a particular airline at recital 391 of the contested decision, only the content of the statement being of interest.

646 It is precisely for the procedural reasons identified by the applicant that the Commission did not rely on the Choi model, since the data used in that model consisted of business secrets.

647 Regarding third party observations, the oral presentations of Rolls-Royce and UTC, referred to by the applicant, are no more than a summary of the concerns that they had already expressed and contain no additional element that could have been made available to the applicant. As regards the suppression of certain confidential passages, the Commission notes that the competition relationship between the parties to the merger, on the one hand, and ILFC and Rolls-Royce and UTC, on the other, explain why the information was covered by business secrecy.

648 As regards the 'market test', in view of the inadequacy of the commitments, the Commission carried out a simple technical verification, in particular by consulting third parties, and the results of that were communicated to the applicant. Moreover, the applicant did not have to respond to third-party concerns but to those of the Commission.

(b) Findings of the Court

649 The Commission rightly observes that, in relation to access to the file, a distinction must be drawn between adverse evidence and documents which are favourable or contain favourable evidence. Adverse evidence is relevant only in so far as the Commission itself relies on it, in which case it must be made available, but if the evidence is not so relied on, the fact that it is not made available has no effect on the lawfulness of the procedure. Conversely, if it is shown that an applicant was not granted access, during the administrative procedure, to a document favourable to its case, i.e. a document which could have been useful to its defence and which could therefore have changed the outcome of the administrative procedure if the applicant had been able to make use of it, the reasoning in the contested decision affected by that document must, in principle be regarded as vitiated by error.

650 It must also be recalled that, according to the case-law, an application for confidential treatment may justify a refusal to grant access to documents emanating from third parties, such as complaints, in competition proceedings. The Court of Justice observed in *BPB Industries and British Gypsum* v *Commission*, paragraph 630 above, that an undertaking holding a dominant position on the market might adopt retaliatory measures against competitors, suppliers or customers who have collaborated in the investigation carried out by the Commission: that being so, third-party undertakings which submit documents to the Commission in the course of its investigations and consider that reprisals might be taken against them as a result can do so only if they know that account will be taken of their request for confidentiality. The Court of Justice thus concluded that the Court of First Instance was therefore right to consider that the Commission was entitled to refuse access to such documents on the ground that they were confidential (see also, on this point, *Endemol* v *Commission*, paragraph 115 above, paragraph 66 et seq.).

651 The Court must next consider the applicant's specific allegations of failure to grant it access to the file.

652 First, it must be noted at the outset that the airlines' complaints, by definition, necessarily contained adverse evidence. Thus, in accordance with the distinction drawn above, they were relevant only in so far as the Commission relied on their contents in the SO. Furthermore, the Commission confirmed to the Court, in particular in its written replies of 26 April 2004 to the questions put by the Court, that all the airlines, without exception, had requested anonymity. Therefore, only a summary of the information was disclosed (see paragraph 3 of the report of the hearing officer).

653 Since the airlines had specifically asked for their identity not to be disclosed and for confidentiality, it must be held that the Commission was entitled to accord the parties to the merger disclosure in the form of a summary. Limited disclosure of that type is a balanced response, endorsed by the case-law, which allows, so far as is

possible, the opposing interests of the parties to the merger, on the one hand, and the Commission and the complainants, on the other, to be reconciled (see, by analogy, the *Cement* judgment, paragraph 632 above, paragraphs 142 to 144 and 147 and the cases cited). In so far as the applicant contends that the complaints might have contained, among the adverse evidence, specific material which it could have used in its defence, it would not be possible to ascertain whether that contention is well founded without violating the confidentiality of the complaints in question and consequently destroying the balance mentioned above, since, if those complaints were produced to the Court, it would also be necessary, in principle, to make them available to the applicant, pursuant to the first subparagraph of Article 67(3) of the Rules of Procedure.

654 The mere fact of the applicant's alleging that the complaints in question might have contained material which it could have used in its defence does not invalidate the balance struck by the Commission in the present case, which was to disclose a summary of the difficulties which the complainants had raised. Likewise, in so far as the applicant casts doubt on the adequacy of the 11-line summary disclosed to it on 24 May 2001, it must be observed that if it were the case that the Commission omitted other objections raised in those complaints, it was not able to rely on them because it had not included them in the summary. Thus, in the present case, nothing prevented the Commission from refusing, on grounds of confidentiality, to disclose the airlines' complaints, which in principle contained adverse evidence, and the Community judicature need not verify the contents of those complaints itself.

655 In the light of the foregoing, the brief summary which the Commission provided of the concerns expressed by the airlines in their complaints satisfied the rights of defence of parties to a notified merger, in light, in particular, of the need in such a situation to balance the opposing interests of those parties and of third parties.

656 However, the applicant advances specific criticisms concerning the complaint made by one airline, which it is necessary to consider separately. The applicant submits that the Commission expressly relied, at recital 391 of the contested decision, on the

statement of a major European airline, made in a document which it was not able to consult, according to which 'whenever Boeing prices a B737, GE steps in with attractive offers on ancillary engine products and services, spare parts, financial assistance and other GE items in order to convince the airline to go for the GE-powered aircraft'. Since the Commission elected to use that affirmation in the contested decision, it should, in the normal course of events, have made available to the parties to the merger, in the course of the administrative procedure, a non-confidential version, or a specific summary, of the document from which it took the information.

657 In any event, it must be noted that, in response to a written question put by the Court, the Commission produced in its reply of 26 April 2004 a non-confidential version of the minutes drawn up by a Commission official of the meeting during which the statement in point was made by the representatives of the airline in question. The applicant, when asked to indicate how the fact that it had not had access to the summary had affected its ability to defend itself in the present case, stated at the hearing that the document was much less categoric than the allegation which it is said to substantiate.

658 It must be held that the Commission overstated the importance of that item of evidence in the contested decision, in so far as it concluded from it that 'whenever' Boeing quoted airlines its price the applicant approached them and made attractive offers on a whole range of products and services. In fact, all that follows from the minutes is that CFMI had made an attractive offer to the airline in question in relation to unspecified ancillary products and services, when an order was placed for a B737, and that engine exclusivity is not necessarily an obstacle to the engine manufacturer making concessions or offering ancillary items when an order is placed.

659 In the light of that overstatement, it should be noted that if the applicant had had access to the document during the administrative procedure, it would have been able to point out that the Commission was not entitled to make that specific statement with regard to the B737.

660 However, it cannot but be noted that this statement is insignificant in the broader context of the contested decision as a whole, and is certainly not the keystone of its operative part, particularly since it is expressly presented in the contested decision as based on one item of evidence alone and thus represents an example rather than a finding of general application. Consequently, it must be held that such an infringement would have changed neither the course of the administrative procedure nor, above all, its outcome and there is no need in the circumstances of the present case for the Court to rule on whether the failure to allow a fuller disclosure of that evidence was such as to amount to an infringement of the rights of the defence.

661 With regard to the applicant's allegation that 'other industry players' made observations to which it did not have access, the Commission stated, in its written reply of 26 April 2004 to the Court's questions, that the parties to the merger were provided with all those observations, at least in a non-confidential version, except as regards a single item of evidence, namely a slide presentation of one such player who refused to provide a non-confidential version of it. The Commission confirmed before the Court that it had not relied in any specific way on the concerns expressed by the undertaking in question, which were in any event subsumed within the concerns expressed by the airlines, and that it provided, in its reply of 26 April 2004, a summary of those concerns. The applicant has not indicated, in the light of that summary, how the non-disclosure of the summary at the stage of the administrative procedure could have changed the course of the procedure or, a fortiori, its outcome.

662 Second, as regards disclosure of third-party observations to the Commission, in particular by Rolls-Royce on 2 April 2001 and UTC on 30 January, 21 February and 22 March 2001, the Commission confirmed before the Court that the oral presentations contained no additional evidence as compared with the same undertakings' other observations, to which the applicant had had access, those presentations being merely a summary of the concerns expressed in their written observations. The Commission repeats that, in any event, the applicant was required to reply only to the objections in the SO. It should be noted that those presentations

were not relied on in either the SO or the contested decision. Moreover, it is stated explicitly in UTC's letter of 3 May 2001, to which the applicant refers, that UTC specifically requested confidential treatment for the presentations in question.

663 In view of all of the circumstances noted in the previous paragraph, and in light of the fact that the two undertakings in question are competitors of the applicant which expressed their firm opposition to the merger in their written observations, there is no reason to call into question the Commission's statement that those presentations are summaries which add nothing to the evidence to which the applicant had had access. Furthermore, there is nothing to suggest that those documents might contain favourable evidence rather than exclusively adverse evidence. The applicant does not make any such allegation, maintaining instead in its reply that those presentations were likely to be prejudicial to it. Consequently, in the circumstances of this case and in view of the fact that production of certain of the documents in question would have been in breach of the confidential treatment which their authors had requested of the Commission, the Commission's statement concerning the content of that material can be accepted by the Court as accurate in the present proceedings. In keeping with the distinction between adverse and favourable documents established at paragraph 649 above, there was no need for the applicant to have access to that material in order to be able to defend itself properly before the Commission, since the Commission did not rely on it in the SO or subsequently in the contested decision.

664 The applicant's allegation, that other third parties made similar observations without its being informed, is supported only by a general reference to an annex to the application containing more than 30 different documents and the Court is therefore unable to identify the basis for the allegation or the companies in question. This allegation which is not supported by any specific evidence cannot be accepted.

665 Third, as regards third-party observations which the Commission disclosed in non-confidential form, in particular Rolls-Royce's reply to the Commission's letter of 21 March 2001, UTC's observations of 24 April 2001 and ILFC's observations, it must

be noted, first of all, that the Commission expressly pointed out in its defence that the oral presentations of Rolls-Royce and UTC (P&W's parent company) related to those undertakings' concerns and are thus adverse evidence. In addition, the Commission also pointed out, in its defence, that the three companies, all competitors of the applicant, had requested confidentiality in respect of the deleted information.

666 The Court must hold that it follows from the precedent laid down in the judgment in *BPB Industries and British Gypsum* v *Commission*, paragraph 630 above, and the reasoning set out above at paragraph 650 et seq. above that the Commission was entitled to grant only limited access to the material in question in the way it did. Accordingly, it also did not infringe the merging parties' rights of defence by the way it handled disclosure of those presentations and other documents emanating from third parties.

667 Fourth, to the extent that the applicant claims not to have had full access to Professor Choi's report on which the Commission's theory on mixed bundling was based, it is sufficient to note, as did the hearing officer in his report of 28 June 2001, that the Commission chose not to rely on the Choi model, precisely because it could not disclose to the applicant the data used, owing to its confidential nature from the point of view of the applicant's competitor, Rolls-Royce (see paragraph 2 of the report of the hearing officer of 28 June 2001 (OJ 2004 C 42, p. 11)). In those circumstances, it should be noted that the Commission's refusal, founded on a request for confidentiality made by Rolls-Royce, to grant access to the data on which the Choi model was based had no effect on the outcome of the administrative procedure. In any event, given that the Court found above that the limb of the Commission's reasoning concerned by the Choi model was not established, the present allegation, even supposing that it were sufficiently established, cannot result in annulment of the contested decision (see paragraph 633 above).

668 The applicant maintained before the Court that it had been unable to obtain disclosure of the identity of external economists appointed by the Commission in

the present case, or of their reports, the existence of which is apparent from footnote 175 and from points 567 and 568 of the SO. In response to a question put by the Court, the Commission produced, as part of its replies of 26 April 2004, the report of an economist, Professor Vives, appointed by it to advise it in the administrative procedure in the present case, and e-mail messages between Professor Vives and Commission officials, as well as the contract on the basis of which Professor Vives was engaged by the Commission.

669 The applicant stated at the hearing that those documents could have been used by it in its defence, in particular in so far as Professor Vives criticised certain aspects of the Commission's reasoning. To that extent, the documents constituted favourable evidence.

670 However, it is clear from the wording and tone of the e-mail messages in question and from the contract by which the Commission appointed Professor Vives, in particular Annex III thereto, that the Professor's role was not to provide evidence capable of providing the Commission or even, in certain circumstances, a party to the administrative procedure, with evidence on which it could rely but rather to comment on other economic evidence and findings of an economic nature made in the SO. As the Commission stated at the hearing, that role is now played by its chief economist, an in-house economist working within the Commission but, since there was no such post at the material time, the Commission used an external economist to carry out that function. The Commission submits, rightly, that it would be formalistic if the status of advice given in the present case were to turn on whether or not the economist who gave it were internal or external to the Commission.

671 It must be held in this regard that the Commission is entitled to seek different opinions, including the opinions of external experts, in order to check the accuracy of its analysis. To the extent that the Commission does not rely on the opinion of

such an expert in its SO and its final decision as evidence substantiating its case against an undertaking, the opinion remains no more than a view expressed by a single person and assumes no particular significance in the context of the administrative procedure. Such a view, even though expressed by an expert, cannot therefore be regarded as either favourable or adverse evidence.

672 In any event, if the documents in question had been regarded as forming part of the Commission's actual case-file, they would have been classified as internal documents, given their status and content, and the applicant would therefore not have had access to them. Moreover, the only argument before the Court which the applicant has based on the documents relating to Professor Vives was, in substance, the fact that the Professor had advanced certain arguments which they themselves had put forward during the administrative procedure and before the Court. Even if the applicant had been given access to those documents, that would not have enabled it to put forward arguments on the substance of the case that differed in any way from those which it in fact put forward. In any event, most of those arguments concern the Choi model, which was abandoned by the Commission and relate, furthermore, to the limb of the contested decision dealing with bundling, which the Court has already held not to be established in the present case (see, in that regard, paragraph 633 above).

673 In the light of all those considerations, it must be held that the applicant's rights of defence were not infringed as a result of the fact that the documents concerning views expressed by Professor Vives in his exchanges with Commission officials and in his report were not disclosed to the applicant during the administrative procedure.

674 Fifth, regarding the internal documents allegedly comprising communications from third parties, the Commission produced, on 18 May 2004, in reply to a question put by the Court, 11 non-confidential documents and non-confidential summaries of 3 confidential documents which had all been wrongly classified as internal documents. The three confidential documents are said to be adverse in that they emanate from

third parties opposed to the merger. As to the 11 non-confidential documents, the Commission admitted that some of those documents could be classified as favourable since they are letters sent by airframers and airlines expressing the view that the merger would not have harmful effects on competition. However, it points out that those documents are not substantiated by any specific evidence such as to give a firm indication that there are no such effects, since most of the documents were brief letters couched in almost identical terms.

675 At the hearing the Court asked the applicant to indicate what arguments it would have been able to advance during the administrative procedure had it had access to the documents in question. The applicant stated that, subject to a single exception, it was relying not on the arguments which it could have advanced but on the fact that the Commission did not take into account documents, such as those which are at issue here, which militated against its case that the merger was incompatible with the common market. In particular, the applicant stated at the hearing that [...], contrary to the impression given by the Commission [...], at recital [...] of the contested decision.

676 It is sufficient to note, on this point, that the documents in question formed part of the Commission's case-file and the applicant's contention that the Commission failed to take them into account is not supported by any evidence. It cannot be inferred from the fact that, at the time of putting together the case-file to which access was granted, those documents were classified as internal documents rather than documents received from third parties that the Commission failed to take them into account. Although that error of classification may have meant that the applicant did not have an opportunity to advance certain arguments, it did not mean that the Commission itself did not have an opportunity to consider those documents in the same way as all the other documents in the file. Consequently, the applicant's argument does not establish an infringement of the rights of the defence.

677 Concerning the specific statement made at recital [...] of the contested decision, it concerns the fact, the accuracy of which is not denied by the applicant, that [...]. The fact that, as the applicant notes, [...] does not invalidate the Commission's citation of the article in question in the contested decision to support the part of its case relating to [...].

678 However, with regard to a single document (the letter from [...], sent to the Member of the Commission responsible for competition at that time), the applicant claims that it would have been of real assistance to it in its defence in the administrative procedure. It notes that in that letter a major customer of the applicant and Honeywell expressed the view that the behavioural commitment accepted by the Commission in the context of the merger between AlliedSignal and Honeywell in 1999 had actually precluded Honeywell from engaging in bundling practices following that transaction.

679 It is sufficient to recall in this connection that, at paragraph 470 above, the limb of the Commission's reasoning relating to bundling has been held not to be established overall. Consequently, since the Commission's reasoning which the applicant claims that it would have been better placed to challenge had it had access to [...]'s letter has already been held not to be established, the infringement of the rights of the defence raised by the applicant on this point has no effect on the outcome of the present proceedings.

680 Sixth, the applicant claims that it did not have access to the observations of third parties obtained when the commitments were subject to the technical verification and market test, on the basis of which the Commission rejected the structural commitments, in particular in relation to large regional aircraft engines, small marine gas turbines and engine starters. It claims that it therefore had no opportunity to reply to the allegations made by its competitors in their responses, according to which, inter alia, the undertakings which would have been created on

the implementation of certain structural commitments would not have been workable.

681 It must first of all be noted that the Commission merely carried out a technical verification of the commitments and not a market test because it considered the commitments as a whole to be clearly insufficient to resolve the competition problems resulting from the transaction notified.

682 Moreover, the Commission points out that, by an e-mail on 22 June 2001, it sent the applicant a summary, annexed to the defence in these proceedings, setting out the results of its technical verification relating to the various commitments proposed by the parties to the merger, in particular the structural commitments relating to the horizontal overlaps. The applicant maintains in this connection that it replied to the e-mail message by a 16-page document on 26 June 2001 and points out that it had also replied to the questions put by the Commission in its technical verification by documents of 14 and 22 June 2001.

683 In those circumstances, it must be held that the applicant did in fact have an opportunity to respond to those aspects of the criticisms of the commitments made by third parties which were adopted by the Commission, before the Commission confirmed them in the contested decision. As the Commission has rightly pointed out, such criticisms are relevant only in so far as they are adopted by the Commission and used by it, where appropriate, in order to justify the rejection of commitments.

684 Furthermore, given that the observations in question were submitted late in the proceedings (after the final date for the submission of commitments), it must be held that the Commission was under no obligation to grant access to new material on the file at that stage of the procedure. In view of the strict timetable laid down by Regulation No 4064/89, and given the necessity for speed which characterises

procedures governed by that regulation, the imposition of such an obligation after the last date for the submission of commitments would be likely to deny the Commission a sufficient period of reflection to analyse the case-file as a whole and draft its final decision. By supplying the parties with the abovementioned summary, the Commission gave the parties to the merger an opportunity adequately to defend their interests in the circumstances of the present case and therefore fully complied with the rights of the defence.

685 It should also be noted that the applicant did not produce to the Court any of the three documents mentioned at paragraph 682 above which it claims to have submitted during the administrative procedure. Furthermore, as was noted above (see, in particular, paragraphs 555 et seq., 581 et seq. and 612 et seq.), it did not advance before the Court arguments which might indicate in what respect the rejection of the structural commitments, in particular those relating to the markets for large regional jet aircraft engines, small marine gas turbines and engine starters, was unfounded, merely asserting in that regard, without more, that the rejection was wholly unjustified.

686 In these circumstances, it must be held, for the purposes of the present proceedings, that the non-disclosure of the third-party observations concerned had no effect on the applicant's ability to defend itself, since it has not submitted to the Court any arguments which put in doubt the reasons provided in the summary of the technical verification and which were reiterated, in essence, in the contested decision for rejecting the structural commitments in question.

687 Thus, in the present case, no infringement of the rights of the defence with any bearing on the outcome of the administrative procedure has been established by reference to alleged failures in relation to the applicant's access to the Commission's file.

3. *Late access to the file*

(a) Arguments of the parties

688 The applicant states, first, that Regulation No 4064/89, in particular Article 18(1) and (3), provides for the right to be heard, and thus to have access to the file, at all stages of the procedure, that is to say, as from initiation of proceedings under Article 6(1)(c) of that regulation. In that regard, it notes that the decision to initiate proceedings is not merely a preparatory act, but a formal decision with legal effects. That legal right to be heard at all stages of the proceedings corresponds to (i) the duty under Article 10(2) of Regulation No 4064/89 not to continue proceedings any longer than strictly necessary, (ii) the general principle of Community law concerning decisions adversely affecting an individual and (iii) the principle of equality of arms.

689 The Commission's refusal to accede to the applicant's requests for access during the two months prior to the adoption of the SO constitutes a violation of its rights, with potentially significant adverse effects. First, there was inequality of arms, in particular during the first phase of the procedure, which prevented the applicant from submitting appropriate evidence or commitments leading to the early termination of the procedure. Secondly, that inequality of arms was aggravated by the Commission's requirement that the applicant provide a full response to the decision to initiate proceedings without having had access to the file and by the fact that the Commission did not reply to its questions. Thirdly, lack of knowledge of the Commission's position and of the content of the file meant that the applicant was not in a position to offer appropriate commitments in order to end the proceedings. Fourthly, during the crucial period of March and April 2001, competitors had direct access to the Commission even though their rights are more limited than those of the parties by virtue of Article 18(4) of Regulation No 4064/89. Fifthly, the SO was based on the applicant's response to the decision to initiate proceedings, which was

adopted even though the applicant had not had access to the file. However, the SO was in reality, in the present case, a final decision, as is confirmed by the fact that it is almost identical to the final decision. Therefore, the procedural guarantees offered to the applicant proved to be no more than the fulfilment of a technical requirement and did not amount in practice to a real opportunity to change the Commission's opinion.

690 Although the Commission received a large number of documents from third parties prior to the adoption of the decision to initiate proceedings, it did not disclose those documents until after 8 May 2001, despite the applicant's previous requests. In that regard, the Commission cannot rely on its notice on access to the file, under which 'any request for access made prior to the statement of objections will in principle be inadmissible', since it is required to comply with the provisions of Regulation No 4064/89.

691 The Commission contends that the applicant's argument disregards the nature and purpose of access to the file in merger cases. Both in the legislation and in the case-law of the Court of First Instance, the right to be heard applies only to the objections that the Commission intends to take into account. The purpose of a decision to initiate proceedings is not to address objections to the parties, but merely to set out, provisionally, the Commission's serious doubts which lead it to open the second phase of the investigation.

(b) Findings of the Court

692 In order to reject this plea it is sufficient to observe, as does the Commission, that it is settled case-law that the right to be heard in competition proceedings relates only to the objections which the Commission intends to sustain (see, to that effect, Joined Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission*

[1992] ECR II-2667, paragraph 38, and *Endemol* v *Commission*, paragraph 115 above, paragraph 65).

693 Thus, since the aim of a decision to initiate proceedings under Article 6(1)(c) of Regulation No 4064/89 is not to address objections to the parties but merely to set out, provisionally, the Commission's serious doubts leading it to initiate the second phase of the investigation, the applicant cannot claim that lack of access to the file, before service of the SO, undermines its ability to defend itself. The fact that the applicant actually had an opportunity to submit written and oral observations on the SO in the present case after it had had access to the Commission's case-file meant that it was able to express its point of view in good time on the objections adopted.

694 It is appropriate to reject the applicant's argument that, according to Article 18(1) and (3) of Regulation No 4064/89 and the judgment in *Kaysersberg* v *Commission*, paragraph 84 above (paragraphs 105 to 107), the parties to a merger have the right to put forward their point of view at any stage of the merger control procedure. Although the terms in which Article 18(1) is couched do mean that the parties must be able to submit observations with effect from the initiation of the proceedings, they do not imply that the Commission must give access to its case-file at this earlier stage. The need for the parties to have access to the Commission's case-file in order to be able to defend themselves, ultimately, against the objections raised by the Commission in the SO should not be interpreted as requiring the Commission to grant them access to its file in portions throughout the proceedings, a requirement which would represent a disproportionate burden on it.

695 Nor can it be inferred from the similarities noted by the applicant between the SO and the contested decision that the SO was in fact a final decision. Any such presumption would be tantamount to a finding that the Commission can never take the view, when adopting its final decision, that it should maintain the position which it adopted provisionally upon service of the SO.

696 With regard to the applicant's argument that lack of access to the file at an earlier stage deprived it of the opportunity to submit appropriate commitments in order to bring the proceedings to an end, the Court notes, first, that the applicant had already been informed, especially once the decision to initiate proceedings under Article 6 (1)(c) had been adopted, of the Commission's main doubts as to the compatibility of the merger with the common market and that it was therefore already in a position to prepare, and indeed submit, proposed commitments. Moreover, the applicant asserts that it in fact submitted such proposals at an early stage of the proceedings. Furthermore, the applicant had an opportunity to submit commitments after it received the SO and after it had had access to the case-file, for which purpose it was granted, upon its own submissions, an additional period of 13 days after the date of the hearing.

4. *The shortness of the period allowed to GE within which to inspect the file*

(a) Arguments of the parties

697 According to the applicant, the time-limit set for its response to the SO was unacceptably short in the light of the late provision of access to file, the volume of material to be reviewed, and the scope of the case. The Commission granted it only 11 working days, plus 1, to review the third party submissions contained in the Commission's file, which consisted of over 3 500 pages, 4 further working days to prepare for the oral hearing and 13 further days to submit appropriate commitments. The effectiveness of that period was again reduced by the time lost in the attempt to gain full access to the file, by the Commission's refusal to grant such access, by the inadequacy of the index provided with the documents disclosed, the large number of pages missing from the file, and the Commission's failure to comply with its internal procedure for classifying documents, set out in the notice on access to the file, including its failure to provide a summary describing the content of the documents in the non-accessible category of documents.

698 According to the applicant, that period was insufficient to enable it to respond to the SO, prepare for the oral hearing and provide appropriate commitments. The brevity of the period was unfair, contrary to the principle of equality of arms in so far as the applicant was not in a position to exercise its rights of the defence at each stage of the proceedings. The applicant submits that the Commission has not justified the brevity of that period in these proceedings.

699 The Commission points to the necessity for speed in merger proceedings. The two weeks accorded to the applicant, extended by one day at its request, must be viewed from that perspective and that period does not infringe the rights of the defence. The applicant's suggestion that the Commission should have presented its objections earlier is at variance with the fact that many of the Commission's concerns were made known to the parties already before the notification and that the applicant submitted a response to the decision to initiate proceedings.

(b) Findings of the Court

700 Regulation No 4064/89 imposes strict periods within which the Commission must adopt a final decision on each notified transaction. In particular, pursuant to Article 10(1) of the regulation, the decision under Article 6(1) as to whether or not to initiate a 'Phase II' procedure with regard to a notified transaction must be taken within one month at most. Moreover, decisions taken at the end of such a procedure pursuant to Article 8(3) are to be made within not more than four months of the date on which the proceedings were initiated.

701 If the Commission is to comply with the timetable thus laid down by Regulation No 4064/89, the intermediate periods laid down at each stage of the procedure must also be brief. Inevitably, this has an adverse effect on the conditions under which all the parties to the proceedings must work, but the gain in terms of the speed of the

proceedings as a whole was regarded by the legislature as justifying those sacrifices, particularly in order to take account of the commercial interest of the parties to a merger in completing their proposed merger as quickly as possible. The Court has already had occasion to observe that, when assessing alleged infringements of the rights of the defence in the context of proceedings under Regulation No 4064/89, it is necessary to take into account the necessity for speed, which characterises the general scheme of that regulation (see, to that effect, *Kaysersberg* v *Commission*, paragraph 84 above, paragraph 113, and *Endemol* v *Commission*, paragraph 115 above, paragraph 68).

702 It must also be noted that under Article 21 of Regulation No 447/98, which applies, inter alia, to the time-limit set under Article 13 of that regulation for replying to the statement of objections, the Commission is to have regard to the time required for preparation of statements and to the urgency of the case. Thus, it is incumbent on the Commission to reconcile, as far as possible, the notified parties' rights of defence and the abovementioned necessity for the rapid adoption of a final decision.

703 In those circumstances, the parties to a notified transaction may invoke the shortness of the periods allowed to them in the context of those proceedings only inasmuch as those periods are disproportionate to the duration of the proceedings as a whole.

704 In the present case, it is common ground that the parties to the proposed merger had a period of 11 working days, plus 1 additional day granted at their request, within which to prepare their written response to the SO. The Court also notes in that regard that the applicant had four additional working days within which to prepare its arguments before the hearing on 29 and 30 May 2001. If it had realised during that additional period that it had omitted some essential matter when drawing up its written response to the SO, it could have raised it orally.

705 Moreover, as the Commission observes, a significant number of the Commission's concerns were already known before the notification or at least after the adoption of the decision under Article 6(1)(c) of Regulation No 4064/89. Thus, the applicant was able to deal with them initially in its response to that decision (a detailed document running to more than 100 pages), on the basis of the documents which it had at that time. It follows that the period of 12 working days within which to respond to the SO must be considered to be the continuation of an exchange of views which had been taking place between the Commission and the applicant for some time, and not a period within which to reply to objections that were entirely unknown and unexpected before the dispatch of that document.

706 In the light of all those circumstances, the Court finds that those periods were not disproportionate in comparison with the total period of four months within which the Phase II procedure had to be fully completed.

707 Furthermore, the applicant has not explained specifically how the shortness of the period at its disposal prevented it from defending itself effectively in the present case.

708 In particular the applicant's written pleadings do not indicate the aspects of the SO on which the applicant was unable to comment effectively in its response to that document. Once again, in reply to an oral question from the Court seeking to establish the specific points on which the applicant had been deprived of an opportunity to defend itself, the applicant merely asserted at the hearing that its plea concerned the inadequacy, in general, of the period at issue.

709 It must also be noted in this context that the response to the SO submitted by the parties to the merger is a detailed document of 47 pages with voluminous annexes, including several documents which contain additional arguments of the parties to

the merger concerning specific markets. In principle, and in the absence of specific arguments capable of establishing otherwise, that fact is incompatible with the assertion that the applicant was not in a position to respond adequately to the SO.

710 As regards the arguments alleging the Commission's poor organisation of access to the file, the applicant produces no examples or specific arguments in support of its allegations that the inadequacy of the index with the documents disclosed, as well as the 'large number of pages missing from the file' served de facto to shorten the period available within which it had to reply to the SO.

711 The arguments relating to access to the file and the absence of a summary of the content of inaccessible documents are relevant in the context of the present plea only in so far as the applicant argues that as a result it lost valuable time because of its attempts to resolve the problems, whereas it should have been able to use that time in studying the case-file itself. However, although the writing of the various letters and e-mails to which the applicant refers must have occupied one of its lawyers for a certain time, that did not prevent it from simultaneously examining, if necessary through other lawyers, the numerous documents to which it already had access.

712 The only document to which the applicant specifically refers in that connection is the statement [...] which it received only on 17 May 2001, three days before the time-limit for lodging its reply to the SO. Leaving aside the fact that the applicant could have commented effectively on that document, possibly in its response to the SO, or at least at the hearing before the Commission, it is sufficient to note that this document was not relied upon by the Commission in the contested decision. Thus, even if it were established that the applicant did not have sufficient time within which to examine it before responding to the SO, that circumstance had no prejudicial impact, from its point of view, on the outcome of the administrative procedure.

713 Consequently, it should be noted once again that the applicant has not made clear specifically which matters or arguments it was unable to put forward effectively during the administrative procedure owing to the obstacles to its defence alleged by it in that context. It has not therefore established that its rights of defence were infringed in the circumstances of the present case owing to the shortness of the period allowed to it in order to respond to the SO.

5. *Compliance with the hearing officer's terms of reference*

(a) Arguments of the parties

714 The applicant considers that the new rules relating to the hearing officer adopted on 23 May 2001 by Commission Decision 2001/462/EC, ECSC on the terms of reference of hearing officers in certain competition proceedings (OJ 2001 L 162, p. 21) were applicable in the present case, as the hearing officer acknowledged in his letter of 19 June 2001. The specific application of those new rules would have allowed the applicant better to defend its rights, not only in terms of objectivity of the proceedings, but also in respect of proper access to all necessary documents. The plea of inadmissibility raised by the Commission in that regard has no legal basis and should therefore be rejected.

715 The fact that the hearing officer acted under the old rules and, in particular, made decisions under those rules, renders his decisions illegal and void. Such an irregularity justifies a finding that the contested decision is inexistent, or, at the very least, should lead to its annulment. The application of the old rules deprived the applicant of the protection of the Charter and of the ECHR, which guarantee its right to be heard.

716 The Commission submits that this plea in law is inadmissible since the applicant does not identify the rules that were not applied or how those rules would have enabled it to defend itself more effectively. In any event the new rules in question were applicable and were applied. The adoption of Decision 2001/462 did not put an end to the mandates of hearing officers responsible for particular cases. In any event, the hearing officer must ensure compliance with substantive rules and a breach of them would have to be proven. No such breach has been shown here. In fact, the error committed was caused by the omission, at the last minute, of a clause in Decision 2001/462 providing for its entry into force on the day after its publication in the Official Journal. Consequently, the decision entered into force upon its adoption, contrary to what had been anticipated by the Commission's staff.

(b) Findings of the Court

717 The Court observes, first of all, that the present plea satisfies the requirements of Article 44(1)(c) of the Rules of Procedure and cannot be rejected as inadmissible. Although the presentation of the plea in the application lacks detail, the content of the plea is clear and it was supplemented, by some factual submissions, in the reply.

718 It is common ground in the present case that Decision 2001/462 entered into force on the date of its adoption, 23 May 2001, and that Decision 94/810/ECSC, EC of 12 December 1994 on the terms of reference of hearing officers in competition procedures before the Commission (OJ 1994 L 330, p. 67) was therefore repealed on that same date. Whilst Article 1 of Decision 2001/462 provides that the Commission is 'to appoint one or more hearing officers', Article 2(1) explains that 'any interruption, termination of appointment or transfer by whatever procedure, shall be the subject of a reasoned decision of the Commission'. That decision did not provide expressly for transitional measures with regard to a hearing officer who was in post when it entered into force.

719 Although the position of the hearing officer changed upon the entry into force of Decision 2001/462, inter alia in that, in accordance with Article 2(2) thereof, he was thereafter attached, for administrative purposes, to the member of the Commission with special responsibility for competition, instead of being attached to the Directorate-General for Competition, it is clear from that decision that the new function of hearing officer is a direct replacement for the function of the person previously operating under that name under Decision 94/810. In those circumstances it must be held, contrary to the applicant's submission, that, in the absence of a decision terminating his mandate in accordance with Article 2(1) of Decision 2001/462, the former hearing officer remained in post after the entry into force of that decision.

720 This interpretation of the abovementioned decisions is supported by the objective need, with regard to the post of hearing officer, to ensure the continuity of his function in accordance with the principle of good administration. It should be noted that Decision 2001/462 necessarily entered into force at a time when the proceedings in certain cases were already under way. If the effect of the entry into force of Decision 2001/462 and of a failure to appoint a new hearing officer was that no one was authorised to perform that function, it would have been impossible to continue those proceedings, and that would have rendered both the provisions of Regulation No 4064/89 and those of Decision 2001/462 ineffective in respect of those proceedings. Therefore it must be held that the hearing officer in post when Decision 2001/462 entered into force was empowered to carry out that function until further notice, at least for the purposes of concluding proceedings already before him, such as those at issue in the present case.

721 As regards the application of the provisions of Decision 2001/462, the Commission does not deny that an error of law was committed by the hearing officer in that regard as to the rules in force at the time of the hearing. On the other hand, it argues that this error had no legal or practical consequences, since the procedure applied by

the hearing officer in practice was in conformity with both the old rules, which he thought he was applying, and the new rules which he ought to have applied.

722 The Commission observes, correctly, that the applicant has been unable to identify any specific provision of Decision 2001/462 which the hearing officer allegedly infringed, or any provision on the basis of which, had he known that he had to apply Decision 2001/462, he would have been likely to adopt a different position from that actually adopted.

723 The only specific questions raised by the applicant in that regard concern the hearing officer's refusal to order the production in full of the Choi model and the data used in it, and that of the complaints and observations received from third parties. It should be noted that, for the reasons set out at paragraph 649 et seq. above, the access to the file has been held sufficient in the circumstances of the present case with regard to the complaints and observations in question. Consequently, the position adopted by the hearing officer in that regard did not prevent the applicant from defending itself in the present case. As regards the Choi model, the hearing officer observed in his report of 28 June 2001 that the Commission was no longer relying, at that date, on that model (see also, in that regard, paragraphs 2 and 3 of the hearing officer's report of 28 June 2001). In any event, it should be recalled that, at paragraph 399 et seq. above, the Court has already rejected the Commission's reasoning concerning bundling, and that any finding of an irregularity concerning access to the Choi model cannot therefore have any impact on the outcome of the present proceedings.

724 The applicant observes that Decision 2001/462 states, in its second recital, that 'the Commission must ensure that [the right to be heard] is guaranteed in its competition proceedings, having regard in particular to the Charter ...'. It relies in that regard in particular on the right to be heard under Article 41(2) of the Charter, its right of access to documents under Articles 41 and 42, its right to a fair trial under Article 47 and, finally, the express obligation, by virtue of Article 52, to comply with the principle of proportionality in any limitation of fundamental rights.

725 It is sufficient to note in that regard that all the specific rights mentioned at paragraph 724 above were, in substance, already protected in Community law before the adoption of the Charter, which, as stated in its own preamble, merely reaffirmed them. It is settled law that fundamental rights form an integral part of the general principles of Community law whose observance the Community judicature ensures (see, in particular, Opinion 2/94 [1996] ECR I-1759, paragraph 33, and Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 14). For that purpose, the Court of Justice and the Court of First Instance draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. The ECHR has special significance in that respect (Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, and *Kremzow*, cited above, paragraph 14). Moreover, according to Article F(2) of the Treaty on European Union (now Article 6(2) EU), 'the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights ... and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

726 Similarly, the principle of proportionality, one of the general principles of Community law, requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, for example, Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13; Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863, paragraph 41; and Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 60).

727 Thus, in the present case, it cannot be inferred from the reference to the Charter in the second recital of Decision 2001/462 that the hearing officer was required to give

effect to the rights invoked by the applicant in a different manner after the entry into force of that decision.

728 The applicant also relies on general statements made by the Commission relating to the strengthening of the rights of the defence that was to result from the reform of the hearing officer's terms of reference, in particular those made in the Green paper which preceded the adoption of Decision 2001/462. However, it does not follow from those statements that the hearing officer would have behaved differently at the hearing before the Commission. The hearing officer himself stated in his letter to the applicant of 19 June 2001 that the hearing was organised in a manner which complied with the requirements of Decision 2001/462 with regard to respect for the rights of the defence. It should be noted, in particular, that the hearing officer gave the parties to the merger an opportunity to lodge written observations following that hearing, in accordance with the provisions of Article 12(4) of Decision 2001/462.

729 The only specific argument submitted by the applicant in that regard concerns the possibility that the hearing officer might have considered it necessary to exclude the Choi model from the proceedings at the stage of the hearing before the Commission on the ground that the parties to the merger had not been able to examine the data used in it. That argument cannot be upheld, since no reference has been made to any specific provisions of Decision 2001/462 altering the criteria which the hearing officer had to apply when taking his decision in that regard. In any event, as has been noted at paragraph 723 above, the Commission abandoned the Choi model before adopting the contested decision.

730 Although, when the hearing was held on 29 and 30 May 2001, the hearing officer was in fact mistaken as to the applicable rules, it cannot be held in the present case that his error had an impact on the applicant's ability to defend itself in such a way that the course of the procedure might have been different.

731 With regard to the course of the administrative procedure after the hearing, the hearing officer applied the new provisions of Decision 2001/462 when he made his report on 28 June 2001. Thus, when adopting a definitive position on the various procedural issues raised by the parties to the merger, he therefore took into account the procedural rules actually applicable. Given that in his report he re-examined the question whether the rights of the defence had been respected in the present case and, in particular, the question whether access to the file had been given in accordance with the applicable rules, it must be concluded that he remedied any defects resulting from his previous error before the contested decision was adopted.

General conclusion

732 It must be held in the context of the present proceedings that the Commission validly found in the contested decision that following the merger the applicant's pre-existing dominant position on the market for jet engines for large regional aircraft would be strengthened and that dominant positions would be created for the merged entity on the markets for engines for corporate jet aircraft and for small marine gas turbines (see, respectively, paragraphs 489 et seq., 566 et seq. and 587 et seq. above). The contested decision also establishes that on each of those markets the creation or strengthening of a dominant position would have resulted in effective competition being significantly impeded in the common market. Furthermore, none of those conclusions is affected by the complaints of a procedural nature submitted by the applicant in the present case (paragraphs 621 to 731 above).

733 On the other hand, although the Commission validly held in the contested decision that the applicant was in a dominant position, prior to the merger, on the market for jet engines for large commercial aircraft, it has not sufficiently established that

dominant positions would be created or strengthened for the merged entity owing to (i) the vertical overlap between Honeywell's engine starters and the applicant's jet engines for large commercial aircraft, (ii) the combination of Honeywell's avionics and non-avionics products and the financial and commercial strength of the GE group or (iii) the possibility of bundling the sale of the applicant's engines with Honeywell's avionics and non-avionics products (see, respectively, paragraphs 286 et seq., 325 et seq. and 399 et seq. above).

734 The Court holds in this regard that a decision finding a notified concentration to be incompatible with the common market is not to be annulled on the ground that the applicant has established the existence of one or more errors vitiating the analysis adopted in relation to one or more markets, in circumstances where it is nevertheless clear from the same decision that, in relation to one or more other markets, the notified concentration satisfied the criteria under Article 2(3) of Regulation No 4064/89 for declaring it incompatible with the common market (see, inter alia, paragraphs 45 to 48 above). Accordingly, since the Commission validly found in the contested decision that those criteria were satisfied in relation to three separate markets, namely the market for jet engines for large regional aircraft, the market for corporate jet aircraft engines and the market for small marine gas turbines, the contested decision should not be annulled in the present case.

Costs

735 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 other party's pleadings. Since the applicant has been unsuccessful in terms of the form of order sought and the defendant and the interveners, Rolls-Royce and Rockwell, have applied for costs against the applicant, it must be ordered to bear its own costs and to pay those incurred by the defendant and by the interveners.

On those grounds,

THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders the applicant to bear its own costs and to pay those incurred by the Commission and by the interveners.

Pirrung Tiili Meij

Vilaras Forwood

Delivered in open court in Luxembourg on 14 December 2005.

E. Coulon J. Pirrung

Registrar President

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