JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
15 December 1999 *

In Case T-22/97,

Kesko Oy, a company incorporated under Finnish law, established in Helsinki, represented by Gerwin van Gerven, of the Brussels Bar, and Sarah Beeston, Solicitor, with an address for service in Luxembourg at the Chambers of Loesch & Wolter, 11 Rue Goethe,

applicant,

v

Commission of the European Communities, represented by Klaus Wiedner, of its Legal Service, assisted by Stephen Kinsella, Solicitor, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: English.

supported by

Republic of Finland, represented by Tuula Pynnä, Legal Adviser, Head of the Department within the Ministry of Foreign Affairs responsible for cases before the Court of Justice of the European Communities, acting as Agent, and David Vaughan QC, of the Bar of England and Wales, with an address for service in Luxembourg at the Finnish Embassy, 2 Rue Heinrich Heine,

and

French Republic, represented by Jean-François Dobelle, Deputy Director of the Legal Affairs Directorate of the Ministry of Foreign Affairs, Frédérik Million, Chargé de Mission in that Directorate, and Kareen Rispal-Bellanger, Head of Subdirectorate in that Directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

interveners,

APPLICATION for annulment of Commission Decision 97/277/EC of 20 November 1996 declaring a concentration to be incompatible with the common market (Case No IV/M.784 — Kesko/Tuko) (OJ 1997 L 110, p. 53),

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

composed of: A. Potocki, President, K. Lenaerts, C.W. Bellamy, J. Azizi and A.W.H. Meij, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearings on 11 November 1998 and 2 June 1999,

gives the following

Judgment

Legal background

1 Article 22 of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1, corrected version in OJ 1990 L 257, p. 13, hereinafter 'Regulation No 4064/89') provides:

'3. If the Commission finds, at the request of a Member State, that a concentration as defined in Article 3 that has no Community dimension within the meaning of Article 1 creates or strengthens a dominant position as

a result of which effective competition would be significantly impeded within the territory of the Member State concerned it may, in so far as the concentration affects trade between Member States, adopt the decisions provided for in Article 8(2), second subparagraph, (3) and (4).

4. Articles 2(1)(a) and (b), 5, 6, 8 and 10 to 20 shall apply. The period within which the proceedings defined in Article 10(1) may be initiated shall begin on the date of the receipt of the request from the Member State. The request must be made within one month at most of the date on which the concentration was made known to the Member State or effected. This period shall begin on the date of the first of those events.

5. Pursuant to paragraph 3 the Commission shall take only the measures strictly necessary to maintain or restore effective competition within the territory of the Member State at the request of which it intervenes.'

2 Article 2(1) of Regulation No 4064/89, relating to the appraisal of concentrations, provides:

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

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

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

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

Background to the dispute and procedure

3 The applicant, Kesko Oy ('Kesko'), is a limited company incorporated in Finland engaged in the retail sale of daily consumer goods and specialty goods. It also sells such goods in the wholesale and cash-and-carry sectors. Kesko's share capital is divided into preference shares ('exclusive shares') and ordinary shares. The exclusive shares are held, directly or indirectly, by Kesko's retailers ('the Kesko retailers'). By virtue of the additional voting rights attaching to the exclusive shares under the applicant's company charter, those shares confer on the Kesko retailers effective control over the majority of the voting rights exercisable by the shareholders in general meeting. According to Kesko's company charter, the

members of its supervisory board, which nominates the other decision-making and executive organs of Kesko, must all be Kesko retailers.

4 Kesko's main object is to assist the Kesko retailers by making buying and promotion possible on a larger scale than is feasible for those retailers on an individual basis. Consequently, Kesko's activities include the negotiation of favourable purchase terms with suppliers, the supplying of its retailers and the provision of numerous additional services.

5 The Kesko retailers, who are legally independent undertakings, are contractually bound to Kesko. They operate in the retail sector relating to daily consumer goods and/or specialty goods, and have since 1995 been organised in five chains comprising stores having common characteristics, namely the 'Neighbourhood Stores', 'Kesko Supermarkets', 'Kesko Superstores', 'Kesko Citymarkets' and 'Rimi' stores. The commercial premises are to a considerable extent owned by Kesko.

6 Tuko Oy ('Tuko') was another Finnish limited company specialising in the wholesale and retail sale of daily consumer goods and specialty goods. In addition to operating the sales outlets owned by it, Tuko had entered into cooperation agreements with a large number of legally independent retailers ('Tuko retailers'). The Tuko retailers comprised three groups, namely the Spar chain, the Anttila department stores and the Tarmo stores. Tuko was also active in the wholesale and cash-and-carry sectors relating to daily consumer goods.

7 On 27 May 1996 Kesko concluded various agreements for the acquisition of 56.3% of Tuko's share capital, representing 59.3% of the voting rights. Thereafter, Kesko increased its holding in Tuko to over 99% of that company's share capital.

8 On 26 June 1996 the Finnish Office of Free Competition ('the OFC') requested the Commission to examine the acquisition of Tuko by Kesko in accordance with Article 22(3) of Regulation No 4064/89.

9 On 28 June 1996 Kesko brought an action before the Korkein Hallinto-Oikeus (Supreme Administrative Court, hereinafter 'the SAC') in which it contested the competence of the OFC to submit a request to the Commission under Article 22(3) of Regulation No 4064/89.

10 On 19 July 1996 the Finnish Ministry of Trade and Industry ('the MTI') sent the Commission a copy of the statement submitted by it in the proceedings brought by Kesko before the SAC, in which it maintained that the OFC was competent to make the abovementioned request.

11 By decision of 26 July 1996, the Commission, taking the view that the concentration in question raised serious doubts as to its compatibility with the common market, decided to initiate the proceedings provided for by Article 6(1)(c) of Regulation No 4064/89 'pending the final ruling of the Finnish Administrative Supreme Court'.

12 On 17 September 1996 the Commission sent a statement of objections to the applicant pursuant to Article 18(1) of Regulation No 4064/89. The applicant replied on 2 October 1996.

13 The SAC delivered its judgment on 1 October 1996. It declined to adjudicate on the substance of the case, on the ground that the action was inadmissible.

14 By letter of 23 October 1996, the applicant submitted to the Commission certain proposals for undertakings designed to dispel the latter's doubts as to the compatibility of the concentration with the common market.

15 On 20 November 1996 the Commission adopted, pursuant, in particular, to Articles 8(3) and 22 of Regulation No 4064/89, Decision 97/277/EC declaring a concentration to be incompatible with the common market (Case No IV/M.784 — Kesko/Tuko) (OJ 1997 L 110, p. 53, hereinafter 'the contested decision').

16 In the contested decision, the Commission made, *inter alia*, the following findings:

— that the concentration in question fell to be assessed not solely in terms of wholesale trade but also by reference to the retail sector, on account of the links existing between, on the one hand, Kesko and Tuko and, on the other, their respective retailers, as described in points 39 to 66;

— that the concentration between Kesko and Tuko would lead to the creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded in the Finnish retail market for the sale of daily consumer goods (see, in particular, points 93 to 138);

— that the concentration would create a dominant supply structure as a result of which effective competition would be significantly impeded in the Finnish cash-and-carry and wholesale market for the sale of daily consumer goods (points 139 to 145);

— that the dominant position created by the concentration in the Finnish retail and cash-and-carry markets would increase Kesko's purchasing power, thereby further strengthening its dominant position in those markets (points 146 to 153);

— that the concentration would strengthen the barriers impeding entry into the market and would make it extremely unlikely that any new competitor could establish itself on the markets in question (points 154 to 161);

— that the change in the structure of the Finnish retail and cash-and-carry markets for daily consumer goods would have an appreciable influence, directly or indirectly, actually or potentially, on the pattern of trade between Member States (points 10 to 13).

17 The Commission also rejected the proposals for undertakings submitted by Kesko in its letter of 23 October 1996, on the ground, *inter alia*, that they were clearly insufficient to remove the dominant position enjoyed by Kesko on the Finnish market for daily consumer goods (points 162 to 172 of the contested decision).

18 In point 173 of the contested decision, the Commission stated, in particular, that it would, 'in a separate decision based on Article 8(4) of Regulation No 4064/89, adopt appropriate measures in order to restore conditions of effective competition.'

19 Article 1 of the contested decision provides: 'The concentration by which Kesko Oy acquired sole control of Tuko Oy by purchase of shares is declared incompatible with the common market and with the functioning of the EEA Agreement.'

20 The contested decision was notified to Kesko on the date of its adoption, 20 November 1996.

21 On 21 November 1996 the Commission addressed to Kesko a communication pursuant to Article 18(1) of Regulation No 4064/89, stating that it considered it appropriate to adopt a decision under Article 8(4) of that regulation requiring Kesko to sell 'en bloc' Tuko's daily consumer goods business.

22 On 30 January 1997 Kesko proposed to the Commission the divestment to a consortium of third party undertakings of Tuko's daily consumer goods business apart from the Anttila department stores.

23 By application lodged at the Registry of the Court of First Instance on 31 January 1997, Kesko brought the present action, in which it seeks annulment of the contested decision. The case was registered as Case T-22/97.

24 On 7 February 1997 Kesko, Tuko and certain subsidiaries of the latter concluded with third-party undertakings a framework agreement ('the divestment agreement') providing for the transfer of Tuko's daily consumer goods business apart from the Anttila department stores, in accordance with the proposal submitted to the Commission on 30 January 1997.

25 Paragraph 4 of the divestment agreement provided that the transactions referred to therein should take effect only if the Commission granted its consent and/or raised no objection by 30 April 1997 at the latest.

26 On 19 February 1997 the Commission adopted, pursuant to Articles 8(4) and 22 of Regulation No 4064/89, Decision 97/409/EC setting out measures in order to restore effective competition (Case No IV/M.784 — Kesko/Tuko) (OJ 1997 L 174, p. 47, hereinafter 'the divestment decision'). Point 13 of that decision stated that Kesko's proposal to sell parts of Tuko's business to a consortium of third-party undertakings had been presented at a late stage in the proceedings and that the Commission still had certain reservations concerning it.

27 The divestment decision provides as follows:

'Article 1

Kesko is hereby ordered to divest the daily consumer goods business of Tuko Oy to a purchaser which must be a viable existing or prospective competitor, independent of and unrelated to the Kesko group and possessing the financial resources and proven expertise enabling it to maintain and develop the divested business as an active competitive force in competition with Kesko's daily consumer goods business (the purchaser standards) ...

...

Article 2

1. Kesko shall, within 30 days of notification of this Decision, appoint an independent trustee, to be approved by the Commission, for monitoring the operation and management of the assets to be divested in accordance with Article 1.

2. Kesko shall ensure that the irrevocable mandate of the trustee includes the following rights and obligations:

...

(d) to provide to the Commission ..., on a monthly basis, written reports concerning the operations and management of the divestiture package, as well as on relevant developments in its negotiations with third parties interested in purchasing the divestiture package, including the time frame within which an agreement with interested third parties would be implemented, and, in particular, sufficient information to enable the Commission to assess whether each bidder satisfies the purchaser standards.

If, in the trustee's opinion, an offer which does not meet the criteria set out in Article 1 would achieve the same result as the "en bloc" solution, the trustee should set out the reasons for this in his report to the Commission. If the Commission, in accordance with point (e), does not indicate its disagreement, such an offer shall, for the purposes of this Decision, be considered valid;

...

Article 4

1. The divestiture in accordance with Article 1 shall be completed within six months of notification of this Decision. Kesko shall be deemed to have complied with this Decision if, within that time-limit, a binding agreement for the sale of

the divestiture package has been signed, provided that completion of the divestiture takes place within three months from the date of such signature.

...

3. In the event that it should prove impossible to sign a binding agreement within the six-month period referred to in paragraph 1, the Commission may, upon request by Kesko and upon the trustee showing good cause, extend that period. In such case, Kesko shall give the trustee an irrevocable mandate to sell the divestiture package on the best possible terms and conditions. ... In any event, the divestiture must be fully completed by 31 December 1997.'

28 On 3 March 1997 Kesko submitted to the Commission a draft specifying the rights and obligations of the trustee, as provided for by the divestment decision. That draft provided, *inter alia*, that Kesko was to have the option to require the trustee to include in the agreement for the sale of Tuko's daily consumer goods business a clause to the effect that the sale would be completed only if the action brought by Kesko before the Court of First Instance for annulment of the contested decision were dismissed. By fax of the same date, the Commission stated that such a clause was unacceptable.

29 On 3 April 1997 the trustee appointed pursuant to the divestment decision submitted to the Commission a report recommending approval of the divestment agreement, subject to one change, namely the addition of a stipulation that, in return for the retention by Kesko of the Anttila department stores, the premises owned by Kesko and let to two Kesko retailers were to be sold to one of the third-party undertakings concerned.

30 By fax of 17 April 1997 the Commission informed Kesko, in accordance with Article 2(2)(d) of the divestment decision, that it was willing to accept the trustee's proposals.

31 By application lodged at the Registry of the Court of First Instance on 25 April 1997, Kesko brought proceedings for annulment of the divestment decision. That case was registered as Case T-134/97.

32 By letter of 14 August 1997 the trustee informed the Commission that the various transactions provided for in his report had been completed.

33 By letter of 26 August 1997 the Commission confirmed to Kesko that the latter had discharged its obligations under the divestment decision.

34 By document lodged at the Registry on 1 September 1997, Kesko informed the Court that it wished to withdraw the application in Case T-134/97.

35 By order of the President of the Second Chamber of the Court of First Instance of 9 October 1997, Case T-134/97 was removed from the Court register, pursuant to Article 99 of the Rules of Procedure.

36 By order of the President of the Second Chamber of the Court of First Instance of 8 June 1998, the Republic of Finland and the French Republic were granted leave to intervene in Case T-22/97 in support of the form of order sought by the Commission. The President also granted an application made by the applicant for confidential treatment, as against the interveners, of certain information.

37 After hearing the parties, the Court referred Case T-22/97 to a Chamber composed of five Judges, in accordance with Article 51 of the Rules of Procedure.

38 Upon hearing the report of the Judge-Rapporteur, the Court opened an oral procedure limited to the issues of the admissibility of the action and the legal interest of the applicant in bringing proceedings, in accordance with Articles 113 and 114(3) and (4) of the Rules of Procedure. The parties presented oral argument and their replies to the Court's questions on those two issues at the hearing in open court on 11 November 1998.

39 By order of 1 December 1998 the Court ordered that the procedure should continue in order that the parties should be heard on the substance of the case, and authorised the Republic of Finland to supplement its statement in intervention on the substance of the case.

40 The Republic of Finland lodged a second statement in intervention on 28 December 1998.

41 Upon hearing the report of the Judge-Rapporteur, the parties presented oral argument and their replies to the Court's questions on the substance of the case at the hearing in open court on 2 June 1999.

Forms of order sought by the parties

42 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

43 The defendant contends that the Court should:

— dismiss the action as inadmissible;

— in the alternative, dismiss the action as devoid of purpose;

— in the further alternative, dismiss the action as unfounded;

— order the applicant to pay the costs.

44 The Republic of Finland contends that the Court should dismiss the action.

45 The French Republic contends that the Court should dismiss the action as unfounded.

The admissibility and object of the action

Arguments of the parties

46 The Commission argues that the applicant has ceased to have any interest in bringing proceedings for annulment of the contested decision, and therefore contends that the Court should dismiss the action as inadmissible or devoid of purpose.

47 By concluding the divestment agreement of 7 February 1997, the applicant committed itself irrevocably to dispose of a number of assets. It chose to enter into that agreement in the absence of any obligation to take any particular action to comply with the contested decision. Moreover, the divestment agreement was not made conditional upon any event save for approval by the Commission, which was given by letter of 17 April 1997.

48 In that regard, the Commission contends that an applicant can contest only the operative part of a decision, and not, as such, the statement of reasons for the decision (Case T-138/89 *NBV and NVB* v *Commission* [1992] ECR II-2181, paragraph 31).

49 Furthermore, in order to justify a person's interest in bringing proceedings, it is not sufficient to rely upon future and uncertain legal situations (*NBV and NVB*, cited above, paragraph 33). If the Commission were called upon, in some hypothetical case concerning the application of Regulation No 4064/89 or of Article 85 or Article 86 of the EC Treaty (now Articles 81 EC and 82 EC), to assess the nature of the links between Kesko and its retailers, it would have to do

so by reference to all the relevant circumstances prevailing at that time. In so far as the applicant disputed the legality of any such new decision, it would be up to the applicant to bring an action for annulment of that decision.

50 The Commission regards as wholly irrelevant the arguments alleging that the contested decision may influence future action on the part of the OFC, that the applicant's reputation has been adversely affected and that a judgment annulling the contested decision could constitute the basis for an action for damages in the future.

51 The applicant maintains, with reference to the Commission's argument that an undertaking which acquires a business loses its legal interest in bringing proceedings if it divests itself of that business pursuant to a declaration that the concentration in issue is incompatible with the common market, without reserving the right to repurchase the business in the event of its action succeeding, that that argument amounts to a denial of justice.

52 In its application, the applicant stated that it was not seeking to regain control of Tuko. Nevertheless, at the hearing on 11 November 1998, it indicated its desire to retain its freedom to repurchase all or part of Tuko's assets if given the opportunity to do so. At all events, the applicant's main aim is to prevent reliance by the Commission or by the OFC, in any future assessment of its situation or that of the Kesko retailers, on what it regards as the flawed assessment contained in the contested decision. The applicant also wishes to restore its reputation and to leave open the option of claiming compensation.

53 The Republic of Finland concurs, in essence, with the Commission's arguments.

54 The French Republic has not commented on the admissibility or object of the action.

Findings of the Court

55 As regards, first, the admissibility of the action, it must be recalled that, for the purposes of assessing a legal interest in bringing proceedings, the relevant date is that on which the action is commenced (Case 14/63 *Forges de Clabecq* v *High Authority* [1963] ECR 357, at 371).

56 On the date on which the action was brought, namely 31 January 1997, Kesko still controlled Tuko, which it had acquired by means of the concentration of 27 May 1996. Although it had submitted to the Commission on 30 January 1997 a draft proposal for the sale of Tuko's daily consumer goods business apart from the Anttila department stores, the agreements required to implement that transaction had not yet been entered into.

57 The fact that the contested decision was addressed to the applicant suffices to confer on it an interest in bringing proceedings and in having the legality of that decision examined by the Community judicature (judgment of 25 March 1999 in Case T-102/96 *Gencor* v *Commission*, not yet published in the European Court Reports, paragraphs 40 to 42). It follows that, when the action was commenced, Kesko had, on any view, a vested, present interest in seeking annulment of the contested decision.

58 As to the question whether the applicant thereafter retained its interest in pursuing the proceedings (Case C-19/93 P *Rendo and Others* v *Commission* [1995] ECR I-3319, paragraph 13), the fact that the contractual basis for a concentration has disappeared cannot in itself exclude judicial review of the legality of a decision of the Commission declaring that concentration incompatible with the common market (*Gencor*, cited above, paragraph 45).

59 As regards the Commission's argument that the applicant voluntarily abandoned the concentration in issue after bringing the proceedings, it must be recalled that, where a company has merely complied with a Commission decision, as it was obliged to do, it cannot thereby be deprived of its interest in seeking annulment of that decision (Joined Cases 172/83 and 226/83 *Hoogovens Groep* v *Commission* [1985] ECR 2831, paragraph 19).

60 In the present case, it was not until 7 February 1997 — that is to say, after the adoption on 20 November 1996 of the contested decision, point 173 of which refers to the Commission's intention, in a separate decision based on Article 8(4) of Regulation No 4064/89, to adopt appropriate measures in order to restore conditions of effective competition (see paragraphs 15 to 18 above) — that the applicant entered into the divestment agreement.

61 Thereafter, the divestment decision of 19 February 1997 specifically required the applicant to sell Tuko's daily consumer goods business, then under the control of a trustee, within six months or by 31 December 1997 at the latest (see paragraph 27 above).

62 On 3 March 1997 the Commission rejected the applicant's proposal that it be allowed to require the trustee to stipulate that the sale was to be completed only if the action for annulment of the contested decision were dismissed (see paragraph 28 above).

63 It was not until August 1997 that the unconditional sale of Tuko's business was finally completed in accordance with the trustee's proposals and with the Commission's agreement (see paragraphs 31 to 33 above).

64 In those circumstances, contrary to the Commission's arguments, neither the divestment agreement of 7 February 1997 nor the subsequent transactions by which the applicant undertook to sell Tuko's daily consumer goods business can be regarded as constituting a 'voluntary abandonment' of the concentration. On the contrary, those transactions were a direct consequence of the contested decision and the subsequent divestment decision, and of the applicant's efforts to comply therewith.

65 It must therefore be concluded that the action is admissible and that the applicant has retained an interest in seeking annulment of the contested decision.

Substance

66 In its application, the applicant advances four pleas, alleging, first, that the Commission lacked competence to adopt the contested decision, second, that the Commission made a manifest error of assessment and/or of law in finding that the concentration in issue might have an effect on trade between Member States, third, that the Commission made a manifest error of assessment and/or of law in finding that the links between Kesko and the Kesko and Tuko retailers created a dominant position and, fourth, that there was a failure to provide an adequate statement of reasons. The latter plea will be considered in the context of the Court's examination of the first two pleas.

The first plea, alleging lack of competence on the part of the Commission

Arguments of the parties

67 The applicant claims that the Commission infringed Article 22(3) of Regulation No 4064/89 and the principle of sound administration by deciding to initiate the procedure under Article 6(1)(c) of that regulation in response to the OFC's request of 26 June 1996.

68 First, only the State Council is competent, pursuant to Article 40:1 of the Finnish Constitution, to perform the functions assigned to the Member States by Community law, in the absence of any specific conferment of such powers on another body by express statutory provision. Although Article 10 of the Finnish Law transposing the EEA Agreement, since replaced by Article 20 of the Finnish Law on competition, assigns to the OFC certain of the functions to be exercised, under Regulation No 4064/89, by a 'competent authority' (see, for example, Articles 9, 12, 13, 18 and 19 of that regulation), there exists no provision of Finnish law which authorises it to make a request under Article 22(3) of Regulation No 4064/89.

69 Since the OFC did not have the power to make such a request, the Commission likewise lacked the power to carry out an investigation into the concentration at issue.

70 Second, the Commission infringed Article 22(3) of Regulation No 4064/89 and the principle of sound administration by failing to verify whether that request had been validly made by a Member State. Although, according to the case-law of the

Court of Justice, 'it is not for the Commission to rule on the division of competences by the institutional rules proper to each Member State' (Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraph 13), the Commission may not accept a request under Article 22(3) of Regulation No 4064/89 without verifying that that request has been validly made.

71 As it is, the applicant states that it drew the Commission's attention to its doubts regarding the competence of the OFC in its letter of 10 July 1996 and in its subsequent dealings with the Commission. In that letter, it also informed the Commission of the action brought before the SAC challenging the competence of the OFC (see paragraph 11 above). In those circumstances, the Commission could not, according to the applicant, regard itself as having even prima facie competence.

72 The Commission wrongly relied on the statement of the MTI of 19 July 1996, confirming that the OFC was competent to submit a request pursuant to Article 22(3) of Regulation No 4064/89. The MTI is not in fact empowered under Finnish law to rule on the scope of the powers conferred on the OFC; nor was it in a position to give an impartial opinion, since it had itself authorised the OFC to submit the request to the Commission. In relying on the statements of the OFC and the MTI, the Commission infringed the principle of non-interference.

73 The judgment of the SAC of 1 October 1996 implicitly confirmed the argument that the OFC lacked the requisite competence, even though it refrained from giving a ruling on the substance of the case. The SAC's letter to the State Council of 20 December 1996, in which it drew the latter's attention to the lacunae in Finnish competition law with regard to the submission of requests under Article 22(3) of Regulation No 4064/89, likewise supports that view.

74 In any event, given that the Commission indicated in its decision of 26 July 1996, adopted pursuant to Article 6(1)(c) of Regulation No 4064/89, that it assumed itself to have competence pending delivery of final judgment by the SAC, it should have taken further steps to verify its competence following delivery of the SAC's judgment on 1 October 1996, in which the issue of the OFC's authority to make a request based on Article 22(3) of that regulation was left undecided.

75 In particular, the Commission should have contacted the Finnish Permanent Representation to the European Communities. Finnish law in fact provides for a procedure, which may be initiated by the Finnish Permanent Representation, whereby an opinion may be obtained from the President of the Republic or the State Council concerning the competence of a Finnish institution. Furthermore, it was for the Commission to prove that it was in fact competent to carry out an investigation into the concentration at issue.

76 Lastly, the Commission infringed Article 190 of the EC Treaty (now Article 253 EC) by failing to state in the contested decision the reasons for which it regarded itself as having competence. Moreover, having regard to the provisional nature of the conclusion regarding its competence which it reached in its decision of 26 July 1996, it was bound to address that issue anew in the contested decision.

77 The Commission has not expressed a view as to the competence of the OFC under Finnish law; it states, with reference to the judgment in *Germany* v *Commission*, cited above, that it is not for the Court to consider that issue.

78 The Commission considers that, since there were prima facie good grounds in the present case for assuming that the body submitting the request under Article 22(3) of Regulation No 4064/89 was competent to make such a request

on behalf of the Member State concerned — as was in fact the case —, it was competent to initiate an investigation into the concentration referred to in that request. As regards a statement of reasons, the Commission maintains that it adequately explained the reasons for its having competence in its decision of 26 July 1996.

79 The Republic of Finland concurs, in essence, with the Commission's arguments. In particular, it submits that the action before the Court of First Instance can only concern the competence of the Commission, and not that of the OFC; consequently, the reference to the steps taken in Finland, in particular the action brought before the SAC, is, in principle, irrelevant.

80 The French Republic submits that, by virtue of the principle of non-interference, it was not for the Commission to verify the regularity under Finnish law of the reference of the matter to it by the OFC.

Findings of the Court

81 It is not disputed in the present case that on 26 June 1996 the OFC requested the Commission to examine the acquisition of Tuko by Kesko on the basis of Article 22(3) of Regulation No 4064/89.

82 According to the case-law of the Court of Justice, it is not for the Commission to rule on the division of competences by the institutional rules proper to each Member State (*Germany* v *Commission*, cited above, paragraph 13).

83 It must also be recalled that, in an action brought under Article 173 of the EC Treaty (now, after amendment, Article 230 EC), the Community judicature has no jurisdiction to rule on the lawfulness of a measure adopted by a national authority (Case C-97/91 *Borelli* v *Commission* [1992] ECR I-6313, paragraph 9).

84 In those circumstances, it was not for the Commission to determine, at the stage of the administrative procedure, the competence of the OFC under Finnish law to submit a request under Article 22(3) of Regulation No 4064/89; it was required only to verify whether the request referred to it was prima facie a request made by a Member State within the meaning of Article 22.

85 The Court's task is to examine whether the Commission discharged that duty of verification to the requisite legal standard.

86 In that regard, it should be noted, first, that the notion of a request by a 'Member State' within the meaning of Article 22(3) of Regulation No 4064/89 is not limited to requests from a government or ministry; it also encompasses requests from national authorities such as the OFC.

87 Second, it must be recalled that, at the time of adoption of the contested decision, the information available to the Commission was as follows:

— the fact that the OFC is the Finnish authority normally having competence in matters concerning the application of competition law;

— the statement lodged by the MTI, the Finnish ministry responsible for competition matters, in the action brought by Kesko before the SAC, maintaining that the OFC was competent to submit the request under Article 22(3) of Regulation No 4064/89 (see paragraph 10 above);

— the judgment of the SAC dismissing the applicant's action as inadmissible (see paragraph 13 above). The applicant was therefore not in a position to produce a decision of a Finnish court declaring that the OFC lacked competence to submit the request in question;

— the fact that the applicant did not comment on the question of the OFC's competence in its reply to the statement of objections of 2 October 1996 or disclose any new information following delivery of the judgment of the SAC.

88 Having regard to all those factors, it must be concluded that, at the time when the contested decision was adopted on 20 November 1996, the Commission had good grounds for considering that the OFC was prima facie competent to submit the request under Article 22(3) of Regulation No 4064/89. In those circumstances, there was no need for the Commission to request the Finnish authorities to provide it with further information on that issue.

89 Consequently, it has not been shown that the Commission made an error of law by deciding to initiate the procedure pursuant to Article 6(1)(c) of Regulation No 4064/89. It follows that the plea alleging lack of competence on the part of the Commission is unfounded.

90 As to the statement of reasons in the contested decision regarding the competence of the Commission, it is apparent from the case-law of the Court of Justice that

the statement of reasons on which a measure is based is not required to specify the various matters of fact and law dealt with in the measure, provided that the measure falls within the general scheme of the body of measures of which it forms part; moreover, the requirements to be satisfied by the statement of reasons depend on the circumstances of each case (Case C-48/96 P *Windpark Groothusen* v *Commission* [1998] ECR I-2873, paragraphs 34 and 35).

91 The Commission stated in its decision of 26 July 1996, adopted pursuant to Article 6(1)(c) of Regulation No 4064/89:

'Kesko Oy has appealed the request of the Office of Free Competition (OFC) to the Finnish Administrative Supreme Court, arguing that the OFC lacked the power to make the request according to Article 22. The Commission has been informed by the Finnish Ministry of Trade and Industry that, in its view, the OFC request is valid. In the absence of any evidence to the contrary, the Commission assumes itself to have competence in this case pending the final ruling of the Finnish Administrative Supreme Court.'

92 As already noted, the applicant did not, following the dismissal on 1 October 1996 of its action before the SAC (see paragraph 91 above), adduce any fresh evidence concerning the OFC's competence to submit the request in issue. In those circumstances, the Commission was not bound to include in the contested decision any further statement of reasons regarding that point.

93 It follows that the first plea must be rejected.

The second plea, alleging a manifest error of assessment or of law concerning the effect of the concentration upon trade between Member States

Arguments of the parties

94 The applicant considers that the Commission's assessment in points 11 to 13 of the contested decision, alleging that the concentration had an effect upon trade between Member States, does not show that it had any such effect and therefore fails to comply with the obligation to state reasons laid down in Article 190 of the Treaty.

95 First, for the purposes of determining whether or not the test regarding the effect of a concentration on intra-Community trade is satisfied, it is necessary to take into account the exceptional nature of the competence conferred on the Commission under Article 22 of Regulation No 4064/89. Given that 99% of the aggregate turnover of Kesko and Tuko is achieved in Finland, the Commission was required to produce particularly convincing evidence showing that the concentration in issue affected trade between Member States; it did not do so.

96 Second, the declaration made by the Commission upon the adoption of Regulation No 4064/89 (see the *Nineteenth Report on Competition Policy*, pp. 265 to 268), in which it stated that trade between Member States is not normally affected where each of the undertakings concerned by the concentration achieves more than two thirds of its aggregate Community-wide turnover within one and the same Member State, also applies in the present case. The Commission was wrong to state, in point 10 of the contested decision, that that declaration relates only to the exercise of the residual powers conferred on it by Article 89 of the EC Treaty (now, after amendment, Article 85 EC). Moreover, the Commis-

sion is bound by its own declaration (Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711).

97 Third, the Commission misapplied Article 22(3) of Regulation No 4064/89 by transposing to the present case the traditional test under Articles 85 and 86 of the Treaty for assessing the effect on intra-Community trade. It is clear from the difference between, on the one hand, the wording of those two articles, which refer to agreements or practices which 'may' affect trade between Member States, and, on the other hand, that of Article 22(3) of Regulation No 4064/89, which applies 'in so far as the concentration affects trade between Member States', that an actual effect is necessary in order to fulfil the criteria for the application of Article 22 of that regulation, whereas a potential effect suffices in cases covered by Articles 85 and 86 of the Treaty. That difference is explained, first, by the exceptional nature of the Commission's competence where a request is submitted to it under Article 22(3) of Regulation No 4064/89 and, second, by the need to prevent Member States which do not have national merger controls from introducing such controls via the back door, by requesting the Commission to deal with them. The effects of the concentration on trade between Member States cited in points 11 to 13 of the contested decision are all of a purely potential nature.

98 Fourth, the arguments advanced by the Commission in the contested decision to show the existence of an effect on intra-Community trade are inconsistent with the competition analysis made by it in that decision. Thus, in points 21 and 22 of the contested decision, the Commission states that the relevant geographical markets are all, at most, national. Since 70% of the goods sold at retail level are manufactured in Finland and all major suppliers of goods produced outside Finland, with one exception, have their own distribution centres in Finland, the effects of the concentration will be felt solely by Finnish operators.

99 Fifth, the Commission should have studied each individual market for daily consumer goods in order to arrive at a correct assessment, since some of the

markets in question are local whereas others are national or international, depending on the products concerned. The Commission did not carry out any such study, however.

100 Lastly, in point 154 of the contested decision, the Commission itself recognised that certain potential obstacles to the establishment of new undertakings on the Finnish market, such as Kesko's purchasing power and the geographic location of Finland, might not necessarily result from the concentration in issue. The alleged existence of those obstacles cannot therefore show that the concentration had an effect on intra-Community trade.

101 The Commission maintains that, in the rare event of a referral under Article 22(3) of Regulation No 4064/89, the test to be applied regarding the effect of the concentration on trade between Member States is that applicable under Articles 85 and 86 of the Treaty. Applying the notion of potential effects, the Commission found, in points 11 to 13 of the contested decision, that the concentration in question made it more difficult for new undertakings to become established on the Finnish market and that it also affected trade as regards the availability of supplies. It therefore had an effect on intra-Community trade.

102 The French Republic and the Republic of Finland concur, in essence, with the Commission's arguments.

Findings of the Court

103 It has been consistently held by the Court of Justice and the Court of First Instance with regard to the application of Articles 85 and 86 of the Treaty that, in order for an agreement between undertakings or, indeed, an abuse of a dominant

position to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability and on the basis of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realisation of the aim of a single market in all the Member States (Case C-250/92 *DLG* [1994] ECR I-5641, paragraph 54, and Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge Transports and Others* v *Commission* [1996] ECR II-1201, paragraph 201). Accordingly, it is not necessary that the conduct in question should in fact have substantially affected trade between Member States. It is sufficient to establish that the conduct in question is capable of having such an effect (see, as regards Article 86 of the Treaty, Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraph 69, and, as regards Article 85, Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraph 235).

104 It is also clear from the case-law of the Court of Justice and the Court of First Instance that trade between Member States is affected, in particular, by an agreement which hampers the operations on the national market of, or entry into that market by, producers or sellers from other Member States, or which prevents competitors from other Member States from establishing themselves on the market in question (Case C-56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235, at 249, Case 8/72 *Cementhandelaren* v *Commission* [1972] ECR 977, paragraphs 29 and 30, Case C-234/89 *Delimitis* v *Henninger Bräu* [1991] ECR I-935, paragraphs 12 to 14, Case T-9/93 *Schöller* v *Commission* [1995] ECR II-1611, paragraphs 76 to 78, and Case T-77/94 *VGB and Others* v *Commission* [1997] ECR II-759, paragraphs 132 and 140).

105 As regards Article 86 of the Treaty, the Court of Justice and the Court of First Instance have also held that, where the holder of a dominant position obstructs access to the market by competitors, it makes no difference whether such conduct is confined to a single Member State as long as it is capable of affecting patterns of trade and competition in the common market (Case 322/81 *Michelin* v

Commission [1983] ECR 3461, paragraph 103; see also Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraphs 134 and 135).

106 That case-law must apply equally to the criterion of an effect on trade between Member States, as referred to in Article 22(3) of Regulation No 4064/89. As is apparent, in particular, from the first eight recitals in the preamble thereto, Regulation No 4064/89, Articles 85 and 86 of the EC Treaty and the regulations implementing them form a composite whole constituting an integral part of the Community system designed to ensure, in accordance with Article 3(g) of the EC Treaty (now, after amendment, Article 3(g) EC), that competition in the internal market is not distorted. It is therefore necessary to apply to the criterion of an effect on trade between Member States, within the meaning of Article 22(3) of Regulation No 4064/89, an interpretation which is consistent with that given to it in the context of Articles 85 and 86 of the Treaty.

107 That conclusion is not invalidated by the fact that the word 'may', appearing in Articles 85 and 86 of the Treaty, does not feature in Article 22(3) of Regulation No 4064/89. It is apparent from the very nature of the control of concentrations established by Regulation No 4064/89 that the Commission is required to carry out a prospective analysis of the effect of the concentration in question, and hence to consider, in the context of Article 22(3) of that regulation, its effect on trade between Member States in the future. It follows that the Commission is entitled, in that context, to take account of potential effects on trade between Member States, provided that they are sufficiently appreciable and foreseeable, without being required to establish that the concentration in question has actually affected intra-Community trade.

108 In the present case, the Commission found, in points 11 to 13 of the contested decision, that the concentration in issue would affect the structure of the Finnish retail and wholesale markets for daily consumer goods and would thus have an

appreciable influence, directly or indirectly, actually or potentially, on the pattern of trade between Member States (see *Société Technique Minière* v *Maschinenbau Ulm*, cited above, at 249). In particular, the Commission made the following observations:

'11. ... The acquisition of Tuko by Kesko will create foreclosure effects for new entrants, including potential entrants from other Member States, in particular on the Finnish markets for daily consumer goods. In addition, a large amount (about 30%) of the products sold by both Kesko and Tuko originates outside Finland. The transaction will also affect trade between Member States in that suppliers from other Member States will, in effect, require access to Kesko's distribution channels to secure sufficient marketing of their products in Finland.

12. Moreover, both companies are members of several international purchasing organisations, together with similar companies in other Member States. Since the spring of 1996, Kesko has also expanded its operations by opening retail outlets in Sweden.'

109 Applying the case-law cited above (see paragraphs 103 to 105 and 108) to the present case, it is apparent that, viewed as a whole, the facts stated by the Commission in point 11 of the contested decision — namely that the concentration will result in foreign undertakings being denied entry to the Finnish daily consumer goods market, that a significant proportion of the products sold by Kesko and Tuko originates outside Finland, and that suppliers from other Member States will be obliged to approach Kesko in order to secure adequate distribution of their products in Finland — are sufficient to establish that the concentration will affect trade between Member States within the meaning of Article 22(3) of Regulation No 4064/89.

110 Moreover, the facts mentioned in point 12 of the contested decision, namely that Kesko and Tuko are both members of several international purchasing organisations and that Kesko is expanding its business in Sweden, likewise constitute further confirmation of the existence of the effect in question in the present case.

111 As to the argument that the Commission failed to produce any conclusive evidence of the alleged effect of the concentration on trade between Member States, it should be noted that the Finnish retail trade was characterised by the existence of just two voluntary chains of retailers, namely the 'Kesko block' and the 'Tuko block'. In the contested decision, the Commission found, in particular, that:

— on the retail market for daily consumer goods, Kesko and Tuko held a market share of at least 55%, whether assessed at local, regional or national level (point 106). That position was further strengthened by the fact that Kesko and Tuko held 69% of sales outlets covering more than 1 000 m^2, by the fact that they controlled a large number of business premises suitable for the retail sale of daily consumer goods, and by numerous other factors, such as the customer loyalty schemes, the importance of private-label products and the advantages resulting from increased buying power (see points 106 to 138);

— on the cash-and-carry and wholesale markets for daily consumer goods, the combined market share of Kesko and Tuko was between 50 and 100% in all regions of Finland and, measured at national level, it was around 80%. They operated 56 cash-and-carry outlets, whereas their three other competitors

together operated only 11. Throughout the northern part of Finland, consisting of nine regions, the applicant was thus the only cash-and-carry/wholesale operator (see points 139 to 146);

— the distribution channels other than those dominated by Kesko and Tuko did not constitute viable alternatives for the majority of suppliers, especially in the non-food sector (see points 146 to 153);

— the concentration will create a dominant position on the retail, wholesale and cash-and-carry markets, which will be further strengthened by the increased buying power of Kesko (see points 144 and 153);

— it is extremely unlikely, following completion of the concentration, that foreign undertakings would be able to establish themselves on the Finnish markets for the sale of daily consumer goods, whether retail, wholesale or cash-and-carry (see points 154 to 161).

112 Subject to the question whether the Commission made a manifest error of assessment regarding the links between Kesko and its retailers, it is clear that the factors referred to above substantiate the Commission's conclusion that the concentration would have resulted, in particular, in the closure of the Finnish market to potential competitors from other Member States and would have meant that suppliers from other Member States would have had to use Kesko/Tuko's distribution channels in order to secure the distribution of their products in Finland.

113 Moreover, having regard to all those factors, the Commission did not make a manifest error of assessment by finding that the concentration would affect trade between Member States without carrying out an analysis of the market in respect of each product within the daily consumer goods sector.

114 Even if, as the applicant asserts, various obstacles to entry onto the Finnish market existed prior to the concentration in issue, it is also apparent from the factors referred to above that the concentration would significantly reinforce those obstacles, to the detriment, in particular, of suppliers from other Member States.

115 Contrary to the applicant's submission, there is no contradiction in the fact that, when analysing the effect of the concentration on trade between Member States, the Commission examined its impact on suppliers from other Member States whereas, for the purposes of assessing the effect of the concentration in terms of competition, it took account only of the Finnish markets. These are, in fact, two separate matters. In order to determine the effect on intra-Community trade, the Commission was necessarily required to assess it in the light of patterns of trade between Member States. By contrast, the question whether a given concentration creates or strengthens a dominant position, as a result of which effective competition would be significantly impeded within the territory of the Member State concerned, within the meaning of Article 22(3) of Regulation No 4064/89, is concerned, by its very nature, with the effects of the concentration on the national market.

116 As to the argument based on the Commission's declaration on pages 265 to 268 of the *Nineteenth Report on Competition Policy*, it must be recalled that this is worded as follows:

're Article 22

(a) The Commission states that it does not normally intend to apply Articles 85 and 86 of the Treaty establishing the European Economic

Community to concentrations as defined in Article 3 other than by means of this Regulation.

However, it reserves the right to take action in accordance with the procedures laid down in Article 89 of the Treaty, for concentrations, as defined in Article 3, but which do not have a Community dimension within the meaning of Article 1, in cases not provided for by Article 22.

In any event, it does not intend to take action in respect of concentrations with a worldwide turnover of less than ECU 2 000 million or below a minimum Community turnover level of ECU 100 million or which are not covered by the threshold of two-thirds provided for in the last part of the sentence in Article 1(2), on the grounds that below such levels a concentration would not normally significantly affect trade between Member States.

(b) The Council and the Commission note that the Treaty establishing the European Economic Community contains no provisions making specific reference to the prior control of concentrations.

[Acting] on a proposal from the Commission, the Council has therefore decided, in accordance with Article 235 of the Treaty, to set up a new mechanism for the control of concentrations.

The Council and the Commission consider, for pressing reasons of legal security, that this new Regulation will apply solely and exclusively to concentrations as defined in Article 3.

(c) The Council and the Commission state that the provisions of Article 22(3) to (5) in no way prejudice the power of Member States other than that at whose request the Commission intervenes to apply their national laws within their respective territories.'

117 It should be noted that the second subparagraph in paragraph (a) of those notes expressly refers to intervention by the Commission, in accordance with the procedures laid down in Article 89 of the Treaty, 'in cases not provided for by Article 22' of Regulation No 4064/89. It is thus apparent that the second and third subparagraphs in paragraph (a) of those notes are intended to specify the criteria governing intervention by the Commission in relation to concentrations falling outside the regulatory framework referred to. Consequently, the declaration made in the abovementioned notes did not concern cases in which a request is made by a Member State under Article 22(3) of Regulation No 4064/89.

118 In any event, such a declaration is not binding on the Commission where, in a case falling within the provisions of Article 22(3) of Regulation No 4064/89, it is established that trade between Member States is significantly affected by the concentration despite the fact that more than two thirds of the turnover of each of the undertakings concerned is achieved within one and the same Member State, within the meaning of the last part of Article 1(2) of Regulation No 4064/89. First, the abovementioned declaration merely states the approach which the Commission would 'normally' adopt in the circumstances envisaged, and does not preclude the adoption by it of a different approach in a given case. Second, such a declaration cannot prevail over the Commission's obligation to interpret the criterion of the effect of the concentration on trade between Member States in accordance with the case-law of the Court of Justice and the Court of First Instance cited above (paragraphs 103 to 105 and 108).

119 Lastly, it follows from the foregoing that the Commission has not failed to comply with its obligation to state reasons under Article 190 of the Treaty as regards the effect of the concentration on trade between Member States.

120 The applicant's second plea must therefore be rejected.

The third plea, alleging a manifest error of assessment or of law as regards the existence of a dominant position

Arguments of the parties

121 In the first part of this plea, the applicant argues that the Commission was wrong to conclude, in points 15, 65 and 66 of the contested decision, that the wholesalers, Kesko and Tuko, are vertically integrated with the retailers to whom they supply goods and services. The Commission thus incorrectly found that all those undertakings constituted a single economic entity following completion of the operation in issue, and that that operation created a dominant position on the retail market for daily consumer goods.

122 According to the applicant, the Commission was not entitled to aggregate the market shares of the Kesko and Tuko retailers, in such a way as to attribute them to the applicant in their entirety, without first establishing the existence of 'control' within the meaning of Article 3 of Regulation No 4064/89. It is essential to distinguish between, on the one hand, vertical cooperation in a corporate group or franchise based on control and, on the other, horizontal cooperation in voluntary chains between independent retailers.

123 The concept of control, as defined, in particular, in Article 3(3) of Regulation No 4064/89, is based on the idea of a decisive influence on the activities of another undertaking. It would be illogical to take into account the criterion of

'control', as laid down by Article 3, for the purposes of determining whether a concentration exists, whilst ignoring that criterion in the context of an assessment of the economic and financial power of the undertaking concerned under Article 2(1) of Regulation No 4064/89.

124 The importance of the criterion of control is apparent both from the Commission Notice on the notion of a concentration (OJ 1994 C 385, p. 5) and from the Commission's decision-making practice (Case 48/69 *ICI* v *Commission* [1972] ECR 619 and Case T-102/92 *Viho* v *Commission* [1995] ECR II-17). In addition, the national authorities competent to apply the Finnish and Swedish systems of competition law regard voluntary chains as horizontal cooperation between independent retailers. Those authorities are assumed to be familiar with the markets concerned.

125 Moreover, the applicant considers that the parties to the concentration in issue must be identified in accordance with the provisions of Article 3 of Regulation No 4064/89, and that it was solely to the concentration at wholesale level between Kesko and Tuko that the Commission should have applied the test provided for by Article 2 of Regulation No 4064/89. By taking as its starting-point the assumption that the concentration was between the Kesko and Tuko blocks, including the retailers, it therefore made an error of law. Had the Commission applied its assessment to the wholesale market, as it should have done, it would have arrived at an appreciably different result, since, in that sector, the combined shares of Kesko and of Tuko are in the region of 25%.

126 In the second part of its plea, the applicant asserts that the Commission erred in its analysis of the links between Kesko and its retailers.

127 In the first place, the Commission overstated the degree of influence exerted by Kesko on the retailers through ownership of the business premises and certain

assets used by them. In fact, most of those assets (capital, stocks, fixtures and fittings, etc.) are owned by the individual retailers, the majority of whom employ their own staff. Kesko owns the business premises of only about 32% of its retailers (accounting for around 60% of its turnover), whilst Tuko is the owner of only about 20% of the premises operated by its retailers. Moreover, the assets held by Kesko, including, in particular, its ownership of the Kesko logotypes and of certain premises, give it only a limited degree of influence over the retailers.

128 Second, the Commission was wrong to infer from certain *de jure* and *de facto* links, the existence of which is not disputed, that Kesko and its retailers form a single economic entity and that those links enable the former to manage and control the latter. The 'K Retailer Agreement' is not legally binding; moreover, it states that the retailer is independent and that it must accept competition from other Kesko retailers. The 'Collaboration Agreement' is signed only by retailers who use premises owned by Kesko, and does not give the applicant any control over those retailers. Lastly, the 'Chain Agreements' are horizontal in nature, and do not therefore constitute a means whereby Kesko can control the retailers. Furthermore, fewer than 50% of its retailers have entered into those agreements.

129 Third, the Commission overstated the importance of Kesko as a wholesaler supplier to the Kesko retailers. Those retailers purchase around 63% of their goods direct from manufacturers, and are not obliged to obtain supplies through Kesko, the wholesale prices offered by which are not significantly lower than those of its competitors. Moreover, the central invoicing service and the related rebate system do not indicate integration between the applicant and the Kesko retailers, since the rebates granted are small and use of that service by the retailers is optional. Central invoicing by Kesko does not entitle it to influence the retailers in fixing prices and laying down other commercial conditions.

130 Fourth, the Commission misconstrued the importance of Kesko's private-label products. Those products are generally cheaper imitations of existing branded goods, and thus serve to increase, rather than to reduce, competition at retail level.

131 Fifth, contrary to the Commission's assertion, the applicant's 'K-advantage' card does not constitute a 'customer loyalty scheme'. It is merely a form of payment, the use of which occasionally gives the right to benefit from special promotions, and is not very important to most consumers. Furthermore, the information concerning purchasing behaviour which the use of the card can provide cannot be used for anti-competitive purposes.

132 Sixth, the applicant maintains that, although the Kesko retailers possess voting rights within the body of Kesko shareholders, and thus exercise a form of control over it, that control is 'theoretical', inasmuch as the retailers' interests frequently diverge. Furthermore, the obligation requiring retailers to hold Kesko shares (worth, in total, approximately EUR 12 280) is principally intended to guarantee the credit granted to them by Kesko, and does not prevent them from leaving the Kesko block and selling those shares.

133 Seventh, the Commission has failed to demonstrate unified conduct between the chains of Kesko retailers. Although competition within chains is restricted, there are no structural links between the chains and each chain operates independently. The applicant refers in that regard to a study produced by the Finnish National Consumer Research Council and to two studies by London Economics.

134 Lastly, the Commission has allegedly failed to show the existence of barriers to entry onto the wholesale market.

135 The Commission contests the applicant's interpretation of Community law regarding the importance of the control test for the purposes of assessing the existence of a dominant position. At that stage of the analysis, it is only the factors set out in Article 2 of Regulation No 4064/89, particularly Article 2(1)(b), that are relevant. The Commission also contests the applicant's criticisms of its factual analysis; it maintains that its findings are sufficient to justify its conclusion regarding the existence of a dominant position. The three studies referred to by the applicant merely highlight the differences between the chains within the Kesko block, which the Commission claims to have taken into account.

136 The French Republic and the Republic of Finland concur, in essence, with the Commission's arguments.

Findings of the Court

— The first part of the plea

137 The applicant argues, in essence, that the Commission was not entitled to aggregate the market shares of the Kesko and Tuko retailers for the purposes of assessing the effects of the concentration in issue without establishing that Kesko and Tuko had 'control' over those retailers within the meaning of Article 3 of Regulation No 4064/89, and that, since the only 'concentration' within the meaning of Article 3 was that between Kesko and Tuko, the assessment of the effect of that concentration should necessarily have been limited to the market in which Kesko and Tuko operate, namely the wholesale market.

138 It must be stated in that regard that Article 3 of Regulation No 4064/89 merely defines the criteria governing the existence of a 'concentration'. By contrast, where, in a proceeding under Article 22(3) of Regulation No 4064/89, the

Commission finds that an operation does indeed constitute a concentration within the meaning of Article 3, its assessment of the question whether that concentration creates or strengthens a dominant position as a result of which effective competition would be significantly impeded within the territory of the Member State concerned must take account of the conditions laid down by Article 2(1)(a) and (b) of Regulation No 4064/89, in accordance with the first sentence of Article 22(4) of that regulation.

139 Thus, the Commission was not in any way bound, when assessing the effect of the concentration at issue on competition, to apply the control test referred to in Article 3 of Regulation No 4064/89 in order to determine whether the market shares of Kesko and Tuko should be aggregated. Having established the existence of the concentration between Kesko and Tuko, the Commission was required to take into account all the facts of the present case, including, in particular, the links between, on the one hand, Kesko and Tuko and, on the other, their respective retailers, in order to assess whether that concentration created or strengthened a dominant position as a result of which effective competition would be significantly impeded on the relevant Finnish markets. By the same token, the Commission was under no obligation to limit its appraisal solely to the wholesale market, since it had concluded that the concentration between Kesko and Tuko would also affect the retail market in daily consumer goods, having regard to the close links existing between, on the one hand, Kesko and Tuko and, on the other, their retailers.

140 It follows that the first part of the plea, alleging, in essence, an error of law in the form of a breach of Articles 2, 3 and 22(3) of Regulation No 4064/89, must be rejected.

— The second part of the plea

141 As to the manifest error allegedly made by the Commission in its assessment of the links between Kesko and its retailers, it should be noted that the Commission is required, in the context of a request under Article 22(3) of Regulation No 4064/89, to verify, by means of a prospective analysis of the markets concerned, whether the concentration referred to it will give rise to the creation or strengthening of a dominant position as a result of which effective competition will be significantly impeded within the territory of the Member State concerned.

142 In that connection, the basic provisions of the regulation, in particular Article 2 thereof, confer on the Commission a certain power of appraisal, especially with respect to assessments of an economic nature. Consequently, review by the Community judicature of the exercise of that power, which is essential for defining the rules on concentrations, must take account of the discretionary margin of appraisal implicit in the provisions of an economic nature which form part of the rules on concentrations (see, to that effect, Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraphs 221 to 224, and *Gencor* v *Commission*, cited above, paragraphs 164 and 165).

143 In the present case, the Commission cites, in points 39 to 66 of the contested decision, numerous factors in support of its conclusion that the Kesko and Tuko blocks constitute 'centrally-planned, structural features of the Finnish retail market', with the result that the concentration at issue must be assessed at retail level and not solely in wholesale terms (points 15 and 66 of the contested decision). Moreover, in points 93 to 135 and 146 to 161 of the contested decision, the Commission mentions numerous factors in support of its finding that, following the concentration, Kesko held a dominant position on the Finnish retail market (points 136 to 138, 153 and 161 of the contested decision).

144 Thus, the Commission puts forward the following factors in the contested decision: the contracts binding the retailers to Kesko (points 40 and 44); the fact that the retailers are required to use the Kesko logotypes and the support services

provided by Kesko (point 45); the bonuses and rebates providing an incentive for retailers to remain loyal to the Kesko group strategy (point 46); the control mechanisms by which Kesko ensures that each retailer adheres to the common objectives (point 41); the fact that the Kesko retailers hold the majority of the voting rights within the body of Kesko shareholders and are all members of the Kesko supervisory board, which nominates all the members of the other decision-making organs (points 4 and 43); the organisation of Kesko into five voluntary chains the purchasing and commercial policies of which are centrally coordinated, in particular by means of a common logotype for each chain, and which are equipped with modern computer systems which continue to be owned by Kesko (points 47 to 50, 54 to 57 and 67 to 72); the fact that the suppliers perceived Kesko and its retailers as an integrated entity, on account, in particular, of Kesko's invoicing system (points 51 to 53 and 148); Kesko's strategy regarding ownership of the premises in which the retailing activities are carried on (points 58 to 61 and 116 to 118); and the retailers' financial commitments to Kesko (point 62).

145 The Commission has also pointed out that most of the above analysis is equally applicable to the relationship between Tuko and its retailers and that, in any event, following completion of the concentration, Kesko will be able to organise the Tuko retailers in the same way as the Kesko retailers (point 65).

146 As to the question whether, in those circumstances, the concentration would create or strengthen a dominant position as a result of which effective competition would be significantly impeded on the Finnish market for the retail sale of daily consumer goods, the Commission draws particular attention in the contested decision to the following: the importance of the role played by voluntary retail chains in Finland, qualified by the fact that the Kesko and Tuko blocks are the only operators in the daily consumer goods sector (point 39); the fact that, following the concentration, the Kesko block accounted for at least 55% of all sales of such goods in Finland, representing a market share nearly three times as large as that of its main competitor (points 93 to 98 and 106); the strong position enjoyed by Kesko and Tuko in the large retail outlets sector in Finland (points 107 to 115); the large number of premises suited for retail sales of daily consumer goods (points 116 to 118); the customer loyalty scheme involving the K-advantage card (points 119 to 125); the importance of the sales by Kesko

and Tuko of private-label products and the competitive advantages arising from such sales (points 126 to 130); the distribution systems operated by Kesko and Tuko, particularly in the field of frozen products (points 131 and 132); the increased purchasing power of Kesko following the acquisition of Tuko (points 133 to 135 and 146 to 153); and the fact that it is extremely unlikely that a foreign undertaking would attempt to establish itself on the Finnish retail market for daily consumer goods (points 154 to 161).

147 Having regard to the abovementioned factors, the applicant's allegations are not such as to call in question the Commission's conclusions regarding the need to assess the impact of the concentration at retail level (points 39 to 66 of the contested decision) and to aggregate the market shares of all the retailers in the Kesko and Tuko blocks in such a way as to attribute them to Kesko (points 93 to 105), or its findings concerning the question whether the concentration would create or strengthen a dominant position as a result of which effective competition would be significantly impeded on the Finnish market for daily consumer goods (points 106 to 161). The applicant has merely asserted that the Commission should have carried out a different analysis, without adducing any specific evidence invalidating the economic analysis of the effects of the concentration contained in points 39 to 161 of the contested decision.

148 As regards the applicant's first argument, alleging that the Commission over-estimated the influence exerted by Kesko on its retailers by means of its ownership of the premises and assets operated by them, it should be noted that over 60% of the total turnover of the Kesko retailers is achieved in stores owned by Kesko (point 59 of the contested decision). Similarly, it is apparent from points 59 to 61 of that decision that the retailers operating on premises owned by the applicant have entered into collaboration agreements with Kesko which set out the principles governing the operation of the business premises and the

method, based on the turnover or profit margin, of calculating the rent. Moreover, no retailer may transfer his business without Kesko's approval.

149 In those circumstances, the fact that Kesko owns a significant part of the business premises operated by the Kesko retailers must be regarded as an important factor ensuring the continuing loyalty of those retailers. Consequently, it has not in any way been shown that the Commission overestimated that factor in its assessment of the links between Kesko and its retailers.

150 It follows that the applicant's first argument must be rejected.

151 As to the applicant's second argument, alleging that the Commission misinterpreted the significance of the various agreements between Kesko and its retailers, the following should be borne in mind:

— under the Kesko retailer agreement, the retailer concerned undertakes, in particular, to 'attempt to take full advantage of the benefits of joint purchasing of the K group and its private-label products. The K retailer shall not, without justification, treat Kesko less favourably than other suppliers' (point 44 of the contested decision);

— in addition, a significant number of Kesko retailers are bound by a 'chain agreement' concluded between the retailer concerned and the Kesko chain of which he forms part (see paragraph 5 above). The main purpose of the chain agreements is to promote trade in goods between Kesko and the retailer.

Under those agreements, the Kesko retailer is bound by decisions of the chain's board of directors concerning marketing policy, products to be included in the basic selection and retail prices of promotional campaign products (points 44, 47 to 50 and 54 to 57 of the contested decision);

— Kesko retailers operating premises owned by Kesko are bound by the 'collaboration agreement' examined in paragraph 148 above;

— the Kesko retailers are required to use the Kesko logotypes and also benefit from the support services provided by Kesko (point 45 of the contested decision);

— Kesko pays bonuses to the Kesko retailers and grants them rebates based on volumes purchased through Kesko (point 46 of the contested decision).

152 In those circumstances, it must be held that, even though the Kesko retailers constitute legally independent undertakings and bear the financial risks involved in their business, the Commission did not make a manifest error of assessment in finding, in point 64 of the contested decision, that the effect of the agreements between Kesko and its retailers is to force the latter to adhere to the commercial policies laid down by the applicant and to remain loyal to Kesko and to the Kesko chain of which they form part.

153 The applicant's second argument must therefore be rejected.

154 As to the applicant's third argument, alleging that the Commission overestimated Kesko's importance as a wholesaler, it should be noted that the Kesko retailers purchase 37% of their supplies direct from Kesko, as the applicant has been at pains to point out. Moreover, purchases which are made by those retailers from other suppliers but invoiced by the applicant account for 46% of all purchases, with the result that only 17% of the total purchases made by the Kesko retailers are made independently of Kesko. Indeed, as regards the purchases invoiced by Kesko, the Commission states, in point 52 of the contested decision, that: (a) those invoicing operations are governed by agreements concluded between Kesko and its suppliers; (b) Kesko acquires legal ownership of the goods before reselling them to the retailers concerned and the transactions in question are included in Kesko's annual income statement as sales; (c) the fees paid and rebates granted to Kesko by its suppliers are calculated on the basis of all purchases by the Kesko group, that is to say, including sales to the applicant in its capacity as a wholesaler as well as purchases made directly by Kesko retailers under the invoicing agreements referred to above; and (d) the invoicing operations carried out by Kesko enable it to obtain extensive information concerning prices and other commercial terms applied by individual suppliers.

155 In those circumstances, the applicant has not shown that the Commission made a manifest error of assessment by finding, in point 53 of the contested decision, that purchases by Kesko retailers of goods which are not physically delivered by Kesko but are invoiced by it cannot be regarded as sourcing which is independent of Kesko.

156 Consequently, the applicant's third argument must be rejected.

157 As to the applicant's fourth argument, its assertions do not invalidate the Commission's conclusions concerning the importance of the role played by products sold under Kesko's own labels. Even if it is true that private-label products represent an additional competition factor *vis-à-vis* manufacturers' branded products, the position of strength enjoyed by products sold under the Kesko and Tuko labels affords those two undertakings advantages in terms of customer loyalty and enables them to price a greater proportion of their sales without having to take the reaction of their competitors into account (point 130 of the contested decision). Moreover, the combination of the Kesko and Tuko private-label products, which are very popular with customers, would have strengthened the applicant's negotiating power *vis-à-vis* its suppliers, enabling it to obtain more favourable terms and, in particular, price reductions, to the detriment of its competitors (points 129 to 133 of the contested decision).

158 It follows that the applicant's fourth argument cannot be accepted.

159 As to the applicant's fifth argument, alleging that the Commission exaggerated the importance of its K-advantage card, the Court finds that, whilst it may be true that the card does not in itself constitute a determining factor, the Commission was correct in its observation — which the applicant has been unable to disprove — that the K-advantage card provides an incentive for customer loyalty

and also serves as an important marketing tool for Kesko (points 119 to 125 of the contested decision).

160 The applicant's fifth argument must therefore be rejected.

161 As regards the applicant's sixth argument, alleging that the Kesko retailers' voting rights, and the obligation requiring them to hold a minimum number of exclusive shares in Kesko, are unimportant in practice, it must be recalled that the exclusive shares held by the Kesko retailers and their associated shareholders confer on them effective control of the majority of the voting rights in the undertaking (point 4 of the contested decision). That situation enables the Kesko retailers, in particular, to control Kesko's supervisory board, which nominates all the members of the other decision-making and executive organs of the undertaking (point 43 of the contested decision). Furthermore, those shares are deposited with Kesko by way of collateral, in order to guarantee performance of the obligations owed to Kesko by the retailer concerned (point 62 of the contested decision).

162 Having regard to those factors, the Court finds that the applicant has failed to show that the Commission made a manifest error in its assessment of the legal structure of the Kesko block and of the financial commitment of the Kesko retailers. More specifically, the applicant's arguments do not invalidate the Commission's conclusion that the Kesko block in fact constitutes a centrally-planned, structural feature of the Finnish retail market, based, in particular, on horizontal cooperation agreements between the Kesko retailers which are designed, in the common interest, to standardise their behaviour and thus to

limit their independence in areas such as purchasing, brand image, promotion and sales policy (points 39 to 41 and 63 to 66 of the contested decision).

163 Consequently, the applicant's sixth argument must be rejected.

164 As to the applicant's seventh argument, concerning the absence of any evidence of unified conduct between the chains of Kesko retailers, it must be recalled, first of all, that the applicant has not contested the Commission's finding that there is no significant competition within each of Kesko's five national chains (points 47 to 50 and 54 to 57 of the contested decision). It is apparent from the contested decision that each national chain of Kesko retailers has a board of directors composed of the retailers concerned and a 'control unit' exclusively made up of Kesko employees. That structure makes it possible to coordinate the activities of the retailers in the chain with regard to purchasing, marketing and sales policies (point 48 of the contested decision). That coordination was to be strengthened by the future installation in the retailers' stores of modern computer systems owned by Kesko (point 50 of the contested decision).

165 As regards competition between the various chains in question, it is true that the study by the Finnish National Consumer Research Council, produced by the applicant as Annex XI to the application, appears prima facie to show price divergences in relation to the same product sold by different Kesko retailers, and

thus to indicate a certain measure of competition between them. However, the fact that Kesko's structure allows a degree of competition, particularly between the different Kesko chains — in order, it seems, to comply with Finnish competition law, as the applicant states in paragraph 133 of its application —, is not in itself enough to invalidate the Commission's finding that, having regard to all the matters set out in points 39 to 66 of the contested decision, Kesko and its retailers must be regarded as a centrally-planned, structural feature of the Finnish retail market.

166 It follows that the applicant has failed to show that the Commission made a manifest error of assessment by finding that the effect of the concentration between Kesko and Tuko fell to be examined at both wholesale and retail level within Finland, having regard to the links between, on the one hand, Kesko and Tuko and, on the other, their respective retailers.

167 Lastly, the applicant has produced no evidence invalidating the Commission's finding in points 154 to 161 of the contested decision that the concentration would strengthen the barriers to access to the Finnish retail and wholesale markets for daily consumer goods.

168 It follows from all the foregoing that the second part of the third plea must be rejected.

169 The action must therefore be dismissed in its entirety.

Costs

170 Under the first subparagraph of Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, as applied for by the Commission.

171 However, under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs. Consequently, the Republic of Finland and the French Republic must each be ordered to bear their own costs.

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 the costs of the Commission;**

3. **Orders the Republic of Finland and the French Republic to bear their own costs.**

Potocki Lenaerts Bellamy

Azizi Meij

Delivered in open court in Luxembourg on 15 December 1999.

H. Jung A. Potocki

Registrar President