JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
27 November 1997 *

In Case T-290/94,

Kaysersberg SA, a company incorporated under French law, established in Kaysersberg (France), represented by Dominique Voillemot and Jacques-Philippe Gunther, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 11 Rue Goethe,

applicant,

v

Commission of the European Communities, represented initially by Francisco González Díaz, of its Legal Service, and Géraud de Bergues, a national civil servant on secondment to the Commission, subsequently by Giuliano Marenco, Principal Legal Adviser, and Guy Charrier, a national civil servant on secondment to the Commission, acting as Agents, with an address for service in Luxembourg at the office of Carlos Goméz de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: French.

supported by

Procter & Gamble GmbH, a company incorporated under German law, established in Schwalbach (Germany), represented by Mario Siragusa, of the Rome Bar, Giuseppe Scasselati-Sforzolini, of the Bologna Bar, and Nicholas Levy, Barrister, of the Bar of England and Wales, with an address for service in Luxembourg at the Chambers of Elvinger and Hoss, 2 Place Winston Churchill,

intervener,

APPLICATION for the annulment of Commission Decision 94/893/EC of 21 June 1994 relating to a proceeding under Council Regulation (EEC) No 4064/89 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (IV/M.430 — Procter & Gamble/VP Schickedanz (II) (OJ 1994 L 354, p. 32),

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

composed of: C. W. Bellamy, President, C. P. Briët, A. Kalogeropoulos, A. Potocki and M. Jaeger, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 23 April 1997,

gives the following

Judgment

Facts and procedure

General context of the concentration

1 Commission Decision 94/893/EC of 21 June 1994 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (IV/M.430 — Procter & Gamble/VP Schickedanz (II)) (OJ 1994 L 354, p. 32) (hereinafter 'the Decision' or 'the contested decision') (see paragraph 41 et seq. below) concerns the acquisition by Procter & Gamble GmbH (hereinafter 'P&G') of Vereinigte Papierwerke Schickedanz AG (hereinafter 'VPS').

2 P&G is a wholly owned subsidiary of its US parent company, Procter & Gamble Company. The consolidated turnover of the group in 1992/93 was ECU 23 626 million, 7 814 million of which was achieved within the Community. Besides laundry, hygiene and beauty products, food and beverages, P&G is active in the paper tissue products and sanitary protection businesses.

3 At the relevant time P&G was the leading operator on the market for sanitary towels in Western Europe, with market shares for 1993 estimated at 42% by value and 33.5% by volume throughout the Community and the EFTA countries. As regards more specifically the German market, P&G's market shares in terms of

value, which, according to point 119 of the contested decision, were between 35 and 40%, made it, by virtue of its Always brand, the leading manufacturer of sanitary towels. In 1993, thanks to its Ausonia and Evax brands, P&G held market shares in Spain of between 75 and 80% by value and between 65 and 70% by volume (point 119 of the Decision).

4 P&G also held a strong position on the market for baby nappies, particularly through its Pampers brand, with a Community market share for 1993 of between 45 and 50% by volume (point 25 of the Decision). On the other hand, until 1994, even though the group was the leading operator on the American market, P&G had not been active in Europe in household hygiene paper products, which comprise, *inter alia*, paper handkerchiefs, toilet paper, kitchen towels and facial tissues.

5 Before the concentration with P&G, VPS was a wholly owned subsidiary of Gustav und Grete Schickedanz Holding KG (hereinafter 'GGS'), a limited partnership under German law. Its consolidated turnover in 1992/93 was ECU 681 million, of which 645 million was achieved within the Community. VPS's activities concerned feminine hygiene products, household hygiene paper products, babies' nappies, as well as adult incontinence products, cotton products and certain body care products.

6 As regards feminine hygiene products in particular, VPS was present, mainly in Germany, on the market for sanitary towels through its premium brand, Camelia, and its secondary brands, Blümia and Femina, and also as a manufacturer of own-label towels. In 1993 the market shares of VPS's Camelia products on the German market for sanitary towels were between 20 and 25% (by value and volume), the share held jointly by the Blümia and Femina brands being between 5 and 10% by

value and 10 and 15% by volume (point 119 of the Decision). VPS also marketed its Camelia products in Spain, where its market shares were, however, less than 5% in 1993, as well as in Austria, Italy and Switzerland. Lastly, VPS manufactured tampons which it marketed under the Tampona trademark.

7 Besides feminine hygiene products, VPS was present on the market for baby nappies through its Moltex and Born brands, with a Community market share of between 1 and 5% in 1993 (point 25 of the Decision).

8 In the household hygiene paper products sector, VPS's overall market shares were modest, but between 15 and 20% (by volume) on the German market for 1993 (point 13 of the Decision).

Procedure before the Commission

9 On 9 December 1993 P&G notified the Commission in accordance with Article 4(1) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (corrected version published in OJ 1990 L 257, p. 13) of the proposed acquisition of the entire share capital of VPS.

10 On 21 December 1993, in the context of that original notification, Kaysersberg SA replied to a Commission questionnaire of 17 December 1993 by sending information relating to the feminine hygiene and adult incontinence sectors in France, together with its observations on the impact of the proposed concentration.

11 Kaysersberg is a public limited company incorporated under French law, a subsidiary of the Netherlands Jamont NV group which is controlled jointly by James River Corporation and Cragnotti & Partners, whose consolidated turnover in 1993 was FF 4 818 million. Kaysersberg is involved in the feminine hygiene sector, principally in France and in Belgium. With its subsidiary Vania Expansion, which markets sanitary towels and tampons, Kaysersberg was the leading operator in France in 1993 with an overall market share of more than 30% in value. Kaysersberg is also present in the household hygiene paper products sector, in particular through its Lotus brand, the adult incontinency products sector and the area of infant hygiene (baby nappies).

12 On 17 January 1994, following the withdrawal of its original notification, P&G notified the Commission under Article 4(1) of Regulation No 4064/89 of a new concentration plan in which P&G proposed to acquire the entire share capital of VPS and of other subsidiaries of GGS operating in related sectors.

13 In the context of that new plan the acquisition agreement concluded by P&G and GGS and a side agreement between P&G, GGS and VPS provided that VPS would separate its 'baby nappy' business from its other activities and would transfer them to a separate company until the transaction had been completed and that immediately after the closing of the purchase of VPS, P&G would transfer the shares of that separate company to a trustee, who had been designated by P&G on 22 December 1993, with a mandate to find a final buyer for those shares (points 5 and 6 of the Decision).

14 Furthermore, the notification included an offer of a commitment by P&G not to acquire control of the 'non-Camelia' business of VPS's 'catamenials' activities, that is to say, the tangible and intangible assets related to the three brands Blümia, Femina and Tampona and to the activities of VPS as manufacturer of private labels for retailers (hereinafter referred to as 'the non-Camelia business') (point 8 of the Decision).

15 On 22 January 1994 the Commission published the notice provided for in Article 4(3) of Regulation No 4064/89 in the *Official Journal of the European Communities* (OJ 1990 C 19, p. 15). In point 4 of that notice the Commission invited 'interested third parties to submit their possible observations on the proposed operation'.

16 On 24 January 1994, in reply to a questionnaire which the Commission had sent to it on 19 January, Kaysersberg provided the information requested regarding the geographical market and the competitive situation in the feminine hygiene products sector and submitted to the Commission its observations regarding the impact of the proposed operation.

17 Kaysersberg sent further letters to the Commission on 14 March, 29 April, 18 May and 31 May 1994.

18 After examining the notification, the Commission decided on 17 February 1994, pursuant to Article 6(1)(c) of Regulation No 4064/89, to initiate proceedings in regard to sanitary towels on the ground that the notified concentration raised serious doubts as to its compatibility with the common market.

19 On 30 March 1994 the Commission sent its statement of objections to P&G.

20 By letter of 12 April 1994 the Commission sent to Kaysersberg a copy of the statement of objections pursuant to Article 15 of Commission Regulation (EEC) No 2367/90 of 25 July 1990 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 (OJ 1990 L 219, p. 5), in order to inform it of the nature and subject-matter of the procedure and to invite it to submit its views.

21 The statement of objections was essentially in the following terms.

22 First, the Commission observed that pursuant to the acquisition agreements the 'baby nappy' business of VPS was to be transferred to a separate company, which a trustee designated by P&G on 22 December 1993 would be mandated to sell to a new purchaser. It deduced from this that the commitment formed an integral part of the notification and for that reason, despite the objections the Commission would have had to any such acquisition, the statement of objections did not address that question (point 7 of the statement of objections). It also pointed out that P&G had voluntarily offered a commitment not to acquire control of the non-Camelia business of VPS and explained that following the initiation of proceedings pursuant to Article 6(1)(c) of Regulation No 4064/89 P&G had confirmed that those commitments would remain in force, provided that the Commission adopted a decision under Article 8 of Regulation No 4064/89 finding that the whole of the notified operation was compatible with the common market (points 8, 9 and 10 of the statement of objections).

23 After observing that the notified operation was a concentration with a Community dimension, the Commission stated that the proceedings were initiated in regard to sanitary towels. The evidence on which the Commission relied in its statement of objections may be summarized as follows.

24 As regards the relevant product market, the Commission considered that there was a separate market for each feminine hygiene product, namely pantliners, tampons and sanitary towels. As to the definition of the geographic market, the Commission considered that the market for sanitary towels had a national dimension. In that regard the Commission took into account in particular the high degree of concentration in Germany and in Spain, the high degree of brand loyalty from customers, difficulties of access to retailers, the need for heavy investment in advertising in order to establish the product and the unsuccessful nature of several attempts to enter the market in recent years.

25 In its assessment of the concentration the Commission emphasized the rapid increase in the value of the West European towel market since the introduction in the early 1990s of new sophisticated products, such as Always, which brought considerable added value in comparison with traditional products. In order to assess the market shares of the parties, the Commission considered that the most appropriate measure was market share by value, in particular because of the estimated price differences of between 50 and 100% between premium brands and secondary brands or own-label products, the predominance of heavily promoted branded articles, and the need to take into account the financial strength of the companies, having regard to the buoyant nature of the premium products sector.

26 According to the Commission, on the national markets for sanitary towels principally concerned by the concentration, market shares for 1993 were as follows (point 93 of the statement of objections):

	GERMANY		SPAIN		AUSTRIA	
	value 1993	volume 1993	value 1993	volume 1993	value 1993	volume 1993
P&G	36.3%	20.4%	79.8%	65.9%	24.6%	17.6%
VP Camelia	24.5%	21.6%	1.4%	1.1%	13.9%	12.6%
P&G + Camelia	60.8%	42%	81.2%	67%	38.5%	30.2%
VP other brands	6.9%	12%	—	0.1%	2.9%	2.4%
Johnson & Johnson	13.4%	9.2%	1.1%	0.8%	30.1%	24.8%
Mölnlycke	—	—	—	—	—	—
Kimberly-Clark	0.9%	0.8%	—	—	—	—
Rauscher	—	—	—	—	17.8%	27.6%
Private labels	12.5%	23.7%	10.6%	18.6%	9.2%	2.2%
Others	5.1%	12.3%	7.1%	13.5%	1.5%	12.81%

27 The Commission observed that the market for sanitary towels was characterized, particularly in Germany, by high barriers to entry as a result, *inter alia*, of high brand loyalty, the need to develop innovative products and the need to undertake large scale advertising campaigns, as well as the difficulty of gaining access to retailers. Moreover, the already high degree of concentration in Germany and in Spain before the operation had increased still further.

28 The Commission also took into account P&G's position on the sanitary towel market, which was particularly strong in the growth area of ultra-thin towels, its commercial strength *vis-à-vis* retailers as a major supplier of products for regular consumption, and its financial strength in relation to its competitors in the sanitary towel sector. According to the Commission, the entry of potential competitors who might challenge P&G's domination in Germany and Spain appeared unlikely having regard to the various unsuccessful attempts to penetrate the German market made by Mölnlycke and Kimberly Clark over the last 10 to 15 years and by Kaysersberg between 1970 and 1985.

29 In view of those factors, and in particular of the analysis of the market shares which P&G would hold at the end of the operation, of the barriers to entry and of potential competition, the Commission considered that, given the factors inherent in the German, Spanish and Austrian markets for sanitary towels, the acquisition of VPS by P&G, even after the divestment of VPS's baby nappy business and taking account of P&G's commitment not to acquire control of the non-Camelia business, would allow P&G to act independently of its customers and competitors in those markets (point 145 of the statement of objections). With regard in particular to the German market, the Commission considered that the acquisition of VPS and its major German brand, Camelia, which is also the last major independent national brand, would make it more difficult for other entrants to gain access to the German market in that it would require them to establish themselves directly on the market rather than through the acquisition of an already established undertaking (point 146 of the statement of objections).

30 The Commission therefore concluded that the concentration notified could be incompatible with the common market since it would be likely to create a dominant position on the German and Austrian markets for sanitary towels and to strengthen a dominant position in Spain as a result of which effective competition would be significantly impeded in a substantial part of the common market within the meaning of Article 2(3) of Regulation No 4064/89 (point 151 of the statement of objections).

31 On 25 and 26 April the Commission held, in accordance with Articles 13 to 15 of Regulation No 2367/90, an initial hearing of the parties to the concentration and third parties, including Kaysersberg, which was followed on 6 May 1994 by a second hearing of the parties to the concentration and third parties. On 9 May 1994 Kaysersberg sent to the Commission a copy of the statements made by its managing director at the initial hearing.

32 On 27 May 1994 the Advisory Committee on concentrations met for the first time and delivered an opinion which was unfavourable to the notified concentration (Opinion of the Advisory Committee on concentrations given at the 20th and 22nd meetings on 27 May and 20 June 1994 concerning a revised preliminary draft decision relating to Case IV/M.430 — Procter & Gamble/VP Schickedanz (II), OJ 1994 C 379, p. 34, paragraphs 1 to 8).

33 On 10 June 1994 P&G proposed new commitments to the Commission relating to the transfer of the Camelia business of VPS in order to remove the Commission's objections as to the compatibility of the proposed concentration with the common market.

34 By letter of 13 June the Commission requested P&G to amend its proposals in certain respects. To that end the Commission sent to P&G an amended draft commitment which took account of the changes requested and asked it also to prepare a non-confidential version of that draft so that third parties could be consulted. By letter of 14 June 1994 P&G accepted the proposed amendments.

35 On Wednesday 15 June 1994 the Commission sent to Kaysersberg a letter from P&G dated 15 June which contained the non-confidential version of the draft commitments which had been accepted and informed it that it was being given an opportunity pursuant to Article 18(4) of Regulation No 4064/89 and Article 15 of Regulation No 2367/90 to submit its written observations, which had to be received by the Commission at the latest on the morning of Monday 20 June 1994 in order that they might be sent to the Advisory Committee.

36 Under the non-confidential version communicated to Kaysersberg, P&G proposed commitments regarding the Camelia business and including, (a) the Forschheim plant and the production lines dedicated to the manufacture of feminine hygiene

products, (b) the Camelia brand name and (c) all other assets and liabilities that formed part of or were necessary for the operation of the Camelia business. Those proposed commitments were as follows:

'1. P&G undertakes that, as soon as practicable after the Commission has adopted a favourable decision under Regulation No 4064/89 and in any event no later than 1 July 1994, it shall appoint Goldman Sachs International Limited ("Goldman Sachs") to act on its behalf in conducting good faith negotiations with interested third parties with a view to selling the Business. P&G and Goldman Sachs shall agree on the latter's remuneration, it being understood that part of such remuneration shall consist of a fee related to the consideration of the sale.

2. P&G undertakes that it shall give Goldman Sachs an irrevocable mandate to find a purchaser for the Business within [CONFIDENTIAL] of its appointment, it being understood that such purchaser shall be a viable existing or prospective competitor independent of and unconnected to P&G and capable of maintaining and developing the Business as an active competitive force on the market concerned. P&G shall take all reasonable steps to encourage the relevant personnel currently employed in the Business, including sales and administrative personnel, to take up employment with such independent third party. P&G shall be deemed to have complied with this undertaking if, within [CONFIDENTIAL], it has entered into a binding letter of intent for the sale of the Business, provided that such sale is completed within [CONFIDENTIAL]. P&G undertakes to give, on an arm's length basis, all assistance requested by Goldman Sachs prior to the sale to the third party.

3. P&G alone shall be free to accept any offer or to select the offer it considers best in case of a plurality of offers. The value of any such offers shall be determined by the price offered plus other obligations affecting the value of such offers.

4. P&G undertakes that, within [CONFIDENTIAL], the Forschheim plant shall be rendered capable of being transferred to an independent third party and, most particularly, that the Forschheim plant is capable of being managed separately from P&G.

5. Prior to the completion of the sale of the Business to a third party, P&G shall ensure that the Business is managed as a distinct and saleable entity with its own management, accounts and a sales distribution effort for the Business that is separate from P&G's catamenials business. P&G further undertakes that the Business shall have its own management that shall be under instructions to manage it on an independent basis in order to ensure its continued viability and market value, and that P&G shall provide sufficient financial resources to this end in the ordinary course of business. Prior to the completion of the sale of the Business to a third party, P&G shall not integrate the Business into any P&G business unit. P&G further undertakes that it shall make no structural changes to the Business without prior Commission approval.

6. P&G shall not obtain from the Business management any business secrets, know-how, commercial information, or any other industrial information of a confidential or proprietary nature relating to the Business.

7. P&G undertakes that it shall cause Goldman Sachs to provide a written report on a [CONFIDENTIAL] basis on any relevant developments in its negotiations with third parties interested in purchasing the Business, and that such reports, together with supporting documentation, shall be furnished to the Commission. Such supporting documentation shall include a report prepared by the management of the Business on its on-going commercial operations.

8. Any dispute between P&G and the third party purchasing the Business arising out of or in connection with the implementation of these undertakings shall be submitted to independent arbitration to be mutually agreed between P&G and such third party.'

37 On 16 June 1994 P&G sent to the Commission a letter in which it confirmed that the commitments given on 14 June 1994 amended and replaced those offered on 17 January 1994 in regard to VPS's feminine hygiene products and that, consequently, in the event of a favourable decision by the Commission, it would be entitled to acquire and retain control over VPS's non-Camelia business.

38 On Friday 17 June 1994 Kaysersberg sent its observations to the Commission. In its letter Kaysersberg began by contending that the commitments proposed by P&G must be regarded as inadmissible because they were submitted at a very late stage and third parties were given only a short time within which to react. It then went on to state the reasons for which it considered that the commitments proposed were unsatisfactory and the amendments which it sought.

39 On 20 June 1994 the Advisory Committee on concentrations met for a second time. In its Opinion the Advisory Committee states that:

'9. (...) having taken into account the information received from the Commission on the remedies proposed by Procter & Gamble in its letter of 15 June 1994 to solve the competition problems raised by the proposed concentration, [the Com-

mittee] agrees with the Commission in finding the concentration compatible with the Common Market and with the functioning of the EEA Agreement subject to the divestiture of the Camelia-branded feminine hygiene products business.

10. (...) the said remedies suffice (...) if the following conditions are respected:

(a) the nomination of an independent trustee by Procter & Gamble to carry out the divestiture of the Camelia-branded feminine hygiene products business and its management independent from Procter & Gamble until the said divestiture has been carried out;

(b) the setting of a short deadline for carrying out the divestiture;

(c) the potential purchaser should have the financial resources and proven expertise in consumer product markets to allow it to maintain and to develop actively the Camelia-branded feminine hygiene products business in competition with Procter & Gamble;

(d) the Camelia-branded feminine hygiene products business should be maintained independent from Procter & Gamble until its divestiture;

(e) the Commission should have the right to examine in advance the profile of the potential purchasers notwithstanding Procter & Gamble's right to choose the final purchaser;

(f) the Commission should maintain sufficient power of control and of decision to ensure the correct fulfilment of the undertakings.

11. Furthermore, a minority of the Committee considers that Procter & Gamble should be obliged to divest the secondary and private label brands of VP Schickedanz.'

40 Following that meeting of the Advisory Committee, the final version of P&G's commitments was prepared by the Commission and accepted by P&G.

The contested decision of 21 June 1994

41 On 21 June 1994, in the light of the commitments given to it by P&G, the Commission adopted the contested decision declaring the concentration compatible with the common market and with the functioning of the EEA Agreement.

42 Article 1 of the operative part reads as follows:

'*Article one*

Subject to the full compliance with all conditions and obligations contained in Procter & Gamble's commitment *vis-à-vis* the Commission in respect of the Camelia-branded feminine hygiene business of VPS, as set out in Recital 186 of this Decision, the concentration notified by Procter & Gamble GmbH on 17 January 1994 relating to the acquisition of VP Schickedanz AG is declared compatible with the common market and the functioning of the EEA Agreement.'

43 That decision was notified to Kaysersberg, for information, on 27 June 1994.

44 The Decision may be summarized as follows.

45 As a preliminary point, the Commission observes that the commitment not to acquire control of VPS's baby nappy business forms an integral part of the notification and for that reason, despite the objections the Commission would have to any such acquisition, the Decision does not address that market (Decision, point 7). As regards the offer by P&G, included in its notification, of a commitment not to acquire control of the non-Camelia business of VPS, the Commission states that in the light of the objections raised by the Commission, P&G substantially altered both the brands to be divested and the terms of such a divestiture, and thus substituted Camelia-branded feminine hygiene products for the non-Camelia products of VPS (point 8 of the Decision).

46 After observing that the notified operation is a concentration with a Community dimension, the Commission notes that the concentration concerns the following products manufactured by VPS: household hygiene paper products, feminine hygiene products, adult incontinence products, cotton products and certain personal body care products, and that proceedings were initiated with respect to sanitary towels.

47 As to household hygiene paper products, the Commission observes that P&G, although it is a market leader in the United States and Canada, is not active in that sector in Europe and that, according to P&G, the strategic aim of the concentration is to enter the European market for those products. The Commission states, moreover, that the market shares of VPS in that overall sector are modest in the Community and lie between 15 and 20% in Germany and that, for each product market considered separately, VPS will hold in Germany between 35 and 40% of the handkerchief market and between 15 and 20% of the market for toilet paper.

48 The Commission concludes as follows:

'In the absence of any overlap between P&G and VPS in this sector and in the light of VPS's limited market shares, the operation does not give rise to any competition concerns for these products' (point 13 of the Decision).

49 As to adult incontinence products, cotton products and cosmetics, the Commission also concludes, after analysing in particular the positions of P&G and VPS on those markets, that the operation does not raise serious doubts as to its compatibility with the common market (points 14 to 23 of the Decision).

50 As regards baby nappies, the Commission considers that, given P&G's market shares in the Community of between 45 and 50%, its financial resources, advanced technologies and strong position in relation to retailers, the operation would, in the absence of the commitment contained in P&G's notification, create a dominant position for P&G despite the slight increase in market shares (points 24 to 26 of the Decision).

51 As to feminine hygiene products, the Decision, after a statement based essentially on all of the factors set out in the statement of objections (points 27 to 182 of the Decision), concludes, first, that the operation as notified with P&G's original offer to divest itself of VPS's non-Camelia feminine hygiene products business would enable P&G, as newly formed, to act independently of its customers and competitors on the German and Spanish markets for sanitary towels (point 183 of the Decision). It finds in particular that after the concentration P&G would hold market shares in Germany of between 60 and 65% by value and between 40 and 45% by volume, its closest competitor having only 10 to 15% of the market by value and 5 to 10% of the market by volume, and adds that the acquisition by P&G of VPS's Camelia-brand would make entry into the German market for other entrants more difficult by obliging them to enter directly rather than through the acquisition of an existing undertaking (point 184 of the Decision).

52 The Commission then indicates that P&G has offered to modify the original concentration plan as notified by entering into commitments in regard to VPS's Camelia business (point 186 of the Decision).

53 P&G's commitments, reproduced in the Decision, include the following:

'P&G hereby gives the following undertakings to the Commission with respect to VPS's Camelia-branded feminine hygiene products business, which comprises: (i) the Forschheim plant and the production lines dedicated to the manufacture of

feminine hygiene products; (ii) the Camelia brand name; (iii) all other assets and liabilities that form part of or are necessary for the operation of VPS's Camelia-branded feminine hygiene products business (hereinafter "the Business").

(1) P&G undertakes that, as soon as practicable after the Commission has adopted a favourable decision under Regulation (EEC) No 4064/89 and in any event no later than at closing of its acquisition of the shares of VPS, it shall appoint an independent trustee to be approved by the Commission, to act on its behalf in overseeing the ongoing management of the Camelia Business to ensure its continued viability and market value and its rapid and effective divestiture from the rest of P&G's activities (hereinafter referred to as "the Trustee"). The Trustee shall simultaneously appoint Goldman Sachs International Limited ("Goldman Sachs") to act on its behalf in conducting good faith negotiations with interested third parties with a view to selling the Business (...).

(2) P&G undertakes that it shall give the Trustee an irrevocable mandate to find a valid purchaser for the Business within [...], it being understood that such a purchaser shall be a viable existing or prospective competitor independent of and unconnected to P&G and, possessing the financial resources and proven expertise in consumer product markets, enabling it to maintain and develop the Business as an active competitive force in competition to P&G's catamenials business on the various markets concerned. [...]

[...]

(8) P&G shall not integrate VPS's secondary and own-label catamenial business into its own commercial and production structures for catamenials until the sale of the Camelia Business is completed.

[...]' (point 186 of the Decision).

54 The Commission then states:

'The Commission is satisfied that P&G's offer to divest a business including the Camelia towel brand will prevent P&G from acquiring a dominant position in Germany and from reinforcing its dominant position in Spain. Post-concentration and post-divestment of Camelia the market structure in Germany and Spain will be as follows, taking into account that P&G will not now divest the non-Camelia business of VPS ([1]):

	Germany		Spain	
	Value % 1993	Volume % 1993	Value % 1993	Volume % 1993
P&G	35—40	20—25	75—80	65—70
VP other brands	5 —10	10 —15	0	< 1
Total P&G	40—45	30—35	75—80	65—70
VP Camelia	20—25	20—25	1—5	1—5
Johnson & Johnson	10—15	5—10	1—5	< 1
Kimberly-Clark	< 1	< 1	—	—
Private labels	10—15	20—25	10—15	15—20
Others	5—10	10—15	5—10	10—15

As can be seen, P&G will increase its share of the German market by 6.9% to a total share of 43.2% by value with Camelia holding a 24.5% and J&J a 13.4% share. The increase in P&G's market share will be solely attributable to its acquisition of VPS's secondary and store brand business (i. e. non-premium brands) while P&G's existing Always business will be subject to competition from two significant suppliers of branded premium towels. In Spain, P&G's share will increase by less than 0.1%. The Commission has therefore concluded that the commitments offered by P&G in respect of the Camelia-branded feminine hygiene business of VPS are

(1) Exact market shares deleted as business secret.

sufficient to prevent the creation or reinforcement of a dominant position on the German and Spanish markets, or indeed elsewhere in the EEA' (Decision, point 187).

Events following the Decision

55 By letter of 5 July 1994 P&G informed the Commission that negotiations regarding the divestiture of the Camelia business of VPS had taken place with Kimberly Clark and that the divestiture could take place upon or shortly after the final closing of the sale of VPS's assets to P&G.

56 On 20 July 1994 the Commission announced in a press release that the sale of VPS to P&G had been closed on 16 July 1994 and that at the same time the whole of VPS's feminine hygiene products business (including the Camelia business) had been sold to Kimberly Clark and that VPS's baby nappy business had been sold to the Wirths group.

57 According to P&G, the intervener in the proceedings, the Camelia and Tampona brands and the private brands were sold to Kimberly Clark and the Blümia mark licensed to that company on 16 July 1994. The Commission and P&G indicate that VPS's Femina brand was acquired by Rewe, the German retail chain.

Procedure and forms of order sought

58 By application lodged at the Registry of the Court of First Instance on 19 September 1994 Kaysersberg brought the present action.

59 By application lodged at the Registry of the Court on 8 January 1995 P&G sought leave to intervene in support of the form of order sought by the Commission and, pursuant to Article 35(2)(b) of the Rules of Procedure of the Court of First Instance, sought leave to use the English language both in the written and oral procedures.

60 By letter lodged at the Registry of the Court on 1 February 1995 the applicant requested that confidential treatment be given to certain documents in its file, should the application for leave to intervene be allowed.

61 By order of the President of the First Chamber, Extended Composition, of the Court of 19 May 1995 P&G's application for leave to intervene was allowed and the applicant's request for confidentiality granted in respect of several documents in the file.

62 By order of 16 August 1995 (Case T-290/94 *Kaysersberg* v *Commission* [1995] ECR II-2249) the Court rejected the request submitted by P&G for derogation from the rules on the use of languages as regards the written procedure, but granted P&G leave to use English during the oral procedure.

63 Upon hearing the Report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory measures of enquiry. However, on 24 January 1997, as part of measures of organization of procedure under Article 64 of the Rules of Procedure, the Commission was requested to reply to certain written questions and to produce non-confidential versions of certain documents. On 19 February 1997 the Commission replied to the written questions put by the Court and produced the documents requested.

64 The main parties and P&G presented oral argument and their replies to the oral questions put by the Court at the hearing on 23 April 1997.

65 The applicant claims that the Court should:

— annul the Commission Decision of 21 June 1994;

— order the Commission to pay the costs.

66 The defendant contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

67 The intervener contends that the Court should:

— declare, without examining the substance of the case, that the application is inadmissible since the applicant has not shown a legal interest in bringing proceedings; or

— dismiss the application as unfounded;

— order the applicant to pay the costs, including the costs incurred by the intervener.

68 In its observations on the statement in intervention the applicant claims that the Court should:

— reject all the pleas raised by the defendant and the intervener;

— order the intervener to pay the costs.

Admissibility

Summary of the arguments of the parties

69 In its application the applicant states that under the fourth paragraph of Article 173 of the EC Treaty it is entitled to seek the annulment of the Decision. It submits, first, that it was an active participant in the procedure leading up to the adoption of the Decision. Moreover, as a leading operator in France and Belgium in the feminine hygiene, tissue paper and baby hygiene sectors, it is directly and individually concerned since the operation is of such a nature as to restrict still further its access to the German market, in particular the market for sanitary towels. That is already a closed market and the applicant has attempted to establish itself on it, but without success, despite continuous commercial investments and the closeness of its production plant. Finally, the Decision deprived it of the opportunity of acquiring the Camelia business, since it allowed P&G to dispose of that business to Kimberly Clark in non-transparent circumstances.

70 The Commission has not submitted any observations as regards the admissibility of the action.

71 P&G, the intervener, considers that the action for annulment should be declared inadmissible. It accepts that the Commission has not contested the admissibility of

the present action and that, as an intervener, it is not entitled to raise an objection of inadmissibility. It observes, however, that, in a similar case, the Court of Justice considered the issue of admissibility of its own motion (Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 13).

72 In the present case, according to the intervener, the Decision had no significant influence on the applicant's competitive position, so that it cannot be regarded as being directly and individually concerned within the meaning of Article 173 of the Treaty (Joined Cases 10/68 and 18/68 *Eridania and Others* v *Commission* [1969] ECR 459). The intervener submits that it has not gained any market share in the feminine hygiene sector, because, upon acquiring VPS, it divested itself not only of the Camelia business in accordance with the Decision, but also the non-Camelia business. Similarly, it points out that it did not acquire any of VPS's business on the baby nappy market. The market shares acquired in the household hygiene paper products sector are negligible.

73 Moreover, the Decision did not deprive the applicant of the possibility of acquiring the Camelia business; nor has the applicant ever displayed any such intention, despite the divestiture commitment given by P&G.

74 Lastly, the applicant has no legal interest in bringing proceedings, since the annulment of the Decision would not compensate it in any way and, in particular, would not enable it to acquire the Camelia business. Furthermore, the Commission took the objections submitted by the applicant fully into account during the administrative procedure.

Findings of the Court

75 The Court observes that the defendant has not claimed that the action is inadmissible and had confined itself to requesting that it be dismissed on its merits. According to the fourth paragraph of Article 37 of the Statute of the Court of Justice of the EC, which applies to the procedure before the Court of First Instance by virtue of the first paragraph of Article 46 of that statute, an application to intervene is to be limited to supporting the form of order sought by one of the parties. Moreover, Article 116(3) of the Rules of Procedure of the Court of First Instance provides that the intervener must accept the case as he finds it at the time of his intervention.

76 It follows that P&G is not entitled to raise an objection of inadmissibility and that the Court is not therefore required to consider the pleas of inadmissibility on which it relies (judgments of the Court of Justice in Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 20 to 22, and Case C-225/91 *Matra* v *Commission*, paragraph 12, and judgments of the Court of First Instance in Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 39, and Case T-19/92 *Leclerc* v *Commission* [1996] ECR II-1851, paragraph 50).

77 In the circumstances of the present case, the Court considers that it is not necessary to consider the admissibility of the action of its own motion.

Substance

78 In support of its action the applicant puts forward five pleas in law alleging various infringements of essential procedural requirements and a sixth plea alleging manifest errors of appraisal.

79 The first plea alleges a lack of real and serious consultation of the Advisory Committee on concentrations, contrary to Article 19(5) and (6) of Regulation No 4064/89. The second plea is based on infringement of Article 18 of Regulation No 4064/89 in that the applicant was not placed in a position in which it could submit its observations on the substance of P&G's commitments. In its third plea the applicant complains that the Commission consented to a material amendment of the notification, contrary to Articles 6 and 8 of Regulation No 4064/89 and Section I of Regulation No 2367/90. The fourth plea alleges infringement of general principles of Community law, the provisions of Regulation No 4064/89 and the provisions of Regulation No 2367/90 in that the Commission failed to observe sufficient and reasonable time-limits before adopting the Decision. The fifth plea alleges failure to state the reasons on which the Decision was based, contrary to Article 190 of the EC Treaty. Lastly, the sixth plea alleges infringement of Articles 2 and 8 of Regulation No 4064/89 in that the Commission committed manifest errors of appraisal in regard to the effects of the concentration on various markets.

The first plea: lack of genuine and serious consultation of the Advisory Committee

Arguments of the parties

80 The applicant claims that the consultation of the Advisory Committee did not take place under the conditions laid down by Article 19(5) and (6) of Regulation No 4064/89. The Advisory Committee did not have the necessary time in which to consider P&G's proposed commitments in regard to the sale of Camelia and to issue a genuine and considered opinion on the concentration plan. The Advisory Committee was convened by the Commission on 15 June 1994 and it met on 20 June 1994, that is to say less than 14 days after the invitation, contrary to the requirements of Article 19(5). The Commission has not shown that in this case it shortened that period, exceptionally, in order to avoid serious harm to P&G.

81 Furthermore, the documents sent to the Advisory Committee for the purpose of its meeting did not enable it to obtain a true and correct understanding of the concentration plan. Thus, the Advisory Committee gave its opinion without being aware of the real importance of VPS's non-Camelia business, since the original commitment to divest that business was still part of P&G's proposed commitments of 15 June which had been submitted for scrutiny by the Committee. Moreover, the arrangements for divesting the Camelia business set out in the proposal of 15 June were substantially altered following the meeting of the Committee inasmuch as it was initially provided that P&G should sell that business to a third party of its choice, whereas the final commitments proved to be more restrictive.

82 The Commission contends that according to the case-law a failure to observe the 14-day rule is not in itself such as to vitiate a decision adopted on the basis of Regulation No 4064/89, where the invitation was sent in circumstances which enabled the Committee to give its opinion in full knowledge of the facts (Case T-69/89 *RTE* v *Commission* [1991] ECR II-485). Moreover, where concentrations are concerned, the shortness of the periods which characterize the general scheme of Regulation No 4064/89 should be taken into account (Case T-83/92 *Zunis Holding and Others* v *Commission* [1993] ECR II-1169, paragraph 38). The Commission states that by virtue of the last sentence of Article 19(5) of Regulation No 4064/89 it may, in exceptional cases, shorten the period of 14 days in order to avoid serious harm to one or more of the undertakings concerned by a concentration. Although not suggesting that there was a risk of serious harm to P&G, the Commission contends that it had grounds for fearing a deterioration in the situation of VPS if a rapid decision were not taken.

83 The Commission considers, in any event, that, in view of the circumstances of this case, the time allowed to the Advisory Committee for considering P&G's proposed commitments of 15 June, that is to say ultimately to sell the Camelia business, was sufficient to enable it to give its opinion in full knowledge of the facts. It observes that the national authorities were closely and continuously involved in the procedure, in particular by the despatch of the main documents from the file and the holding of two formal hearings, and that the Committee had already met for a first time on 27 May 1994.

84 Furthermore, the terms of P&G's final commitment, namely not to acquire the Camelia business, did not differ substantially from the proposals of 15 June which were sent to the Advisory Committee. Only the arrangements for implementing them were strengthened following its opinion. As regards P&G's original commitment not to acquire the non-Camelia business, the Commission contends that it was still current when the Advisory Committee met and that since only a minority of the Committee took the view that P&G should also divest itself of that business, it decided, in accordance with the majority opinion, not to require P&G to implement it.

85 The intervener states that the final amendments to its proposals of 15 June 1994, which were accepted by it following the meeting of the Committee, are essentially procedural in nature and were made by the Commission in order to take account of the observations of the national authorities and third parties. The Commission therefore fully took into account the opinion expressed by the Advisory Committee, even though it is not bound by its opinions. Moreover, it claims that no objection was raised by the Advisory Committee as regards the period within which it was convened.

Findings of the Court

86 As a preliminary point, it should be noted that, pursuant to Article 19(3) of Regulation No 4064/89, the Advisory Committee on concentrations is to be consulted before any decision is taken, *inter alia*, pursuant to Article 8(2) of that regulation. Article 19(5) of the regulation provides that the Committee is to meet not earlier than 14 days after the invitation is sent, but that the Commission may exceptionally shorten that period as appropriate in order to avoid serious harm to one or more of the undertakings concerned by a concentration. Article 19(6) of the regulation provides, moreover, that the Commission 'shall take the utmost account of the opinion delivered by the Committee'.

87 It is not disputed in this case that when the Advisory Committee was convened for its second meeting, of 20 June 1994, the 14 days' notice referred to in Article 19(5) of Regulation No 4064/89 was not complied with. The Court observes, moreover, that, while referring to its concern of a possible deterioration in VPS's situation if a decision had not been rapidly adopted, the Commission does not allege that it shortened the period for convening the Advisory Committee in order to avoid serious harm to VPS or P&G. Furthermore, according to the uncontested observations of the applicant, neither of those two undertakings requested the Commission during the administrative proceedings to apply Article 7(4) of the Regulation under which the Commission may, exceptionally, authorize the carrying out of a concentration in the course of the proceedings in order to prevent serious damage to one or more undertakings concerned by a concentration.

88 However, the Court considers that, even in the absence of exceptional circumstances relating to the risk of serious harm within the meaning of Article 19(5) of Regulation No 4064/89, the failure to comply with the period of notice for convening the Advisory Committee is not in itself such as to render the Commission's final decision unlawful. That 14-day period constitutes a purely internal rule of procedure, like the period for convening the Advisory Committee on cartels and dominant positions laid down in Article 10(5) of Regulation No 17 (Council Regulation of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty, OJ, English Special Edition 1959-1962, p. 87, 'Regulation No 17'), which also provides that the Committee is to be consulted 'not earlier than fourteen days after dispatch of the notice convening it'. It is settled law that the failure to comply with that rule can render the Commission's final decision unlawful only if it is sufficiently substantial and it had a harmful effect on the legal and factual situation of the party alleging a procedural irregularity (*RTE* v *Commission*, cited above, paragraph 27). That cannot be the case where the Advisory Committee in fact had a sufficient period of time to enable it to gain knowledge of the important factors in the case and was able to give its opinion in full knowledge of the facts, that is to say, without having being misled on an essential point by inaccuracies or omissions. In such circumstances, the failure to comply with the period of notice for convening the Committee cannot have any effect on the outcome of the consultation procedure or, as the case may be, on the terms of the final decision.

89 In the present case, it should first be noted that the Advisory Committee itself did not object to its meeting taking place at the date fixed by the Commission, that is to say, less than 14 days after it was convened.

90 Moreover, the Court considers that it is apparent from the opinion of the Advisory Committee itself that, despite the shortness of the time which had been allowed to it, the Committee was able to express its view in full knowledge of the facts on the commitments offered by P&G and, accordingly, on the Commission's draft decision. While declaring itself to be in agreement with the Commission in considering that the commitments regarding the divestiture of the Camelia business were sufficient to ensure the compatibility of the operation with the common market and the European Economic Area, the Committee also expressed the view that certain aspects should be clarified and applied in practice. Those aspects were the nomination of a trustee, the setting of a short deadline for the divestiture, the qualities of the potential purchaser, the independence of the Camelia management until the divestiture was completed and, finally, the possibility for the Commission to consider the qualities of potential purchasers and to oversee fulfilment of the commitments (see paragraph 39 above). It is therefore clear that, despite the fact that the period of notice for convening it had not been observed, the Advisory Committee nevertheless had the time necessary within which to formulate precise recommendations regarding the circumstances in which, in its opinion, the proposed divestiture of VPS's Camelia business should be carried out.

91 The Court finds, furthermore, that those recommendations of the Committee concerning the detailed arrangements for the divestiture of the Camelia business were essentially included in full in the final version of the commitments drawn up following its meeting. In particular, the final form of the commitments, as set out at point 186 of the Decision, provides that a trustee is to be appointed by P&G and approved by the Commission by closing of the acquisition of VPS in order to ensure the transfer of the Camelia business to a viable purchaser and also that the purchaser will be able to develop the Camelia business in such a way as to compete with 'P&G's catamenials business on the various markets concerned' (see paragraph 53 above). In that regard, the applicant's argument to the effect that the detailed arrangements for the divestiture of the Camelia business were, therefore, substantially amended following the meeting of the Committee, in that they were made more strict, is not such as could demonstrate that the Committee was misled in regard to an essential point. Inasmuch as those amendments were made pre-

cisely on the basis of the Advisory Committee's recommendations in order to strengthen the arrangements for implementing P&G's commitment to divest itself of that business, the amendments so made, far from proving that the Committee was unable to give its opinion in full knowledge of the facts, show, to the contrary, that the Commission took the utmost account of the Committee's opinion, in conformity with the requirements of Article 19(6) of Regulation No 4064/89.

92 Nor, in the Court's opinion, is it possible to uphold the applicant's argument that the Advisory Committee could not have assessed the real importance of the non-Camelia business on the ground that P&G's proposed commitments of 15 June 1994, which were communicated to it when it was convened, did not provide expressly for the withdrawal of the original commitment whereby P&G was to divest itself of that business.

93 Admittedly, P&G's proposed commitments, as sent to the Advisory Committee, did not contain any express stipulation as to what would happen to the non-Camelia business of VPS and it was only by letter of 16 June, that is to say, after the convocation of the Advisory Committee, that P&G confirmed to the Commission that it intended to retain that business.

94 However, the Court finds, first, that neither the absence of a provision relating to the non-Camelia business in P&G's proposed commitments communicated to the Advisory Committee on 15 June 1994 nor the fact that P&G expressly informed the Commission, after the Advisory Committee was convened, of its intention to retain that business were such as to prevent the Committee from expressing its views on the question whether P&G should also be compelled to divest itself of the non-Camelia business. That interpretation is confirmed by the fact that the Advisory Committee's opinion states that only a minority of its members considered, at the end of the meeting, that 'Procter & Gamble should be obliged to divest the feminine hygiene protection businesses under the "own-label and secondary brands" of VPS Schickedanz' (see paragraph 39 above and paragraph 11 of the

opinion of the Advisory Committee). It follows that, as is apparent from the uncontested observations of the Commission, the Advisory Committee was in any event informed of P&G's intentions in regard to the non-Camelia business at the time when its meeting commenced.

95 Second, consideration of the file in this case has not brought to light anything to suggest that the Advisory Committee did not have all the necessary evidence in order to assess the importance of VPS's non-Camelia business. On the contrary, it is apparent that the authorities of the Member States were closely and constantly associated with the procedure in which the proposed concentration was examined and that their representatives in the Advisory Committee were thus in a position to acquaint themselves, at the time of the second meeting, with all the important evidence in the file concerning, in particular, the market share of that business. Apart from the fact that, in accordance with Article 19(1) of Regulation No 4064/89, such an association involves the despatch of the notification and the most important procedural documents, it is apparent from the Court's file that in this case the representatives of the Member States also took part in the formal hearings organized by the Commission on 25-26 April and 6 May 1994, during which the notifying parties and the third parties were heard, and met for the first time in the Advisory Committee on 27 May 1994 in order to give their views on the Commission's first draft decision. Although the Committee then gave its opinion on the basis of a draft decision prohibiting the concentration, the fact remains that the appraisal of the operation, as originally notified, necessarily entailed an analysis of the scope of the commitment, then proposed by P&G, to divest itself of the non-Camelia business of VPS, and to that end, an appraisal of the importance of that business on the relevant market.

96 In those circumstances, and having regard to the fact that there is no allegation of failure to communicate new and significant evidence concerning the importance of the non-Camelia business to the Advisory Committee, the Court considers that the Committee was able to give its opinion in full knowledge of the facts as regards the necessity for P&G to divest itself of that business.

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

The second plea: failure to consult third parties on P&G's commitments

Arguments of the parties

98 The applicant claims that the procedure for consulting 'interested competitors' was not complied with, contrary to Article 18(1), (3) and (4) of Regulation No 4064/89. Referring to the judgment in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, it submits that it was not placed in a position in which it could effectively make known its point of view regarding P&G's commitments, since the Commission gave it only a period of two working days in which to submit its observations on P&G's proposals and did not send to it, for a preliminary view, the final version of P&G's commitments, despite the amendments subsequently made to those proposals. Consequently, it was not able to comment on the situation created by P&G's acquisition of VPS's non-Camelia business, because the proposed commitments of P&G communicated to the third parties on 15 June 1994 gave no grounds for concluding that the original commitment by P&G to divest itself of the non-Camelia business had been withdrawn.

99 The applicant contests the Commission's argument that third-party undertakings may only rely on Article 18(4) of Regulation No 4064/89. It claims that the case-law on which the Commission relies, relating to the procedural rights of third parties in the context of the application of Regulation No 17, is irrelevant in the present case inasmuch as the reasoning adopted is not transposable to the implementation of Regulation No 4064/89; moreover, the facts of the cases cited were different.

100 In any event, even supposing that there is a difference in treatment *vis-à-vis* the undertakings referred to in Article 18(1), (2) and (3) of Regulation No 4064/89, the applicant considers that Article 18(4) of that regulation requires that it should be heard at an appropriate time by the Commission and on the basis of full information. Third parties are entitled to participate in the administrative procedure in order to safeguard their legitimate interests (Case T-17/93 *Matra Hachette* v

Commission [1994] ECR II-595). Respect for the right of competitors to intervene in the procedure is all the more necessary in the context of control of concentrations in view of the difficulty of re-establishing, after the event, the situation which existed prior to the concentration. Moreover, the reduction in the rights of third parties owing to the absence of a complaints procedure should be compensated for by their being given the opportunity to gain awareness of all the commitments given by the parties during the procedure. Furthermore, under Regulation No 17 the complainants are informed of the outcome of the commitments given by the undertakings with which the complaint is concerned and the Commission adopts a final decision only after receiving the complainants' observations in that regard (Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487).

101 The Commission contends that Article 18(1), (2) and (3) of Regulation No 4064/89 refers only to the undertakings interested by a concentration, in the present case P&G, GGS and VPS, and not to third-party undertakings such as the applicant, which can, therefore, rely only on Article 18(4) (Case T-3/93 *Air France* v *Commission* (*'Dan Air'*) [1994] ECR II-121, paragraph 81). Furthermore, on several occasions the Court of Justice and the Court of First Instance have pointed out the distinction between the right of the interested undertakings to be heard and the rights of third parties in the various procedural regulations concerning competition matters (Case 43/85 *Ancides* v *Commission* [1987] ECR 3131; *BAT and Reynolds* v *Commission*; judgment in *Matra Hachette* v *Commission*, cited above). As regards the argument that no comparison can be made between the procedure for the control of concentrations and the implementation of Articles 85 and 86, the Commission observes that the controls which it carries out under Articles 85, 86 and 92 to 94 of the Treaty and under Regulation No 4064/89 aim to ensure, in a complementary fashion, a system of undistorted competition in the common market. As regards the absence of a complaints procedure in the context of the control of concentrations, the Commission replies that this was the choice of the Community legislature and that, in any event, Article 4(1) and (3) of Regulation No 4064/89 requires the undertakings which are parties to a concentration with a Community dimension to notify it and requires the Commission to publish the fact of such notification in the *Official Journal of the European Communities.*

102 In the present case the Commission considers, first, that it did not infringe Article 18(4) of Regulation No 4064/89 by allowing Kaysersberg a period of only two working days in which to consider the commitments proposed by P&G. It claims that, in view of its participation throughout the procedure, the applicant knew that the question of the resale of Camelia was the principal obstacle to the authorization of the operation and that it could not have been caught unawares by P&G's proposed commitments. Furthermore, the fact that the applicant sent its observations to the Commission on 17 June instead of 20 June shows that it was able effectively to submit its point of view.

103 The Commission considers, second, that it did not infringe the applicant's procedural rights by not communicating to it the final version of P&G's commitments for the purpose of inviting its observations on them. In the first place, unlike the undertakings referred to in Article 18(1) of Regulation No 4064/89, third parties do not have a right to be heard at all stages of the procedure in which a concentration is examined. Moreover, P&G's final commitments take ample account of the observations of third parties and in particular those of the applicant, since the procedural arrangements for the sale of Camelia were strengthened and the third parties had stressed throughout the procedure that P&G's original commitment to sell VPS's non-Camelia business was insignificant. The Commission concludes from this that it was not obliged to consult the third parties in regard to the final version of the commitments, since, particularly in the light of their previous observations, it considered that those commitments avoided any risk of a dominant position being created. To adopt the contrary approach might have made it impossible for the Commission to observe the time-limits laid down in Regulation No 4064/89.

104 P&G considers that under Article 18(4) of the regulation third parties have no more than a right to receive basic information concerning the notified operation and that the Commission is in no way required to send to them, for their observations, the proposed commitments drawn up in the course of the procedure. The Commission therefore permitted the third parties to make known their points of view to an extent which exceed its obligations under Regulation No 4064/89. Furthermore, the applicant has not shown that, if the consultation procedure had been conducted differently, the terms of the Decision would have been different; consequently, no procedural defect has been shown to exist.

Findings of the Court

105 The Court observes *in limine* that it clearly follows from the provisions of Article 18 of Regulation No 4064/89 on 'the hearing of the parties and of third persons' that the procedural position of third parties, such as the applicant, cannot be equated with that of the interested persons, undertakings and associations of undertakings referred to in the first three paragraphs of that article. While the persons interested by the concentration in question, namely the parties to the draft concentration submitted for examination by the Commission, enjoy the specific guarantees laid down in those provisions in order to ensure that their rights of defence are observed in the course of the administrative procedure, Article 18(4), in contrast, gives to third parties, since they are merely liable to suffer the incidental effects of the decision, only the right to be heard by the Commission, provided that they have so requested and have shown that they have a sufficient interest for that purpose (Case T-96/92 *CCE de la Société Générale des Grandes Sources and Others* v *Commission* [1995] ECR II-1213, paragraph 56; and the judgment in *Dan Air*, cited above, paragraph 81).

106 Contrary to the applicant's submissions, that interpretation is confirmed by the judgment in *Ancides* v *Commission*, cited above, in which it was held that qualifying third parties cannot be equated with interested persons in the context of Regulation No 17, Article 19(2) of which expressly provides, in identical terms to those of Article 18(4) of Regulation No 4064/89, that third parties showing a sufficient interest are to be heard solely upon their request (see also *CCE de la Société Générale des Grandes Sources*, cited above, paragraph 56). The fact that, in that case, the third party had not asked to be heard in the procedure before the Commission is irrelevant to the question as to what provisions are applicable to third parties in the context of Regulation No 4064/89. Similarly, the applicant's claim that the judgments in *BAT and Reynolds* and *Matra Hachette*, cited above, concerned the access of third parties to the file cannot in any way call into question the fact that under Regulation No 4064/89 only Article 18(4) applies to third parties.

107 It follows that the applicant, as a third party to the procedure, cannot invoke guarantees identical to those granted to interested persons and, in particular, the rights conferred on them by Article 18(1) and (3), which provides, *inter alia*, that those persons must be given the opportunity, before the adoption of any decision taken under the second subparagraph of Article 8(2), 'at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them' and that 'the Commission shall base its decision only on the objections on which the parties have been able to submit their observations'.

108 However, although the procedural rights of third parties are not as extensive as the rights granted to the interested persons in order to ensure their rights of defence, it is nevertheless the fact that, in so far as they show a sufficient interest, qualifying third parties have a right under Article 18(4) of Regulation No 4064/89 to be heard if they have so requested. To that end, Article 15(1) of Regulation No 2367/90 states that if third parties showing a sufficient interest apply to be heard pursuant to Article 18(4) of Regulation No 4064/89, 'the Commission shall inform them in writing of the nature and subject matter of the procedure and shall fix a time-limit within which they may make known their views'. Under Article 15(2) 'the third parties referred to in paragraph 1 above shall make known their views in writing or orally within the time-limit fixed. They may confirm their oral statements in writing'. On the other hand, where third parties showing a sufficient interest do not ask to be heard, Article 15(3) provides that the Commission 'may ... afford to [them] the opportunity of expressing their views', but does not impose any obligation on it to provide information.

109 It follows from those provisions taken as a whole that third-party undertakings which are competitors of the parties to the concentration have a right to be heard by the Commission, if they so request, in order to make known their views on the harmful effects on them of the notified concentration plan, but such a right must nevertheless be reconciled with the observance of the rights of the defence and with the primary aim of the regulation, which is to ensure effectiveness of control as well as legal certainty for the undertakings to which the regulation applies (see, for example, the order of the President of the Court of First Instance in Case T-322/94 R *Union Carbide* v *Commission* [1994] ECR II-1159, paragraph 36).

110 It is in the context of this system for the protection of the respective rights of interested parties and third parties that it is, consequently, necessary to determine whether in the present case the applicant's procedural rights were disregarded in that it was allegedly not placed in a position in which it could effectively make known its views on the commitments given by P&G. In that regard, the applicant claims that it did not have a sufficient period of time within which to comment on the proposals submitted by P&G on 15 June 1994 and that it was not consulted on the final version of the commitments, under which P&G was authorized to retain the non-Camelia business.

111 The Court finds, first, that, as is clear from the file, before being informed by the Commission on 15 June 1994 of the proposed commitments submitted by P&G, the applicant, as a qualifying third party, was closely associated with the procedure and in particular received, following its request to be heard in accordance with Article 15(1) of Regulation No 2367/90, a copy of the statement of objections addressed to P&G, from which it was apparent that P&G's acquisition of VPS and its Camelia brand was liable to lead to the creation of a dominant position on the German market for sanitary towels. In addition to the letters which it sent to the Commission, the applicant also participated in the formal hearings which took place on 25 and 26 April and 6 May 1994 and at the first of those hearings stressed, *inter alia*, the dangers of the acquisition by P&G of Camelia.

112 The Court next points out that it was in that context, in which it was apparent that the acquisition by P&G of VPS's Camelia business constituted, both in the view of the Commission and that of the applicant, the essential obstacle to authorizing the proposed concentration, that by fax dated 15 June 1994 the Commission sent to the applicant, on the basis of Article 15 of Regulation No 2367/90, a non-confidential version of P&G's proposed commitment not to acquire VPS's Camelia business and that it requested it to make known its views before 20 June 1994. It is apparent from the file that in its letter of 17 June the applicant was able to submit substantial observations on the commitment offered by P&G and that it requested, in particular, modifications to the arrangements for the divestiture, certain of which, relating to the capacities of the potential purchaser and the need to make

the choice of the purchaser subject to the Commission's prior authorization and to guarantee the independence of the assets of the Camelia business, were adopted in substance in the final version of the commitments.

113 In those circumstances, and having regard to the fact that Article 15(2) of Regulation No 2367/90 does not lay down any specific obligation in regard to the length of the period fixed by the Commission, the Court considers that the mere fact that the applicant had only a period of two working days within which to make its observations on the amendments proposed by P&G to the plan is not, in the present case, such as to show that the Commission failed to have regard for its right to be heard under Article 18(4) of Regulation No 4064/89. That interpretation is all the more called for since, although the legitimate interest of qualifying third parties to be heard may require them to be allowed a sufficient period for that purpose, such a requirement must, nevertheless, be adapted to the need for speed, which characterizes the general scheme of Regulation No 4064/89 and which requires the Commission to comply with strict time-limits for the adoption of the final decision, failing which the operation is deemed compatible with the common market (see the judgment in *Dan Air*, cited above, paragraph 67, and the order of the President of the Court of First Instance in Case T-96/92 R *CCE de la Société Générale des Grandes Sources and Others* v *Commission* [1992] ECR II-2579, paragraph 30).

114 It follows that the complaint that an insufficient period was granted to the applicant within which to make known its views on P&G's proposed commitments is unfounded.

115 As regards the failure to send to the applicant, for its prior opinion, the final version of the commitments made by P&G with a view to the amendment of the original concentration plan, the Court points out that, by this complaint, the applicant is claiming in substance that it was not enabled to be heard on the acquisition by P&G of the non-Camelia business. In that regard, it should be pointed out that P&G's proposed commitments sent to the applicant on 15 June 1994 did not contain any stipulation regarding VPS's non-Camelia business and that it was only by letter of 16 June 1994 that P&G confirmed to the Commission the withdrawal of its original offer not to acquire that business, although the applicant was not expressly advised of that fact by the Commission.

116 However, the Court observes, first, that, despite the absence of any provision stipulating what should happen to the non-Camelia business in P&G's proposed commitments sent to the applicant on 15 June 1994, the applicant could not legitimately expect at that date that P&G would maintain its original commitment not to acquire the non-Camelia business of VPS or that the Commission would make its approval of the concentration plan subject to a condition that that commitment be maintained.

117 First, as is clear from point 10 of the statement of objections addressed to P&G, on which the applicant was invited to submit its views, P&G expressly specified that this offer of a commitment would be maintained only in so far as the operation was declared compatible in the form notified, so that any subsequent modification of the original concentration plan necessarily replaced that commitment offered by P&G at the time of the notification. Moreover, the Court considers that the applicant has not adduced any evidence to show that the Commission indicated during the proceedings that it intended to authorize the operation only on condition that the whole of VPS's feminine hygiene business was disposed of. On the contrary, it is clear that the applicant had itself pointed out to the Commission that the original proposal was inappropriate, since it indicated in its observations of 31 January 1994 that 'the changes proposed by P&G are not of such a nature as to reduce its dominant position on the German market for sanitary towels, particularly on account of the decreasing and almost marginal share of products under the Blümia and Femina brands'. Those factors therefore show that, at the time when it was informed of the commitments proposed by P&G on 15 June 1994, the applicant was in possession of all the relevant information for the purpose of making known its views and that the onus was, therefore, on it to make its position known as regards the adequacy or inadequacy of the proposed commitments.

118 The Court finds, second, that in its letter of 17 June 1994, referred to above, the applicant in fact expressed a wish that P&G should undertake to divest itself of the whole of VPS's feminine hygiene businesses to a single purchaser, in order that the latter would carry sufficient weight to compete effectively on the market, which, in the circumstances of this case, necessarily meant that the applicant was opposed to P&G's being authorized to retain VPS's non-Camelia business. This interpretation is confirmed by the applicant's own observations at the hearing, namely that it

had therefore been able to make known its views regarding the need for P&G to divest itself of the Camelia and non-Camelia businesses of VPS.

119 It is therefore clear that in the present case the applicant was able to make known its position concerning the extent and nature of the commitments which it considered should be given by P&G and imposed by the Commission as a condition or obligation in order for the operation to be regarded as compatible with the common market. Having regard to the abovementioned principles, the Court considers that the legitimate interest of qualifying third parties, such as the applicant, to make known their views on the harmful effects of the concentration on competition is fully safeguarded where, as in the present case, they are placed in a position, on the basis of all information communicated to them by the Commission during the procedure initiated under Article 6(1)(c) of Regulation No 4064/89 and, in particular, of the offers of commitments submitted by the undertakings concerned, to make known their views on the amendments proposed to the concentration plan with a view to removing the serious doubts existing as to its compatibility with the common market. In such a case, there is a sufficient guarantee that the considerations put forward by the competing third parties can, if appropriate, be taken into account by the Commission in determining whether the concentration is in conformity with Community law and, in particular, whether the commitments proposed by the undertakings concerned appear to it to be sufficient for that purpose.

120 Contrary to the applicant's submissions, the Commission is not also required under Article 18(4) of Regulation No 4064/89 to send to qualifying third parties, for their prior comment, the final terms of the commitments given by the undertakings concerned on the basis of the objections raised by the Commission as a result, *inter alia*, of the observations received from third parties in regard to the proposed commitments offered by the undertakings in question. As has just been stated (paragraph 107 above), qualifying third parties do not enjoy guarantees identical to those given to interested persons in order to ensure that their rights of defence are respected in the course of the proceedings before the Commission. In particular, it is only to those persons that Article 18(1) gives an opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them, in particular where the

Commission envisages, as in the present case, attaching conditions and obligations to its decision, in accordance with the second subparagraph of Article 8(2) of Regulation No 4064/89, which are intended to ensure that the undertakings concerned comply with the commitments which they have entered into. It follows that it is only the undertakings concerned and the other interested persons, which must — since they are, as a rule, the sole addressees of the condition imposed — be placed in a position in which they may effectively make known their views on the objections raised to the proposed commitments in order to enable them, if they so wish, to make the necessary amendments to them and to ensure the respect of their rights of defence.

121 Nor is it possible to accept the applicant's argument that, like the authors of complaints within the meaning of Article 3(2) of Regulation No 17, qualifying third parties should be informed of the outcome of the negotiations entered into by the Commission with the undertakings concerned. In its judgment in *BAT and Reynolds* v *Commission*, cited above, on which the applicant relies, the Court of Justice held that the rights of complainants had been fully safeguarded since, in order to enable them to submit any supplementary observations, they had been informed by letters sent to them pursuant to Article 6 of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47) of the outcome of the negotiations, in the light of which the Commission intended to close the file on their complaints. The Court observes that in the present case the version of the commitments addressed to the applicant in order that it might give its views also corresponded to what, in the Commission's view, was sufficient for the issue of a declaration of compatibility to be envisaged and that the subsequent amendments were intended specifically to take account of the supplementary observations of third parties and of the Advisory Committee. Consequently, the applicant's argument based on the judgment in *BAT and Reynolds* v *Commission*, cited above, is not such as to show that the Commission did not observe its procedural rights. Furthermore, and in any event, inasmuch as Regulation No 4064/89 does not provide for any complaints procedure for the purpose of having an infringement of the rules of the Treaty established, the Court considers that no analogy may be drawn in this case between the rights of third parties and the rights of complainants in the context of Regulation No 17 nor, *a fortiori*, between the provisions of Article 15 of Regulation No 2367/90 and Article 6 of Regulation No 99/63.

122 It follows from all of the foregoing that the applicant cannot rely on an infringement of its right to be heard for the purposes of Article 18(4) of Regulation No 4064/89.

123 It follows that the second plea must be rejected.

The third plea: material modifications of the notification

Arguments of the parties

124 The applicant submits that the Commission infringed Articles 6 and 8 of Regulation No 4064/89 and Section I of Regulation No 2367/90, in regard to the notifications, by allowing P&G to replace its original commitment concerning the non-Camelia business with its commitment not to acquire control of VPS's Camelia business. It was a material modification of the notification inasmuch as, according to the applicant, P&G's original commitment relating to VPS's non-Camelia business formed, in the same way as did its commitment not to acquire control of its 'baby nappies' business, an integral part of the notification. Moreover, that modification implemented a radical change in P&G's strategy, which enabled it to orientate the concentration towards the tissue-paper sector, while retaining a not inconsiderable market share in the feminine hygiene sector. The applicant concludes from this that the Commission was under a duty to reject the amendments to the notification submitted by P&G and to call for a new notification dealing solely with the divestiture of the Camelia business, in conformity with Article 6 of the regulation, which requires the Commission to examine a concentration in the form notified.

125 The Commission contends that it was its decision not to require P&G to resell the non-Camelia business and that P&G did not therefore modify the details of the

concentration by withdrawing its original commitments. It contends that under the second subparagraph of Article 8(2) of Regulation No 4064/89 it may impose only conditions and obligations that are strictly necessary for the authorization of a concentration and that it is entitled not to take up, as a condition, an original commitment offered by an undertaking if, in the light of subsequent, more substantial commitments, the original commitment does not appear to be necessary. That approach is all the more justified in the present case, since the Commission had maintained throughout the procedure that P&G's original commitment relating to the non-Camelia business was not such as to resolve the problem of competition on the relevant market and competitors, including the applicant, had themselves stressed the insignificant extent of that commitment.

126 P&G contends that the notification concerned its acquisition of the whole of VPS's business in the feminine hygiene sector and contained all the necessary information, both as regards the Camelia business and the non-Camelia business. Moreover, there is a clear distinction, in the context of the concentration, between the 'feminine hygiene' business and the 'baby hygiene' business, since only the latter was transferred to a separate legal entity before the sale became final. Moreover, the offer, in the notification, not to acquire control of the non-Camelia business was subject to the express condition precedent that there would be a decision authorizing the operation under Article 6(1)(b) of Regulation No 4064/89; consequently, it would have lapsed following the initiation of the proceedings under Article 6(1)(c) of the Regulation, as is confirmed by the letter which it sent to the Commission on 16 June 1994.

Findings of the Court

127 Under Regulation No 4064/89 the initiation of proceedings on the basis of Article 6(1)(c) constitutes, *inter alia*, the opportunity for the undertakings concerned to modify the original concentration plan in order to dispel the Commission's serious doubts as to the compatibility of the concentration with the common market. The Court observes in that regard that the possibility thereby

conferred on the undertakings concerned to modify the plan notified is expressly provided for by Article 8(2) of the regulation, which states that the Commission is to issue a decision declaring the concentration compatible with the common market 'where [it] finds that, following modification by the undertakings concerned if necessary, a notified concentration fulfils the criterion laid down in Article 2(2)' and that it 'may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into *vis-à-vis* the Commission with a view to modifying the original concentration plan'.

128 It follows that Article 6 of Regulation No 4064/89, under which the Commission 'shall examine the notification' in order to determine, in particular, whether the concentration notified raises serious doubts as to its compatibility with the common market, cannot be interpreted, as the applicant essentially claims, as requiring the Commission to refuse modifications made by the undertakings concerned to the notified concentration plan and to require a new notification.

129 The applicant's argument to the effect that P&G's withdrawal of the commitment, proposed upon the notification of the concentration, not to acquire control of the non-Camelia business constitutes a material modification of the notification is in no way of such a nature as to show that the Commission failed to observe the provisions of Articles 6 and 8 of Regulation No 4064/89 and those of Section I of Regulation No 2367/90.

130 First, the criterion of the allegedly material nature of the modifications made to a notification is, in itself, irrelevant, since such an eventuality is expressly envisaged by the provisions of Section I of Regulation No 2367/90, Article 3(2) of which provides that 'material changes in the facts specified in the notification which the notifying parties know or ought to have known must be communicated to the Commission voluntarily and without delay'.

131 Moreover, in the present case, the Court considers that the commitment proposed by P&G in its notification in regard to the non-Camelia business of VPS did not constitute an arrangement that was inherent to the notified concentration plan, unlike that relating to the 'baby nappies' business of VPS. As is clear both from the Decision and from the statement of objections addressed to P&G, unlike the commitment not to acquire the 'baby nappies' business of VPS, that proposed commitment was neither part of the acquisition agreements concluded between the parties to the concentration nor the subject-matter of partial performance. On the contrary, it constituted a unilateral offer by P&G, supplemented by an additional agreement between the parties concerning solely the definition of that business and the arrangements for any sale of it. The Court observes, furthermore, that when proceedings were initiated under Article 6(1)(c) of Regulation No 4064/89 it was expressly stipulated that the proposed commitment would be maintained only in so far as the concentration was authorized in the form notified.

132 Finally, the Court observes that the applicant has not adduced any cogent evidence to call into question the fact that in the course of examining the plan as notified the Commission had all the necessary information concerning the non-Camelia business for the purpose, in particular, of assessing the importance of the market shares of that business and determining whether the original commitment so proposed was appropriate in order to prevent the creation of a dominant position for P&G on the relevant markets. In that regard, by letter of 14 February 1994 P&G supplied the Commission with precise data concerning the market shares of that business and, in the context of the statement of objections addressed to P&G concerning the notified plan, the Commission took into account the importance of that business on the market. Consequently, merely switching the businesses to be sold and modifying the commitments so proposed did not alter the objective data concerning the importance of those businesses, which the Commission had gathered in the context of the notification and in the proceedings in which the concentration plan was examined.

133 The Court considers that the claim that the switch of P&G's commitments amounted to a material modification at an industrial level is irrelevant in the context of the present plea, since the purpose of any modification to the concentration plan by the undertakings concerned, pursuant to Article 8(2) of Regulation No 4064/89, is precisely to enable changes to be made in regard to the economic

impact of the concentration in order to render it compatible with the common market. The question whether the Commission committed manifest errors of assessment in accepting the modifications so made to the original concentration plan, on the ground that it allegedly underestimated the market shares of the non-Camelia business, is a matter falling solely within the appraisal of the substantive legality of the Decision.

134 Consequently, the third plea must be rejected.

The fourth plea: failure to provide for sufficient and reasonable time-limits

Arguments of the parties

135 The applicant submits that the Commission did not provide for sufficient and reasonable time-limits before adopting the Decision and that, by so doing, it infringed general principles of Community law and Article 10(4) of Regulation No 4064/89, read in conjunction with Article 9 of Regulation No 2367/90.

136 First, the applicant complains that the Commission accepted the commitments proposed by P&G despite the lateness with which they were lodged. Referring to the Opinion of Advocate General Warner in Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223, it claims that the time-limits set by the Commission in the course of merger control proceedings must observe the principles of proportionality, effectiveness and *audi alteram partem*. In the present case, the time allowed to P&G to submit new commitments was disproportionate in relation to that allowance to third parties

and the Advisory Committee to submit their observations. The Commission allowed P&G to lodge new commitments practically at the end of the period of four months provided for in Regulation No 4064/89, namely on 15 and again on 20 June 1994, whereas the third parties had only two days within which to comment on P&G's proposals. Moreover, in adopting Regulation (EC) No 3384/94 of 21 December 1994 on the notifications, time limits and hearings provided for in Regulation No 4064/89 (OJ 1994 L 377, p. 1), the Commission acknowledged that the period within which P&G required the proposed commitments to be examined constituted an abuse.

137 Second, the applicant submits that, failing rejection of P&G's belated commitments, the Commission should at least have refrained from bringing forward the date of adoption of the final decision from 27 June to 21 June 1994. The procedure followed by the Commission was all the more unreasonable since, in view of the circumstances for which P&G was responsible, Article 10(4) of Regulation No 4064/89 required it to suspend the period of four months laid down by Article 10(3) in order to gather supplementary information or to order an investigation into the commitments given.

138 The Commission points out that the commitments at issue were offered to it by P&G on 10 June 1994, that is to say, 17 days before the expiry of the period laid down by law for the adoption of the Decision. According to the Commission, there was therefore no serious reason for it to reject those proposals of its own motion, particularly since neither Regulation No 4064/89 nor Regulation No 2367/90, which applied at the material time, lay down a period within which offers of commitments must be made. Nor could it prescribe such a period in anticipation without infringing P&G's legitimate expectations. The Commission considers, moreover, that the provisions of Article 10(4) of Regulation No 4064/89 were not applicable in this case, since it took the view that it was in possession of all the evidence enabling it to adopt its decision and that it was therefore required to take a decision, since it was clear that the serious doubts referred to in Article 6(1)(c) had been removed.

139 P&G adopts the Commission's arguments in all essential respects.

Findings of the Court

140 As regards, first, the complaint that P&G's commitments were lodged very late, the Court observes that neither Regulation No 4064/89 nor Regulation No 2367/90, which was then in force, makes the option given to the undertakings concerned to propose commitments in order to modify the notified concentration plan subject to compliance with a pre-established time-limit. It is settled law that the legality of a contested measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (see Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7, and Joined Cases T-79/95 and T-80/95 *SNCF and British Railways* v *Commission* [1996] ECR II-1491, paragraph 48, and Case T-115/94 *Opel Austria* v *Council* [1997] ECR II-39, paragraph 87). Accordingly, the argument that it follows from the provisions of the subsequent regulation, Regulation No 3384/94, that the commitments proposed by P&G must be regarded as unreasonably late is of no relevance to a submission that the Commission was required to reject the modifications made by the undertakings concerned and to the original concentration plan.

141 As regards the argument that the time-limits set for the various participants in the proceedings were too short, the Court points out, first, that P&G submitted its proposed commitments to the Commission on 10 June 1994, that is to say, 17 days before the expiry of the period prescribed by Article 10(3) of Regulation No 4064/89, the rules for calculating that period being set out in Section II of Regulation No 2367/90. Having regard to the fact that the commitments in question, relating to the sale to a third party of the Camelia business, satisfied the essential requirement set by the Commission during the proceedings for the authorization of the planned concentration, the Court considers that the Commission could not refuse to examine them in the absence of a specific provision in Regulations Nos 4064/89 and 2367/90 concerning the periods within which the undertak-

ings concerned might submit commitments with a view to modifying the original concentration plan.

142 Moreover, as the Court has found in the course of its examination of the first two pleas in this action, the Advisory Committee was able to issue its opinion on the modified concentration plan in full knowledge of the facts and the applicant was put in a position to make known its views on the commitments proposed by P&G, so that the time allowed to them in this case cannot be regarded as inadequate.

143 It follows that it has not been shown that, in the circumstances of the present case, the Commission went beyond the bounds of what was appropriate and necessary to attain the objective sought, which, under Regulation No 4064/89, is to ensure effectiveness of control and legal certainty for the undertakings concerned and, for that purpose, to observe strict time-limits (see the order in *CCE de la Société Générale des Grandes Sources and Others* v *Commission*, cited above, paragraph 30).

144 As regards, second, the complaint based on the period within which the Commission adopted the Decision, the Court observes that by virtue of Article 10(2) of Regulation No 4064/89 '[d]ecisions taken pursuant to Article 8(2) concerning notified concentrations must be taken as soon as it appears that the serious doubts referred to in Article 6(1)(c) have been removed, particularly as a result of modifications made by the undertakings concerned, and at the latest by the deadline laid down in paragraph 3', that is to say, a period not exceeding four months from the date on which proceedings were initiated. Moreover, Article 10(4) of the regulation provides as follows: 'The period set by paragraph 3 shall exceptionally be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision pursuant to Article 11 or to order an investigation by decision pursuant to Article 13'. Article 9 of Regulation No 2367/90 sets out the specific cases referred to in Article 10(4) and the rules for suspending the period.

145 It follows from those provisions that suspension of the period may be ordered only in so far as the Commission considers that it is not in possession of all the information necessary in order to adopt its decision. Since the Commission considered, in the present case, in the exercise of the discretion conferred on it for that purpose, that it had all the information for the purposes of adopting a decision, the Court considers that the Commission could not, without infringing Article 10(4) of Regulation No 4064/89, suspend the prescribed period of four months merely on the ground that P&G had submitted its proposed commitments at a time that was allegedly unreasonably late but that, on the contrary, it was required to adopt its decision as soon as it appeared to it that the serious doubts regarding the transaction had been removed. Consequently, the applicant's argument that the Commission was required to suspend the period laid down by Article 10(3) of Regulation No 4064/89 or, at least, not to adopt its decision six days before the end of that period, cannot be accepted.

146 It follows from all the foregoing that the fourth plea must be rejected.

The fifth plea: lack of reasoning

Arguments of the parties

147 The applicant considers that the Commission infringed Article 190 of the EC Treaty by failing to set out in the Decision the reasons which led it to accept the replacement of P&G's original commitments relating to the divestiture of the non-Camelia business of VPS by those relating to the divestiture of the Camelia business. Furthermore, the Decision does not contain any economic analysis of the effects of the acquisition by P&G of the non-Camelia business, which, according to the applicant, is due to the Commission's failure to take proper account of the data relating to the German market in regard to the own-label brands.

148 The Commission observes that it is settled law (Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661; Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1) that it is not required to respond to every point of fact and of law raised by each interested party and, *a fortiori*, by third parties during the administrative proceedings, but that it suffices if it sets out the facts and the legal considerations having decisive importance in the context of the decision. In the present case, it stressed, throughout the proceedings, the limited and ineffective nature of P&G's original commitments and also set out in the Decision the reasons for which the commitments relating to the Camelia divestiture appeared to it to be necessary and sufficient for the concentration not to be incompatible with the common market.

149 P&G considers that the Commission adequately set out in point 187 of the Decision the reasons for which it did not believe it to be necessary to require P&G to divest itself of the non-Camelia business as well as the Camelia business.

Findings of the Court

150 As to the complaint that there was a lack of reasoning in regard to the switch in the commitments proposed by P&G, the Court observes, first of all, that it is settled law that, although under Article 190 of the Treaty the Commission is obliged to state the reasons on which its decisions are based, mentioning the factual and legal elements which provide the legal basis for the measure in question and the considerations which have led it to adopt its decision, it is not required to discuss all the issues of fact and of law raised by every party during the administrative proceedings (see Case T-2/93 *Air France* v *Commission* ('*TAT*') [1994] ECR II-323, paragraph 92). Moreover, the question whether a statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86, and *Skibsværftsforeningen and Others* v *Commission*, cited above, paragraph 230).

151 In the present case, the Court considers that the statement of reasons for the Decision clearly shows the reasons for which the Commission considered that the acquisition by P&G of VPS's non-Camelia business was not likely to lead to the creation of a dominant position for P&G in Germany or to the strengthening of such a position in Spain, so that the commitment proposed by P&G to divest itself of the Camelia business appeared to it to be sufficient for the concentration to be declared compatible with the common market.

152 In point 187 of the Decision (see paragraph 54 above), after having noted the switch in the brands of which P&G was to divest itself, the Commission set out in a table the structure of the market for sanitary towels in Germany and in Spain after the concentration, taking into account the acquisition by P&G of VPS's non-Camelia business and the sale of Camelia to a third party. On that basis, it found that even though P&G increased its market share of the German market by 6.9% to reach a total share of 43.2% (by value), that increase was solely attributable to its acquisition of VPS's non-Camelia business (namely the non-premium brands), whereas its Always brand would be subject to competition from two significant suppliers of branded premium towels, namely Camelia and Johnson & Johnson, each holding market shares of respectively 24.5% and 13.4%. In those circumstances, having also observed that P&G's market share in Spain would increase by only 0.1%, the Commission concluded that 'the commitments offered by P&G in respect of the Camelia-branded feminine hygiene business of VPS are sufficient to prevent the creation or reinforcement of a dominant position on the German and Spanish markets, or indeed elsewhere in the EEA' (point 187 of the Decision), which constitutes a sufficient statement of reasons for its decision.

153 Moreover, since each part of the Decision must be read in the light of the others (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 66), the Commission's reasoning to the effect that, because of the sale of Camelia and thus the switch of commitments, P&G will be prevented from acquiring a dominant position in Germany is the logical conclusion of its appraisal, *inter alia*, in points 43, 44, 92, 114 and 125 of the Decision, according to which the strength of companies on the market is determined by their ownership and development of a well-

known brand in the premium-products sector, competition with secondary brands or private label brands being, on the other hand, limited.

154 Lastly, as is clear from the file, throughout the proceedings before the Commission the applicant itself stressed the insignificance of VPS's non-Camelia business brands, namely the secondary brands Blümia and Femina, stating that 'the Femina brand is distributed by Schickedanz in Germany only to an extremely limited range of customers' and further that 'having regard to the position of Blümia on the market, the decline of that brand seems to us to be inevitable' (applicant's letter to the Commission of 24 January 1994).

155 In that context, the Court considers that the recitals in the preamble to the Decision set out clearly and unequivocally the reasons for which the Commission considered that the sale of VPS's Camelia business alone was sufficient for the concentration to be declared compatible with the common market, without its being necessary for P&G also to sell the non-Camelia business.

156 As regards the complaint that the Decision does not contain any analysis of the effects of P&G's acquisition of the non-Camelia business of VPS, the Court observes that it follows from Article 2(2) of Regulation No 4064/89 that the Commission is required to declare a concentration compatible with the common market where two conditions are satisfied: first, that the concentration does not create or strengthen a dominant position and, second, that competition will not be significantly impeded by the creation or strengthening of such a position. If a dominant position will not be created or strengthened, the concentration must therefore be authorized, without its being necessary to examine the effects of the concentration on actual competition (judgment in *TAT*, cited above, paragraph 79). Consequently, since in the present case the Commission gave a sufficient statement of the reasons for which it considered that P&G's acquisition of the non-Camelia business would not result in the creation of a dominant position in Germany or the strengthening of that position in Spain, the Court considers that no defect in the statement of reasons can be imputed to the Commission concerning its appraisal of the other effects of that acquisition on the relevant markets.

157 As regards the claim that the Commission failed to take proper account of the data relating to the German market concerning the own-label brands, the Court observes that the applicant is thereby complaining essentially that the Commission underestimated the market share of products manufactured by VPS as own-label brands and, consequently, did not state the reasons for not taking them into account in the overall assessment of the market shares acquired by P&G following the concentration.

158 The Court points out that it is clear from the table in point 187 of the Decision that the figure of 6.9%, which, according to the Commission, represents the increase in P&G's market share on the German market following the concentration, relates solely to the market shares for VPS's secondary brands for towels, Blümia and Femina, and does not include the individual market share of products manufactured by VPS as sub-contractor for retailers, the market shares of the own-label brands being considered together in order to assess the competition brought to bear by retailers on manufacturers such as P&G.

159 However, the Court considers that in the present case the failure to take the specific market share of products manufactured by VPS as sub-contractor and sold under private label brands into account in VPS's total market share does not mean that the statement of reasons is defective. The market shares of those products must, in principle, be attributed to those retailers alone, since they sell them on the market under their own-labels and so compete with the sales of products sold under the manufacturers' brands. In those circumstances, having regard to the probable impact of such a factor on the assessment of the actual strength conferred by the concentration (see paragraphs 174 and 175 below), it is only if the Commission took the view, in the light of the information obtained during the proceedings, that VPS manufactured a high proportion of those products on the German market that the Commission should have explained why that market share was not taken into account in assessing the position acquired by P&G. Since, in the present case, the Commission considered that that specific market share of VPS was slight, the Decision cannot be regarded as being vitiated by a defect in the statement of the reasons on which it is based. The question whether, as the applicant claims, the Commission nevertheless underestimated the market share of VPS's products sold under own-label brands concerns the substance of the contested decision and not the reasoning adopted.

160 In any event, the Court finds that, as is apparent from the present action, the applicant was fully able to dispute the validity of the Commission's substantive assessment of the market shares of VPS's products sold under the own-label brands and, accordingly, the position acquired by P&G as a result of the concentration.

161 It follows that the plea alleging a defect in the statement of reasons of the Decision must be rejected.

The sixth plea: manifest errors of assessment

162 This plea is divided into three parts. In the first part the applicant submits that the Commission incorrectly assessed the consequences of P&G's acquisition of VPS's non-Camelia business on the German market for sanitary towels. In the second and third parts, it claims that the Commission did not correctly determine the impact of the authorized transaction on the household hygiene paper products market and on the market for baby nappies. It concludes from this that the Decision should be annulled for infringement of the Treaty and Regulation No 4064/89, in particular Articles 2 and 8 thereof.

First part: incorrect assessment of the consequences of the acquisition of VPS's non-Camelia business on the market for sanitary towels

— Arguments of the parties

163 The applicant submits that the concentration leads to the strengthening of P&G's dominant position on the German market for sanitary towels, so that the Decision should be annulled for infringement of Article 2(1) and (3) and Article 8 of Regulation No 4064/89.

164 First, it claims that the Commission underestimated the importance of VPS's non-Camelia business and, accordingly, the position obtained by P&G on the German market for sanitary towels as a result of the concentration, since it failed to take into account the specific market share of the products manufactured by VPS and sold under own-label brands. According to the applicant, VPS's share in the own-label products sector is 60%. That estimate is confirmed by the information supplied by the Commission in the course of the present action, from which it appears that the market share of VPS's products sold under own-labels amounts to 8.2% by value and 13% by volume of the total German market for sanitary towels in 1993, which should therefore be added to the market share of 43.2% (by value) attributed to P&G following the concentration. Moreover, in response to the argument that the Femina brand was sold by VPS and should not be taken into account, the applicant states that such a sale could have taken place only after the contested decision, since P&G had been authorized to retain it. However, the appraisal of the legality of the contested decision should take into account only the economic situation and commitments existing at the date on which it was adopted, not events after that date.

165 The applicant considers, second, that by requiring only the Camelia brand and the corresponding plant to be sold the Decision allows P&G, as a result in particular of the large sales force retained in VPS, to offer large retailers non-Camelia business products and Always brand products in substitution for products sold under the Camelia brand. Moreover, the acquisition of the non-Camelia business of VPS allows P&G to establish a complete range of feminine hygiene products and at the same time reduces the possibility for a new entrant to have its products accepted by the large retailers. Lastly, by authorizing a split in the feminine hygiene products business of VPS, the Commission encouraged a weakening of the Camelia brand and thus of competition with P&G.

166 The Commission considers that the applicant's complaint is wholly unfounded in that it claims that there is a strengthening of a dominant position but does not show in what respect the Commission's assessment that the acquisition of VPS by P&G does not give rise to the creation of a dominant position on the German market is incorrect (judgment in *TAT*, cited above).

167 In any event, the acquisition of VPS's non-Camelia business by P&G does not lead to the creation of a dominant position. The Femina brand was, in the end, sold to a third party, so that the non-Camelia business actually acquired, namely Blümia and the products manufactured by VPS and sold under own-labels, represents a market share of only 2% to 3% and concerns lower-quality products which do not compete directly with the products sold under well-known brands such as Always and Camelia. In response to the claim that VPS has a 60% share of the sector for own-label brands in Germany, the Commission states that, according to the statistics sent by P&G on 14 February 1994, the non-Camelia products of VPS represented 13% of the German market by volume and 8.2% by value in 1993. In reply to the written questions put by the Court, the Commission explained, on the basis of the above statistics, that that figure did not relate solely to the market share of VPS's products sold under own-labels, the latter share being estimated at about 1.3% of the German market.

168 Furthermore, the Commission submits that a switch from products sold under premium brands to products sold under own-label brands or secondary brands is very unlikely in view of the wish of large retailers to foster competition between manufacturers in order to maintain a policy of very low margins. Consequently, the large retailers would obtain supplies from other producers if P&G sought to gain an advantage from the favourable position of its Always brand by increasing its prices.

169 P&G contends that during the administrative proceedings the applicant stressed the fact that the commitment to sell the non-Camelia business would have an insignificant effect on competition. P&G adds that in any event it has not retained any of the non-Camelia brands.

— Findings of the Court

170 The Court observes, first of all, that, although the applicant is claiming that the concentration in question is liable to strengthen a dominant position of P&G on the German market for sanitary towels, whereas the Commission concluded in the

Decision that a dominant position would not be created on that market, the applicant is thereby submitting, at least implicitly, that the Commission committed an error of appraisal in reaching that conclusion; the applicant cannot therefore be prevented from contesting the legality of the Commission's decision in that regard (see the judgment in *TAT*, cited above, paragraph 86).

171 Article 2(2) of Regulation No 4064/89 provides as follows: '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'. On the other hand, under Article 2(3), concentrations which create or strengthen such a position are to be declared incompatible with the common market. By virtue of Article 2(1) of the regulation the Commission is required to take into account in particular the market position of the undertakings concerned and their access to markets.

172 In the present case, the applicant claims that the Commission committed an error of appraisal in the Decision both as regards the assessment, in terms of market shares, of the position of VPS's non-Camelia business on the German market for sanitary towels and as regards the privileged access to the large retailers afforded to P&G as a result of the acquisition of that business and the — allegedly harmful — effect of separating VPS's Camelia business from its non-Camelia business.

173 As regards, first, the complaint that the market shares of the non-Camelia business were underestimated, the fact that one or all of the non-Camelia business brands were ultimately sold to third parties after the adoption of the Decision authorizing P&G to acquire the whole of that business cannot be taken into account by the Court, since it is settled law that the legality of a decision must be assessed on the basis of the elements existing at the time of its adoption (see, in particular, *SNCF and British Railways* v *Commission*, cited above, paragraph 48). It must therefore be determined whether, as the applicant claims, the Commission commit-

ted an error of appraisal in taking the view in the Decision that P&G would increase its market share by 6.9% by value, a figure corresponding solely to the market shares of VPS's secondary brands, Blümia and Femina, without taking into account the specific market share of the products manufactured by VPS on behalf of retailers.

174 The Court considers that the mere failure to take into account such a market share is not, of itself, such as to show that the Commission committed an error of appraisal regarding the assessment of VPS's market position. When assessing the market strength of an undertaking which is a party to a concentration, the market shares of the products which it manufactures as sub-contractor for retailers which resell those products under their own labels cannot, in principle, be imputed, in whole or in part, to the market share held by that undertaking in regard to similar products which it sells under its own brand. Since the retailers sell those products under their own labels in order to compete with the products sold under the manufacturers' brands, the market share which they hold as a result of those sales must therefore, as a general rule, be attributed to them for the purposes of assessing the competition to which the manufacturers of premium and secondary brands are subject.

175 Admittedly, if, as the applicant alleges, at the moment when the Decision was adopted VPS manufactured approximately 60% of the products sold in Germany under own-labels, the failure to take any account of that share of production would in this case result in an underestimate of the actual strength of VPS on the market and therefore of the position acquired by P&G as a result of the concentration. In such a case, the fact that VPS is the main source of supply for retailers in regard to the products which they sell under their own-labels would have been liable to confer on P&G, as a result of the acquisition of the non-Camelia business, privileged access to the major retailers and to enable it to practice, in regard to the retailers, a commercial policy which made the supply of those products conditional on the preferential purchase of towels under its premium brand.

176 However, during the proceedings before the Court, the Commission proved to the requisite legal standard, on the basis of statistics sent to it by P&G on 14 February 1994 in the course of its examination of the notified concentration plan, the low market share of products manufactured by VPS and sold under own labels. According to those statistics, the market share of the whole of VPS's non-Camelia business, including the products sold under own labels, amounted to 8.2% (by value) of the German market for towels in 1993, that is to say, a market share, solely for VPS's products sold under private labels, of merely 1.3% (by value) (8.2% less 6.9%). Moreover, having regard to the fact that, according to the Decision and the Commission's uncontested observations, the market share of all the own-label brands was approximately 12.5% (by value), it follows that the share of VPS in the production of towels sold under own-label brands was only approximately 10%.

177 Since, in contrast, the applicant's assertions in regard to the specific market share of VPS's products sold under private label brands are uncorroborated by any evidence or by any figures such as to call into question the correctness of the Commission's assessment, the claim that the market share of the non-Camelia business was underestimated must be rejected (see, for example, Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 89).

178 As regards, second, the complaint that there was an error of assessment concerning the privileged access to major retailers that would be afforded to P&G as a result of the concentration, the Court considers that, in the circumstances of the present case, that argument is not such as to show that the effect of the concentration was to create a dominant position on the relevant market. Thus, in the light of the small market shares of VPS's secondary brands — Blümia and Femina — and of the products manufactured by VPS on behalf of retailers, the mere claim that P&G would, as a result of their acquisition, have the power to prevent competitors' access to the major retailers does not appear to be well founded. Moreover, the applicant has not adduced any evidence to support the argument that P&G might propose to retailers that non-Camelia products be substituted for Camelia products, whereas the Commission has shown, in particular, in the

Decision that the market for towels was characterized by consumers' brand loyalty, in particular in the premium products sector (points 97 and 125 of the Decision). It follows that this complaint must be rejected, just as the claim — which is pure conjecture — that the Commission encouraged the future weakening of the Camelia brand by authorizing a division of VPS's businesses.

179 In the absence of any cogent evidence adduced by the applicant in support of its arguments, the Court considers that, in view of the characteristics of the relevant market and the market share of the two principal competitors of P&G in the premium brands sector, the Commission was therefore entitled to take the view that a market share of 43.2% did not lead to the conclusion that a dominant position would be created (see, by analogy, Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraphs 108 and 109), and that there was no need for it to give any further consideration to the ancillary effects of the concentration on competition (see the judgment in *TAT*, cited above, paragraph 79).

180 In those circumstances, the first part of the plea must be rejected.

Second part: incorrect appraisal of the consequences of the concentration on the household hygiene paper products market

— Arguments of the parties

181 The applicant complains that, when analysing the consequences of the concentration on the paper products market, the Commission failed to take account of P&G's position in the United States and the change in its financial capacities as a result of the sale of Camelia. According to the applicant, the acquisition of VPS, whose market shares in Germany were between 15 and 20%, gave P&G the opportunity to penetrate the European market and to increase its market shares as a result of its financial resources and leading position on the North American market. Moreover, the abandonment of the plan to purchase Camelia enabled P&G to

call on the financial resources which had originally been earmarked for it. By failing to make such an analysis, the Commission infringed Article 2(1) and (3) and Article 8 of Regulation No 4064/89.

182 The Commission considers that the applicant does no more than criticize the alleged failure to take into account certain factors, but does not show that if the Commission had taken them into account the result would have been reversed or prove that the Commission's analysis is incorrect. Furthermore, in the Decision it examined the impact of P&G's entry on the European market, but took the view that there were no serious doubts having regard to the market share of VPS, the absence of P&G from that market in Europe and the characteristics of the market, such as the presence of strong competitors, the growth of the market and the importance of own-label brands. As regards the argument based on P&G's withdrawal from the purchase of Camelia, the Commission considers that, having regard to P&G's financial resources in general, the sale of Camelia is not such as to have a direct effect on P&G's expenditure on the household hygiene paper products market.

183 P&G states that in point 13 of the Decision the Commission took account of the potential impact on the European market of P&G's position on the household hygiene paper products market in the United States and Canada and that it found that there was no overlap between the activities of VPS and P&G. In any event, the market shares acquired by P&G as a result of the concentration are approximately 4% and cannot therefore give rise to any doubts as to the compatibility of the concentration with the common market.

— Findings of the Court

184 The Court observes that in the present case the applicant relies on the Commission's failure to take into account the alleged effects of the concentration on the paper products sector, but does not show in what respect the concentration in

question would result in the creation of a dominant position on one of the relevant markets in that sector. The applicant does not contest the fact, found in the Decision (see paragraph 47 above), that P&G was not active in Europe in that sector at the time when the concentration was notified, so that the concentration in question did not give rise to an addition to the market shares of the undertakings concerned. Moreover, it is not alleged that the Commission committed an error of assessment in finding that competitors and own-labels played an important role in that sector and in taking the view that, having regard to those factors, even on the narrowest possible definition of the market, namely the German market for paper handkerchiefs, on which VPS held a market share of between 35 and 40%, the concentration did not give rise to any serious doubts as regards its compatibility with the common market. If a dominant position is not created or strengthened, a concentration must be authorized and it is not necessary to examine its alleged effects on actual competition (see the judgment in *TAT*, cited above, paragraph 79). In those circumstances, the Court considers that the applicant cannot dispute the legality of the Commission's analysis in regard to the consequences of the concentration for tissue-paper products.

185 In any event, the Commission's conclusion that the concentration does not give rise to serious doubts as to its compatibility with the common market in regard to those products is in no way weakened by the applicant's arguments. Even supposing that the financial resources of P&G and its position on the North American market enable it to increase the market shares of VPS, which is the very purpose of such a concentration, the fact remains that the applicant does not show in what respect such circumstances should have caused the Commission to prohibit the concentration in question when there would be no creation or strengthening of a dominant position on the markets which the Commission considered relevant (see the judgment in *TAT*, cited above, paragraph 87).

186 It follows that the second part of the plea must be rejected.

Third part: erroneous assessment of the consequences of the concentration for the market for baby nappies

— Arguments of the parties

187 The applicant complains that the Commission did not analyse the consequences of the sale to third parties of the 'baby nappies' business of VPS in Germany and in Spain and, accordingly, that it failed to take measures to maintain competition with P&G, which was already dominant on those markets. As regards, in particular, the German market, the Commission failed to exercise any control in regard to the qualities of the purchaser of VPS's business, so that in choosing an operator which does not have the financial and commercial means to remain permanently on the market for manufacturers' brands, P&G is in a position to eliminate the products of VPS which compete with its Pampers products. The applicant concludes that, if VPS's products disappear, P&G, which holds 51% of the market, will hold a dominant position as against competitors who hold market shares in the order of 9 and 5%. In the light of those factors, the Commission should have objected to that sale or at least placed P&G under obligations in regard to the qualities of the purchaser of that business in order to allow competition to be maintained between the products of VPS and the products sold by P&G. In the absence of such measures, the Decision is contrary to Article 2(1) and (3) and Article 8 of Regulation No 4064/89.

188 The Commission argues that the criticisms and assumptions put forward by the applicant do not show that the acquisition of VPS by P&G led to the creation or strengthening of a dominant position, so that this objection is ineffective (judgment in *TAT*, cited above). In any event, since P&G did not acquire control of VPS's 'baby nappies' business, that business was not covered by the concentration and the Commission therefore had no power to impose restrictions as regards the third party chosen to acquire that business.

189 P&G adopts the Commission's arguments and considers that the Commission would have exceeded its powers if it had extended its power of control to the sale by P&G of VPS's 'baby nappies' business, since P&G never acquired control of it.

— Findings of the Court

190 The Court observes that, as is apparent from the Decision and the uncontested observations of the Commission, the parties to the concentration in question clearly intended to exclude VPS's business relating to infant hygiene, that is to say baby nappies, from the subject-matter of the concentration since that business was intended to be sold to a third party concomitantly with the authorization of the concentration. Under the acquisition agreements notified to the Commission, that business was to be separated from VPS and transferred to a trustee, already designated at the time of the notification, with a mandate to ensure its sale to a third party within a short period of time following the completion of the acquisition of VPS by P&G (points 5 and 6 of the Decision). Consequently, since there was no lasting and actual transfer of control of that business to P&G, the business was not covered by the concentration plan submitted to the Commission for its examination. It follows that, since there was no concentration likely to lead to the creation of a dominant position or to the strengthening of such a position on the German and Spanish markets for baby nappies, it is not open to the applicant to complain that the Commission did not adopt a position in regard to the choice — which the applicant alleges is harmful to the maintenance of effective competition — of the third party actually designated to acquire that business of VPS, since the Commission has no power to do so under Regulation No 4064/89.

191 For the same reasons, the claim that, pursuant to Article 8(2) of Regulation No 4064/89, the Commission should at least have imposed obligations in regard to the qualities of the purchaser of that business is ineffective. Moreover, in that regard it should be noted that it is not for the Court, in the context of annulment proceedings, to substitute its own appraisal for that of the Commission and to rule on the question whether the Commission should, pursuant to that article, have attached conditions or obligations to its decision, particularly since the provision in question concerns the substantive examination of the compatibility of the proposed concentration with the common market after proceedings have been initiated under Article 6(1)(c) of Regulation No 4064/89 (see the judgment in *Dan Air*, cited above, paragraph 113).

192 Accordingly, the third part of the plea, alleging a failure by the Commission to analyse the consequences of the concentration in regard to the markets for baby nappies, must be rejected.

193 It follows from all the foregoing that the application must be dismissed.

Costs

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

On those grounds,

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

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs, including the costs incurred by the intervener, P&G.**

Bellamy Briët Kalogeropoulos

Potocki Jaeger

Delivered in open court in Luxembourg on 27 November 1997.

H. Jung A. Kalogeropoulos

Registrar President