JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
9 July 2007 *

In Case T-282/06,

Sun Chemical Group BV, established in Weesp (Netherlands),

Siegwerk Druckfarben AG, established in Siegburg (Germany),

Flint Group Germany GmbH, established in Stuttgart (Germany),

represented by N. Dodoo and K.H. Eichhorn, lawyers,

applicants,

v

Commission of the European Communities, represented by A. Whelan, S. Noë and V. Bottka, acting as Agents,

defendant,

* Language of the case: English.

supported by

The Apollo Group, established in New York, New York (United States),

Hexion Specialty Chemicals, Inc., established in Columbus, Ohio (United States),

represented by I.M. Sinan, Barrister, and J. Uphoff, Solicitor,

interveners,

APPLICATION for the annulment of the Commission Decision of 29 May 2006 declaring a concentration compatible with the common market and the EEA Agreement by which Hexion Speciality Chemicals (The Apollo Group) proposed to acquire full control of Akzo Nobel's Inks and Adhesive Resins business (Case COMP/M.4071 — Apollo/Akzo Nobel, IAR),

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

composed of J. Pirrung, President, N.J. Forwood and S. Papasavvas, Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 27 February 2007,

gives the following

Judgment

Legal context

1 Article 2 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1; 'the Merger Regulation') provides inter alia:

'2. A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.

3. A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.'

2 Article 6(1) of the Merger Regulation provides that the Commission shall examine the notification as soon as it is received and states, at subparagraph (b):

'Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

...'

3 The Commission has set out the analytical approach of its appraisal of horizontal mergers in its Guidelines on the assessment of horizontal mergers under the Merger Regulation (OJ 2004 C 31, p. 5; 'the Guidelines').

Background to the dispute

A — *Parties to the procedure and the concentration*

4 Sun Chemical Group BV ('Sun') manufactures printing inks used in packaging, publication, commercial and industrial, pigments, dispersions, and security and brand protection. It is an indirect wholly owned subsidiary of Dainippon Ink and

Chemicals, Inc. Sun employs more than 12 000 people and its turnover in the last financial year was in excess of EUR 3 billion. In 2005, Sun sourced approximately [confidential] [1] of rosin resins in Europe.

5 Siegwerk Druckfarben AG ('Siegwerk') is a global manufacturer of printing inks, with its focus on packaging ink, gravure ink and web offset. It is the parent company of the Siegwerk group of companies. Siegwerk employs approximately 4 000 people and its turnover in the last financial year was approximately EUR 830 million. In Europe, it purchases approximately [confidential] of rosin resins each year from independent third party suppliers.

6 Flint Group Germany GmbH ('Flint') supplies the printing, converting, and colorant industries. It was formed by the merger of XSYS Print Solutions and Flint Ink Corp in 2005. Flint employs nearly 7 500 people and its turnover in the last financial year was approximately EUR 2.2 billion. In Europe, Flint sources approximately [confidential] of rosin resins each year from independent third party suppliers.

7 Hexion Speciality Chemicals, Inc ('Hexion') produces and sells a range of thermosetting and specialty resins, in particular, rosin resins, hydrocarbon resins, rosin-hydrocarbon hybrid resins, alkyd resins, acrylic dispersions, acrylic resins and other resins such as amino resins, epoxy resins, phenolic resins and polyester resins. Hexion has more than 90 production and distribution facilities in 18 countries in the Americas, Europe and the Asia Pacific region, and employs approximately 7 000 employees.

1 — Confidential information omitted.

8 The Apollo Group ('Apollo') manages a number of investment funds with interests in a wide range of activities at global level. Apollo controls Hexion.

9 Akzo Nobel's Inks and Adhesive Resins business ('Akzo') primarily manufactures products based on rosin, in particular rosin resins, hybrid resins and other rosin derivatives, for use mainly as printing inks and adhesives. It has production facilities in the Netherlands, Portugal, China, New Zealand, Argentina, Canada and the United States.

B — *Product market*

10 Rosin resin is a naturally occurring resin derived from pine trees. It is classified into three types: wood rosin, gum rosin and tall oil rosin. The raw material is upgraded through chemical processing that includes hydrogenation, esterification, polymerisation and purification. From a chemical or technical standpoint, such rosin resins can be classified as rosin soaps, resinates, rosin esters, maleic and fumaric modified resins. Rosin resin is an essential component in the manufacture of printing inks. Printing ink companies rely heavily on the supply of rosin resins and expend, according to the applicants, each year significant efforts to secure the supplies that they need for their production of printing inks. The applicants purchase, according to their own account, 90% of the rosin resins for ink applications available in Europe. Rosin resin is also used in other products such as varnishes, adhesives, medicines, chewing gum and soap.

C — *Administrative procedure*

11 The proposed concentration by which Hexion, owned by Apollo, was to acquire control within the meaning of Article 3(1)(b) of the Merger Regulation, either directly or through wholly owned subsidiaries, of the whole of Akzo by way of purchase of shares and assets did not have a Community dimension within the meaning of Article 1(2) or (3) of the Merger Regulation. Knowing that it was capable of being reviewed under the national merger control laws in four Member States, the parties to the concentration applied to the Commission, on 3 February 2006, for a referral pursuant to Article 4(5) of the Merger Regulation. As none of the Member States expressed its disagreement within the applicable period, the concentration was deemed to have a Community dimension and the Commission received notification of the proposed concentration on 18 April 2006.

12 On 25 April 2006, the Commission sent out detailed questionnaires to 21 competitors ('the competitors' questionnaire') and to 13 customers ('the customers' questionnaire') of the merging parties in the markets for rosin resins, hydrocarbon resins and hybrid resins. The questionnaires were to be answered by 2 May 2006. The Commission received replies from 13 competitors and 10 customers.

13 On 28 April 2006, Flint submitted its reply to the customers' questionnaire. On the same date, the Commission published a notice in the *Official Journal of the European Union* (OJ 2006 C 102, p. 9), inviting interested third parties to submit any observations they might have on the proposed operation to the Commission no later than 8 May 2006.

14 On 4 May 2006, having obtained an extension of two days, Sun submitted its reply to the customers' questionnaire. On 10 May 2006, Sun contacted the Commission's

case team and left a voicemail message seeking a meeting to discuss both the concentration and Sun's reply to the customers' questionnaire. On 11 May 2006, Sun sent an email to a member of the Commission's case team, indicating that it would be prepared to meet with the Commission at short notice to discuss the case.

15 On 12 May 2006, Siegwerk submitted its reply to the customers' questionnaire. On the same date, Sun provided information and additional explanations as to why it had concerns about the concentration. The Commission asked the notifying party to give its views on the issues raised in Sun's submissions.

16 On 16 May 2006, the notifying party gave its views by letter. On 17 May 2006, Sun lodged two separate submissions in which it set out why the Commission should declare the operation incompatible with the common market. The information provided concerned recent price increases, capacity constraints in the market and difficulties of switching suppliers that had been experienced by the customers of the merging parties. The Commission asked the notifying party for observations on Sun's final comments.

17 On 18 and 19 May 2006, the notifying party submitted its observations in three emails.

D — *Contested decision*

18 On 29 May 2006, the Commission adopted, pursuant to Article 6(1)(b) of the Merger Regulation, its decision in Case COMP/M.4071 — Apollo/Akzo Nobel IAR,

declaring the notified concentration to be compatible with the common market ('the contested decision').

19 In the contested decision, the Commission first considered, in recitals 10 to 45, the relevant product and geographic markets and then analysed, in recitals 51 to 80, the effects of the concentration on competition on these markets.

20 As to the relevant product markets, the Commission identified, in recitals 8 to 24 of the contested decision, an overlap of the merging parties' activities in the production of rosin resins, hydrocarbon resins, alkyd resins and acrylic dispersions. It observed that this overlap only occurred in resins used for the production of inks. Leaving open the precise delimitation of the relevant product market, because it considered that the transaction did not raise competitive concerns under any definition, the Commission examined each of the resins for printing ink applications and took the view that the rosin resins for printing ink applications all belonged to the same product market.

21 With respect to the relevant geographic market, the Commission considered, in recitals 35 to 38, that it covered at least the European Economic Area (EEA) and that it may be global. It left the precise definition open, observing that the final assessment did not change regardless of whether the market should be defined as being at least the EEA or worldwide.

22 As regards the assessment of the effects of the concentration on the EEA market for rosin resins for printing ink applications, in recitals 51 and 53 the Commission

estimated the market shares of the merging parties and of their competitors on this market in 2005 as follows: Hexion [10-20]%, Akzo Nobel IAR [20-30]% (combined [30-50]%), Arizona [10-20]%, Cray Valley [10-20]%, Respol [0-10]%, DRT [0-10]%, Euro-Yser [0-10]%, Kraemer [<5]%, Westvaco [<5]%, Others [0-10]%. At the level of the worldwide market for rosin resins, the Commission estimated that the combined market shares of the merging parties would be [20-30]%, due to the presence of a significant number of new entrants.

23 As to anti-competitive effects on this market, the Commission began by stating in recital 59 that 11 out of 13 of the merging parties' competitors considered that the transaction would not have such effects, but that around half of the customers which had participated in the market survey had indicated that the reduction in the number of players and the relatively high market share of the merged entity could lead to price increases and to a reduction in product development.

24 Recital 60 then points out that the market investigation confirmed that most of the customers needed specific grades of rosin resins for their applications and that in some instances the resin was customised for the customer, a process which could take several months. According to the Commission, this indicated that the products sold on the market in question were not homogeneous and that there were many producers on the market, characterised by lack of symmetry in market shares. Recital 60 also notes concerns voiced by around 30% of producers about the growing impact of other producers from outside of the EEA, such as Arez (China). The Commission therefore considered that, in principle, coordinated anti-competitive behaviour was unlikely to result from this transaction. However, given that two big players were to merge, the transaction could give rise to anti-competitive effects in this market, resulting from the unilateral behaviour of the merging undertakings.

25 In recitals 62 to 65, the Commission first examined production capacities and observed that, according to the results of the market investigation, the market was not subject to capacity constraints. Recital 64 states that, considering that production on the EEA market for rosin resins for ink applications is around 144 000 t, the producers who took part in the market investigation (Arizona, Cray Valley, Respol, Kraemer, Megara, Union Resinera and Eastman) accounted for 28 200 t of spare capacity, which represents 19.5% of total production on the market. According to the contested decision, if the parties' estimates for other producers (including DRT and Euro-Yser) were correct, spare capacity would amount to 41% of total production on the market. Recital 65 affirms that the market investigation confirmed, and the majority of the customers acknowledged, that there was overcapacity on the market.

26 Recitals 66 and 67 then address the concerns expressed by one customer relating to the price increases of rosin resins by Akzo and Hexion and to supply problems between September and December, when seasonal demand for rosin resins is at its peak, leading to supply constraints during these months. In that respect, recital 67 states that the evidence submitted by the parties to the merger indicates that the supply issues reported were not caused by an anti-competitive situation on the relevant market. First, they resulted rather from an increase in the prices of raw materials which are key inputs for the production of rosin resins, such as crude oil, gum rosin and tall oil resin, which were subject to significant price increases in recent years, with the price of gum rosin having risen from USD 500 per tonne in January 2004 to about USD 1 250 per tonne at the date of the contested decision. Secondly, it is noted that the available information regarding the supply problems mentioned above appears to indicate that they were due to technical problems experienced by a particular supplier or to shutdowns resulting from scheduled maintenance work and not to a general lack of production capacity in the overall market during the period considered. Furthermore, it appears that the customer in

question was able to find alternative sources of supply which mitigated the impact of that unexpected shortage.

27 Recital 68 affirms that, in the light of the above, it appears to be likely that any attempt of the merged entity to raise prices unilaterally could be defeated by significant competitors currently on the market such as Arizona, Cray Valley, Respol and by other smaller producers, which have both the spare capacity and the technical knowledge to counteract any anti-competitive behaviour.

28 In recitals 69 to 71, the Commission examines possible countervailing buyer power exerted by ink manufacturers on the resin manufacturers. Recital 69 states that the parties to the merger indicated that their customers are in a position to influence the prices and that some, which have in-house rosin resin production, discipline their suppliers successfully. With respect to the influence of in-house production of rosin resins that some ink manufacturers have, recital 69 notes that the parties estimate that three major customers have significant in-house production: Flint and Siegwerk, which have an estimated production capacity of around 25 000 t and 12 000 t respectively, and Huber, which recently acquired Micro Inks and informed its suppliers that it would begin shifting purchases to its subsidiary. Recital 70 then states that the investigation has shown that, in general, rosin resin producers' sales are concentrated with two or three big customers, with the top five ink producers accounting for approximately [80-90]% of Hexion's sales of rosin, hybrid and hydrocarbon resins for ink applications and [90-100]% of Akzo's. In addition, the top two customers accounted for [50-60]% and [70-80]% of the two companies' respective sales of rosin, hybrid and hydrocarbon resins for ink applications. Therefore, the Commission considers in recital 71 that the strong dependence of the parties on a few big customers, and the ability that other producers have to serve

these customers, constitute significant disincentives to potential unilateral anti-competitive behaviour.

29 Recital 72 concludes that, in the light of the above, the proposed transaction does not give rise to competition concerns with respect to rosin resins for printing ink applications.

Procedure

30 By an application lodged at the Registry of the Court of First Instance on 9 October 2006, the applicants brought the present action.

31 By a separate document lodged on the same day, the applicants also applied for an expedited procedure, pursuant to Article 76a of the Rules of Procedure of the Court of First Instance.

32 By a document lodged at the Registry of the Court of First Instance on 31 October 2006, Apollo and Hexion applied for leave to intervene in support of the Commission.

33 On the same day, the Commission lodged its observations on the application for an expedited procedure, in which it indicated that, in order to exercise its rights of defence, it would have to rely on confidential information and documents submitted by the merging parties and by third parties.

34 By a separate document lodged on the same day at the Registry of the Court of First Instance, the Commission lodged an application for measures of organisation of procedure pursuant to Article 64(4) of the Rules of Procedure.

35 By way of measures of organisation of procedure, the applicants, the Commission and the interveners attended an informal meeting on 8 November 2006 with three judges of the Second Chamber of the Court of First Instance, to whom the case was assigned, in order to examine the possibility of the application for an expedited procedure being granted. At that meeting, the applicants stated that, given the constraints of the expedited procedure, they did not intend to dispute the market definition set out in the contested decision.

36 On 14 November 2006, the Second Chamber of the Court of First Instance decided to grant the application for an expedited procedure.

37 On 16 November 2006, the Second Chamber of the Court of First Instance adopted measures of organisation of procedure governing the submission in evidence of confidential information or documents in the present case.

38 By order of the President of the Second Chamber of the Court of First Instance of 17 November 2006, after hearing the views of the main parties, Apollo and Hexion were granted leave to intervene in support of the Commission and to submit a statement in intervention, which they did on 8 December 2006.

39 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure and, by way of measures of organisation of procedure, sent the parties a number of questions to be answered orally at the hearing.

40 The parties presented oral argument and answered the written and oral questions put by the Court at the hearing on 27 February 2007.

41 At the hearing, the Commission gave a non-confidential version of a new document to the members of the Court of First Instance and to the other parties. After hearing the parties' views, the decision on the admissibility of that document in evidence was reserved. The Court decided not to add it to the file.

Forms of order sought by the parties

42 The applicants claim that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

43 The Commission contends that the Court should:

— declare the action inadmissible with respect to Siegwerk and Flint;

— dismiss the remainder of the application;

— order the applicants to pay the costs.

44 The interveners claim that the Court should:

— dismiss the application;

— order the applicants to bear their own costs and to pay those incurred by the interveners.

Law

A — *The admissibility of the application*

1. *Arguments of the parties*

45 The Commission submits that the contested decision is not of individual concern to Siegwerk and Flint. Whether a third party is individually concerned by a decision finding a concentration to be compatible with the common market depends, first, on its active participation in the administrative procedure, and secondly, on the effect of the decision on its market position. Mere participation in the administrative

procedure is not sufficient on its own, because merger control requires regular contact with numerous undertakings. Only active participation in the administrative procedure is a factor regularly taken into account to establish, in conjunction with other specific circumstances, the admissibility of an action, especially where such active participation had an effect on the course of the procedure and on the content of the contested decision.

46 In the present case, however, the participation of Siegwerk and Flint in the administrative procedure was limited to submitting a reply to the Commission's customers' questionnaire and their replies are terse and general. Their limited participation did not have any identifiable effect on the course of the procedure or on the content of the contested decision. Therefore, their participation in the administrative procedure cannot be described as active participation. The application does not detail any other circumstances that would differentiate those two undertakings from other customers of the merging parties. The concentration affects the market position of Siegwerk and Flint in the same way as it affects that of any other buyer of rosin resins.

47 According to the Commission, there are no good grounds in the present case for allowing Siegwerk and Flint to be parties to an action that they could not have brought on their own. The application relies to a considerable extent on statements that Siegwerk made in its reply to the Commission's customers' questionnaire with respect to the availability of raw materials and neither Sun nor Flint had raised this issue of availability during the administrative procedure. This lack of consistency in the applicants' respective replies is another reason for assessing the standing of each party separately.

48 The applicants consider that the contested decision is of direct and individual concern to them since it will affect their businesses and in particular their circumstances in respect of supply, because rosin resins form a vital input in their production, accounting for a significant part of the price of the end product.

Furthermore, prior to the merger, the applicants were major customers of both Hexion and Akzo and they are the largest purchasers of rosin resins in the ink industry, accounting together for approximately 90% of rosin resins purchased in the EEA. The applicants also consider that each of them took an active part in the administrative procedure.

2. *Findings of the Court*

49 It must be pointed out at the outset that the Commission does not dispute Sun's *locus standi*. Since Sun participated actively in the administrative procedure, the admissibility of its application is not in any doubt.

50 According to case-law which is now well established, since one and the same application is involved, there is no need to consider whether the other applicants are entitled to bring proceedings (Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 31, and Case T-374/00 *Verband der freien Rohrwerke and Others* v *Commission* [2003] ECR II-2275, paragraph 57; see also, to that effect, Joined Cases T-447/93 to T-449/93 *AITEC and Others* v *Commission* [1995] ECR II-1971, paragraph 82).

51 None of the points put forward by the Commission in the present case provides justification for the Court to depart from this case-law. The Court has indeed distinguished, in some cases, between applicants as regards the purpose of admissibility of an action (Case T-131/99 *Shaw and Falla* v *Commission* [2005] ECR II-2023, paragraph 12, and the order in Joined Cases T-228/00, T-229/00, T-242/00, T-243/00, T-245/00 to T-248/00, T-250/00, T-252/00, T-256/00 to T-259/00, T-265/00, T-267/00, T-268/00, T-271/00, T-274/00 to T-276/00, T-281/00, T-287/00 and T-296/00 *Gruppo ormeggiatori del porto di Venezia and Others* v

Commission [2005] ECR II-787, paragraphs 38 and 45). However, the distinctions in those cases were based, as with the case-law referred to in the previous paragraph, on considerations of economy of procedure.

52 The examination which the Commission proposes in the present case would not be in line with those considerations, since, even if it transpires from separate consideration of the admissibility of Flint's and Siegwerk's action that neither has *locus standi*, the Court must nevertheless consider the action as a whole. In that case, the statements made by Flint and Siegwerk would not be excluded from the Court's assessment. Since those statements were submitted to the Commission for assessment during the administrative procedure, they should in any event be taken into account in the present proceedings and the Court's assessment should cover all the pleas and arguments raised in the course of the present action.

53 For reasons of economy of procedure, it is not therefore appropriate to consider the admissibility of the action brought by Flint and Siegwerk separately.

B — *The substance of the application*

54 In support of their application, the applicants raised two pleas in law. The first alleges that the Commission did not follow the Guidelines, and the second, that it made factual errors and errors in its assessment. As regards the second plea, the applicants also allege, in essence, inadequacy of reasoning.

1. *Preliminary observations*

55 It must be pointed out that the Commission is bound by notices which it issues in the area of supervision of concentrations, provided they do not depart from the rules in the Treaty and from the Merger Regulation (Case T-114/02 *BaByliss* v *Commission* [2003] ECR II-1279, paragraph 143, and Case T-119/02 *Royal Philips Electronics* v *Commission* [2003] ECR II-1433, paragraph 242).

56 It is clear from paragraph 5 of the Guidelines that they describe the analytical approach which the Commission aims to follow in its appraisal of horizontal mergers and which it applies to the particular facts and circumstances of each case. Paragraph 13 states that it is not a question of a 'checklist' to be mechanically applied in each and every case; rather, the competitive analysis in a particular case will be based on an overall assessment of the foreseeable impact of the merger in the light of the relevant factors and conditions. According to the same paragraph '[n]ot all the elements will always be relevant to each and every horizontal merger ... and it may not be necessary to analyse all the elements of a case in the same detail'.

57 It follows that the Guidelines do not require an examination in every case of all the factors mentioned in the Guidelines, since the Commission enjoys a discretion enabling it to take account or not to take account of certain factors (see, by analogy, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 553).

58 Furthermore, it cannot be inferred from the obligation to state reasons that the Commission must provide reasons for its assessment of all the matters of law and of fact which may be connected with the notified concentration and/or which were raised during the administrative procedure. The requirement to state reasons must be adapted to suit the measure at issue and depends on the circumstances of each

case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. Therefore, although the statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review, the Commission does not fail in its duty to state reasons if, in its decision, it does not include specific reasons concerning the assessment of a number of aspects of the concentration which seem to it manifestly irrelevant or insignificant or plainly of secondary importance for the assessment of the concentration (*Verband der freien Rohrwerke and Others* v *Commission*, cited in paragraph 50 above, paragraphs 184 to 186).

59 It should also be pointed out that acts of the Community institutions are presumed to be valid (Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraph 48, and Case T-310/00 *MCI* v *Commission* [2004] ECR II-3253, paragraph 55), and that the legality of the individual contested measure must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted. Consequently, the legality of the contested decision must be assessed on the basis of the facts existing at the time when the measure was adopted and not in the light of subsequent events (see, to that effect, Case T-177/04 *easyJet* v *Commission* [2006] ECR II-1931, paragraphs 203 and 204).

60 Lastly, according to settled case-law, review by the Community judicature of complex economic assessments made by the Commission in the exercise of the power of assessment conferred on it by the Merger Regulation is limited to ascertaining compliance with the rules governing procedure and the statement of reasons, the substantive accuracy of the facts and the absence of manifest errors of assessment or misuse of powers (see Case T-342/00 *Petrolessence and SG2R* v *Commission* [2003] ECR II-1161, paragraph 101; Case T-87/05 *EDP* v *Commission* [2005] ECR II-3745, paragraph 151, and *easyJet* v *Commission*, cited in paragraph 59 above, paragraph 44). In that respect, it should be borne in mind that not only must the Community judicature ascertain whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the

information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraph 39).

61 It is clear from the foregoing that review by the Court of First Instance of the contested decision is not limited merely to establishing whether or not the Commission took into account elements mentioned in the Guidelines as relevant to the assessment of the impact of the concentration on competition. The Court must also, in the course of its review, consider whether any possible omissions on the part of the Commission are capable of calling into question its finding that the present concentration does not raise serious doubts as to its compatibility with the common market (see, to that effect, Case T-201/01 *General Electric* v *Commission* [2005] ECR II-5575, paragraphs 42 to 44 and 48).

2. *The first plea in law, alleging that the Commission did not follow the Guidelines*

62 The first plea is subdivided into three parts concerning, respectively, market shares and concentration levels, non-coordinated effects and coordinated effects of the merger. It is appropriate to examine the second and third parts of this plea before the first part.

(a) The second part, alleging the Commission's failure to follow the Guidelines as regards non-coordinated effects of the merger

63 In the context of the second part of the first plea, concerning non-coordinated effects of the merger at issue, the applicants put forward five complaints relating to,

first, classification of the merging parties as close competitors, secondly, the credibility of the alternative suppliers identified by the Commission, thirdly, the opportunities for the merging parties' customers to switch supplier, fourthly, available capacity in the market, and fifthly, the merged entity's ability to hinder expansion by competitors.

64 In that regard, it is appropriate to recall the key elements of the Commission's reasoning in the contested decision relating to non-coordinated effects. The Commission based its finding that the proposed transaction does not raise competition problems on four criteria. First, it found that the competitors Arizona, Cray Valley, Respol and other smaller producers had excess capacity. Secondly, it took the view that price increases and supply problems during the peak period which had been pointed out by a customer were the result, according to the evidence provided, of a price increase in raw materials and temporary technical problems suffered by one producer. Thirdly, the Commission took the view that Arizona, Cray Valley, Respol and other smaller producers had both the capacity and the knowledge enabling them to counter anti-competitive conduct by the merged entity. Fourthly, it stated that the merged entity's customers could exercise countervailing buyer power owing to their size, in-house production of certain rosin resins (including Flint and Siegwerk), vertical integration in the production of rosin resins of others (Huber) and the dependence of rosin resin producers for their sales on two or three large customers.

The first complaint, alleging that the Commission did not follow the Guidelines with regard to the closeness of the merging parties' competitive relationship

— Arguments of the parties

65 The applicants contend that the Commission should have examined whether the merging firms were close competitors, whether they had a history of past rivalry, and

whether the merger would eliminate an important competitive force. The applicants observe that they replied to the customers' questionnaire, first, stating that Hexion and Akzo were their main suppliers. Secondly, they maintained that those two undertakings were indispensable first and second choice suppliers to large printing ink producers, as they were more capable of supplying larger volumes than their competitors. Thirdly, they stated, with regard to certain grades of rosin resins for printing ink applications, that the merging parties possessed highly confidential know-how and were the only ones to have access to raw materials and customers necessary to develop them.

66 The applicants assert that the Commission did not take their comments into account and did not examine whether the merging parties were close competitors within the meaning of the Guidelines and whether the reduction in competition following the merger would lead to price increases, even though the activities of the two merging parties overlapped. The applicants note that the higher the degree of substitutability between the products of merging firms, including their technical skills and their factories' respective production capacities, the more likely it is that they will raise their prices significantly post-merger. Given its size and available production capacity, the combination of Hexion and Akzo has made the merged company an indispensable supply partner of the applicants, allowing it to behave wholly independently of all other market participants, including customers.

67 The Commission replies that the classification of the merging parties as major suppliers does not prove that they were close competitors within the meaning of the Guidelines. At least three other suppliers are also classified as major suppliers by the applicants (without any indication of a preference), by other customers and by competitors. Since Arizona and Cray Valley have [confidential] and seven of the eight producers have stated that they could easily produce the whole range of rosin resins, the applicants have not substantiated their argument that the competitors of

the merged entity could not invest in the development of potentially profitable new grades of resins. The applicants also failed to produce evidence of the closeness of their product portfolios or competitive strategies.

68 The interveners add that the Commission's finding in recital 68 of the contested decision, which states that other producers would be likely to defeat any attempt of the merged entity to raise prices unilaterally, necessarily implies that the merging parties' products are not significantly closer substitutes for each other than for those of their competitors.

— Findings of the Court

69 As a preliminary point, it must be pointed out that the contested decision did not expressly examine whether the merging parties were close competitors. In that regard, according to paragraph 28 of the Guidelines, such proximity is assessed by reference to the degree of substitutability between the parties' products. That same paragraph explains that indications as to the degree of substitutability may result, inter alia, from the fact that a substantial number of customers regard the merging parties as their first and second choices of supplier, that rivalry between the parties has been an important source of competition and that their competitors produce substitutes which are not close to the products of the merging parties.

70 It must therefore be ascertained whether the Commission failed to follow the Guidelines by not examining whether the merging parties were close competitors.

71 As regards, first of all, the applicants' argument that they had informed the Commission that the merging parties were their main suppliers, it is apparent from the file that the applicants also described Arizona, Cray Valley and Respol as their main suppliers and that other customers added Arez, Westvaco, Resinall and DRT (replies to questions 35 and 36 of the customers' questionnaire) to that list. In addition, of the applicants only Siegwerk clearly stated that the merging parties were its number one suppliers, Flint and Sun not having made any classification of their main suppliers. Of the other customers, only two described the merging parties as their number one and number two suppliers (Ciba Specialty Chemicals mentions Hexion and Akzo, Van Son refers to Hexion), but none of them specified whether this was the case for rosin resins. The other customers did not make any classification. In addition, Huber points out that Hexion lost market share, Van Son states that Akzo lost market share and Epple Druckfarben states that both merging parties lost market share.

72 In the light of all those replies, it must be concluded that the assertions of the applicants and the other customers that the merging parties were their main suppliers pre-merger does not indicate that a substantial number of customers regarded the merging parties as their first and second choice suppliers within the meaning of paragraph 28 of the Guidelines (see paragraph 69 above). Therefore, contrary to what the applicants claim, those assertions do not substantiate their argument that the merging parties are close competitors within the meaning of the Guidelines.

73 As regards, secondly, the argument that the merging parties are indispensable suppliers to large printing ink producers, as they are more capable than their competitors of supplying the larger volumes needed, it must be borne in mind that Flint and Sun referred, in their replies to questions 40 and 45 (Flint) and 42 (Sun) of the customers' questionnaire, to the size of rosin resin volumes which those producers can supply. It is apparent from the administrative file that three of the merging parties' competitors state that the volumes are large because of the limited number of customers which have major global requirements and which purchase

90% of printing ink resins (replies of Neville, Cray Valley and Respol to question 40 of the competitors' questionnaire).

74 However, it is also apparent from the administrative file that the applicants also obtain supplies from smaller producers such as Megara and Kraemer (replies of Megara and Kraemer to question 48 of the competitors' questionnaire). This fact indicates that, at least for certain categories of rosin resins, the smaller competitors of the merging parties can meet the applicants' requirements. In that regard, it is clear from the contested decision that the smaller undertakings together have a market share which is not insignificant (around 21% according to the Commission) and that they have excess capacity. In addition, the market shares of Arizona, Cray Valley and Respol show that they are able to supply all volumes required. Furthermore, it is clear from the file that they also have considerable excess capacity. In addition, Arez is described by two of the customers who replied to question 35 of the customers' questionnaire as one of their main suppliers and the Commission points, in recital 60 of the contested decision, to Arez's growing impact on the market. Finally, the fact that other customers mentioned Westvaco, Resinall and DRT (smaller suppliers) as their main suppliers shows that the need for large volumes as argued by the applicants does not relate to all the demand in the market.

75 In the light of all those replies, it must be held that the assertion made by the applicants and by certain competitors that the applicants require large volumes does not therefore show that the competitors' products are less close substitutes, from the customer point of view, than the merging parties' products. Consequently, contrary to what the applicants claim, that assertion does not substantiate their argument that the merging parties are close competitors within the meaning of the Guidelines.

76 Thirdly, as regards the argument that the merging parties are the only ones to possess highly confidential know-how and the raw materials and customers

necessary to develop certain grades of resins, it must be pointed out that almost all the merging parties' competitors indicated that they could easily produce the whole range of rosin resins (replies to question 25 of the competitors' questionnaire). Even though the applicants dispute that fact, in particular in relation to Arizona, it must be observed, however, that the applicants have not provided any evidence to that effect and that Arizona had also asserted, in reply to question 25 of the competitors' questionnaire, that it could easily produce the whole range of rosin resins. In addition, the market shares of Arizona and Cray Valley show that they have a customer base which is comparable in quantitative terms to Hexion's pre-merger customer base. Furthermore, the applicants have not given details of the nature of the alleged difficulties in accessing the necessary raw materials in the present case. Accordingly, the applicants have not sufficiently proven their argument.

77 Finally, it must be held that the applicants have not provided any evidence other than that referred to in the previous paragraphs to support the specific argument that there was a history of particular rivalry between the merging parties. By the same token, they also have not substantiated their claim that the merger eliminated an important competitive force within the meaning of paragraphs 37 and 38 of the Guidelines.

78 For those reasons, it must be held that the applicants have not shown that the merging parties were close competitors within the meaning of the Guidelines. Accordingly, and in the light of the evidence put forward by the parties and examined above, the Commission cannot be criticised for not dealing with the closeness of competitive relations between the merging parties in the contested decision. Therefore, since the absence of such analysis does not undermine the Commission's finding, this plea must be rejected.

The second complaint, alleging that the Commission did not follow the Guidelines with regard to the credibility of the alternative suppliers

— Arguments of the parties

79 The applicants maintain that the Commission did not correctly examine whether the competitors on the market could be regarded as credible suppliers to the printing ink industry. When stating in recital 68 of the contested decision that 'it appears to be likely that ... other smaller players ... have both the capacity and the knowledge [to be credible suppliers]', the Commission ignored the applicants' submissions which indicated that pre-merger only four or five (main) players in the market were worth considering. The Commission, however, estimated the number of credible suppliers at 13. Contrary to its previous practice, the Commission took the view that suppliers accounting for less than 5% of total supply could be considered to be credible competitors and therefore deemed to exercise a sufficient competitive constraint.

80 In the view of the applicants, it is apparent from previous decisions that the Commission should have taken into account factors such as the credibility of 'fringe' suppliers (Commission Decision 2002/174/EC of 3 May 2000 declaring a concentration to be compatible with the common market and the EEA Agreement (Case No COMP/M.1693 — Alcoa/Reynolds) (OJ 2000 L 58, p. 25; 'Alcoa/Reynolds'), their reliability as long-term suppliers of sufficient quantities where supply of small and fragmented quantities on an irregular basis does not make them an option for customers (Alcoa/Reynolds), whether large customers could shift purchases from larger suppliers to a greater number of smaller suppliers (Commission Decision 92/553/EEC of 22 July 1992 relating to a proceeding under the Merger Regulation (Case No IV/M.190 — Nestlé/Perrier) (OJ 1992 L 356, p. 1; 'Nestlé/Perrier'), and whether other smaller suppliers would be able to meet orders in the short term for a significant part of the market (Commission Decision 91/535/

EEC of 19 July 1991 declaring the compatibility with the common market of a concentration (Case No IV/M068 — Tetra Pak/Alfa-Laval), 'Tetra Pak/Alfa-Laval').

81 For those reasons, the applicants question the Commission's market definition, as a number of smaller competitors may be able to supply smaller customers, but are unable to supply larger needs such as those of the applicants. Therefore, the Commission should have investigated whether the market for rosin resins for printing ink applications had to be sub-divided into, on the one hand, a market for large customers, and on the other, a market for small customers.

82 The Commission considers that, by virtue of their market shares, Arizona, Cray Valley and Respol are credible alternative suppliers which also have significant excess production capacity. As regards smaller suppliers, the relevant question is not whether each of the smaller suppliers can compete with the main suppliers, but whether, as a whole, they can put competitive pressure on the merged entity. In that regard, the Commission notes that the smaller suppliers account for 21 to 25% of the total production capacity of rosin resins, that the majority of producers of rosin resins have confirmed that they were able to produce easily the whole range of rosin resins and that the applicants also sourced their needs from smaller competitors, including Megara and Kraemer. The contested decision also states that producers from outside the EEA, in particular Arez, may be credible alternative suppliers. Finally, according to the Commission, the facts in Alcoa/Reynolds, Nestlé/Perrier and Tetra Pak/Alfa-Laval are different from those in the present case.

83 The interveners support the Commission's reasoning, in particular in relation to statements made by the applicants at joint meetings which took place prior to adoption of the contested decision. Those statements indicate that, in fact, the applicants purchase large quantities of rosin resins from various competitors of the merging parties. The interveners also claim that the applicants have not provided proof that the suppliers referred to in the contested decision are not credible alternatives.

— Findings of the Court

84 At the outset, it should be recalled that the Commission examined, in recitals 62 to 67 of the contested decision, the production capacity, and in particular, the excess capacity of the suppliers on the market, including smaller competitors of the merging parties. According to paragraph 31 of the Guidelines, customers of merging parties may have difficulties switching to other suppliers where there are few alternative suppliers or where their switching costs are too high, and, therefore, the merger may affect these customers' ability to protect themselves against price increases.

85 It must therefore be established whether the Commission failed to follow the Guidelines by taking the view that the smaller producers were alternative credible suppliers.

86 First of all, the applicants stated, during the administrative procedure, that there were no alternative suppliers and that only a very few producers (Akzo, Hexion, Arizona, Respol and Cray Valley) were capable of producing resins able to be used to produce printing inks (Siegwerk's replies to questions 12 and 15 of the customers'

questionnaire), that the same five undertakings were the main suppliers of rosin resins in Europe (Flint's reply to question 36 of the customers' questionnaire) and that there were very few suppliers (Akzo, Hexion, Arizona and Cray Valley) (Sun's replies to questions 36 and 40 of the customers' questionnaire).

87 However, it has already been pointed out that it is also clear from the file that other customers also described other, smaller producers as their main suppliers (see paragraph 71 above), that the applicants also obtain supplies from smaller competitors of the merging parties (see paragraph 74 above), that smaller undertakings together have a significant market share and have excess capacities (see paragraph 74 above), and, finally, that almost all competitors of the merging parties stated that they could easily produce the whole range of rosin resins (see paragraph 76 above). Therefore, it must be held that the applicants have not shown that the Commission failed to follow the Guidelines by including the smaller competitors of the merging parties in the group of credible alternative suppliers. In particular, in the light of their combined market share and their excess capacities, the evidence on the file does not exclude the possibility that the smaller competitors can, at least with regard to the customers which described them as their main suppliers, exert competitive pressure on the merged entity.

88 Secondly, as regards the Commission's previous decisions on which the applicants rely, it must be observed that the credibility of alternative suppliers must be assessed according to the circumstances of each case. Consequently, the Commission's assessments of the facts in earlier cases cannot be transposed to the present case. In the light of the findings in the previous paragraphs, the Commission cannot be accused of failing to make the same assessment of the facts in the present case as of those in the cases to which it refers (see, to that effect, *General Electric* v *Commission*, cited in paragraph 61 above, paragraphs 118 to 120).

89 Finally, although the applicants submit that a number of smaller competitors would be capable of supplying smaller customers but could not meet larger needs such as those of the applicants, they confirmed, however, at the informal meeting of 8 November 2006, that they were not disputing the market definition set out in the contested decision. Consequently, the credibility of the alternative suppliers should not be assessed according only to the alleged needs of the large customers such as the applicants, but such assessment must encompass the needs of all purchasers on the market. For the rest, that argument is the same as that examined in paragraphs 86 and 87 above and, therefore, should be rejected on the same grounds.

90 In the light of the foregoing, the applicants have not shown that the Commission failed to follow the Guidelines by taking the view that the merging parties' smaller competitors were credible alternative suppliers. Accordingly, that complaint must be rejected.

The third complaint in law, alleging that the Commission failed to follow the Guidelines with regard to the possibility for the merging parties' customers to switch suppliers

— Arguments of the parties

91 The applicants submit that the Commission should have assessed the possibility for the merging entities' customers to switch suppliers. Switching to alternative suppliers of rosin resin is a complicated process for ink production companies and requires exceptionally long lead-in periods, as evidenced by the applicants' replies to

the customers' questionnaire and additional data submitted. The applicants indicated that, because of laboratory scale and additional production trials needed to qualify a new supplier, it usually took [confidential] to introduce a new resin, but that [confidential] could be necessary for some types of ink. Thus, even if credible alternative suppliers were available, customers would be unable to 'credibly threaten to resort, within a reasonable time frame, to alternative sources of supply ... should [the] supplier decide to increase prices', as stated in paragraph 65 of the Guidelines. However, the Commission ignored the applicants' submissions on the difficulties and feasibility of switching suppliers.

92 The Commission replies that the applicants have not sufficiently substantiated their argument since, even if certain resins appear to require a lengthy qualification period, others seem to allow suppliers to be switched within a short time frame. In particular, certain types of resins produced by various suppliers may be pre-qualified, enabling suppliers to be substituted quickly. Furthermore, where contracts are concluded for an average duration of one to three years, with renegotiations on an annual basis, and where the qualification periods, according to certain customers, last [confidential], a qualification period of, for instance, six months, enables suppliers to be switched without difficulty. Finally, the Commission contends that it took account of the applicants' statements in recitals 21 and 60 of the contested decision.

93 The interveners contend that the large resin purchasers, in particular the applicants, pursue multiple supply strategies and that therefore they approve a number of suppliers when qualifying the important resins. Therefore, they are able to change supplier of those resins without delay.

— Findings of the Court

94 As a preliminary point, it must be observed that it is clear from recitals 21 and 60 of the contested decision that, when defining the relevant product market and assessing the merger's possible anti-competitive coordinated effects, the Commission took into account the periods, tests and adaptations necessary for the substitution, from the customers' point of view, of grades of rosin resins by other grades as well as the customised production of certain grades of rosin resins.

95 It must therefore be established whether the Commission failed to follow the Guidelines by not undertaking an analysis, in the context of its assessment of the merger's non-coordinated effects, such as that requested by the applicants, of the difficulties experienced by the merging parties' customers in changing supplier due to the need to qualify rosin resins.

96 First of all, the applicants' replies to the customers' questionnaire indicate that it is not possible to change supplier within a short period (Sun's reply to question 7 of the customers' questionnaire), that it can take [confidential] (Flint's reply to question 13 of the customers' questionnaire), [confidential] (Sun's reply to question 13 of the customers' questionnaire) or [confidential] (Siegwerk's replies to questions 7 and 13 of the customers' questionnaire). At the same time, the applicants and the Commission state that the duration of supply contracts generally varies from three months to three years, with annual renegotiations in the case of multiannual contracts. Therefore, since the qualification periods and duration of contracts vary to that extent, the alleged difficulties in transferring orders to other suppliers, even if such difficulties exist, can only concern a part of those orders, that is, generally, the rosin resins for which there are no substitutes available from competing suppliers (see the paragraph below) and for which longer qualification periods are necessary.

Accordingly, the applicants' argument concerns, in any event, only one sector of the market in question.

97 Secondly, it is apparent from email correspondence, submitted by Sun during the administrative procedure, that, [confidential]. Therefore, even though Sun argued at the hearing that this was an emergency, it is clear that, when necessary, qualification of grades of several rosin resins equivalent to those used by the applicants may be undertaken within a short time frame, thereby enabling orders to be transferred rapidly to other suppliers. In this regard, it should also be pointed out that almost all producers stated in their answers to question 25 of the competitors' questionnaire that they were capable of producing the whole range of rosin resins.

98 Thirdly, in reply to question 42 of the customers' questionnaire, Sun explained that, for its most important products, it sought to have two or three pre-qualified suppliers. In that respect, it should be pointed out that pre-qualification of rosin resins of several suppliers for the same application allows supply by several suppliers of the same resin, or even equivalent grades of resin, and a quicker change of supplier when necessary. Consequently, it is clear from the administrative file that, by virtue of pre-qualification of several suppliers, the applicants are able to transfer their orders for important rosin resins to other suppliers within shorter time frames.

99 In the light of the foregoing, it must be held that the applicants have not established that there are, as they alleged, considerable difficulties in changing supplier, given the need to qualify rosin resins, which prevent customers from credibly threatening to resort, within a reasonable time frame, to alternative sources of supply should the merged entity decide to increase prices anti-competitively. Consequently, and in the light of the evidence put forward by the parties and examined above, the Commission cannot be criticised for not extending its analysis beyond taking into

account, in recitals 21 and 60 of the contested decision, of the limitations to substitution of rosin resins. Therefore, since the lack of analysis claimed by the applicants does not invalidate the Commission's finding, this complaint must be rejected.

The fourth complaint, alleging errors concerning existing capacity in the market

100 The applicants submit that the Commission should have determined whether there is spare or excess capacity in the market. The applicants consider that the Commission conducted an analysis of capacity constraints and of the possibility for competitors to expand output, but that it reached an inaccurate conclusion.

101 In this regard, it suffices to point out that, by this complaint, the applicants are not accusing the Commission of disregarding the Guidelines by failing to conduct an analysis of spare capacity in the market, but rather of having made errors in conducting that analysis. That question falls within the first part of the second plea and will be examined in that context (paragraph 162 et seq. below).

The fifth complaint, alleging that the Commission failed to follow the Guidelines with regard to the merged entity's ability to hinder expansion by competitors

— Arguments of the parties

102 The applicants submit that the Commission should have analysed whether the merged entity could hinder expansion by competitors. They dispute the

Commission's assertion that the majority of the competitors, 11 out of 13, consider that the transaction will have no anti-competitive effects. They submit that the Commission had to explain why it considered that the merged undertaking would be constrained to such a degree that it would neither increase prices nor take other action detrimental to competition.

103 The Commission replies that the applicants' argument is not at all reasoned and that the question they raised was discussed at length in recitals 62 to 74 of the contested decision.

— Findings of the Court

104 As a preliminary point, it must be observed that the contested decision does not contain any express examination of the merged entity's ability to hinder expansion by competitors.

105 It must therefore be ascertained whether the Commission failed to follow the Guidelines by not undertaking an analysis of the merged entity's ability to hinder expansion by competitors.

106 In that regard, it should be borne in mind, according to paragraph 36 of the Guidelines, that some proposed mergers could significantly impede effective competition by leaving the merged entity in a position where it would have the ability to hinder expansion by competitors, and in such a case, competitors may not

be in a position to constrain the merged entity to such a degree that it would not take actions detrimental to competition. Such a position may result, for instance, from control over the supply of inputs, over distribution possibilities or over patents and from the financial strength of the entity in question.

107 In the present case, it must be held that the applicants do not advance any evidence for the purposes of paragraph 36 of the Guidelines to support their specific argument that the merged entity will enjoy a position enabling it to hinder expansion by competitors. Although they assert, in another context, that the merged entity may, on account of its size, infrastructure and experience, acquire a high degree of control or influence over the supply of gum rosin and will have a bargaining power significantly exceeding that of its competitors (see paragraph 148 below), the Commission submitted, without being contradicted by the applicants, that the merged entity will only purchase 5 to 10% of global gum rosin production, which is not indicative of significant purchasing power (see paragraph 154 below). Thus, the applicants have not established, in the present case, that the Commission was required to examine the question of whether the merged entity had the ability to hinder expansion by competitors.

108 Furthermore, the Commission is right in stating, in response to the claim that it was required to set out the reasons why it considered that the merging parties would not increase their prices, that the contested decision sets out, in recitals 62 to 74, the reasons why the Commission considered that competitive constraints would prevent the merged entity from taking action detrimental to competition.

109 In those circumstances, the Commission cannot be criticised for not conducting an analysis of the merged entity's ability to hinder expansion by competitors. Since the absence of analysis claimed by the applicants does not undermine the Commission's finding, that complaint must be rejected.

(b) The third part, alleging that the Commission did not follow the Guidelines with regard to the coordinated effects of the merger in dispute

Arguments of the parties

110 The applicants assert that the Commission failed to analyse properly the coordinated effects which could result from the merger. In their view, the Commission's analysis, based in large measure on the same facts as those relied on by the Commission to find against the creation of a dominant position post-merger, is deficient. Had the Commission reviewed objectively and critically the evidence at its disposal and followed the Guidelines on the appraisal of coordinated effects, it would have concluded that the high combined market share of the merged firm, the few credible alternative suppliers, the capacity constraints and the absence of buyer power pointed both to a position of collective dominance and to a market displaying certain characteristics likely to lead to coordinated effects.

111 An assessment of the case in accordance with the Guidelines would have led to an examination, first, of the ability of market players to monitor to a sufficient degree whether the terms of coordination were adhered to, second, of the existence of credible deterrent mechanisms, and third, of the reactions of third parties and whether they would be able to affect the results expected from the coordination. Even taking account of all the market players that the Commission described as viable competitors in the contested decision, the rosin resin market is highly concentrated, with the top four players accounting for 60 to 90% of the market. Previous Commission decisions indicate that where three or more leading suppliers account for 60% or more of sales, there may be a risk of collective dominance.

112 The Commission considers that it was entitled to limit its reasoning to some key elements because coordinated effects were unlikely to materialise in the present case. Recital 60 of the contested decision points out that the market is not homogenous — most customers buying specific grades of rosin resin that are sometimes customised for them — that there are many producers in the market, that there is a lack of symmetry in market shares, and that the increasing impact of producers outside the EEA, such as Arez (China), gives rise to some concerns among producers. The Commission stands by this analysis and takes the view that the lack of homogeneity and transparency suggests that it is not easy to agree terms of coordination and that it is difficult to monitor the behaviour of competitors. The mere fact that a limited number of players together account for a high share of the market is not a sufficient basis for a finding of collective dominance.

113 The interveners consider that the same facts are relevant to the analysis of coordinated effects as to that of non-coordinated effects of a concentration. They contend that the merger will increase asymmetry in market shares, which, according to the Guidelines and the case-law (Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraph 134), would make it less likely that the undertakings would be able to coordinate. Furthermore, the applicants' claims as to the difficulties experienced by customers in switching suppliers and the inability of competitors to expand their production would, if true, indicate, according to the Guidelines, that producers lack both the incentive and the ability to punish deviation from the terms of the coordination. Therefore, the Commission cannot be expected to engage in a lengthy analysis of the coordinated effects.

Findings of the Court

114 First of all, it must be recalled that the Commission justified its finding that coordinated anti-competitive behaviour has little chance of being adopted post-merger on four criteria. It took the view, first, that the market in question was not

characterised by the homogeneity of the products sold, which were sometimes customised, secondly, that the market had a large number of producers, thirdly, that the market shares were very different, and fourthly, that about 30% of the producers which participated in the market investigation had voiced their concerns about the increasing impact of producers outside the EEA, such as Arez (China).

115 It must therefore be ascertained whether the Commission failed to follow the Guidelines by not carrying out a more detailed analysis of any coordinated effects of the merger.

116 In relation, first, to the contention that the Guidelines provide for an examination of the ability of market players to monitor behaviour deviating from the terms of any coordination, of the existence of credible deterrent mechanisms and of the potential reactions of third parties, it must be pointed out that the Guidelines provide for the examination of those factors, respectively, in paragraphs 49 to 51, 52 to 55 and 56 and 57. That section of the Guidelines also underlines, however, in paragraphs 44 to 48, the need for a common understanding on the terms of coordination.

117 First, paragraphs 45 and 48 of the Guidelines state that firms may find it easier to reach a common understanding on the terms of coordination if they are relatively symmetric, especially in terms of cost structures, market shares, capacity levels and levels of vertical integration. It is also clear that the less complex and the more stable the economic environment, the easier it is for firms to reach a common understanding on the terms of coordination. Therefore, it is easier, for instance to coordinate among a few players than among many. It is also easier to coordinate on a price for a single, homogeneous product, than on hundreds of prices in a market with many differentiated products.

118 It follows that the absence of homogeneity of the products sold, the high number of producers in the market and the asymmetry of market shares indicate that it is not easy for firms to reach a common understanding on the terms of any coordination. It that regard, it should be recalled that the Commission stated in recital 60 of the contested decision that the market in question was not characterised by the homogeneity of the product sold, that there were a number of producers and that their market shares were very different. It follows that the Commission focussed its analysis on whether the undertakings could reach a common understanding on the terms of coordination and that it considered, without however saying so explicitly, that for those reasons it was unlikely that the undertakings would reach a common understanding on the terms of coordination.

119 Secondly, the Guidelines state in paragraph 49 that only the credible threat of timely and sufficient retaliation keeps firms coordinating their conduct from deviating. Markets therefore need to be sufficiently transparent to allow the coordinating firms to monitor to a sufficient degree whether other firms are deviating from the terms of coordination, and thus to know when to retaliate. The Commission considers, in paragraph 50 of the Guidelines, that transparency in the market is often higher, the lower the number of active participants in the market, and that the degree of transparency often depends on how market transactions take place in a particular market.

120 It follows that a high number of producers in the market and an absence of homogeneity of product sold, particularly where it is customised for the customer, indicates a low level of transparency and that, therefore, monitoring of deviating conduct is difficult. In that regard, it should be recalled that, in recital 60 of the contested decision, the Commission stated that the market in question was not characterised by the homogeneity of the product sold, explaining that the product was sometimes customised for the customer, and that there were many producers in the market. Consequently, the Commission also assessed the market players' ability

to monitor compliance with the terms of coordination and considered, without saying so explicitly, however, that for those reasons monitoring of non-compliance was difficult in the present case.

121 In addition, the Commission stated, in recital 60 of the contested decision, that around 30% of the producers which participated in the market investigation had expressed concerns about the increasing impact of producers from outside of the EEA, such as Arez. In that regard, their effect on the market can make both the achievement of the mutual understanding on the terms of coordination and the monitoring of non-compliance even more difficult.

122 In those circumstances, the Commission cannot be accused of failing to follow the Guidelines in considering, first, that coordinated anti-competitive behaviour had little chance of being adopted post-merger, and secondly, that an assessment of deterrent mechanisms and of reactions of third parties was not necessary.

123 As regards, secondly, the argument that the combined market shares of the merging parties, the shortage of credible alternative suppliers, the capacity constraints and the absence of buyer power pointed to collective dominance, it must be observed at the outset that those elements are not among those set out in the Guidelines as being relevant to the assessment of a merger's possible coordinated effects.

124 In particular, according to the Guidelines, purchasing power is a factor to be taken into account when assessing whether the merging parties' customers have countervailing buyer power; the existence of capacity constraints plays a significant role only in the examination of non-coordinated effects. In any event, the

Commission found, in recitals 62 to 67 of the contested decision, that there was excess capacity in the market and, in recital 69, that the customers had significant purchasing power. To the extent that the applicants accuse the Commission of having erred in its assessment in this regard, these aspects are examined in the context of the second plea (see paragraphs 162 et seq. and 206 et seq. below).

125 In addition, neither the merging parties' combined market share of [40-50]% nor the alleged shortage of credible alternative suppliers point to likely coordination between undertakings on the relevant market. Furthermore, it has already been held that the applicants have failed to establish that the smaller suppliers were not credible alternatives (see paragraph 84 et seq. above). The inferences which may be drawn, with regard to paragraph 17 of the Guidelines, from the merged entity's market share will be examined in paragraph 135 et seq. below.

126 As regards, thirdly, the argument that the first four operators hold between 60% and 90% of the market indicates that there may be a risk of collective dominance, the confidential version of the contested decision shows that the merging parties, Cray Valley and Arizona together hold [confidential]% of the market, rising to [confidential]% with Respol. In that regard, it must be borne in mind that, while it is necessary, for the purposes of showing that there is a risk of collective dominance, to establish the existence of a significant collective market share, a significant collective market share is not by itself sufficient to prove that such collective dominance exists. As set out in the Guidelines, the market conditions must be conducive to the creation of a collective dominant position. However, it has already been held that, in the present case, the Commission cannot be accused of failing to follow the Guidelines by considering that, on account of the difficulties in agreeing the terms of coordination and the difficulty in monitoring such coordination, coordinated anti-competitive conduct had very little chance of being adopted post-merger (see paragraphs 115 to 122 above).

127 In relation, fourthly, to the argument that previous Commission decisions indicate that where three or more leading suppliers account for 60% or more of sales, there may be a risk of collective dominance, it must be pointed out, first of all, that the applicants do not refer to any specific previous decision, secondly, that it is clear from the foregoing that a significant collective market share is not by itself sufficient to prove the existence of such dominance, but that the market must be conducive to the creation of a collective dominant position, and thirdly, that in the present case the Commission cannot be accused of failing to follow the Guidelines by considering that coordinated anti-competitive conduct had very little chance of being adopted post-merger (see paragraphs 115 to 122 above).

128 In relation, finally, to the applicants' claim that the Commission's analysis of the merger's possible coordinated effects is based to a large extent on the same facts as those on which it relied to find against the creation of a dominant position post-merger, it must be observed that the same facts may be relevant to several distinct aspects of the Commission's assessment of the possible effects of a merger and that, therefore, consideration of those facts at several points in the analysis does not in any way limit their relevance in those respective contexts. In the present case, it suffices to point out in this regard that it is clear from the considerations set out in paragraphs 115 to 122 above that the Commission based its analysis of any coordinated effects of the merger on matters of fact relevant to that analysis.

129 In those circumstances, the Court must hold that the applicants have not established that the Commission failed to follow the Guidelines by not carrying out a more thorough analysis of any coordinated effects of the merger. Consequently, that part of the plea must be rejected.

(c) The first part, alleging that the Commission failed to follow the Guidelines with regard to market share and concentration levels

Arguments of the parties

130 The applicants claim that, while the Commission was correct to conclude that the transaction would result in a merged entity of the first and the second players in the rosin resin market with a very high combined market share of 40 to 50%, indicative of dominance (*BaByliss* v *Commission*, cited in paragraph 55 above, paragraph 329), and with the third and the fourth players having a mere 10 to 20% each, it failed to draw the right conclusions in accordance with its own Guidelines (paragraphs 16 to 21). The Commission also failed to consider the concentration levels in the relevant market, despite their providing a valuable indicator of the competitive situation in the market. In the present case, appropriate consideration of that factor would have revealed that the change in concentration levels brought about by the merger raised real concern.

131 The Commission replies that paragraph 17 of the Guidelines declares that only very large market shares of 50% or more may in themselves be evidence of the existence of a dominant market position. Furthermore, paragraph 21 of the Guidelines does not contain a presumption that concentration levels above those indicative thresholds would give rise to competition concerns. Therefore, where other case-specific grounds exist for concluding that there are no serious doubts, it is not necessary to examine concentration levels.

132 The interveners submit that market shares and concentration levels are only the starting point for the Commission's analysis. Furthermore, the issue in *BaByliss* v *Commission*, cited in paragraph 55 above, was not whether the Commission should have presumed that a market share in excess of 40% was likely to give rise to

dominance. Furthermore, the Court of First Instance found in Case T-290/94 *Kaysersberg* v *Commission* [1997] ECR II-2137, paragraph 179, that a market share of 43.2% was not sufficient to give rise to dominance where the two next largest competitors had market shares of 24.5% and 13.4%.

Findings of the Court

133 As a preliminary point, it must be observed that the Commission set out the market shares of the various suppliers in the market in recitals 51 to 53 of the contested decision, but did not assess those market shares according to the criteria stated in paragraph 17 of the Guidelines nor did it make a Herfindahl-Hirschmann index ('HHI') calculation for the purposes of comparison with the thresholds laid down in paragraphs 19 to 21 of the Guidelines.

134 It must therefore be established whether the Commission failed to follow the Guidelines by not carrying out, in the contested decision, an analysis, first, of the market shares in relation to the criteria set out in paragraph 17 of the Guidelines, and secondly, of the concentration levels.

135 As regards, first of all, the market shares, it must be borne in mind that, according to paragraph 17 of the Guidelines, only very large market shares of 50% or more may in themselves be evidence of the existence of a dominant market position. According to the same paragraph of the Guidelines, in the case of a smaller market share, the transaction may raise competition concerns in view of other factors such as the strength and number of competitors, the presence of capacity constraints or the extent to which the products of the merging parties are close substitutes. It follows that, in the present case, the analysis of market shares would not in itself have shown the existence of dominance, since the merged entity only held [40-50]% of the market. Therefore, the analysis of the other factors set out in paragraph 17 of the

Guidelines is necessary to establish whether, overall, there is evidence of a dominant position. It follows from examining the second and third parts of the plea, however, that the other factors stated in paragraph 17 of the Guidelines and alleged by the applicants to exist in the present case also fail to indicate that the merged entity was dominant.

136 In relation to the reference to *BaByliss* v *Commission*, cited in paragraph 55 above (paragraph 329), it must be noted, as the interveners point out, that the issue in that case was not whether a market share in excess of 40% was likely to give rise to dominance, but whether, having established that threshold in that case, the Commission had made a proper assessment of other factors. Furthermore, the interveners correctly point out that it is apparent from another case that a market share of 43.2% is not sufficient to give rise to dominance (*Kaysersberg* v *Commission*, cited in paragraph 132 above, paragraph 179). It follows that the existence of a dominant position must be assessed on a case-by-case basis according to the circumstances of the case and that the Commission's findings on the factual circumstances of the merger in *BaByliss* v *Commission*, cited in paragraph 55 above (paragraph 329), cannot be transposed to the present case.

137 With regard, secondly, to concentration levels, it must be pointed out that paragraphs 19 to 21 of the Guidelines set out, essentially, the HHI thresholds below which a merger is unlikely to raise competition problems. Thus, the Commission considers, in particular, that a merger is unlikely to raise horizontal competition concerns in a market with a post-merger HHI between 1000 and 2000 and a delta below 250, or where a post-merger HHI is above 2000 and the delta below 150, save in exceptional circumstances. According to paragraph 16 of the Guidelines, the HHI is equal to the sum of the squares of the individual market shares of each of the firms in the market.

138 In the present case, it must be pointed out, first, that the applicants have not elaborated on their argument on HHI value brackets, even though they knew the exact market shares used in the contested decision as soon as the Commission's defence was lodged. However, the HHI calculated on the basis of those figures is shown to increase from around [confidential] pre-merger to about [confidential] post-merger, which represents a delta of approximately [confidential]. Those values indicate that the effects of the merger on the market exceed the HHI thresholds below which the merger does not, in principle, raise any competition concerns. However, the second sentence of paragraph 21 of the Guidelines states that exceeding those thresholds does not give rise to a presumption of the existence of competition concerns. It must be observed, however, that the greater the margin by which those thresholds are exceeded, the more the HHI values will be indicative of competition concerns.

139 It follows that the post-merger HHI value does not provide any clear indication of the existence of competition problems in the present case, since it does not significantly exceed the HHI threshold of 2000. In fact, only the delta significantly exceeds the corresponding HHI threshold. However, that value is the only one likely to indicate competition problems, while neither the market shares nor the factors examined in the context of the second and third parts of this plea are indicative of such problems. In those circumstances, the Commission cannot be accused of disregarding the Guidelines in considering that there was no need to assess the concentration levels in the contested decision.

140 Finally, it must be pointed out that paragraph 14 of the Guidelines states that market shares and concentration levels provide useful first indications of the market structure and of the importance of the merging parties, but it does not require the Commission to assess those factors in every decision.

141 It is clear from the foregoing that the Commission cannot be criticised for not analysing, in the contested decision, the concentration levels and market shares in relation to the criteria set out in paragraph 17 of the Guidelines. Since the absence of such analysis does not undermine the Commission's findings, that part must be rejected.

142 It follows from the foregoing that the first plea in law must be rejected.

3. *The second plea, alleging errors of fact and of assessment*

143 The second plea in law is subdivided into four parts, by which the applicants assert that the Commission's analysis of the merger's non-coordinated effects is tainted by errors concerning, first, free capacity in the market for rosin resins for ink applications, secondly, the nature and extent of customers' vertical integration, thirdly, the impact of significant raw material price increases, and fourthly, the alleged countervailing buyer power wielded by customers. In the context of their arguments advanced in the first and fourth parts of the present plea, the applicants also criticise the inadequate reasoning of the Commission's findings, which will be examined in paragraph 218 et seq. below.

(a) First part, alleging errors in the assessment of free capacity in the market

Arguments of the parties

144 The applicants consider that the Commission's assessment of the free capacity of the merging parties' competitors lacks sufficient reasoning and is vitiated by manifest

errors of assessment, on the ground that the Commission failed to examine the availability of raw materials needed in the production of rosin resins. The importance of such availability is reflected in paragraph 71(b) of the Guidelines and in the Commission's previous decisions. Raw material shortages prevent competitors from increasing production and raise barriers to entry and expansion in the market.

145 In earlier decisions, the Commission concluded that serious competition concerns could be raised on account of a lack of available capacity or an insufficient number of suitable competitors and examined whether competitors had sufficient spare capacity to cover sales to a significant extent, whether they could make available such capacity and whether potential competitors could contribute to making available spare capacity (Commission Decision 2006/171/EC of 3 May 2005 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (Case COMP/M.3178 — Bertelsmann/Springer/JV) (OJ 2006 L 61, p. 17; 'Bertelsmann/Springer/JV'). The Commission conducted detailed investigations into access to raw materials for alternative suppliers to be able to compete with the merged entity, emphasising and examining closely the need for access to necessary resources (Bertelsmann/Springer/JV), easy access to raw materials [Commission Decision of 29 March 2006 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (Case COMP/M.3975 — Cargill/Degussa Food Ingredients); 'Cargill/DFI'], access to essential inputs [Commission Decision 96/177/EC of 19 July 1995 declaring a concentration to be incompatible with the common market and the functioning of the EEA Agreement (Case IV/M.490 — Nordic Satellite Distribution) (OJ 1995 L 53, p. 20; 'Nordic Satellite Distribution')], the availability of increased supplies (Commission Decision 2000/42/EC of 9 March 1999 relating to a proceeding under the Merger Regulation (Case IV/M.1313 — Danish Crown/Vestjyske Slagterier) (OJ 1999 L 20, p. 1; 'Danish Crown/Vestjyske Slagterier') and other aspects such as geographical location, available infrastructure, transport costs, operating costs, political stability, available land for plant expansion and the limited availability of supplies (Alcoa/Reynolds, cited in paragraph 80 above).

146 In the contested decision, the Commission did not follow its previous decisions and ignored, misrepresented or dismissed evidence provided by the applicants without providing reasons for doing so. The applicants submitted to the Commission that capacity on the market for rosin resins was constrained, that they made great efforts each year to secure the supplies needed for their publication inks and that it was difficult to obtain the necessary volume commitment from the suppliers, given the decline in their production capacity. They submitted further that capacity was the only relevant criterion for awarding a supply contract, that they would be forced to include the merged entity in their supplier portfolio, as the remaining suppliers could not provide the required volumes, that the lack of availability of raw materials was a major hurdle to market entry, that there had been severe procurement problems in the recent past due to a lack of availability of raw materials and that a competing supplier had had to stop production of some rosin resins due to a shortage of raw materials.

147 While the Commission took into account in the contested decision an additional submission of Sun that provided specific examples of supply shortages, it failed to draw the correct conclusions in that it attributed those shortages to technical maintenance and not to a general lack of production capacity in the overall market. The Commission neither re-examined this information after having discussed it with the merging parties nor explained how an isolated technical problem at a supplier could lead to a complete refusal of that supplier to supply a customer when, according to the Commission's own account, all suppliers had excess capacity. It is also unclear how the Commission could conclude that '[i]t appears that the customer in question was able to find alternative sources of supply which mitigated the impact of the unexpected shortage'. No such information had been submitted to the Commission, nor had it contacted Sun to corroborate that statement.

148 The applicants also point to letters submitted during the administrative procedure which show that Hexion itself had to deal with production capacity issues, because it could not confirm the quantities requested and had to draw lots for its customers. They also submit that, given the shortage of raw materials, the merged entity may, on account of its size, infrastructure and experience acquire a high degree of control or influence over the supply of rosin resins and that this will further disadvantage the smaller suppliers that cannot match the size and strength of Hexion and Akzo. Inevitably, any hypothetical expansion by rival firms will be even more difficult if not impossible. However, the Commission did not investigate whether the combined bargaining power of Hexion and Akzo over providers of gum resin was likely to significantly exceed that of their competitors and what effect that would have on the market.

149 The applicants submit that three internet documents confirm the scarcity of raw materials in the past few months and the applicants' appraisal of the industry dynamics. In their view, in a recent report on resins, published by *Ink World Magazine*, a Product Manager for resins of Hexion stated that the single largest issue currently facing the resin industry was inconsistent availability of key materials and the corresponding cost increases and that, from Hexion's perspective, cost increases and shortages of tall oil rosin and gum rosin were critical issues. A joint statement on 2 August 2006 by Megara and Resinall similarly confirms, in the view of the applicants, that the supply situation was very difficult, as they state that this year the industry faced unprecedented challenges, including raw material shortages and increased costs, that, as the busiest time of the year was approaching, recent developments made further supply disruptions likely and that, therefore, Resinall was not accepting new customers or business until further notice and would make every effort to avoid the need for quotas. Finally, the website of DRT reveals, according to the applicants, that the latest news from China concerning raw materials shows that the situation remains very difficult.

150 The applicants further submit that, whilst the 'Resin Report' and the Megara and Resinall statement were not available by 29 May 2006, it is surprising that the Commission failed to perceive any signs of a raw material shortage before adopting the contested decision. While the contested decision notes that Megara and DRT have free capacity of 5 000 t (representing 50% of its production capacity) and 1 000 t (representing approximately 6% of its production capacity) respectively, Megara announced fears that it would not even be able to fulfil its existing commitments. According to the applicants, moreover, DRT is also facing serious supply problems.

151 The applicants also question the Commission's methodology in measuring capacity. While it realises that demand is seasonal, entailing supply problems due to capacity constraints, it fails to appreciate that an industry characterised by excess capacity should be able to use that excess capacity to meet customers' orders in periods of high demand.

152 The applicants conclude that the data the Commission had at its disposal does not support its conclusions that 'the majority of customers have acknowledged that the market has overcapacity'. They consider the Commission's assertion that 'five out of seven customers indicated that the market [was] not capacity constrained and [had] overcapacity' and that 'two other customers did not take a position' is incorrect since the applicants all stated that the market was capacity constrained.

153 First of all, the Commission notes that the applicants do not dispute that the merging parties' competitors had overcapacity amounting to at least 19.5% of total production in the market, and 41% taking into account the estimates of the market share for the producers which did not reply to this question.

154 Second, the Commission submits that the applicants' argument is conceptually flawed because shortages of raw materials in a market are liable to affect all suppliers in the same way. Anti-competitive effects would only result if the merged entity had preferential access to raw materials, thereby allowing it to limit its competitors' access to those inputs. However, the applicants do not contend this and there is no indication to this effect. In fact, it is clear from a document taken off the Internet by the Commission that only 25% of rosin is used for the production of resins for printing ink applications. Consequently, the merged entity is only likely to purchase, by virtue of its [20-30]% global market share for rosin resins (recital 53 of the contested decision), 5 to 10% of global rosin production, which is not indicative of significant purchasing power.

155 Third, the market investigation did not suggest that shortages of raw materials were a barrier to increases in production. While it did not specifically ask the merging parties' competitors whether they were facing shortages of certain rosins, the Commission considers that that information would have been mentioned in their answers to questions 39 and 40 of the competitors' questionnaire if they had considered that those shortages were a major obstacle to resin production. However, that is not the case. The Commission also contends that the only customer who mentioned the problem of raw material shortages during the administrative procedure was Siegwerk. Both Flint and Sun remained silent during the administrative procedure on a problem which they now regard as a key element for the assessment of the concentration. Furthermore, the information submitted to the Commission concerning [confidential] points to, respectively, problems of a technical nature and maintenance measures for the reactors. The information does not contain any reference to raw material shortages.

156 As regards, fourth, the publications to which the applicants refer, the Commission recalls that the lawfulness of the contested measures must be assessed according to matters of fact and law which existed on the date the measure in question was

adopted. It also takes the view that a close examination of those documents shows that none of them contains indications of shortages of raw materials that would have impeded increase in the production of rosin resins.

157 Fifth, in relation to its previous decisions, the Commission argues that those cases concerned very different facts from those in the present case and that they are therefore irrelevant to this case.

158 Finally, the Commission observes that, in reply to questions 35 and 39 of the customers' questionnaire, Siegwerk stated that 'there [was] some overcapacity in the market'.

159 The interveners state that resin prices had climbed sharply at the time of the merger owing to a temporary shortfall in supply relative to demand resulting from a combination of low starting inventories, bad weather that delayed the gum rosin harvest and speculation, but that rosin could be obtained at the market price and that prices had fallen subsequently. In reference to a meeting with Sun, which took place after the contested decision was adopted, the interveners submit that the applicants knew this when they lodged their application.

160 As regards two of the publications to which the applicants refer, the interveners maintain that the statements which they contain are irrelevant, given that they do not have any connection with rosin resin production in Europe. The third states that Arez began construction in China on a project to double its resin production capacity, which implies that that undertaking believed it had the necessary access to raw materials. Furthermore, those publications, together with a manufacturing and

sales agreement between Megara and Resinall, are examples of new market entry which show that barriers to entry and expansion were low.

161 Finally, no facts support the assertion that the merged entity could obtain preferential access to raw materials. Rather, at a meeting on 7 April 2006, Sun expressed concerns that Hexion was not vertically integrated in the rosin sector, unlike some of its competitors.

Findings of the Court

162 By the first part of this plea, the applicants essentially put forward two complaints, the first alleging that the Commission erred in finding that there was excess capacity in the market, the second alleging that it erred in failing to analyse, in the contested decision, either the availability of raw materials needed to produce rosin resins or the impact of alleged raw material shortages on the utilisation of capacity.

— The first complaint, alleging errors concerning existing capacity in the market

163 It must be recalled, at the outset, that the Commission considered in recitals 63 to 67 of the contested decision that the market was characterised by excess capacity.

164 The Court must therefore examine whether the Commission made an a manifest error of assessment by considering that there was excess capacity in the market.

165 As regards, first, the alleged general and seasonal constraints, it is clear from the administrative file that the applicants stated that there were constraints on the market impeding production capacity, that the suppliers' capacity was potentially in decline and that Sun expended great effort each year to secure the supplies it needed, in particular for the period from September to December, when demand was seasonally high and that production capacity was insufficient (replies of Flint to question 40 and of Sun to question 39 of the customers' questionnaire). In addition, in its supplementary observations, Sun stated that [confidential].

166 In this regard, it should be recalled that the contested decision is based primarily, in recitals 62 to 65, on information provided by the merging parties' competitors, according to which there was spare production capacity of at least 19.5% of total production on the market and which could reach, according to estimates, as high as 41% (see paragraph 25 above). According to recital 65 of the contested decision, five of the seven customers who replied to the questionnaire acknowledged that the market had overcapacity. To the extent that the applicants dispute this, the Commission correctly refers to Siegwerk's replies to questions 35 and 39 of the customers' questionnaire, in which it recognises that there is excess capacity. Therefore, it is clear from the file that only Flint and Sun clearly stated, during the administrative procedure, that capacity was constrained. It is also clear from Sun's further observations and [confidential] reply that [confidential]. In fact, they show that [confidential].

167 Furthermore, it is also clear from email correspondence provided by Sun that it was [confidential]. Consequently, the Commission was under no obligation to provide further explanation of how [confidential] or to check its assertions in that regard with Sun. Furthermore, since the information provided [confidential], the Court considers that the Commission was not required to check this aspect with Sun.

168 In those circumstances, the Court considers that the Commission was not required to corroborate further the findings set out in recital 67 of the contested decision and that it made no manifest error of assessment in considering that there was excess capacity in the market.

169 As regards, secondly, the alleged capacity constraints experienced by the applicants' competitors, Flint indicated that other suppliers did not have sufficient free capacity, that it was very difficult to obtain the relevant volume commitments which they needed from the suppliers, that capacity was the main criterion to be taken into account when concluding a supply contract and that it was required to include the merged entity in its supply portfolio, as the other suppliers were unable to supply it with the volumes it needed (replies to questions 12, 40, 43 and 45 of the customers' questionnaire). Furthermore, Sun stated that all rosin resin producers currently supply the ink industry and that, as a result, there was no alternative supplier available to the industry, that the required volume was one of the criteria for concluding supply contracts, that no supplier today was capable of meeting its needs and that all the major rosin purchasers had multiple supply strategies (replies to questions 12, 42 and 44 of the customers' questionnaire). Finally, Siegwerk stated that there was no alternative to the suppliers established in Europe (reply to question 12 of the customers' questionnaire).

170 In that regard, it must be observed that, in the present case, the only relevant question is whether the available capacity permits the merging parties' customers to transfer orders, until now provided by the merging parties, to other existing suppliers or potential new entrants. It is clear from the answers to the customers' questionnaires set out in the previous paragraph that only Flint clearly stated, during the administrative procedure, that there were problems connected with the volumes available from competitors of the merging parties. Flint, however, also stated, as regards difficulties in obtaining commitments to supply for the 'relevant volumes' from suppliers, that such commitments could be obtained if the customer was prepared to pay the price ('If we pay, we get!', reply to question 40 of the customers' questionnaire). Thus, the alleged difficulties identified appear to be linked more to the level of prices charged by the suppliers depending on demand than to capacity shortages.

171 Next, it is not necessary, in order to discourage any anti-competitive conduct on the part of the merged entity, for all its customers to be able to transfer all their orders to other suppliers. In fact, the possibility for the applicants to transfer a substantial part of their requirements to other suppliers may be regarded as a threat liable to cause sufficient losses for the merged entity to deter it from pursuing such a strategy. In the present case, it is clear from the multiple supply strategy which Sun referred to during the administrative procedure that customers seek to include a number of producers in their supply portfolio. It is clear from the market shares of Arizona, Cray Valley and Respol as well as from their production capacities and significant excess capacity, identified in recitals 51 and 62 to 64 of the contested decision and not disputed by the applicants, that those suppliers are capable of supplying the large volumes that the applicants may require. It must also be pointed out that the smaller suppliers together have a market share of around 21% and significant excess capacity. Therefore, the Court considers that the Commission did not make a manifest error of assessment in finding, in recitals 68 and 71 of the contested decision, that the other producers in the market had the capacity to be able to

counter anti-competitive conduct and to supply the merging parties' major customers.

172 Finally, it must be remembered that only Flint and Sun submitted, during the administrative procedure, that there were capacity constraints, while the other customers, including Siegwerk, and the merging parties' competitors all accepted that there was excess capacity. For those reasons, the Court considers that the Commission did not make a manifest error of assessment in considering that the applicants' competitors were not under capacity constraints capable of preventing those customers from transferring a sufficiently significant part of their orders to other suppliers.

173 In the light of the foregoing, the Court considers that the Commission was entitled to consider that there was excess capacity in the market. Consequently, this complaint must be rejected.

— The second complaint, alleging errors relating to the availability of raw materials

174 As a preliminary point, the Court observes that in recital 67 of the contested decision the Commission found that, in the years leading up to the merger, there was an increase in the prices of raw materials constituting essential inputs in the production of rosin resins, such as crude oil, gum rosin and tall oil resin, the price per tonne of rosin resin having increased from USD 500 in January 2004 to around USD 1 250 on the date of the contested decision.

175 It must therefore be established whether the Commission made a manifest error of assessment in failing to examine, in the contested decision, the availability of raw materials necessary for the production of rosin resins or the impact of an alleged shortage of such raw materials on the utilisation of capacity.

176 As regards, first of all, assertions as to the existence of raw material shortages, it must be pointed out that Siegwerk stated, in reply to questions 36 and 39 of the customers' questionnaire, that the high prices and availability of raw materials were a major hurdle to market entry at the current time, and that there had been severe procurement problems in the recent past due to the lack of raw materials. In reply to question 15 of the customers' questionnaire, Siegwerk also stated that in February 2006 Arizona had stopped supplying it with the majority of modified phenolic resins because it had interrupted production due to a persistent lack of two essential raw materials, crude tall oil resin and gum rosin. Further, it has already been recalled that recital 67 of the contested decision refers to a significant increase in the prices of raw materials over the years leading up to the adoption of the contested decision. Finally, the interveners acknowledge that there was a temporary shortfall in supply relative to demand due to a combination of different factors.

177 However, the Commission is right in pointing out that Siegwerk is the only one of the ten customers which replied to the customers' questionnaire to point to problems arising from the availability of raw materials. No other customer, not even Flint and Sun, maintained, during the administrative procedure, that there were such difficulties. By the same token, none of the 13 competitors of the merging parties which replied to the competitors' questionnaire mentioned such problems in relation to crude tall oil resin or rosin resin, even though the Commission asked questions as to the utilisation of capacity for the production of hybrid resins (which are made up of hydrocarbon resins and resins based on tall oil or gum rosin) and as to difficulties in entering, in particular, the market for rosin resins (questions 39 and 40 of the competitors' questionnaire). In fact, the only indication to this effect is

from Cray Valley, which claimed that 'limited access to cheap raw materials (particularly hydrocarbons)' was an obstacle for new entrants. In particular, Arizona did not refer to any difficulty in this regard. However, rosin resin producers are the best placed to detect supply problems concerning their raw materials. In addition, the interveners also maintain that, despite the temporary shortfall observed in supply relative to demand, it was still possible to obtain gum rosin at the market price.

178 Having regard to the foregoing, the Court considers that, in view of the statements of Siegwerk alone, in a situation where all producers should encounter the same difficulties, the Commission did not make a manifest error of assessment by not examining the availability of raw materials in the contested decision.

179 As regards, secondly, the documents available on the internet to which the applicants refer, it must be observed, first, that those documents cannot be taken into account as evidence of the existence of alleged raw material shortages, since none of those documents was submitted to the Commission during the administrative procedure. In addition, the announcement of the agreement between Megara and Resinall and the resin report were published after adoption of the contested decision, while DRT's statement is not dated.

180 Second, to the extent that the applicants seek to rely on those documents in order to show that the shortages of crude tall oil resin and gum resin were, at the time the contested decision was adopted, supposedly common knowledge, it must be observed that Resinall's announcement fails to specify which raw materials were affected by the alleged shortage or the reasons for that shortage and that the interveners stated, without being contradicted by the applicants, that Resinall was not selling rosin resins in Europe at the time of the contested decision and of the

announcement. In addition, DRT's statement refers to terpene derivatives and the interveners asserted, without being contradicted by the applicants, that what is true for terpene derivatives is not necessarily so for rosin resins. Furthermore, in so far as that statement refers to gum rosin, it must be observed that it is not apparent from that statement whether it is referring to an increase in production or in prices, and that even evidence of price increases does not necessarily prove that there is a shortage. Finally, it is clear from the resin report that it does not relate specifically to crude tall oil resin and gum rosin, but to all the raw materials and in particular hydrocarbons, that it refers generally to the existence of difficulties in 2005, but that supply stabilised in 2006 and that the difficulties in 2005 were linked to price increases and their volatility rather than to the lack of the two raw materials in question. In fact, the only reference specifically to a shortage of those two raw materials concerns 2005 and explains that shortage as well as their higher costs by reference to, in particular, higher energy costs. It must therefore be considered that those documents do not show that a shortage of crude tall oil resin and gum rosin was common knowledge at the time the contested decision was adopted nor that the Commission was therefore required to investigate that issue.

181 For those reasons, the Court considers that the documents available on the internet to which the applicants refer do not show that the Commission made a manifest error of assessment in not examining the availability of raw materials in the contested decision.

182 In relation, third, to the claim that the alleged raw material shortages prevent competitors from increasing their production and constitute a barrier to entry and expansion in the market, the Commission correctly observes that the applicants have failed to explain how anti-competitive effects could result from raw material shortages which would seem to affect all suppliers in the same way. In that regard, it must be pointed out that Siegwerk stated, in reply to question 12 of the customers' questionnaire, that the highest volume of rosin was produced in China and that if Chinese rosin became more costly, all suppliers across the globe would face the

same problem. In fact, if gum rosin is not available, no producer, even the merged entity, is able to produce rosin resins from gum rosin. On the other hand, if it is available, any producer can obtain it to the extent that it is prepared to pay the price (see paragraph 170 above).

183 Thus, as the Commission contends, only preferential access for the merging parties as compared with their competitors could affect competition. However, the applicants do not claim that the merging parties have such access. They merely claim that the merged entity may, on account of its size, infrastructure and experience acquire a high degree of control or influence over the supply of gum rosin. However, the Commission pointed out, without being contradicted by the applicants, that the merged entity will only purchase 5 to 10% of global gum resin production (see paragraph 154 above).

184 For those reasons, the Court considers that the applicants' arguments that, first, raw material shortages would prevent competitors from increasing their production and constitute a barrier to entry and expansion in the market, and second, that the merged entity would have significant purchasing power, have not been sufficiently proven.

185 As regards, fourth, the references made to the Guidelines and the Commission's previous decisions, it suffices to point out that each case must be assessed according to its particular factual circumstances and that it is clear from the foregoing that the evidence advanced by the applicants has not shown that the Commission was under an obligation, in the contested decision, to look into the availability of raw materials and the impact of their alleged shortage on the utilisation of capacity.

186 In the light of the foregoing, the Court considers that the applicants have not established that the Commission made a manifest error of assessment by not dealing, in the contested decision, with the availability of raw materials or the impact of their alleged shortage on the utilisation of capacity. Consequently, that complaint must be rejected.

187 It follows that this part of the plea must be rejected.

(b) The second part, alleging errors concerning the nature and extent of vertical integration of the merged entity's customers

Arguments of the parties

188 The applicants assert that the Commission failed to examine the nature and extent of customers' vertical integration. When noting in recital 69 of the contested decision that undertakings such as Siegwerk and Flint who possess 'in-house rosin resin production ... discipline their suppliers successfully', the Commission used production capacity numbers as estimated by the merging parties without asking the applicants about the nature of their production. The in-house production in question only covers one particular type of rosin resin that can only be used in the production of a limited range of printing inks. In addition, instead of 25 000 t and 12 000 t, Flint and Siegwerk actually produce only [confidential]. A proper investigation, attempting to corroborate the data, would have revealed that this production lacks any potential to constrain the merging parties, because the applicants remain dependent on external supplies. The Commission failed to ascertain whether the information at its disposal was accurate, relevant or objective. Since both applicants had voiced serious concerns about the transaction in their

submissions, pointing to competitive constraints that the merger would bring about, it is surprising that the Commission did not re-examine the data submitted by the merging parties.

189 The Commission observes that the applicants do not deny that Flint and Siegwerk have significant in-house production and that the difference between the estimates mentioned in the contested decision and the figures given by the applicants is small. The applicants' assertion that in-house production can only be used for a limited range of printing inks should be rejected as unsubstantiated, because producers of rosin resins for ink applications are generally capable of producing the full range. In any case, the applicants' arguments do not call into question the finding in recital 69 of the contested decision that the customers may threaten to integrate vertically.

190 The interveners indicate that Flint's and Siegwerk's combined capacity, according to their own figures, of [confidential] is significant compared with Hexion's pre-merger capacity of 35 000 t. Also, the Commission was aware from the form notifying the concentration that Flint and Sun Chemical only made resinates. Given the ease of supply substitution, Flint and Siegwerk could use their internal production capacity to discipline their suppliers, first, by threatening to stop ordering resins for publication gravure and offset inks and, second, by freeing up other suppliers' capacity to produce other types of resins for the printing ink market. Finally, the applicants are well aware of their ability to threaten vertical integration, Sun having threatened to do so at a meeting with Hexion on 5 May 2006.

Findings of the Court

191 As a preliminary point, it must be borne in mind that, in the context of its examination of the countervailing buying power of the merging parties' customers, the Commission noted in recital 69 of the contested decision that, according to the parties' estimates, three major customers had significant in-house production capacity: Flint and Siegwerk, which had an estimated production capacity of around 25 000 t and 12 000 t respectively, and Huber, which recently acquired Micro Inks and informed its suppliers that it would start to transfer its purchases to its subsidiary.

192 It must therefore be examined whether the Commission made errors concerning Flint's and Siegwerk's vertical integration which could affect its finding that the merging parties' customers have countervailing buyer power.

193 As regards, first of all, the difference between the production quantities referred to in the contested decision and the figures produced by the applicants, it must be observed that this difference is minimal. Even on the basis of the figures produced by the applicants, Flint's and Siegwerk's combined production amounts to over [confidential]% of Hexion's pre-merger production capacity. For those reasons, it must be considered that the difference suggested by the applicants has no impact on the Commission's finding of countervailing buyer power contained in recital 69 of the contested decision.

194 As regards, second, the argument that Flint's and Siegwerk's production is limited to certain resins and that, therefore, they are reliant on market suppliers, the interveners state that in-house production, even if limited to certain rosin resins, enables them to exert pressure on suppliers. In any event, the Commission correctly asserts that the possible limitations to Flint's and Siegwerk's in-house production do not affect the substance of its reasoning set out in recital 69 of the contested decision. In fact, it uses the examples of Flint, Siegwerk and Huber to show that the countervailing buyer power of the merging parties' customers is strengthened by the reality of their threat to integrate vertically. For those reasons, it must be considered that the Commission's failure to mention, in recital 69 of the contested decision, the possible limitations to Flint's and Siegwerk's production has no effect on the Commission's finding of countervailing buyer power.

195 Finally, it is clear from the foregoing that the Commission did not make a manifest error of assessment in considering that, in the circumstances of this case, there was no need to check the data relating to Siegwerk's and Flint's production.

196 In the light of the foregoing, the applicants have not shown that the Commission made a manifest error of assessment by considering that the merging parties' customers have countervailing buyer power or, in relation to Flint's and Siegwerk's threat to integrate vertically, a factual error likely to undermine that finding.

197 Consequently, this part of the plea must be rejected.

(c) The third part, alleging errors concerning the impact of significant raw material price increases

Arguments of the parties

198 The applicants take the view that the Commission failed to investigate properly the impact on competition of the price increase of gum resin from USD 500 to USD 1 250 per tonne during a period of 29 months leading up to the merger. Sun had informed the Commission about steep price increases of rosin resin, in particular price increases applied by the merging parties from February 2005 to 15 May 2006. However, the Commission did not examine the impact of these price increases, coupled with growing demand, on producers and purchasers of rosin resin, while in other cases the Commission concluded that the 'ability to increase prices ... is strong proof that competition has not been sufficient in the past and is not likely after the merger to significantly constrain the market power' of the merged entity (see Nestlé/Perrier) and that price increases 'run counter to the argument that prices are constrained by excess capacity' (Commission Decision 2002/244/EC of 14 March 2000 declaring a concentration to be compatible with the common market and the EEA Agreement (Case COMP/M.1663 — Alcan/Alusuisse) (OJ 2002 L 90, p. 1; 'Alcan/Alusuisse')).

199 The Commission observes that the applicants do not explain why a detailed investigation into raw material price increases that affect all producers of the relevant product is necessary. It contends that such price increases are not linked to this merger and the merger is not the cause of those increases. Since prices of the raw materials needed for producing rosin resins have increased significantly over the last few years, the prices of rosin resins have followed suit.

200 The interveners also contend that the application does not explain how raw material price increases can relate to the notified concentration. Also, the facts of Alcan/Alusuisse and Nestlé/Perrier are not comparable to those of the present case. Finally, they note that the evidence relating to the price increases provided by Sun was examined in recitals 66 and 67 of the contested decision.

Findings of the Court

201 First of all, it should be observed that the Commission noted, in recital 66 of the contested decision, that Akzo and Hexion have, in the past, increased the prices of rosin resins. It pointed out, in recital 67 of the contested decision, that those increases in the years preceding the merger were due to an increase in the prices of the raw materials, which constitute key inputs for rosin resin production, such as crude oil, rosin gum and tall oil resin, the price per tonne of rosin gum having increased from USD 500 in January 2004 to around USD 1 250 at the date of the contested decision.

202 It must therefore be ascertained whether the Commission made a manifest error of assessment by not carrying out an examination in the contested decision, as the applicants allege, of the impact of the price increases of, first, rosin resins, particularly those increases imposed by the merging parties, and, second, raw materials, on producers and purchasers of rosin resins.

203 As regards, first, the price increase of rosin resins, it has already been pointed out in paragraph 201 above that the contested decision explains in recital 67 that their increase is due to the price increase of raw materials. The applicants do not contest this explanation. It follows that, on the basis of those factors, it cannot be claimed that the Commission found in the present case that, contrary to its findings on the facts in Alcan/Alusuisse and Nestlé/Perrier, the price increases were not indicative of insufficient competition and market power. Since the applicants have not advanced any other explanation to support their view that those general price increases — which affect, a priori, all customers in the same way — are relevant to the assessment of the merger's anti-competitive effects, they have failed to show that the Commission made a manifest error of assessment by not examining the impact of those price increases on purchasers of rosin resins.

204 As regards, secondly, the prices of the raw materials, it is stated in recital 67 of the contested decision that, to some extent, their increase is due to the price increase of crude oil. Furthermore, it should be borne in mind that Siegwerk indicated, and it is not disputed, that those increases affected all producers of the relevant product in the same way (see paragraph 181 above). Therefore, there is no reason to find that those general price increases in raw materials raise competition problems (see paragraphs 181 to 183 above). Indeed, the applicants have not advanced any specific reasons why the Commission should have investigated the impact of the price increase of the raw materials on producers and purchasers of rosin resins.

205 It is clear from the foregoing that the applicants have not shown that the Commission made a manifest error of assessment in not analysing the impact of the price increases on producers and purchasers of rosin resins. Therefore, this part of the plea must be rejected.

(d) The fourth part, alleging errors concerning countervailing buyer power

Arguments of the parties

206 The applicants assert that the Commission failed to properly assess arguments relating to countervailing buyer power. It is not sufficient to show that demand in the market is concentrated or that customers source from a number of suppliers. The Commission should have focused on the ability of buyers to take action to undermine any attempt by suppliers to increase prices. In the light of the evidence in the case file, which contradicted the Commission's buyer power argument, it was incumbent upon the Commission to conduct a more sophisticated analysis, extending to the structure and other dynamics of the industry as well as to the precise strategies that buyers could undertake to curb price increases post-merger (Commission Decision 1999/641/EC of 25 November 1998 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case IV/M.1225 — Enso/Stora) (OJ 1998 L 254, p. 9; 'Enso/Stora')). The contested decision remains silent on all these issues, since the Commission merely contends that the strong dependence of the merging parties on a few large customers will militate against any anti-competitive behaviour, even though the applicants pointed out that the market is not characterised by buyer power and stated that, because they source from both merging firms, they were particularly vulnerable to the dictates of the merged entity. The applicants had noted in their submissions to the Commission that it was a seller's market and that they could not exercise significant bargaining power over the suppliers in the industry because of the lack of alternative suppliers and technical constraints. In the light of those submissions, the Commission was under an obligation to set out the reasons for its conclusions, but failed to do so as it did not address the applicants' arguments in the contested decision.

207 The Commission states that the applicants do not dispute the finding that the demand side of the market is highly concentrated and observes that the top five ink producers account for approximately [80-90]% of Hexion's and [90-100]% of Akzo's revenues. It also observes that the supply side of the market is less concentrated, as the sales of the merged entity to the applicants represent [confidential]% of Hexion's and [confidential]% of Akzo's total sales, but only [confidential]% of Sun's total requirements. Consequently, the merging parties are much more dependent on the applicants than vice versa. The purchasers also have a significant number of credible alternative suppliers, their own production and the ability to integrate vertically. In those circumstances, the Commission takes the view that the finding in the contested decision that the strong dependence of the merging parties on a few big customers constitutes a constraint on possible anti-competitive behaviour by the merged entity is justified.

208 The interveners maintain that the Commission analysed the issue of buyer power in the contested decision closely. Enso/Stora does not set out a policy that the Commission is bound to follow, nor are the facts in that case sufficiently close to suggest that an equivalently detailed analysis would be appropriate in the present case. The replies to the questions to which the applicants refer are not entirely unambiguous, do not contradict the facts found and analysed by the Commission and are not sufficiently corroborated.

Findings of the Court

209 It must be examined whether the Commission made a manifest error of assessment in limiting its analysis of countervailing buyer power to the elements set out in the contested decision.

210 First of all, it must be borne in mind that paragraphs 64 and 65 of the Guidelines state that even firms with very high market shares may not be in a position, post-merger, to significantly impede effective competition, if their customers possess countervailing buyer power. According to the Guidelines, countervailing buyer power must be understood as the bargaining strength that the buyer has vis-à-vis the seller in commercial negotiations due to its size, its commercial significance to the seller and its ability to credibly threaten to resort, within a reasonable timeframe, to alternative sources of supply should the supplier decide to increase prices, or to otherwise deteriorate quality or the conditions of delivery. This would also be the case if the buyer could credibly threaten to vertically integrate into the upstream market or to sponsor upstream expansion or entry. Finally, it is more likely that large and sophisticated customers will possess this kind of countervailing buyer power than smaller firms in a fragmented industry.

211 Next, as regards the applicants' own assertions, Flint stated that, to its knowledge, purchasers of rosin resins had no bargaining power (answer to question 40 of the customers' questionnaire). Siegwerk considered that it was a seller's and not a buyer's market (reply to question 40 of the customers' questionnaire). Sun stated that, in its view, purchasers could not exercise sustained bargaining power over suppliers in the industry because there were very few suppliers, combined with the difficulty for buyers to change supplier rapidly or use alternative chemical products (reply to question 40 of the customers' questionnaire).

212 Therefore, only Sun put forward reasons to show that there was no countervailing buyer power, that is, the very limited number of suppliers and the difficulties in transferring orders to other suppliers. However, it has already been pointed out that the applicants have not sufficiently proved those claims (see paragraphs 84 et seq. and 94 et seq. above). The same is true for the assertions concerning the lack of

necessary volumes and the suppliers' declining capacity which, according to the applicants, were made by Flint in that context (see paragraph 73 et seq. above).

213 In relation to the argument that the Commission should have examined the ability of customers to take action against any attempt by suppliers to increase prices and that it was incumbent upon it to conduct a more sophisticated analysis, extending to the structure and other dynamics of the industry as well as to the precise strategies that buyers could undertake to curb price increases post-merger, it must be borne in mind, first, that the contested decision is based, in that regard, on the fact that certain customers operate their own in-house production which allows them to discipline their suppliers to a certain extent. Second, it refers to the possibility for customers to source their supplies from other large and small suppliers which have significant excess capacity and are able to produce the whole range of rosin resins. Third, the Commission observes that demand is concentrated on a very limited number of large customers, which confers on them, in particular in the light of the factors already mentioned, considerable negotiating power. Fourth, it points to the existence of the credible threat of vertical integration, which also allows those customers to discipline their suppliers (see paragraph 28 above).

214 In addition, those considerations set out in the contested decision correspond, in essence, to the relevant factors for assessing countervailing buyer power stated in paragraphs 64 and 65 of the Guidelines (see paragraph 210 above). In fact, the contested decision underlines the suppliers' high level of dependence on a few large customers. The Court considers, in that regard, that it is not necessary, in order to discourage anti-competitive conduct on the part of the merged entity, for such customers to withdraw entirely from the supplier in question. The possibility for the applicants to transfer a substantial part of their requirements to other suppliers may

be regarded as a sufficient threat of losses for the merged entity to be capable of deterring it from pursuing such a strategy (see paragraph 171 above).

215 In the present case, it must be borne in mind that the applicants, in respect of resins for printing ink applications, are among the merging parties' largest customers. Consequently, a transfer even of only part of their orders to other suppliers would amount to a significant proportion of the merged entity's production. It must also be recalled that the Court has already held that the Commission did not make a manifest error of assessment by considering, in recitals 68 and 71 of the contested decision, that the other producers in the market had the capacity to be able to counter anti-competitive conduct and to supply the merging parties' major customers (see paragraphs 170 to 172 above) and that the applicants have not established that there are, as they allege, considerable difficulties in changing supplier, given the need to qualify rosin resins, which prevent customers from credibly threatening to resort, within a reasonable timeframe, to alternative sources of supply should the merged entity decide to increase prices (see paragraphs 96 to 99 above).

216 Furthermore, whilst the facts in Enso/Stora may have required, due to an exceptional market structure, sophisticated analyses of the industry structure and strategies that buyers could undertake to curb price increases post-merger, it is clear from the foregoing that this does not apply to the present case. In the light of the above findings, the Court considers that the Commission could not be required, in the circumstances of this case, to carry out a more detailed examination of the countervailing buyer power of the merging parties' customers.

217 In the light of the foregoing, this part must be rejected.

(e) The alleged lack of reasoning

218 To the extent that the applicants contend that the Commission's assessment of available excess capacity on the part of the merging parties' competitors is not sufficiently reasoned, in particular because the Commission did not examine, in the contested decision, either the availability of raw materials needed to produce rosin resins or the impact of an alleged shortage of those raw materials on the utilisation of capacity, and that it ignored or rejected the evidence provided by the applicants without stating reasons for doing so, it must be pointed out that it is clear from the findings in paragraphs 165 to 185 above that the Commission set out sufficient reasons for its finding that there was excess capacity in the market. Recitals 62 to 67 of the contested decision set out clearly and unequivocally the Commission's reasoning in that regard and have enabled the Court to exercise its power of review and the interested parties to defend their rights.

219 Finally, it is also clear from the findings in paragraphs 213 and 214 above that the Commission provided sufficient reasoning for its finding on countervailing buyer power of the merging parties' customers. Recitals 69 to 71 of the contested decision set out clearly and unequivocally the Commission's reasoning in that regard and have enabled the Court to exercise its power of review and the interested parties to defend their rights.

220 It follows that the arguments based on alleged insufficiency of reasoning must be rejected.

221 It follows from all the foregoing that the Court must reject the second plea.

222 In those circumstances, the action must be dismissed.

Costs

223 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to pay the costs, as applied for both by the Commission and the interveners.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the action;

2. **Orders Sun Chemical Group BV, Siegwerk Druckfarben AG and Flint Group Germany GmbH to bear their own costs and to pay those of the Commission and of the interveners.**

Pirrung Forwood Papasavvas

Delivered in open court in Luxembourg on 9 July 2007.

E. Coulon J. Pirrung

Registrar President

Table of contents