OPINION OF ADVOCATE GENERAL TIZZANO delivered 25 May 2004 [1]

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1 — Original language: Italian.

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1. The subject-matter of this case is an appeal brought by the European Commission against the judgment of the Court of First Instance of 25 October 2002 in Case T-5/02 *Tetra Laval* v *Commission* [2002] ECR II-4381 which annulled 'Commission Decision C(2001) 3345 final of 30 October 2001 declaring a concentration to be incompatible with the common market and with the EEA Agreement (Case No COMP/M.2416 — Tetra Laval/Sidel'.

I — The relevant provisions

2. As everyone knows, in order to contribute to the creation of 'a system ensuring that competition in the internal market is not distorted' (Article 3(f) of the EEC Treaty, then, after amendment, Article 3(g) of the EC Treaty, now Article 3(g) EC), Council Regulation No 4064/89 [2] ('the merger Regulation' or just 'the Regulation') introduced control of concentrations with a Community dimension. [3] For that purpose, it provided in particular that prior notification of those operations should be made to the Commission, which is called upon to appraise their compatibility with the common market.

3. In accordance with Article 2(1) of the Regulation, in making that appraisal the Commission is to take into account:

'(a) the need to maintain and develop effective competition within the com-

2 — Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1; corrigendum in OJ 1990 L 257, p. 13). Regulation No 4064/89 was amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1).

3 — What is meant by 'concentrations' is explained in Article 3 of the Regulation, while Article 1(2) and (3) makes clear in what circumstances a concentration may have a 'Community dimension'.

mon market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;

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

4. The subsequent subparagraphs of Article 2 then provide:

— on the one hand, that 'a concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market' (2);

— on the other hand, that 'a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market' (3).

II — Facts and procedure

The concentration notified and the procedure before the Commission

5. The relevant parts of the reconstruction of the facts in the judgment under appeal reveal the following:

'9. On 27 March 2001, Tetra Laval SA, a privately held company incorporated under French law and a wholly owned

subsidiary of Tetra Laval BV (hereinafter "Tetra" or "the applicant"), a holding company belonging to the Tetra Laval group, announced a public bid for all outstanding shares in Sidel SA (hereinafter "Sidel"), a French publicly quoted company. On the same day, Tetra Laval SA acquired roughly 9.75% of the shares in Sidel from Azeo (5.56%) and Sidel's directors (4.19%).

...

11. Pursuant to the bid, Tetra acquired approximately 81.3%, of the outstanding shares in Sidel. After the closing of the bid, the applicant acquired certain additional shares, making its current holdings roughly 95.20% of the shares and 95.93% of the voting rights in Sidel.

12. Tetra comprises, inter alia, the Tetra Pak company, which is mainly active in the area of liquid food carton packaging, where Tetra Pak is the world-wide market leader. Tetra also has more limited activities in the plastic packaging sector, mainly as a converter (which consists of manufacturing and supplying empty packaging to producers who then fill the packaging themselves), particularly of high density polyethylene (hereinafter "HDPE") bottles.

13. Sidel is involved in the design and production of packaging equipment and systems, particularly stretch blow moulding machines (hereinafter "SBM machines"), which are used in the production of polyethylene terephthalate (hereinafter "PET") plastic bottles. It is the world-wide leader for the production and supply of SBM machines. It is also active in barrier technology, used to make PET compatible with products which are sensitive to gas and light, as well as in the manufacture of filling machines for PET and, to a lesser extent, HDPE bottles.

14. On 18 May 2001, the operations by which Tetra acquired its shareholding in Sidel were notified to the Commission.

15. It is agreed by the parties that those operations (hereinafter "the merger" or "the notified transaction") constitute an acquisition within the meaning of Article 3(1)(b) of the Regulation and that

the merger has a Community dimension within the meaning of Article 1(2) thereof.

16. By decision of 5 July 2001, the Commission, having concluded that the merger raised serious doubts as to its compatibility with the common market and the Agreement on the European Economic Area ("the EEA Agreement"), initiated proceedings in accordance with Article 6(1)(c) of the Regulation.

...

19. On 25 September 2001, the applicant proposed a number of commitments, in accordance with Article 8(2) of the Regulation, with a view to remedying the competition concerns expressed in the first statement of objections.

(...)

21. On 9 October 2001, the applicant offered the Commission a new set of firm commitments (hereinafter "the commitments"), replacing those dated 25 September 2001.

(...)

24. By decision of 30 October 2001 (Case No COMP/M.2416 — Tetra Laval/Sidel C (2001) 3345 final) (hereinafter "the contested decision"), the Commission declared the notified transaction incompatible with the common market and the functioning of the EEA Agreement, pursuant to Article 8(3) of the Regulation.

(...)

26. In the light of the findings in the contested decision and following a separate administrative procedure initiated by the sending of a statement of objections to Tetra on 19 November 2001, the Commission adopted, on 30 January 2002, a decision setting out measures in order to restore conditions of effective competition pursuant to Article 8(4) of the Regulation (Case No COMP/M.2416 — Tetra Laval/Sidel).'

The contested decision

6. If I confine myself to the core passages, and reserve the right to return in greater detail to certain aspects of particular impor-

tance to this case, the contested decision can be briefly summarised as follows.

7. After describing in general terms the packaging-for-liquid-foods industry, the Commission analysed the relevant product markets, starting with an assessment of whether it was possible to substitute alternative packaging materials and, in consequence, alternative packaging systems.

8. For the purposes of that analysis, the Commission considered it appropriate to use 'end-use segmentation'; that is to say, to assess by reference to the kind of liquid to be packaged whether or not the various packaging materials and systems are substitutable. [4] From that point of view, and considering that Tetra and Sidel were active chiefly in the segments of carton and PET packaging, the Commission focused its analysis in particular on drinks that could be packaged in both those materials ('common' or 'sensitive' products), namely: liquid dairy products (referred to in the contested judgment also as 'LDPs' [5]); 'juices' and 'nectars' (which in the contested decision and judgment are referred to simply as 'juices'); 'fruit-flavoured still drinks' (which in the decision are simply called 'fruit-flavoured drinks') and in the judgment 'FFDs'), and 'ready-to-drink tea and coffee drinks' (referred to in the decision and judgment simply as 'tea/coffee drinks'). [6]

9. Examining the interrelation between the two materials, the Commission began by pointing out that although they have 'traditionally been used for ... different beverages', [7] 'PET is a suitable material for the packaging of all the products that have been traditionally packaged in carton'. [8] Following a full analysis and in particular 'in the light of recent and forthcoming technological developments, cost and marketing considerations', the Commission arrived at the conclusion that 'PET use in the common product segments will grow significantly in the next five years'. [9]

10. The Commission then stated 'that, although substitution between the systems [of carton and PET packaging] does not currently have the necessary effectiveness and immediacy required for the purposes of market definition (i.e., they are weak substitutes), this may change in future'. It also

4 — See in particular paragraphs 40 and 44 of the decision.

5 — This footnote is not relevant in the English version.

6 — See in particular paragraphs 12 and 45 of the decision.

7 — Paragraph 55, in which it is explained that 'PET and carton have traditionally been used for packaging different beverages. This is mainly due to different physical characteristics of these packaging solutions. Carton is non-transparent and hence suitable for oxygen and light-sensitive products but cannot withstand carbonation. PET is transparent and can withstand carbonation but has been traditionally less suitable for oxygen and light-sensitive products. As a result, carton has been used mainly for LDPs (primarily white milk) and juices whereas PET has been principally used for water (still and carbonated) and soft (carbonated drinks)

8 — Paragraph 57.

9 — Paragraph 103.

concluded that, 'given their presence in the same sector of liquid-food packaging, their common product segments, customer base and increasing use of aseptic technology, the two packaging systems belong to two very closely neighbouring markets'. [10]

11. Having said that, the Commission found it 'necessary to analyse whether there are distinct relevant product markets for specific equipment within each packaging system. [11]

12. As a result of that analysis, with reference to the PET packaging systems, [12] the Commission concluded: (i) that 'high-capacity stretch blow-moulding [SBM] machines form a separate market from low-capacity SBM machines' and that, 'in light of the specific characteristics of the "sensitive" products and the ability for price discrimination', 'separate relevant markets exist for each distinct group of customers on the basis of end-use in particular in the four "sensitive" beverage segments'; [13] (ii) that the various 'barrier technologies for PET form part of the same product market'; [14] (iii) that there existed 'two distinct product markets for aseptic PET filling machines and non-aseptic PET filling machines'; [15] (iv) and that 'preforms [for PET] are a distinct product market'. [16]

13. With reference to carton packaging systems on the other hand, the Commission has 'concluded that there are four distinct product markets: aseptic carton packaging machines, aseptic cartons, non-aseptic car-

10 — Paragraph 163.

11 — Paragraph 164.

12 — With regard to those systems, it ought to be borne in mind that '[p]ackaging of liquid food in PET bottles requires a combination of distinct machinery and, if required, a barrier technology. There are three distinct stages in the packaging process: (a) production of plastic preforms, the preproduction tubes used to make PET bottles; (b) production of empty PET bottles using the plastic preforms in specialised stretch blow-moulding machines (SBM machines) and (c) filling of the finished PET bottles with the liquid using a dedicated filling machine' (paragraph 20 of the contested decision). In the PET packaging systems '[l]iquids are packaged in two main ways: in-house by the liquid producers themselves and by "bottle converters". In-house packaging requires the purchase of packaging equipment and installation of packaging lines at the premises of the beverage company. By contrast, converters produce empty packages, which are then either filled by filling companies or sold to beverage companies for filling in-house (paragraph 15 of the decision).

13 — Paragraph 188.

14 — Paragraph 199. In this regard I would point out that 'for oxygen-sensitive products (such as juices or beer), the gas-barrier properties of a PET bottle need to be enhanced. ... To enhance the barrier properties of PET a barrier technology is applied onto the standard PET bottle. ... For light-sensitive products such as UHT white milk, a light barrier needs to be added' (paragraphs 22-24 of the decision).

15 — Paragraph 204. In this connection, I would note that 'non-aseptic filling machines are generally used for carbonated drinks, mineral water, edible oils and fresh milk. Aseptic PET filling machines are used for ambient juices, fruit or flavoured still drinks, ready-to-drink tea and coffee drinks and liquid dairy products' (paragraph 21 of the decision).

16 — Paragraph 206.

ton packaging machines and non-aseptic cartons'. [17]

14. After making those statements with regard to the relevant product markets, the Commission then went on to a rapid examination of the geographical dimension of those markets, concluding that for them 'the relevant geographic market is the EEA'. [18]

15. Turning to an assessment of the effect on competition of the notified concentration, the Commission began by finding that before the concentration Tetra already held 'a dominant position on the market for aseptic packaging machines and cartons and a leading position on the market for non-aseptic packaging machines and cartons'; moreover, it also held 'a dominant position in the carton packaging market as a whole'. [19] Before the notified concentration Sidel, on the other hand, held 'a leading position in the high- and low-capacity SBM machine market across all end-use segmentations and a strong position in other PET packaging equipment, in particular aseptic filling machines, secondary equipment and associated services'. [20]

16. In those circumstances, the Commission assessed whether the concentration notified would lead to the creation or strengthening of one or more dominant positions within the meaning of Article 2 of the Merger Regulation.

17. In that regard, the Commission first of all found that '[t]he proposed transaction produces direct horizontal effects as both parties are active in three distinct product markets: SBM machines (low capacity); barrier technology and aseptic PET filling machines'. According to the Commission, 'the already strong position of Sidel' would as a result 'immediately be strengthened further through the merger'. [21]

18. More particularly, with reference to the 'horizontal effects' of the merger, the Commission concluded: (i) that 'the low-capacity

17 — Paragraph 209. With regard to such systems, it is helpful to note that, 'unlike PET with its distinct stages of production (preforms, empty bottles, filling), the liquid-food carton business is one of integrated pack construction, filling and sealing ... All these operations are done on one carton packaging machine within the beverage company's factory ... There are distinct aseptic and non-aseptic carton machines and the distinction between aseptic and non-aseptic carton packaging runs throughout the packaging process' (paragraph 28 of the decision).

18 — Paragraph 212.

19 — Paragraph 231.

20 — Paragraph 259.

21 — Paragraph 263.

market would become more concentrated as a result of the operation' and that 'Tetra/Sidel would be by far the leading company throughout the entire spectrum of SBM machinery from the simplest low-capacity machines to the highest-capacity and most technologically advanced machines';[22] (ii) 'that the combination of the parties' ... technologies would enhance the merged entity's position in the barrier technology market significantly', even though 'not to the extent that a dominant position would be created';[23] and (iii) 'that the merged entity would have a strong position in aseptic PET filling machines'.[24]

19. The Commission then examined the 'vertical effects' of the merger, finding that it would result in 'Tetra/Sidel being vertically integrated in three packaging systems: carton, HDPE and PET'. That could 'create a channel conflict with independent converters with possible anti-competitive effects'. The Commission did not, however, conclude that 'these vertical concerns would, by themselves, result in the creation of a dominant position for PET equipment or preforms'.[25]

20. After making those findings in respect of the 'horizontal' and 'vertical' effects of the merger, the Commission went on to assess the possible 'conglomerate' anti-competitive effects arising from the fact that the body created by the merger would occupy a strong position in neighbouring markets, such as those in carton and carton-packaging equipment and those in PET packaging equipment. Such an assessment, in its opinion, was made especially necessary by the close links between the various markets, due to the fact that 'PET is already becoming an important alternative, as well as complementary, packaging to carton in the "sensitive" product markets and that it will continue to grow in importance'.[26]

21. From that point of view, the Commission first of all appraised whether the merged entity might not exploit its dominance in the carton sector in order to gain a dominant position in the markets for PET packaging equipment ('leveraging'). In this connection, following a thorough analysis, the Commission arrived at the conclusion 'that, by combining the dominant company in carton packaging, Tetra, and the leading company in PET packaging equipment, Sidel, the proposed transaction would create a market structure which would provide the merged entity with the incentives and tools to turn its leading position in PET packaging equipment, in particular SBM machines (low- and high-capacity) used for the "sensitive" pro-

22 — Paragraphs 269 and 270.

23 — Paragraph 282.

24 — Paragraph 290.

25 — Paragraph 324.

26 — Paragraph 337.

duct segments into a dominant position. This is also likely to enhance the merged entity's position and have anti-competitive effects on the overall SBM machine market'. [27]

22. The Commission then assessed the possible effects of the notified merger on Tetra's dominant position in carton. On this point, considering that 'carton and PET packaging systems form closely neighbouring product markets that exert some competitive restraint on one another', it came to the conclusion that 'by eliminating Sidel as a growing competitive constraint in a closely neighbouring market, Tetra's position in carton packaging would be strengthened'. [28]

23. Last, the Commission assessed whether the merged entity's dominance in carton and PET packaging equipment could lead to further strengthening of its predominance. In this respect, it considered it 'likely that, through the merger, the merged entity's position in the end-use sectors of "sensitive" products would marginalise competitors and raise barriers to entry, thus reinforcing dominance in the relevant markets for carton packaging equipment and PET packaging equipment, in particular SBM machines used for "sensitive" products'. [29]

24. After carrying out those assessments of the effect on competition of the notified transaction, the Commission went on to evaluate the commitments offered by Tetra, namely: (i) 'divestiture of Tetra's SBM business'; (ii) 'divestiture of Tetra's PET preform business'; (iii) 'holding Sidel separate from TetraPak companies' and (iv) 'granting a licence of Sidel's SBM business for sale to customers filling "sensitive" products and for sales to converters'. [30]

25. Following a swift examination of those commitments, the Commission considered, however, that they were 'insufficient to eliminate the major competition concerns identified on the PET packaging equipment and carton packaging equipment markets', since the 'two divestitures will have a minimal impact on the position of the merged entity'; the licence, apart from being 'insufficient to remove the Commission's competition concerns, ... does not appear

27 — Paragraph 389.
28 — Paragraphs 397 and 399.
29 — Paragraph 408.
30 — Paragraph 410.

to be a viable option and may actually introduce complex mechanisms in the market resulting in artificial regulation', and 'the two behavioural commitments are considered insufficient as such to resolve the concerns arising from the structure of the market following the merger'. [31]

26. The Commission therefore concluded 'that, given both the lack of viability of the proposed commitments and their overall insufficiency to address the competition concerns raised by the transaction', they were not 'sufficient to remove the identified competition concerns and thus cannot form the basis for an authorisation decision'. [32]

27. Having regard to the considerations summarised above, the Commission concluded therefore 'that the notified concentration would create a dominant position in the market for PET packaging equipment, in particular SBM machines used for the "sensitive" product segments, and strengthen a dominant position in aseptic carton packaging and aseptic cartons in the EEA as a result of which effective competition would be significantly impeded in the common market and in the EEA'. [33] Taking the view that the commitments proposed by Tetra were considered insufficient to remedy that situation, the Commission accordingly declared the concentration 'incompatible with the common market and the functioning of the EEA Agreement'. [34]

The judgment under appeal

28. By action lodged at the Registry of the Court of First Instance on 15 January 2002, Tetra challenged the Commission's decision. By judgment of 25 October 2002 the Court of First Instance granted the application, annulling the contested decision.

29. If I again confine myself to the essential passages and reserve the right to return in greater detail to certain aspects, the judgment can be briefly summarised as follows.

30. After dismissing the plea in the action alleging 'infringement of the right of access

31 — Paragraph 424.
32 — Paragraph 451.
33 — Paragraph 452.
34 — Article 1 of the operative part.

to the file', [35] the Court of First Instance — so far as is of more direct interest here — dwelled: (i) on the pleas based on the absence of horizontal or vertical anti-competitive effects of the modified merger [36] and (ii) on 'the plea based on the lack of foreseeable conglomerate effect'.

31. With reference to the pleas concerning the 'horizontal' and 'vertical' effects of the merger, the Court of First Instance began by finding 'that, even though the Commission did not base the contested decision on those ... effects, it did take them into account in support of its finding that the modified merger must be prohibited'. [37]

32. Having said that, the Court of First Instance found that, taking into account the commitments proposed by Tetra, 'the negative horizontal effects of the merger referred to by the Commission in the contested decision are merely minimal, if not almost non-existent, on the various relevant PET packaging equipment markets'. On that basis it concluded 'that the Commission made a manifest error of assessment in so far as it relied on the horizontal effects of the modified merger to support its finding that a dominant position on those PET markets would be created for the merged entity through leveraging'. [38]

33. Similarly, the Court of First Instance found that 'it has not been shown that the modified merger would result in sizeable or, at the very least, significant vertical effects on the relevant market for PET packaging equipment'. In such circumstances, it had, in its opinion, necessarily to find 'that the Commission made a manifest error of assessment in so far as it relied on the vertical effects of the modified merger to support its finding that a dominant position on those markets would be created for the merged entity through leveraging'. [39]

34. According to the Court of First Instance, however, the 'manifest errors of assessment' into which the Commission fell 'in relying on the horizontal and vertical effects of the modified merger to support its analysis of the creation of a dominant position on the relevant PET markets' did not, however, 'lead to the annulment of the contested decision,

35 — Paragraphs 83-118.

36 — By 'modified merger' the Court of First Instance means 'the merger as modified by the commitments' (paragraph 81).

37 — Paragraph 124.

38 — Paragraph 132.

39 — Paragraph 140.

since the conglomerate effect alleged by the Commission could by itself suffice to justify the decision'. [40]

35. Coming to the 'plea based on the lack of foreseeable conglomerate effect', the Court of First Instance went on to examine in turn 'the three pillars of the Commission's reasoning concerning leveraging, the elimination of potential competition and the general effect of strengthening the competitive position of the merged entity'. [41]

36. Beginning with the first of the those pillars, the Court of First Instance noted first of all that, as the Commission itself had acknowledged, 'leveraging by Tetra through the conduct described [in the decision] [42] could constitute abuse of Tetra's pre-existing dominant position in the aseptic carton markets'. [43] In such a case, according to the Court of First Instance, the Commission ought to have assessed 'whether, despite the prohibition of such conduct, it is none the less likely that the entity resulting from the merger will act in such a manner or whether, on the contrary, the illegal nature of the conduct and/or the risk of detection will make such a strategy unlikely. While it is appropriate to take account, in its assessment, of incentives to engage in anti-competitive practices, such as those resulting in the present case for Tetra from the commercial advantages which may be foreseen on the PET equipment markets ..., the Commission must also consider the extent to which those incentives would be reduced, or even eliminated, owing to the illegality of the conduct in question, the likelihood of its detection, action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue'. [44]

37. Since, therefore, 'the Commission did not carry out such an assessment in the contested decision', the Court of First Instance stated that, 'in so far as the Commission's assessment is based on the possibility, or even the probability, that Tetra will engage in such conduct in the aseptic carton markets, its findings in this respect cannot be upheld'. [45]

38. Likewise, the Court of First Instance held that 'the fact that the applicant offered

40 — Paragraph 141.

41 — Paragraph 145.

42 — In this connection, summarising the contents of the decision, the Court of First Instance noted that 'the leveraging from the aseptic carton market ... would manifest itself — in addition to the possibility of the merged entity's engaging in practices such as tying sales of carton packaging equipment and consumables to sales of PET packaging equipment and forced sales — firstly, by the probability of predatory pricing by the merged entity; secondly, by price wars, and, thirdly, by the granting of loyalty rebates' (paragraph 156).

43 — Paragraph 158.

44 — Paragraph 159.

45 — Paragraph 160.

commitments regarding its future conduct is also a factor which the Commission should have taken into account in assessing whether it was likely that the merged entity would act in a manner which could result in the creation of a dominant position on one or more of the relevant PET equipment markets'. However, '[t]here is no indication in the contested decision that the Commission took account of the implications of those commitments when it assessed the creation of such a position in future through leveraging'. [46]

39. The Court of First Instance then concluded in examining 'whether the Commission based its analysis of the likelihood of leveraging ... and of the consequences ... on sufficiently convincing evidence', it was necessary 'to take account only of conduct which would, at least probably, not be illegal'. [47]

40. Having said that, and going on with its analysis, the Court of First Instance asserted that 'the Commission did not commit a manifest error of assessment in finding that it would be possible for the merged entity to engage in leveraging practices'. [48] In particular, according to the Court of First Instance, that institution had 'established to the requisite legal standard that growth in the PET market is foreseeable, rendering possible the occurrence of the predicted leveraging'. [49]

41. Since, however, the contested decision indicates 'that the incentive for the merged entity to exercise leveraging depends to a large extent on the anticipated level of growth in the PET markets', the Court of First Instance found it necessary to examine whether, as the applicant maintained, 'the foreseeable volume of sensitive products packaged in PET by 2005, as compared with the total future volume of products packaged in PET, makes that incentive unlikely or at least reduces the likelihood significantly'. [50]

42. At the outcome of that examination, it concluded that 'the growth forecasts for LDPs and juices as stated by the Commission in the contested decision have not been proven to the requisite legal standard. Although a certain amount of growth in those segments is likely, especially for premium products, convincing evidence of the

46 — Paragraph 161.
47 — Paragraph 162.
48 — Paragraph 199.
49 — Paragraph 195.
50 — Paragraph 201.

extent of the growth is lacking'.[51] According to the Court of First Instance, however, 'having regard to the fact that PET use will probably increase by 2005, even if less sharply than that forecast by the Commission, the incentive to leverage cannot be excluded'.[52]

43. Given the foregoing, the Court of First Instance went on 'to examine the ways in which the merged entity could engage in leveraging'.[53] On that point, it found that by limiting the analysis 'to those [practices] which, at least probably, do not constitute an abuse of a dominant position on the aseptic carton markets',[54] and taking into consideration the commitments proposed by Tetra, it had to 'be found that the merged entity's possible means of leveraging would be quite limited'.[55] Account would therefore have to be taken of that in 'examination of the foreseeable consequences of its resorting to such conduct'.[56]

44. Turning to the consideration of those consequences, the Court of First Instance found that it was 'necessary to distinguish the various PET equipment markets from those specifically for SBM machines'.[57]

45. As regards the former, following a careful market-by-market analysis, the Court of First Instance concluded 'that the contested decision does not provide sufficiently convincing evidence to show that leveraging from the aseptic carton market would enable a dominant position to be created for the new entity by 2005 on the markets for barrier technology, aseptic and non-aseptic filling machines, plastic bottle closure systems and auxiliary equipment'.[58]

46. With regard to the SBM machines markets, again after a detailed analysis, the Court of First Instance concluded:

— that, 'on the basis of the evidence in the contested decision, the Commission committed an error, first, by finding that "the majority of SBM machines are generic" ... and, second, by distinguish-

51 — Paragraph 214. Nevertheless, the Commission did not commit an error on that point, according to the Court of First Instance, with regard to the forecast growth in FFDs and tea/coffee drinks (paragraph 215).

52 — Paragraph 216.

53 — Paragraph 216.

54 — Paragraph 218.

55 — Paragraph 224.

56 — Ibid.

57 — Paragraph 225.

58 — Paragraph 254.

ing between them according to end-use'. Moreover, '[t]he contested decision does not provide sufficient evidence to justify the definition of distinct sub-markets among SBM machines with reference to their end-use', for which reason 'the only sub-markets it is necessary to consider are those for low- and high-capacity machines';[59]

— that, 'as regards low-capacity SBM machines, ... in so far as the Commission predicts that a dominant position will be created on that market by 2005 through leveraging, it committed a manifest error of assessment';[60]

— and that, 'as regards the market for high-capacity SBM machines, the evidence relied on by the Commission does not justify a finding that both the merged entity's competitors and the converters would be marginalised by 2005 due to leveraging by that entity directed at Tetra's current customers on the carton markets who, during that period, intend to switch all or part of their production over to PET for packaging of sensitive products'.[61]

47. Drawing a '[g]eneral conclusion on leveraging', the Court of First Instance held, in consequence, 'that, in relying as it did on the consequences of leveraging by the merged entity in order to support its finding that a dominant position would be created by 2005 on the PET packaging equipment markets, especially those for low- and high-capacity SBM machines used for sensitive products, the Commission committed a manifest error of assessment'.[62]

48. The Court of First Instance then noted that, '[s]ince the conditions required by Article 2(3) of the Regulation have not been fulfilled as regards the leveraging foreseen by the Commission, it must be examined whether those conditions are fulfilled with regard to the second pillar of the Commission's reasoning concerning the carton markets'.[63]

59 — Paragraph 269.
60 — Paragraph 283.
61 — Paragraph 306.
62 — Paragraph 308.
63 — Paragraph 309.

49. Undertaking that assessment, the Court of First Instance first of all observed generally that the Commission did not 'commit any error in examining the significance for the carton markets of a reduction of potential competition from the PET equipment markets. It does have to show, however, that such a reduction, if it exists, would tend to strengthen Tetra's dominant position in relation to its competitors on the aseptic carton markets'. [64]

50. In that regard, after examining the assessments made by the Commission, the Court of First Instance concluded that 'the evidence relied on in the contested decision does not establish to the requisite legal standard that the effects of the modified merger on Tetra's position, principally on the aseptic carton markets, would, by eliminating Sidel as a potential competitor, be such as to fulfil the conditions of Article 2(3) of the Regulation'. Indeed, in its opinion, 'it has not been shown that the merged entity's position would be strengthened vis-à-vis its competitors on the carton markets'. [65]

51. Turning, finally, to the 'third pillar' of the Commission's reasoning, which concerns the overall position of the merged entity in the packaging of sensitive products, the Court of First Instance confined itself to the finding that '[t]hese effects of the notified transaction cannot, however, be considered in isolation from the analysis in the contested decision concerning the first two pillars of the Commission's reasoning. Since the analysis of those two pillars is vitiated by manifest errors of assessment ..., the third pillar must also be dismissed and it is not necessary to examine it in detail'. [66]

52. The Court of First Instance therefore concluded that 'the contested decision does not establish to the requisite legal standard that the modified merger would give rise to significant anti-competitive conglomerate effects'. In its view, '[i]t must therefore be concluded that the Commission committed a manifest error of assessment in prohibiting the modified merger on the basis of the evidence relied on in the contested decision relating to the foreseen conglomerate effect'. [67]

53. Drawing an overall conclusion as to the outcome of the action, the Court of First Instance therefore affirmed that 'the pleas alleging lack of horizontal, vertical and

64 — Paragraph 323.
65 — Paragraph 333.
66 — Paragraph 335.
67 — Paragraph 336.

conglomerate anti-competitive effects must be declared well founded, and it is not necessary to examine the other pleas' and that '[c]onsequently, the contested decision is annulled'.[68]

The appeal and the procedure before the Court of Justice

54. By application lodged at the Registry of the Court of Justice on 8 January 2003, the Commission brought an appeal against that judgment of the Court of First Instance, seeking to have it set aside. Tetra has of course opposed that request, lodging a response as provided for by Article 115 of the Rules of Procedure of the Court of Justice.

55. In that response, in addition to claiming that the appeal should be dismissed, Tetra requested — as a measure of inquiry pursuant to Article 45(2)(b) of the Rules of Procedure — the production of the translation into French of the appeal (the original version of which is in English, the language of the case in the proceedings before the Court of First Instance and, therefore, in these proceedings). The request for that measure of inquiry was rejected by the Court by order of 24 July 2003.

68 — Paragraphs 337 and 338.

56. On leave given by the President of the Court of Justice in accordance with Article 117 of the Rules of Procedure, the Commission submitted a reply, which was followed by a rejoinder lodged by Tetra. In addition, the parties replied in writing to a question asked by the Court and were heard at the hearing of 27 January 2004.

III — Legal analysis

57. In support of its application the Commission has raised five grounds of appeal, relating to:

(i) an error of law concerning the standard of proof required and the scope of judicial review;

(ii) an error of law, and in particular infringement of Articles 2 and 8(2) of the Merger Regulation, in that the Court of First Instance required the Commission to take into consideration the unlawfulness of certain conduct and to take account of purely behavioural commitments;

(iii) an error of law in that the Court of First Instance did not uphold the Commission's definition of separate product markets for SBM machines by reference to their end-use;

(iv) infringement of Article 2 of the Regulation, distortion of the facts and failure to take account of the Commission's arguments in that the Court of First Instance did not uphold the Commission's finding as to the strengthening of Tetra's dominant position in carton;

(v) error of law in that the Court of First Instance did not uphold the Commission's conclusions as to the creation of a dominant position for Tetra in SBM machines.

58. After a few brief general remarks on the admissibility of appeals against the judgments of Court of First Instance, those grounds of appeal will be examined in the same order as that in which they were submitted by the Commission.

General considerations on the admissibility of appeals against judgments of the Court of First Instance

59. Having regard to the fact that Tetra is challenging the admissibility of most of the Commission's grounds of appeal, before I go on to analyse those grounds, I must briefly point out that, in accordance with Article 225 EC and Article 51 of the Statute of the Court of Justice, an appeal may be brought against a judgment of the Court of First Instance 'on points of law only'.

60. It follows, according to settled case-law, that the Court of First Instance 'has exclusive jurisdiction, first, to establish the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. When the Court of First Instance has established or assessed the facts, the Court of Justice has jurisdiction under Article 168a of the Treaty [now Article 225 EC] to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them ... . The Court of Justice thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced

to it ... . The appraisal by the Court of First Instance of the evidence put before it does not constitute, save where the evidence has been fundamentally misconstrued, a point of law which is subject, as such, to review by the Court of Justice'. [69]

61. It is, therefore, only within those narrow confines fixed by established case-law that the various grounds of appeal may be examined by the Court of Justice.

The ground of appeal relating to an error of law concerning the standard of proof required and the scope of judicial review

62. By the first ground of appeal, which may in essence be broken down into two parts, the Commission first criticises generally the scope of the judicial review carried out by the Court of First Instance and the standard of proof demanded by that court in order for a concentration to be prohibited and, second, provides a 'concrete example' of the mistakes made by the Court of First Instance, challenging the kind of review carried out by that court in relation to the Commission's assessments of foreseeable growth in PET. For the sake of clarity, those two aspects will be analysed separately.

(a) The Commission's general criticisms

63. The criticisms of a general nature formulated by the Commission relate first and foremost to the scope and nature of the judicial review carried out by the Court of First Instance in relation to the complex economic evaluations made in the contested decision.

64. In particular, the Commission complains that the Court of First Instance did not confine itself to establishing whether the institution had committed a 'manifest error of assessment', and therefore to ascertaining whether the facts on which its assessment was based were correct, whether the conclusions drawn from those facts were not clearly mistaken or inconsistent and whether all the relevant factors had been taken into account.

65. According to the appellant institution, instead of limiting itself to those aspects, the Court of First Instance carried out a far more incisive review, going so far as to ascertain whether the Commission's conclusions were supported by 'convincing' [70] evidence or facts. In its view, therefore, the Court of First Instance carried out a form of review that, taken literally, required the Commission to 'convince' it of its conclusions and, as a result, enabled the court to tackle the

69 — Case C-7/95 P *John Deere* v *Commission* [1998] ECR I-3111, paragraphs 21 and 22. To the same effect, see, *inter multos*, Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraphs 42 and 43, and Case C-8/95 P *New Holland Ford* v *Commission* [1998] ECR I-3175, paragraph 26.

70 — [Footnote not relevant to the English-language version of this text].

substance of the issues and to substitute its own point of view for that of the Commission. To the latter's mind, furthermore, in the case in point the Court of First Instance carried out a review far more rigorous than performed by the Court of Justice in *Kali and Salz*,[71] which also concerned concentrations and in which the Community judicature merely established whether the Commission's conclusions were borne out by a 'sufficiently cogent and consistent body of evidence'.[72]

66. Next, the Commission complains that the Court of First Instance considered that, where 'the anticipated dominant position would emerge only after a certain lapse of time', the 'analysis [by the Commission] of the future position must, whilst allowing for a certain margin of discretion, be *particularly plausible*'.[73] Such an approach would in fact excessively reduce the discretion enjoyed by the Commission in carrying out complex economic assessments, requiring it to rely exclusively on facts and evidence lending themselves to a single, unequivocal interpretation.

67. Lastly, the Commission challenges the Court of First Instance for considering that, in order for a conglomerate-type merger to be prohibited, the Commission must base its decision on facts that show that '*in all likelihood*' the merger would produce the predicted anti-competitive effects.[74] In that manner, however, the Court of First Instance left very little opportunity of prohibiting that type of merger and introduced an unequal standard of proof, depending on whether the decision was to prohibit or to authorise the concentration. It argues that the Court of First Instance's interpretation is therefore contrary to Article 2(2) and (3) of Regulation No 4064/89, which provide perfectly symmetrical legal requirements whether a concentration is declared compatible or incompatible with the common market.[75]

68. Tetra counters those challenges by claiming, in essence, that the Commission's arguments are toothless, since they turn on a disquisition of a semantic nature on the terminology used by the Court of First Instance, rather than a specific examination of the kind of judicial review carried out by that court. In any case, according to Tetra, the Commission's complaints fall wide of the

71 — Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375 ('*Kali and Salz*').

72 — Paragraph 228.

73 — Paragraph 162 of the judgment under appeal; italics added.

74 — Paragraph 153 of the judgment under appeal; italics added.

75 — As we have seen, that provision states: on the one hand, that 'a concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market' (Article 2(2)); and, on the other, that 'a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market' (Article 2(3)).

mark since the expressions used by the Court of First Instance, taking account also of the various language versions, do not materially depart from those used by the Court of Justice in *Kali and Salz* and by the Commission itself in its decisions.

69. In Tetra's opinion, furthermore, regardless of the expressions used, the Court of First Instance in substance respected the discretion enjoyed by the Commission in carrying out complex economic assessments. Just as the Court of Justice did in *Kali and Salz*, so the Court of First Instance simply established whether the Commission had discharged the burden of proof placed on it in relation to the requirements laid down by Article 2(3) of the Merger Regulation.

70. Next, with regard to the Commission's argument concerning the perfectly symmetrical nature of the requirements laid down by Article 2(2) and (3), Tetra maintains that if the Commission fails to prove that the requirements of Article 2(3) are fulfilled, then it must approve the concentration, without any need for it to prove subsequently that those requirements are not fulfilled. If that were not so, indeed, the undertakings concerned would without justification be required to prove that the transaction notified was not incompatible with the common market

71. For my part, I agree with Tetra that the Court of Justice cannot linger over the carrying out of a purely formal linguistic or semantic assessment in order to establish whether or not the Court of First Instance committed an error of law in applying too rigorous a judicial review or in claiming a standard of proof too high for decisions prohibiting mergers. I believe rather that the Court of Justice must look to the heart of the matter, assessing in concrete terms whether, beyond the formal aspect, the Court of First Instance did in fact carry out a review inconsistent with the relevant provisions of Community law and incompatible with the particular judicial role entrusted to it by the Treaty.

72. In carrying out that assessment it must first and foremost bear in mind that, on the basis of the system laid down by Regulation 4064/89, the Commission is to prohibit a concentration — of any kind whatsoever — whenever it arrives at the conclusion that that concentration would lead to the creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it (Article 2 (3) of the Regulation).

73. It is plain, however, that the Commission's opinion regarding the creation or strengthening of such a dominant position

involves more than a mere factual assessment as to the material existence or otherwise of certain requirements. In addition to that assessment, its opinion entails a complex technical evaluation, based not on the application of precise scientific rules but on criteria and principles which are open to question, such as economic ones. More particularly, the Commission is required to undertake a complex assessment predicting the effects of the concentration on the structure and competitive dynamics of the markets concerned, taking into consideration the many constantly evolving factors which may impinge on the future development of supply and demand on those markets.

74. It therefore cannot be claimed that in order to prohibit a concentration the Commission must establish with absolute certainty that the concentration would lead to the creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it. It seems to me sufficient for that purpose if, on the basis of solid elements gathered in the course of a thorough and painstaking investigation, and having recourse to its technical knowledge, the Commission is persuaded that the notified transaction would very probably lead to the creation or strengthening of such a dominant position. If the Commission is not so convinced, it must on the contrary authorise the merger.

75. Unlike the Commission, I believe that application of such a test is not contrary to the perfectly symmetrical nature of the legal requirements laid down by Article 2(2) and (3) of the Regulation for a declaration that a concentration is or is not compatible with the common market.

76. As a matter of fact, I consider that the symmetry of those requirements cannot be absolute, seeing that there is, between the cases in which the notified transactions would very probably create or strengthen a dominant position within the meaning of Article 2 and the cases in which those transactions very probably would not create or strengthen such a dominant position, a 'grey area': an area, that is to say, in which cases are to be found where it is especially difficult to foresee the effects of the notified transaction and where it is therefore impossible to arrive at a clear distinct conviction that the likelihood that a dominant position will be created or strengthened is significantly greater or less than the likelihood that such a position will not be created or strengthened. The system laid down by Regulation 4064/89 must therefore necessarily provide a yardstick for the solution of those cases which are of doubtful or difficult classification.

77. I believe that in such cases the most correct solution is quite certainly to authorise the notified transactions.

78. It appears to me that Article 10(6) of the Regulation provides to that effect, stating that where, within the deadlines set, the Commission has not taken a decision concerning a notifiable transaction, the concentration 'shall be deemed to have been declared compatible with the common market'.

79. By stipulating that, if the Commission does not make a decision in good time, the concentration must be deemed to be authorised, the Community legislature demonstrates as a matter of fact that it considers that, in the case of uncertainty as to whether or not the transaction is compatible with the common market, the interest of the undertakings seeking to make the merger must prevail. In other words, in similar situations it has been thought preferable to run the risk of authorising a transaction incompatible with the common market, rather than the risk of prohibiting one that is compatible, so unjustifiably restraining the parties' freedom of economic activity.

80. To my mind the same must hold good in cases falling within the 'grey area' of which I have spoken, those also being marked by appreciable uncertainty as to whether or not the notified concentrations are compatible with the common market.

81. That notified concentrations are authorised in such situations seems moreover justified to me by the fact that, if they should lead to the creation or strengthening of a dominant position within the meaning of Article 2 of the Regulation, the Commission and the competent national authorities would nevertheless be able to limit the distortions of competition by making *ex post* use of the powers given them by Article 86 of the Treaty.

82. Having said that with regard to the evaluations which the Commission must carry out, I can now turn to the question of the bounds of judicial review.

83. On this point, I shall begin with the observation that in accordance with settled case-law 'examination by the Community judicature of the complex economic assessments made by the Commission must necessarily be confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and

whether there has been any manifest error of appraisal or misuse of powers'. [76]

84. With specific reference to Regulation 4064/89, the Court of Justice in *Kali and Salz* had furthermore the opportunity to make it clear that 'the basic provisions of the Regulation, in particular Article 2 thereof, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature ... Consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations'. [77]

85. It is clear from that case-law that the Community judicature, in addition naturally to monitoring observance of the rules of law and in particular those relating to procedure and the obligation to state reasons, exercises a different review dealing with the accuracy of the findings of fact and economic assessments made by the Commission.

86. With regard to the findings of fact, the review is clearly more intense, in that the issue is to verify objectively and materially the accuracy of certain facts and the correctness of the conclusions drawn in order to establish whether certain known facts make it possible to prove the existence of other facts to be ascertained. By contrast, with regard to the complex economic assessments made by the Commission, review by the Community judicature is necessarily more limited, since the latter has to respect the broad discretion inherent in that kind of assessment and may not substitute its own point of view for that of the body which is institutionally responsible for making those assessments.

87. However, the fact that the Commission enjoys broad discretion in assessing whether or not a concentration is compatible with the common market does certainly not mean that it does not have in any case to base its conviction on solid elements gathered in the course of a thorough and painstaking investigation or that it is not required to give a full statement of reasons for its decision, disclosing the various passages of logical argument supporting the decision. The Commission has itself acknowledged in its appeal, moreover, that it is bound to examine the relevant market carefully; to base its assessment on elements which reflect the facts as they really are, which are not plainly insignificant and which support the conclusions drawn from them, and on adequate reasoning; and to take into consideration all relevant factors.

76 — Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 279. To the same effect, see *inter multos* Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 34, and Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 62.

77 — Cited above, paragraphs 223 and 224.

88. As is also clear from the approach taken by the Court of Justice in *Kali and Salz*, those duties imposed on the Commission make it possible for the Community judicature to exercise an adequate review. Without entering into the merits of the Commission's assessments, it can in particular ascertain whether the factual information on which such assessments are based is accurate and whether the conclusions drawn as to fact are correct; [78] whether the Commission undertook a thorough and painstaking investigation, and in particular whether it carefully inquired into and took sufficiently into consideration all the relevant factors; [79] and whether the various passages in the reasoning developed by the Commission in order to arrive at its conclusions in respect of the compatibility or otherwise of a concentration with the common market satisfy requirements of logic, coherence and appropriateness. [80]

89. The rules on the division of powers between the Commission and the Community judicature, which are fundamental to the Community institutional system, do not however allow the judicature to go further, and particularly — as I have just said — to enter into the merits of the Commission's complex economic assessments or to substitute its own point of view for that of the institution.

78 — This for example is the kind of review carried out in paragraphs 229-231 and 245 of *Kali and Salz*.

79 — This type of review underlies for example the finding made in the last sentence of paragraph 241 in *Kali and Salz*.

80 — It seems that the assessments made by the Court of Justice in paragraphs 228, 239, 241 (except the last sentence), 246 and 247 of *Kali and Salz* are referable to this type of review.

90. That having been expressed in general terms, it is now necessary to go on to assess specifically whether the Court of First Instance committed an error of law in applying too rigorous a standard of judicial review or too high a standard of proof in respect of a decision to prohibit a concentration (see paragraph 71 above).

(b) The 'concrete example' of the errors committed by the Court of First Instance

91. After putting forward the general criticisms just mentioned, in the second part of its first ground of appeal the Commission proposes to give a 'concrete example' of the errors made by the Court of First Instance. In this part of that ground, in addition to challenging the various passages in the judgment under appeal in which it claims the Court of First Instance overstepped the bounds of judicial review, the Commission puts forward other summary complaints relating to errors of various kinds committed by the Court of First Instance in carrying out its own assessments.

92. In its first objection the Commission complains that the Court of First Instance overstepped the bounds of judicial review by rejecting its conclusion as to the foreseeable growth in PET packaging for long-life (UHT) milk of up to 1% of that market segment. In particular, according to the Commission, the Court of First Instance unlawfully and without reasoning overturned the conclusion reached by the institution, merely finding that 'the use of PET will not actually increase for UHT milk and, consequently, for approximately half of the LDP market'. [81]

93. The objection seems to me to hit the mark. Indeed, I agree with the Commission that with that terse statement (especially if we look at the text of the judgment in the language of the case) the Court of First Instance incorrectly substituted its own point of view for the Commission's, formulating its own autonomous prediction of future developments in the market.

94. Contrary to what Tetra maintains, the Court of First Instance's laconic assertion contains no criticism of the logic, coherence or appropriateness of the reasoning developed by the Commission on the basis of the elements available. Instead, that assertion clearly shows that the Court of First Instance took those elements into direct consideration in order to draw from it its own distinct conclusion that use of PET would not increase for the packaging of UHT milk or, consequently, for approximately half the LDP market. By so doing, that court therefore plainly overstepped the bounds of its judicial review (see paragraphs 82 to 89 above).

95. The Commission's objections relating to the Court of First Instance's opinion concerning the estimated increased use of PET for packaging fresh milk (increase put at 10-15%) and flavoured milk and milk-based drinks (increase put at up to 25%) seem to me to be equally well founded.

96. In this respect I agree first of all with the Commission that the conclusion that 'the growth estimates adopted by the Commission ... are not really very convincing' [82] is invalidated by an incomplete or inaccurate

81 — Paragraph 211 of the judgment.

82 — Paragraph 212.

assessment of the relevant factors and is not, in any case, supported by adequate reasoning.

97. As, in fact, the Commission has correctly observed, in stating its reasons for that conclusion:

(i) the Court of First Instance did not even mention the extensive market investigation carried out by the Commission, which showed that market participants in the sector expected levels of growth even higher than those finally accepted by the Commission. [83] It is, by the way, clear that, contrary to what Tetra maintains, the mere fact that the Commission opted for more prudent predictions can in no way justify the failure to assess one of the factors which the Commission had taken into account in arriving at its own conclusion;

(ii) the Court of First Instance appears to have distorted the sense of one of the studies considered in the decision (and placed in the file at its request), [84] in which, examining the foreseeable growth of PET, it stated that: 'for aseptic packaging, the Warrick report predicts only minimal growth, of 1%, for flavoured milk, and a slight decline for other milk-based drinks'. [85] It would indeed seem from that passage that the predictions of the Warrick report referred to the increase in PET for packaging flavoured milk and other milk-based drinks, whereas reading of the document clearly shows (and this is, moreover, not denied by Tetra) that those predictions referred only to the volume of the products concerned to be packaged, irrespective of the material used;

(iii) the Court of First Instance did not make any serious criticisms of the Commission's reasoning. but did no more than remark that: 'the PCI report, the only independent study to concentrate on the LDP market, predicts growth as a result of which PET use will be 9.2% of the fresh non-flavoured market in 2005' (and that is a proportion not far distant from that predicted by the Commission); 'for aseptic packaging, the Warrick report predicts only minimal growth, of 1%, for flavoured milk, and a slight decline for other milk-based

83 — On this point, paragraph 142 of the decision states: 'Generally, market participants suggested significant growth in PET use in the short term in the "sensitive" products. For those participants who felt able to quote the proportion of the "sensitive" products that would be packaged in PET in 2005, the Commission found that on average PET would represent around 40% on milk, 30% in juice, 40% in FFDs and over 50% in ice tea'.

84 — In that regard, see paragraphs 75 and 76 of the judgment under appeal

85 — Paragraph 212.

drinks' (which as we have seen is misleading, for those predictions did not relate to increased use of PET), 'whilst the Pictet report does not give any specific forecasts for LDPs'; and 'the PCI report provides the only proof which might possibly support the forecast of a 25% market share for PET in other milk-based drinks' (a proportion corresponding exactly to that predicted by the Commission). [86] As may easily be established, those summary observations concerning 'independent studies' [87] do not satisfactorily explain why, in the Court of First Instance's opinion, the Commission's estimates were not 'very convincing', especially when it is borne in mind that those estimates — based on a series of factors — were already more cautious than those appearing in the market investigation carried out by the Commission.

98. The Court of First Instance's statement that 'generally, the contested decision does not explain adequately how PET could displace HDPE as the main material competing with carton by 2005, especially in the important fresh-milk packaging segment' also appears inadequately reasoned to me. [88]

99. As rightly pointed out by the Commission, the Court of First Instance as a matter of fact came to that conclusion without in any way criticising, or indeed even mentioning, the assessments made by that institution — on the basis of the findings of its market investigation and of information provided in independent studies — concerning the competitive advantages of PET in comparison with HDPE. [89]

100. That the Court of First Instance referred particularly to fresh-milk packaging raises the doubt that it did not take any account at all of those assessments, seeing that the contested decision reveals that that product was one of those for which PET offered major competitive advantages compared to HDPE. In the decision it is in fact clearly stated that '[t]he Commission's market investigation confirmed PCI's suggestion that PET has marketing advantages over HDPE, in particular, where visibility can be achieved', [90] and especially for those pro-

86 — The quotations are again from paragraph 212 of the judgment.

87 — 'Independent studies' means those not commissioned by Tetra.

88 — Paragraph 212.

89 — See, in particular, paragraphs 80, 95-97 and 101 and 102 of the decision.

90 — Paragraph 97 of the decision.

ducts, such as fresh milk, which do not need a light barrier. [91] As observed by the Commission, the failure to take those assessments into consideration seems furthermore to be confirmed by the part of the judgment concerning the possible effects of leveraging, in which, wrongly substituting its own assessments for those of the Commission, the Court of First Instance tersely affirmed that 'fresh milk is not a product for which the marketing advantages offered by PET have any particular importance'. [92]

101. I would add, moreover, that the Court of First Instance's conclusion as to the reasons given for the decision finds no valid justification in the subsequent statement that 'the Commission does not dispute either the overall figure of 17.3% for the use of HDPE for LDPs given by Canadean for 2000 ... or the forecast [again Canadean's] that that figure could reach 19.5% by 2005'. [93]

102. Indeed I agree with the Commission that the Court of First Instance made reference to the Canadean study (commissioned by Tetra) without considering that the Commission had explained that it did not regard the predictions made in that study as generally reliable. The Court of First Instance ought instead to have taken account of the Commission's criticisms that, on the one hand, that study had wrongly 'used a model which considers previous growth as an indicator of future growth and ignores the future technological developments particular to barrier technology' and that, on the other, given 'that the decision to package products in PET is said to be customer-driven, a study [such as Canadean's] excluding customer views is not particularly robust'. [94]

103. Given the foregoing, I consider that the Commission's various charges in respect of foreseeable growth in the use of PET for packaging liquid dairy products must be upheld.

104. I believe, however, that the charge relating to the assessment of the foreseeable growth in the use of PET for packaging juices cannot be upheld.

91 — It is clear from the decision that while 'UHT white milk requires a light barrier', 'fresh milk can successfully [be] packaged in standard PET without any barrier properties' (paragraphs 76 and 77). Furthermore, according to Tetra, limitations on the use of PET because of the need for a light barrier 'apply only to UHT white milk'. In that respect, Tetra notes that 'technical solutions to provide a light barrier for PET' 'involve high costs and complex manufacturing technology, raise recycling issues and eliminate transparency of the bottle which is one of the major advantages of PET' (paragraph 74 of the decision).

92 — Paragraph 289.

93 — Paragraph 212, end.

94 — Paragraph 123 of the decision.

105. In that objection, the Commission complains in particular that the Court of First Instance stated that, although 'the Commission itself acknowledged that the growth in question would be due mainly to a switch from glass to PET, it did not conduct any analysis of the glass market'. [95] By so doing, according to the Commission, the Court of First Instance ignored important evidence as to the decline of glass for non-premium products, which the Commission took as a basis in the contested decision, later examining them in more detail in its defence. According to the Commission, to proceed in such a way confirms that the Court of First Instance erred in regarding as unimportant factors not mentioned in the contested decision, but referred to in the pleading in support of the necessarily more general considerations contained in the decision.

106. In that connection I must, nevertheless, agree with Tetra that the Court of First Instance did not make any mistake in asserting that the Commission had made no analysis of the market for glass, seeing that, apart from some vague and fleeting references, there is no trace of any such analysis in the decision. Contrary, therefore, to what the Commission maintains, that gap in the investigation could certainly not be filled by subsequent statements made in the pleadings, since the evidence and the assessments on which the decision was based had to be clearly indicated in that act and could not be supplied only later in connection with proceedings before the Court of First Instance. [96]

107. Finally, the Commission's last objection seems to me to be well founded, in which it complains that the Court of First Instance took into account that 'the cost of PET is higher than that of carton' in assessing whether it was likely that Tetra's customers would switch from carton to PET as a result of leveraging. [97]

108. In fact, I agree with the Commission that no clear conclusion was reached in the contested decision as to the vexed question of the difference in cost between PET and carton and that, as a result, it was not open to the Court of First Instance to enter into the merits of that complex economic assessment, by deciding for itself that PET cost more than carton.

95 — Paragraph 213.

96 — It is clear from the Court of Justice's case-law that 'a failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the decision during the proceedings before the [Community judicature]' (Case 195/80 *Michel* v *Parliament* [1981] ECR 2861, paragraph 22). To essentially the same effect, see Case C-343/87 *Culin* v *Commission* [1990] ECR I-225, paragraph 15, and Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraph 70.

97 — Paragraph 288 of the judgment under appeal. That assertion as to the difference in cost between PET and carton is then repeated by the Court of First Instance in paragraph 326 in connection with the assessment of the reduction of potential competition in the carton markets.

109. On this point, in contrast to what Tetra submits and is affirmed in a later passage of the judgment under appeal, [98] I do not think that the Commission by implication accepted the finding of the Warrick report that, with regard to aseptic packaging, PET is 30 to 40% more expensive than carton. After recalling the conclusions at which that study arrived, the Commission as a matter of fact stated that its 'market investigation did not produce a clear picture of the relative costs of PET- and carton-packaging systems', since the persons questioned had given contradictory answers. [99] It seems plain enough to me that even if that last assertion does not in some way cast doubt on the findings of the Warrick study, it certainly does not make it possible to hold that the Commission by implication confirmed them.

110. Nor, moreover, do I think it possible to discern, as Tetra would have it, confirmation of the greater cost of PET in the Commission's statement that some customers 'indicated that they would consider a switch from carton to PET only if carton prices rose by a significant amount of 20% or more'. [100] That assertion does no more, in fact, than report the point of view of certain customers questioned by the Commission in the ambit of its market investigation: an investigation which, as we have seen, 'did not produce a clear picture of the relative costs of PET- and carton-packaging systems'.

111. As matters stand, it seems clear to me that, while the Court of First Instance could possibly have found that the Commission's investigation was incomplete, or have criticised the logic, consistency and appropriateness of its reasoning, it definitely could not carry out its own assessment of the information in that institution's possession in order to conclude that PET was 'more expensive than carton'.

(c) Conclusions on the first ground of appeal

112. In the light of all the considerations set out above, I believe that the first ground of appeal is in part well founded and that, in particular, the Commission's objections concerning foreseeable growth in the use of PET for packaging of liquid dairy products and the difference in cost between PET and carton must be upheld.

98 — Paragraph 326.

99 — Paragraph 92. Referring to the findings of its market investigation, the Commission stated in particular that: 'Some market participants stated that for most applications and in particular for products requiring a barrier, PET is more expensive. The majority of respondents, however, were not able to identify the precise cost differences; for many, this was because they did not have experience in both materials. However, some third parties (notably those with greater experience in PET) informed the Commission that for them PET was actually cheaper than carton' (paragraph 92).

100 — Paragraph 397 of the decision

Concerning the ground of appeal relating to the requirement that the unlawful nature of certain behaviour should be taken into consideration and that purely behavioural commitments should be taken into account

113. By its second ground of appeal, the Commission criticises certain general assessments made by the Court of First Instance in respect of 'leveraging' (see paragraphs 36 to 39 above), charging the Court with having asked it to take into consideration as a possible deterrent to such a practice: (i) the unlawfulness of given conduct inherent in that practice which would have led to abuse of a dominant position; [101] (ii) the purely behavioural commitments offered by Tetra, which consist of nothing more than a promise not to act abusively.

114. Referring to the first aspect, the Commission recalls that Regulation 4064/89 introduced prior control of concentrations in order to avoid structural changes to the market that might involve abusive conduct. Where an undertaking dominant on one market acquires an undertaking operating on another neighbouring market, the concentration must be prohibited if the entity created by the merger would have the means and incentives to engage in abuses permitting it to oust its competitors from that other market. [102] In the Commission's view, therefore, by asking it to assess also whether economic incentives to abuse the dominant position held by the merged entity could not be counterbalanced by the disincentives of the unlawful nature of abuse, the Court of First Instance has misinterpreted Article 2 of the Regulation.

115. Furthermore, according to the Commission, yet another misinterpretation of that provision led the Court of First Instance to assert that 'it is also appropriate to distinguish, on the one hand, between a situation where a merger having conglomerate effects immediately changes the conditions of competition on the second market and results in the creation or strengthening of a dominant position on that market due to the dominant position already held on the first market and, on the other hand, a situation where the creation or strengthening of a dominant position on the second market does not immediately result from the merger,

101 — On this point, I would note that 'leveraging from the aseptic carton market ... would manifest itself — in addition to the possibility of the merged entity engaging in practices such as tying sales of carton packaging equipment and consumables to sales of PET packaging equipment and forced sales — firstly, by the probability of predatory pricing by the merged entity, secondly, by price wars; and, thirdly, by the granting of loyalty rebates' (paragraph 156 of the judgment under appeal).

102 — In this connection, in its reply and at the hearing the Commission stated that a structural change in market conditions as a result of which the merged entity acquired such means and incentives constitutes the immediate creation of a dominant position on the other market.

but will occur, in those circumstances, only after a certain time and will result from conduct engaged in by the merged entity on the first market where it already holds a dominant position. In this latter case, it is not the structure resulting from the merger transaction itself which creates or strengthens a dominant position within the meaning of Article 2(3) of the Regulation, but rather the future conduct in question'. [103] In the Commission's opinion, indeed, in that latter case too, contrary to what the Court of First Instance maintains, it is the merger that creates or strengthens the dominant position since it has the direct immediate effect of bringing about the conditions in which abuse is not only possible but also economically rational.

116. Lastly, the Commission maintains that there are insuperable legal and practical obstacles to the engaging in an analysis of the possible deterrent effect of the unlawfulness of certain conduct. It would as a matter of fact be impossible to assess with a sufficient degree of certainty the inclination of particular undertakings to engage in unlawful conduct and the effect that the danger of being discovered and penalised might have on their actions.

117. With regard next to the second of those aspects, concerning the behavioural commitments offered by Tetra (see paragraph 113 above), the Commission remarks that, given the purpose of prior control under Regulation 4064/89, commitments not to abuse a dominant position created or strengthened by a merger are unacceptable, because they do not make it possible to put right the structural problems which the Regulation seeks to avoid. In its view, by requiring it to take into consideration such commitments, the Court of First Instance has therefore infringed the provisions of the Regulation, in particular Articles 2 and 8(2). In any case, according to the Commission, the Court of First Instance incorrectly stated that that institution had not taken account of the commitments offered by Tetra, since it is clear from the decision that those commitments had been analysed and rejected not only for reasons of principle, but also because they were 'extremely difficult, if not impossible, to monitor'. [104]

118. I do not find those arguments of the Commission persuasive.

119. The criticisms made of the Court of First Instance would in fact be justified only if the decision revealed that, as the Commission maintained in its reply and at the hearing, the merger would lead to structural changes in the market which would immediately and automatically create a second dominant position which the new entity

103 — Paragraph 154 of the judgment under appeal.

104 — Paragraph 431 of the decision.

could abuse by foreseeable actions on its part.

120. However, as Tetra rightly emphasises, the decision does not say that the merged entity would immediately and automatically acquire a dominant position on the PET packaging equipment markets, but predicts that that would happen only subsequently, by means of abuse of the dominant position already held by Tetra in carton.

121. That is clearly shown in, for example, the passage in the decision in which we read that the 'bringing together of Tetra's dominant position in carton packaging and Sidel's leading position in PET packaging equipment ... would create a market structure which would enable the merged entity to leverage its dominant position in aseptic carton packaging to acquire a dominant position in the PET packaging equipment market'. [105] From that passage it is to be deduced, in fact, that the merger would *immediately* create a market structure giving the merged entity the means and incentives to engage in certain leveraging practices and *subsequently* to acquire, by means of those practices, a dominant position in the PET packaging equipment markets.

122. As matters stand, the Court of First Instance rightly declared that the Commission ought to have taken into consideration the various factors that might have influenced the likelihood of the merged entity's behaving in such a way as to enable it to acquire the predicted dominant position on the PET packaging equipment plant.

123. In other words, as stressed by Tetra, the Court of First Instance correctly found that, just as the Commission had assessed the economic incentives for engaging in such conduct, so it ought to have taken into consideration the possible disincentive in that respect of the unlawful nature of the conduct in question (which would have involved abuse of Tetra's pre-existing dominant position in carton) or of the commitments into which that company had offered to enter.

105 — Paragraph 342 of the contested decision. To the same effect, see also paragraph 330, in which it is stated: 'By acquiring Sidel, Tetra would ensure that its dominant position in aseptic carton packaging was retained and strengthened by eliminating Sidel as a source of competitive constraint. In addition, leveraging its dominant position in carton, Tetra/Sidel *would have the ability to reach a level of dominance in PET equipment* and in particular SBM machines of high and low capacity in the relevant end-use segments' (emphasis added). Similar assertions are made in many passages of the decision, such as, for example, paragraphs 331, 359 and 389.

124. Contrary to what the Commission maintains, by asking it to take into con-

sideration the unlawful nature of certain conduct brought about by leveraging and the relevant commitments offered by Tetra, the Court of First Instance did not require the Commission to assess the likelihood of the merged entity's abusing the dominant position created by the merger. It simply requested that the Commission should assess the likelihood that, by exploiting Tetra's pre-existing dominant position in carton, the new entity might acquire a dominant position in the PET-packaging-equipment markets: that is to say, to assess whether the merger would lead to the creation of a dominant position for the purposes of Article 2 of Regulation 4064/89.

125. Nor, moreover, do I believe that there were insurmountable legal and practical obstacles to carrying out the assessment requested by the Court of First Instance. The latter did not in fact expect the Commission to establish with certainty whether the unlawfulness of the conduct in question or the commitments proposed by Tetra would deter that undertaking from engaging in such conduct, nor on the other hand did it expect the Commission to demonstrate that the economic incentives identified in the decision would definitely drive Tetra to engage in that conduct. The Court of First Instance simply asked the Commission to take account of those factors in the ambit of its predictions, assessing, for example, whether — in view of the normal business practices in that sector — the Commission, the competent national authorities or injured competitors could easily learn of any unlawful conduct.

126. Lastly, the Commission's argument that the Court of First Instance wrongly ignored its analysis of the commitments as to conduct offered by Tetra does not seem to me to be persuasive. As that company rightly remarks, the Commission did no more than make the brief and unsupported assertion that the commitments in question were 'extremely difficult, if not impossible, to monitor', but made no adequate assessment of how they might possibly impinge on the merged entity's future conduct or, in particular, of whether they might constitute a significant disincentive to engaging the predicted leveraging practices.

127. Given the foregoing, it must be concluded that the Commission's allegations have not been justified. I repeat that it would have been otherwise had it been apparent from the decision that the merger would have brought about structural changes in the market liable to lead to the immediate and automatic creation of a dominant position on the PET markets. That is what the Commission maintained in its reply and at the hearing but, as we have seen, it is not what appears in the contested decision.

128. Having regard to the foregoing considerations, I therefore consider that the second ground of appeal must be rejected.

The ground of appeal relating to the definition of distinct markets for SBM machines depending on their end use

129. By its third ground of appeal the Commission criticises the Court of First Instance for not having upheld the Commission's assessment relating to the definition of distinct markets for SBM machines (high- and low-capacity) used for the packaging of 'sensitive' products. In that regard, the Commission formulates various grounds of complaint, distinguishing in particular between those relating to the characteristics of the supply of, and those relating to the characteristics of the demand for, those machines.

130. Beginning with supply-side characteristics, the Commission challenges the conclusion that 'the contested decision fails to provide sufficiently convincing evidence to demonstrate the allegedly specific characteristics of SBM machines used for packaging sensitive products'. [106] In its opinion, to put it extremely briefly, the Court of First Instance arrived at that conclusion without taking account of the information provided in the decision and defence as to the adaptation of SBM machines to suit customers' particular requirements and mistakenly based its own conviction on statements which Tetra made to the contrary at the hearing.

131. I think, however, that that company holds a strong position when it insists that the contested decision clearly asserts that 'the majority of SBM machines are "generic"', but that, '[n]evertheless, a PET packaging line, of which the SBM machine is only one component, is usually tailored to the specific products filled by the customer'. [107] Contrary therefore to the Commission's submission, it was clear from the contested decision that SBM machines were for the most part generic, that is to say suitable for packaging various kinds of products, whereas PET-packaging lines, of which such machines were just one component, were generally 'tailored' to the specific products to be packaged.

132. In the light of that reasoning in the decision, it was possible therefore for the Court of First Instance correctly to state that '[t]he mere fact that each SBM machine must be installed in a PET line in order to be useful to its purchaser does not justify that specific characteristics of other PET equipment in that line should be attributed to the SBM machines themselves'. [108]

133. With regard next to the further information supplied in the defence concerning the technical adaptations which must be

106 — Paragraph 261 of the judgment under appeal.

107 — Paragraph 177 of the contested decision.

108 — Paragraph 265 of the judgment under appeal.

made to SBM machines also in order for them to be integrated in specific PET-packaging lines, the Court of First Instance correctly responded that 'the contested decision makes no reference to this information'. [109] As I have said, in fact, the evidence and the assessments on which the decision was based ought to have been clearly indicated in that act and could not be supplied only later in connection with proceedings before the Court of First Instance (see paragraph 106 above).

134. In view of the foregoing, the assessments subsequently made by the Court of First Instance in order to counter, in light of evidence furnished by Tetra, the subsequent technical arguments developed in the defence must be considered to be irrelevant. Although the Court of First Instance would have done better not to have ventured into that sort of appraisal, that does not alter the fact that it was not in any event open to the Commission to introduce evidence in proceedings before that court to which it had made no reference in the contested decision.

135. Having said that in connection with the grounds of challenge relating to the supply-side characteristics of SBM machines, I can now turn to those relating to demand-side characteristics.

136. In this respect, it has to be made clear that these grounds of challenge refer to the reasoning used by the Commission in defining specific markets for SBM machines used for the packaging of 'sensitive' products having regard to the price discrimination in the past practised by Sidel with regard to customers intending to package such products and to the possible continuance of that practice by the new entity.

137. That reasoning was based, in particular, on the twofold theoretical premiss that 'a distinct group of customers for the relevant product may constitute a narrower, distinct product market when such a group could be subject to price discrimination' and that '[t]his will usually be the case when two conditions are met: (a) it is possible to identify clearly the group to which an individual customer belongs at the moment it purchases the relevant products and (b) trade among customers or arbitrage by third parties should not be feasible'. [110] Starting from that premiss, and considering that the conditions set out therein had been satisfied in the case in point, the Commission reached the conclusion that there existed distinct markets for SBM machines used for the packaging of 'sensitive' products.

138. By the grounds of challenge now under consideration, the Commission objects to the assessments made in the judgment under appeal relating to that reasoning, alleging in

109 — Ibid.

110 — Paragraph 178 of the decision.

particular that the Court of First Instance: (i) wrongly omitted to take into consideration the price discrimination practised in the past by Sidel, on the grounds that it 'cannot constitute sufficiently convincing evidence that the merged entity will continue to behave in a similar way', since '[u]nlike Sidel prior to the merger, the merged entity would be bound not only by the commitments but also by the various obligations limiting Tetra's conduct';[111] (ii) wrongly omitted to take into consideration many of the Commission's observations about the possibility of identifying those customers that intended to use SBM machines to package 'sensitive' products and, in any case, that it misunderstood the relevance of those observations, and (iii) misunderstood and wrongly failed to take into consideration the Commission's observations about the impossibility of buying a given producer's machines from other persons (who would essentially be other customers seeking to sell second-hand).

139. Nor do those objections appear to me to be well founded.

140. With regard to the first of them, I have in fact to concur with Tetra that the statement challenged has nothing to do with the identification of specific markets for SBM machines used for packaging of 'sensitive' products. Far from relating to the definition of the relevant markets, that statement is in point of fact to be found in that part of the judgment which examines the 'ways in which the merged entity could engage in leveraging', and indicates in particular that 'the leveraging practices which may be taken into consideration by the Court are limited to those which, at least probably, do not constitute an abuse of a dominant position on the aseptic carton markets' and refers to the need to take into account the commitments offered by Tetra (see paragraph 43 above).

141. Contrary to what is alleged in the appeal, I believe therefore that the Court of First Instance properly considered and understood the various passages in which the Commission's reasoning is set out. The Court of First Instance none the less found that that reasoning was in essence vitiated by a defect in logic, seeing that the fact that it is possible for the new entity to identify those customers who intend to package 'sensitive' products (and in consequence to practise price discrimination against them) 'does not preclude those customers from turning to other suppliers of SBM machines if they become dissatisfied with the conditions offered by the merged entity'.[112]

142. Although it is terse in the extreme, it seems to me that we may in substance concur with that appraisal by the Court of First Instance. I in fact consider that, even if

111 — Paragraph 223 of the judgment.

112 — Paragraph 268.

the new entity should be capable of identifying those customers who intend to package 'sensitive' products and, in view of its being impossible for those customers to buy its machines from other persons, should decide to demand from them a higher price than that asked of the other customers, that would not of itself make it possible to identify specific markets for SBM machines used for the packaging of 'sensitive' products, inasmuch as — as the Court of First Instance stated — the customers 'discriminated against' could turn to other suppliers that did not operate the same pricing policy.

143. To my mind, in other words, the fact that a single operator (not followed by its competitors) adopts a pricing policy that discriminates against a particular group of customers does not of itself make it possible to identify a specific market in relation to that group of customers, for the presence of other operators that do not practise the same policy may prevent the establishment of essentially different market conditions for the group of customers in question.

144. Therefore I do not think that the Court of First Instance erred in law in criticising the Commission's reasoning based on the price-discrimination operated in the past by Sidel and on the possible continuance of such a practice by the new entity.

145. Having regard to all the foregoing considerations, I therefore believe that the third ground of appeal must be rejected.

The ground of appeal relating to the strengthening of Tetra's dominant position in carton

146. In its fourth ground of appeal the Commission challenges the Court of First Instance's conclusion that 'the evidence relied on in the contested decision does not establish to the requisite legal standard that the effects of the modified merger on Tetra's position, principally on the aseptic carton markets, would, by eliminating Sidel as a potential competitor, be such as to fulfil the conditions of Article 2(3) of the Regulation'. [113]

147. In that regard, the Commission objects, first, that the Court of First Instance did not recognise that a reduction in 'potential' competition from the PET equipment markets would in itself lead to a strengthening of Tetra's dominant position in carton. The Court of First Instance was wrong to require

113 — Paragraph 333 of the judgment.

it to show that any such reduction in potential competition would tend 'to strengthen Tetra's dominant position *in relation to its competitors* on the aseptic carton markets', [114], given that that strengthening was not to be assessed with reference to Tetra's competitors, but to the unavoidable consequences that reduction of 'potential' competition from PET would have for customers and consumers in the form of a price rise (or a failure to lower prices) for carton and less innovation in products.

148. According to the Commission, furthermore, in view of its submissions in connection with the first ground of appeal, the Court of First Instance was mistaken when it found that the Commission's assessment concerning the reduction in 'potential' competition was vitiated by the fact that growth in the use of PET for packaging of 'sensitive' products 'will probably be much less marked than the Commission believes'. [115]

149. The Commission also disputes the Court of First Instance's finding that it had not on any view been 'shown that, in the event of elimination or significant reduction of competitive pressure from the PET markets, Tetra would have an incentive not to reduce its carton packaging prices and would stop innovating'. [116]

150. On this point it begins by remarking that the Court of First Instance's assessment of the effects of a reduction in 'potential' competition on carton prices was invalidated by the mistaken conviction that PET costs were higher than carton costs (here it refers to what it said in the first ground of appeal). Still in relation to that assessment, the Commission then criticises the comments made thereupon by the Court of First Instance, on account of the fact that the Court reprimanded it for failing to explain why Tetra's competitors would not benefit from a rise in carton prices: by so doing, the Court of First Instance did not, in the Commission's opinion, consider that those competitors were *ex hypothesi* marginalised by Tetra's strongly dominant position. In addition, the Commission charges the Court of First Instance with failing to take into account the effects on carton prices of the fact that, as a result of acquiring the major operator on the PET markets, Tetra could safely assume that most of those of its customers who had switched from carton to PET would in any case be 'recaptured' through Sidel.

151. Again with reference to the effects of a reduction of 'potential' competition on innovation, the Commission alleges that the

114 — Paragraph 323. Emphasis added by the Commission.

115 — Paragraph 324.

116 — Paragraph 325.

Court of First Instance overestimated the possible response of competitors marginalised by Tetra's dominant position. Finally, according to the Commission, the Court of First Instance erred: on the one hand, by passing over the difference between the pressure to innovate caused by the growth in the use of PET and the pressure proceeding from Tetra's competitors in the carton markets and, on the other, by claiming that recent innovations made by that company were not due to pressure exerted by PET.

152. Before evaluating those objections, it is necessary to specify that, as observed by Tetra, the 'potential' competition referred to in connection with this ground of appeal did not consist of competition on the part of undertakings able to enter the carton-packaging markets which might therefore have represented potential competitors of Tetra on those markets. On the contrary, the issue was plainly *indirect* competition proceeding from undertakings active on markets distinct from the carton-packaging markets (although closely neighbouring), which produced machinery for packaging in a material, PET, which was regarded by the Commission from the economic point of view as a 'weak substitute' for carton. [117] From this point on I shall therefore refer to *indirect* rather than *potential* competition exerted by PET.

153. Having said that, I must agree with Tetra that it cannot be held that a reduction in indirect competition, proceeding from the acquisition of the leading undertaking operating on a neighbouring market, leads *of itself* to the strengthening of a dominant position within the meaning of Article 2 of Regulation No 4064/89. In view of the well-known notion of 'dominant position' used in the Court of Justice's case-law, it falls instead to be determined whether such a reduction in indirect competition may increase the 'economic strength' of the dominant undertaking, with the result that it is in a position to impede yet further (or with greater facility) 'effective competition's being maintained on the relevant market' and has the power to behave still more 'independently *of its competitors, its customers and ultimately of the consumers*'. [118]

154. It therefore follows also that it is to that concept that the Court of First Instance ought more correctly to have referred in its analysis, instead of asserting that it was for the Commission to show that a reduction in indirect competition by PET could have

117 — See in particular paragraph 332 of the contested decision, which states that carton and PET are 'technical substitutes in that both packaging materials can package the relevant end-use product segments', and might be considered 'weak substitutes' in an economic sense. To that effect see also paragraph 163 of the decision (referred to in paragraph 10 above), in which moreover attention is drawn to the fact that the definition of the markets for packaging in PET and carton may change in the future.

118 — Case 85/76 *Hoffman-La Roche* v *Commission* [1979] ECR 461, paragraph 38; emphasis added.

strengthened 'Tetra's dominant position *in relation to its competitors* on the aseptic carton markets'. Nevertheless, I believe that this is not such a particularly serious mistake as to vitiate the conclusion reached by the Court of First Instance, since the latter did in any case assess, and find to be marred by several errors, the reasoning developed by the Commission in showing the effects that the predicted reduction in indirect competition by PET would have for customers and consumers in the shape of a rise (or a reduction that never took place) in carton prices and less innovation of the products.

155. Likewise, I consider that the conclusion arrived at by the Court of First Instance is not vitiated by the errors it may have made in respect of the assessment of foreseeable growth in the use of PET for packaging of liquid dairy products (see paragraphs 103 and 112 above). [119]

156. Undoubtedly, the finding that growth in the use of PET for packaging of 'sensitive' products 'with the exception of growth in FFDs and tea/coffee drinks, will probably be much less marked than the Commission believes' led the Court of First Instance to hold that 'it is not possible, on the basis of the evidence relied on in the contested decision, to determine, with the certainty required to justify the prohibition of a merger, whether the implementation of the modified merger would place Tetra in a situation where it could be more independent than in the past in relation to its competitors on the aseptic carton markets'. [120] Yet the Court of First Instance did not come to a stop with that assertion, but went on with its analysis, reaching the conclusion 'that the two factual elements regarding Tetra's future conduct, on which the Commission relies in order to prove the alleged negative effects which the modified merger would have on the aseptic carton markets, have, *on any view*, not been established to the requisite legal standard' (emphasis added). In particular, as we have seen, according to the Court of First Instance 'it has not been shown that, in the event of elimination or significant reduction of competitive pressure from the PET markets, Tetra would have an incentive not to reduce its carton packaging prices and would stop innovating'. [121]

157. So, moving on to consider the Commission's objections to that conclusion, I shall start by remarking that, contrary to what the Commission maintains, the Court of First Instance's assessment of the effects of

119 — It is in this connection to be borne in mind that the Commission's objection concerning errors allegedly committed by the Court of First Instance in assessing the foreseeable growth of the use of PET for packaging of juices has been considered to be without foundation (paragraph 104, above).

120 — Paragraph 324

121 — Paragraph 325

a reduction in indirect competition by PET on the prices of carton is not, to my mind, invalidated by the mistaken belief that PET costs were higher than those of carton (concerning the mistake actually made by the Court of First Instance, see paragraphs 111 and 112 above).

158. As a matter of fact, I would point out that, referring to the Commission's notion that the merger would enable Tetra to avoid the reduction in carton prices which it would otherwise have been led to make, the Court of First Instance stated that:

(i) 'As regards the "more price-sensitive" carton customers who indicated to the Commission, during its market investigation, "that they would only consider a switch from carton to PET if carton prices rose by a significant amount of 20% or more" ... , it is clear that a lowering of carton prices is not necessary to keep them in the carton markets. In finding simply that "[t]hese same price-sensitive customers would presumably be dissuaded from making a switch from carton to PET if a carton-price reduction increased the price difference between a carton and PET packaging line" ..., the contested decision does not explain why, without the merger, Tetra would be obliged to make such price reductions in order to keep those customers. These customers would not switch to PET unless carton prices rose by at least 20% or there was a corresponding reduction in PET prices';[122]

(ii) 'Inasmuch as the Commission pleads before the Court that, once the merger is implemented, it is possible that Tetra might find it more easy to raise its prices on the aseptic carton markets for those customers, it does not explain, in particular, why this would not enable Tetra's competitors on the carton markets who are also active on the PET market, such as SIG and Elopak, to benefit from this';[123]

(iii) 'As for beverage producers who will switch from carton to PET for commercial reasons despite the fact that PET is considerably more costly than carton, a reduction in carton prices would not

122 — Paragraph 327.
123 — Ibid.

necessarily persuade those "non-price-sensitive customers" to keep carton packaging'; [124]

(iv) 'The contested decision does not show why companies active in the PET equipment markets which, without the modified merger, "would be expected to compete vigorously to gain market share from carton" ..., would modify their behaviour following the transaction in question here. If the pressure from Sidel were to disappear, the contested decision does not explain why, if Sidel's competitors had not been marginalised through successful leveraging, the other companies active in the PET equipment markets would no longer be able to promote the advantages of PET to Tetra's customers on the carton markets'. [125]

159. As may easily be verified, with those statements the Court of First Instance pointed out flaws of logic inherent in the Commission's reasoning, but never founded its own opinion on the mistaken persuasion that the costs of PET were greater than those of carton, even in (iii), which contains the only reference to that aspect. Careful reading of that passage makes it clear, indeed, that the Court of First Instance was doing no more than refer to the Commission's claim that some customers would in any case switch to PET, despite its 'being more expensive or despite no change at all in carton prices', [126] logically deducing therefrom that 'a reduction in carton prices would not necessarily persuade those "non-price-sensitive customers" to keep carton packaging'.

160. Having made it clear, therefore, that the Court of First Instance's assessment is not vitiated by the mistaken belief that PET costs are higher than those of carton, I would observe that I do not consider well founded the Commission's objection concerning (ii) above, by which that institution charges the Court of First Instance with incorrectly failing to take into account the fact that Tetra's competitors on the carton markets were *ex hypothesi* marginalised by the strongly dominant position held by that company.

161. On this subject, first of all I agree with Tetra that such an objection runs the risk of

124 — Paragraph 328.

125 — Ibid.

126 — The quotation is taken from paragraph 397 of the decision, where it is stated that many of the companies questioned in the scope of the market investigation carried out by the Commission 'clearly stated that they have already switched or would switch from carton to PET despite PET's being more expensive or despite no change at all in carton prices'.

proving too much. If one did no more than consider theoretically that, by virtue of its dominant position, Tetra could by definition 'behave to an appreciable extent independently of its competitors' [127] in the carton markets, and therefore even raise prices without any fear of a response on their part, it would be hard to explain why, if the merger did not take place, that company, given its dominant position in carton, should not be able to do the same and ought rather to fear the indirect competition of operators active solely on neighbouring markets (Sidel), which produced machinery for packaging in a material regarded as just a 'weak substitute' for carton.

162. I would furthermore remark that, contrary to what would appear to emerge from the Commission's appeal, the Court of First Instance did not take into consideration Tetra's competitors active solely on carton markets, but also those competitors already active on PET markets. It therefore referred to operators which could benefit from a rise in the price of carton in the PET markets too and which could therefore exert greater competitive pressure by virtue of the concomitant presence on the markets of the two packaging materials, considering also that they, 'unlike the merged entity, would not be subject to any constraints as to joint offers of carton and SBM machines'. [128]

163. Still in relation to the effect of reduction in indirect competition by PET on carton prices, I do not, in short, believe to be well founded the Commission's objection that the Court of First Instance failed to consider that, as a result of acquiring the leading operator on the PET markets, Tetra would have greater liberty to raise carton prices, knowing that through Sidel it could recapture most of the customers that had for that reason switched to PET.

164. As rightly emphasised by Tetra, the Court of First Instance really cannot be reproached for not considering that aspect, when it had not been developed in the contested decision. In any event, I would note that, even following the acquisition of Sidel, for Tetra's customers to switch from carton to PET would certainly not be a matter of economic indifference to the new entity. In point of fact it is obvious that the certain loss of Tetra's customers on markets

127 — See *Hoffmann-La Roche* v *Commission*, cited above, paragraph 38.

128 — Paragraph 330.

which it dominated and on which it was in a position to make big profit margins could be offset only in part by the hope of recapturing those customers on markets, such as those of PET, under full development and notable for lively competition. [129]

165. Coming next to the effects of reduction in indirect competition by PET upon innovation, I would remark that the ground of complaint relating to the overestimation of the response of Tetra's competitors must be rejected for the same reasons, *mutatis mutandis*, as set out in relation to the similar complaint concerning the effects on carton prices (see paragraphs 161 and 162 above).

166. Lastly, as regards the ground of challenge in which the Commission alleges that the Court of First Instance did not adequately consider the kind of pressure to innovate created by the growth in the use of PET and that it mistakenly held that the recent innovations made by Tetra were not due to the pressure exerted by that material, I too think that the Commission is in fact raising questions of fact that the Court of Justice has no jurisdiction to resolve (see paragraphs 59 to 61 above).

167. In the light of all the foregoing considerations, I consider that the fourth ground of appeal must be rejected.

The ground of appeal relating to the creation of a dominant position for Tetra in SBM machines

168. In its final ground of appeal the Commission criticises the Court of First Instance's conclusion that 'the contested decision does not prove to the requisite legal standard that by 2005 the merged entity could acquire a dominant position on the market for low- and high-capacity machines, thereby fulfilling the conditions of Article 2 (3) of the Regulation as regards those markets'. [130]

169. Here I shall straight away briefly examine the summary objections raised by the Commission concerning errors suppo-

129 — Clearly things would be otherwise (at least in part), were the new entity successful in leveraging Tetra's position in carton in order to drive towards Sidel those of its customers wishing to switch to PET and thus to acquire a dominant position on some or all of the PET markets. However, given that the assessments made on that subject by the Commission have been dropped by the Court of First Instance, that scenario cannot be taken into consideration.

130 — Paragraph 307 of the judgment.

sedly committed by the Court of First Instance in relation to both the SBM machine markets (low- and high- capacity), in order to assess next whether the errors actually identified are such as to invalidate the conclusion reached by the Court of First Instance.

(a) The objections raised by the Commission

170. Starting with the allegations relating to the low-capacity SBM machines, the Commission first of all objects that the Court of First Instance referred to the share of the market held by Sidel during the period 1998 to 2000 (which was less than 40%), without taking into account the fact that the contested decision shows that in 2001 that share rose to a level of between 40 and 50%. [131]

171. I believe, however, that, as pointed out by Tetra, the Court of First Instance could legitimately take into account the period from 1998 to 2000, since that was the period in essence referred to by the Commission. The paragraph of the decision mentioned by the Commission (as, furthermore, in an earlier paragraph quoted by the Court of First Instance) [132] in fact showed the market-shares held by Sidel, Tetra and their chief competitors 'during the period 1998-2000', whilst only in a footnote were Sidel and Tetra's shares in 2001 mentioned (and they were not, moreover, compared with those held for the same period by their main competitors).

172. Just as baseless seems to me the next objection in which the Commission challenges the Court of First Instance for asserting that 'with Tetra's exit from that market, the merged entity's position will remain basically unchanged as compared to Sidel's current position', [133] without taking into account the immediate strengthening of Sidel's position proceeding from a series of factors indicated in the decision (Tetra's financial and commercial power, the 'first-mover's' advantage it enjoys vis-à-vis customers seeking to switch from carton to PET and its dominant position in carton). [134]

131 — The Commission would appear to refer to paragraph 272 of the judgment under appeal, in which it is stated that '[t]he Commission admits in the contested decision that, in low-capacity SBM machines, Sidel had "a market share of [30-40%] both in terms of capacity and by unit sales in the EEA in 2000" (paragraph 233)'. In order to demonstrate the Court of First Instance's error, the Commission refers instead to paragraph 266 of the decision. Since, for reasons of confidentiality, the version of the decision published in the Official Journal does not contain the exact share but just a bracket given for information purposes, it seems to me to be proper to follow the same yardstick in my Opinion.

132 — See the previous footnote.

133 — Paragraph 280 of the judgment under appeal.

134 — On this subject, the Commission refers to paragraphs 376 to 387 of the contested decision.

173. In point of fact I agree with Tetra that those factors were indicated generally in the decision (but on the other hand no account was taken of the commitments offered by that company) in order to stress the new entity's leadership and global strength due also to its presence on all the markets concerned and not to highlight a particular and immediate strengthening of Sidel's position on the low-capacity SBM machine market. As matters stand, I consider that the Court of First Instance could legitimately declare that, as a result of Tetra's leaving that market, the new entity's position would remain in essence unchanged in relation to Sidel's.

174. Lastly, I do not think it possible to accept the objection relating to the Court of First Instance's statement that 'the contested decision does not contain a sufficient analysis of current and future use of low-capacity SBM machines' either. [135]

175. With that objection the Commission charges the Court of First Instance with basing its decision on two irrelevant aspects: first, the importance of low-capacity SBM machines in packaging non-'sensitive' products, which is irrelevant if the segmentation of the market in SBM machines proposed by the Commission is accepted; second, the proportion of customers that would opt for high- or low-capacity SBM machines for the packaging of 'sensitive' products, [136] a proportion that also is of no relevance to the assessing of Tetra's ability to leverage its dominant position in carton in order to gain a dominant position in the market for low-capacity SBM machines too.

176. With regard to the first aspect, it is nevertheless easy to establish that the Commission's assessment of the definition of specific markets for SBM machines for the packaging of 'sensitive' products has not been accepted (see paragraph 145 above). As regards the second, I observe that it is not at all clear that choices made by customers intending to package 'sensitive' products in PET would be irrelevant in assessing development in the market for low-capacity SBM machines and the opportunity for the new entity to gain a dominant position in it. More generally, I cannot see how the Court of First Instance can be reproached for ascertaining

135 — Paragraph 280.

136 — On this point the Commission mentions in particular the Court of First Instance's statement that 'a significant proportion of the SBM machines used to package sensitive products will, in all likelihood, be low-capacity machines' (paragraph 279 of the judgment).

whether the Commission's assessment concerning the acquiring of such a dominant position was based on an accurate and thorough analysis of the dynamics of the relevant market.

177. Turning then to the grounds of complaint relating to the high-capacity SBM machine market, I shall observe immediately that the objection raised by the Commission alleging that the Court of First Instance failed to take into account the immediate strengthening of Sidel's position as a result of the factors referred to in paragraph 172, [137] must, in my opinion, *mutatis mutandis*, be rejected for the same reasons as those set out in paragraph 173.

178. On the other hand, the objection relating to the Court of First Instance's assertion that 'the "first-mover" advantage [enjoyed by Tetra vis-à-vis customers intending to switch to PET] has been overestimated' [138] appears to me to be in part well founded.

179. In fact, I consider that with regard to the packaging of liquid dairy products the Commission rightly argues that the assessment made by the Court of First Instance is marred by errors it committed in relation to its estimates of growth in the use of PET (see paragraph 103 above) and, in particular, the relationship between that material and HDPE (see paragraph 98 above). The judgment under appeal makes it apparent that, as regards the packaging of the products in question, the Court of First Instance considered 'overestimated' the first-mover advantage, in substance: (i) because '[t]he foreseeable growth in PET use among Tetra's ... customers on the aseptic carton market is not considerable'; [139] and (ii) because '[a]s regards fresh milk in particular, the contested decision does not give an adequate explanation of the relationship between HDPE and PET'. [140]

180. By contrast, I believe that that part of the Commission's objection cannot be accepted which criticises the assessment of the first-mover advantage in relation to customers intending to switch from glass to PET, alleging in particular that the Court of First Instance: (i) failed to take into consideration the fact that only rarely do customers packaging drinks in glass use that material exclusively; (ii) distorted the facts

137 — Here the Commission refers in particular to the statement that 'Tetra would add nothing to the merged entity on this market [high-capacity SBM machines]' (paragraph 284 of the judgment).

138 — Paragraph 288.

139 — Paragraph 288.

140 — Paragraph 289. With reference to the relationship between HDPE and PET, the Court of First Instance considers in particular that 'it is at least as likely that Tetra's existing customers who wish to switch part of their fresh milk production to plastic will choose HDPE rather than PET' (ibid.).

when it stated that, with reference to those customers, Tetra's competitors 'active on the glass and PET packaging markets', such as SIG, Krones and KHS, could 'enjoy a ... "first-mover" advantage'. [141]

181. In fact I agree with Tetra that those arguments of the Commission's must be rejected, since they are based on matters not mentioned in the contested decision [142] (see paragraph 106 above) and, in any event, especially as regards (ii), raise questions of fact which the Court of Justice has no jurisdiction to resolve (see paragraphs 59 to 61 above).

182. Then that objection seems to me baseless in which the Commission charges the Court of First Instance with stating: first, that 'the contested decision should have examined in more detail the ability of that competition to resist leveraging on the part of the merged entity'; [143] and, second, that 'the Commission committed an error in under-estimating the importance of SIG's current position on the market for high-capacity machines and by playing down the positions held on that market by the merged entity's other principal competitors, in particular SIPA and Krones'. [144]

183. I do not in fact believe that, as the Commission submits, the Court of First Instance distorted the contents of the decision (in particular, by denying that it contained any analysis of Sidel's position on the SBM machine markets vis-à-vis its competitors) [145] or that it substituted its own point of view for that of the Commission.

184. Rather, the Court of First Instance simply found that, in view of the considerable and unchallenged increase in market-shares recorded in recent years by those three competitors of Sidel (SIG, SIPA and Krones), and having regard to the timely observations made by Tetra during the administrative procedure, the Commission ought not to have confined itself to the generic observations contained in the deci-

141 — Paragraph 290.

142 — Only in relation to (i) does the Commission attempt to find a pretext in the decision for its assertions (paragraphs 14 and 335). Nevertheless, far from demonstrating that the decision makes it clear that glass customers are only rarely exclusively glass customers, the Commission quotes passages in which it is stated generally that '[i]ncreasingly, beverage companies use a mix of different materials to package their products', providing the single example of Coca Cola as a drink which 'can be found in glass, PET and aluminium cans' (paragraph 14).

143 — Paragraph 294.

144 — Paragraph 297.

145 — On this subject, the Commission refers in particular to paragraphs 232 to 248, 293 to 300, 303 to 310 and 369 to 387 of the decision.

sion, but ought to have examined more particularly those three companies' competitive power and ability to respond. The Court of First Instance did actually remark that it was only in relation to SIG that the contested decision contained any specific assessment (which cannot, it seems to me, be disputed in any substance) and considered that those assessments did not adequately answer the specific and pertinent points raised by Tetra. [146] It is from that point of view, therefore, that the statement must be read that in the decision the position of those three companies was 'underestimated' or 'played down': meaning, that is, that the Commission did not give the consideration of their position that attention which, given the circumstances of the case, was necessary.

185. Furthermore, I would add that the part of the objection that goes so far as to accuse the Court of First Instance of distorting the facts in the definition of certain advantages enjoyed by Sidel's competitors raises questions of fact which the Court of Justice has no jurisdiction to resolve (see paragraphs 59 to 61 above).

186. On the other hand the final objection, concerning the opportunity for converters to resist leveraging, does seem to me to be well founded. In this objection the Commission alleges that the Court of First Instance did not provide adequate reasons for its statements, did not answer the arguments put forward by the Commission in its decision and unlawfully substituted its own point of view for that of the appellant.

187. Indeed, I agree with the Commission that the Court of First Instance did not adequately explain what were the errors, the deficiencies of investigation or flaws of logic that, in its view, invalidated the Commission's conclusion that converters were 'to a certain extent dependent on Sidel and would continue to be dependent on the merged entity'. [147] Without making any assessment of the wide-ranging analysis carried out by the Commission in order to arrive at that conclusion, [148] the Court of First Instance did in fact no more than assert: (i) that, 'given the current level of existing competition, also in the high-capacity SBM machine market, the finding of the converters' dependency on Sidel is not convincing'; (ii) that, 'if the sales conditions offered by the merged entity were to become less attractive, converters could always purchase such machines from one of Sidel's current competitors'. [149]

146 — See, in particular, the observations in paragraph 295 of the judgment under appeal.

147 — Paragraph 310.

148 — See paragraphs 303 to 310 of the decision.

149 — Paragraph 305 of the judgment. For our purposes here no particular importance seems to attach to the later clarification that 'SIG and Elopak could also offer [to converters] carton equipment if the converters' customers want the joint supply of PET and carton packaging equipment', since the Commission had in no manner linked the converters' dependency on Sidel or on the merged entity to the need for joint supplies of PET and carton packaging equipment.

188. From what i apparently to be understood, the Court of First Instance therefore found the Commission's conclusion that the converters were dependent on Sidel 'not convincing' just because they could have bought SBM machines from that company's competitors. By so doing, the Court of First Instance failed, however, to consider that, although the Commission had acknowledged that converters could 'turn to other suppliers of SBM machines for purchases of new machinery and design and testing of preforms', none the less — in the light of its market analysis — it considered that 'switching costs and the continued need to use the large number of Sidel machines they have already acquired will prolong converters' current degree of dependency on Sidel'. [150]

189. It therefore seems obvious to me that, while the Court of First Instance might possibly discover mistakes, deficiencies of investigation or flaws of logic in the Commission's reasoning, it could not reject the conclusion reached by that institution without stating sufficient reasons. I would moreover observe that the line of argument used by Tetra to justify the Court of First Instance's opinion as to the converters' chance to respond, regardless of its merits, cannot make good the defective reasoning which mars the judgment under appeal.

(b) The effect of the errors detected on the conclusion arrived at by the Court of First Instance

190. Of the foregoing considerations the following must, to my mind, be regarded as well founded: (i) the objection concerning the first-mover advantage, in so far as it relates to the packaging of LDPs (see paragraphs 178 and 179 above), and (ii) the objection concerning the opportunity for converters to resist leveraging (paragraph 186 above).

191. I consider, nevertheless, that the errors made by the Court of First Instance and made clear in those objections are not such as to vitiate the conclusion reached by that court, 'that the contested decision does not prove to the requisite legal standard that by 2005 the merged entity could acquire a dominant position on the market for low- and high-capacity machines, thereby fulfilling the conditions of Article 2(3) of the Regulation as regards those markets'. [151]

150 — Paragraph 310 of the decision.

151 — Paragraph 307 of the judgment.

192. Indeed, that conclusion seems to me to be most certainly justified by the many defects in the decision which the Court of First Instance has identified in assessments not challenged in these proceedings or challenged in objections here held to be unfounded. Since there is no need to dwell on this point, drawing up a long list of the defects in question, I can confine myself to the observation that, in addition to the flaws identified in the course of assessments which have been the subject of unsuccessful objections in this ground of appeal, it is necessary to bear in mind the defects relating to: (i) the failure to take into consideration, as a possible disincentive to leveraging, the unlawfulness of certain conduct and the commitments as to conduct offered by Tetra (defect identified in the assessments unsuccessfully challenged in the second ground of appeal); (ii) the identification of specific markets for SBM machines for packaging 'sensitive' products (defect identified in assessments unsuccessfully challenged in the third ground of appeal).

193. It follows therefore that acceptance of the two objections mentioned in paragraph 190 cannot of itself vitiate the conclusion arrived at by the Court of First Instance in relation to the creation of a dominant position on the low- and high-capacity SBM machine markets.

Concluding considerations on the outcome of the appeal

194. In the light of all the foregoing considerations, it must be found that, even though various of the objections raised by the Commission have proved to be founded, they are not enough to vitiate the conclusions arrived at by the Court of First Instance concerning the strengthening of Tetra's dominant position on the carton markets and the creation of a dominant position on the low- and high-capacity SBM machine markets.

195. In such a situation I must point out that, in accordance with settled case-law, 'where the grounds of a judgment of the Court of First Instance disclose an infringement of Community law but the operative part of the judgment is shown to be well founded for other legal reasons, the appeal must be dismissed'. [152]

152 — Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, paragraph 57. To the same effect see Case C-30/91 P *Lestelle* v *Commission* [1992] ECR I-3755, paragraph 28; Case C-320/92 P *Finsider* v *Commission* [1994] ECR I-5697, paragraph 37, and Case C-210/98 P *Salzgitter* v *Commission* [2000] ECR I-5843, paragraph 58.

196. Taking into account, therefore, that the operative part of the judgment under appeal, relating to the annulment of the decision, is certainly well founded on the many grounds of law that support the Court of First Instance's conclusions as to the strengthening of Tetra's dominant position on the carton markets and the creation of a dominant position on the low- and high-capacity SBM machine markets, I consider that the Commission's appeal must be dismissed.

Costs

197. In the light of Article 69(2) of the Rules of Procedure, and having regard to the conclusions I have reached concerning the dismissal of the appeal, I consider that the Commission must bear the costs.

IV — Conclusion

198. In the light of the foregoing conclusions, I propose that the Court should declare that:

— the appeal is dismissed;

— the Commission is to bear the costs.