OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 14 July 2005 [1]

1. The present appeal is brought against the judgment given by the Court of First Instance on 28 January 2004, [2] upholding the refusal of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) ('OHIM') to register eight three-dimensional shapes for stand-up pouches for drinks, intended to identify fruit drinks and fruit juices.

I — The Regulation on the Community trade mark

2. Once again there arises the question of the distinctive character of three-dimensional signs and, hence, the interpretation of Article 7(1)(b) of the Regulation on the Community trade mark. [3] Most of the pleas relied on in the appeal raise matters already discussed at length in Community case-law, with the exception of that pertaining to the spatial and objective delimitation of context when establishing whether a three-dimensional indication is capable of serving the essential function of this form of industrial property.

3. Regulation No 40/94 contains those provisions which need to be applied for a decision on the appeal.

4. Pursuant to Article 4, a Community trade mark may consist of 'any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings'.

1 — Original language: Spanish.

2 — Judgment in Joined Cases T-146/02 to T-153/02 *Deutsche SiSi Werke* v *OHIM* [2004] ECR II-447.

3 — Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended by Council Regulation (EC) No 3288/94 of 22 December 1994 for the implementation of the agreements concluded in the framework of the Uruguay Round (OJ 1994 L 349, p. 83).

5. Article 7(1), headed 'Absolute grounds for refusal', requires that the following not be registered:

'(a) signs which do not conform to the requirements of Article 4;

(b) trade marks which are devoid of any distinctive character;

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service;

...

(e) signs which consist exclusively of:

(i) the shape which results from the nature of the goods themselves; or

(ii) the shape of goods which is necessary to obtain a technical result; or

(iii) the shape which gives substantial value to the goods;

...'

6. Article 7(3) provides that paragraph 1(b), (c) and (d) are not to apply 'if the trade mark has become distinctive in relation to the goods or services for which registration is requested in consequence of the use which has been made of it'.

II — Background to the appeal

A — *The facts of the dispute*

7. On 8 July 1997 Deutsche SiSi Werke GmbH & Co. Betriebs KG ('SiSi Werke') filed at OHIM eight applications for Community trade marks, for goods in Classes 1, 3, 5, 6, 16, 20, 29, 30, 32, 33, 39 and 40 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957.

8. The applications relate to various shapes of stand-up pouches for drinks, distinguished by their convex shapes and widened bottoms, displaying one triangular or oval face and with concave sides in some cases.

9. By decisions of 24 and 27 September 1999, the OHIM examiner refused the eight registrations pursuant to Article 38 of Regulation No 40/94 on the ground that they were devoid of any distinctive character.

10. On 11 November 1999, SiSi-Werke brought appeals against those decisions under Article 59 of the Regulation, limiting its application to Classes 32 and 33. The Second Board of Appeal dismissed these appeals by decisions of 28 February 2002, holding that consumers would not perceive the signs requested as an indication of their commercial origin but only a pattern of packaging, adding that there could not be a monopoly in those packagings, in the interests of competitors or manufacturers of packagings or beverages.

11. Having exhausted all administrative appeals but prior to bringing legal action, the applicant company, in a letter of 6 May 2002, limited its application to the following goods in Class 32: 'fruit drinks and fruit juices'.

B — *The judgment under appeal*

12. Actions for annulment were brought against these decisions of 28 February 2002 and the cases were joined. The actions were dismissed in the judgment of the Court of First Instance of 28 January 2004, the subject of the present action.

13. The judgment of the Court of First Instance identifies the subject-matter of the proceedings on the basis of the limitation of 6 May 2002 (paragraphs 11 and 12); it restricts the legal analysis to Article 7(1)(b) of Regulation No 40/94 and sets aside subparagraph (c), which was also relied upon in the applications (paragraphs 13 to 15).

14. On the basis of its own judgments in *SAT.1* v *OHIM (SAT.2)*[4] and *Unilever* v *OHIM (Ovoid tablet)*,[5] the Court of First Instance states, in paragraph 31, that Article 7(1)(b) covers signs which, from the point of view of the relevant public, are commonly used for the presentation of the goods or services that they are meant to designate.

15. After noting, in paragraph 33, that the distinctiveness of a trade mark can only be assessed, firstly, by reference to the goods or services for which registration is sought and, secondly, on the basis of the perception of that mark by the relevant public, it is observed in paragraph 36 of the judgment that, in the present case, the goods in question are fruit juices and the public concerned is end consumers.

16. The Court then points out the special features of the public's perception of a three-dimensional sign consisting of the appearance of the product itself and, since a liquid must of necessity be packaged for sale, it finds that the average consumer will perceive the packaging first and foremost simply as a means of packaging the product for sale. Packaging can be allowed as a trade mark only if it is regarded immediately as an indication of its commercial origin (paragraphs 37 and 38).

17. On the basis of those factors, the Court considers that the check carried out by OHIM on certain internet sites shows that the pouches in question are used worldwide for packaging beverages and, in particular, fruit juices, and are used within the Community for liquids for human consumption. Thus the pouches are commonly used for this class of articles and, as they are not sufficiently unusual, consumers do not attach a specific origin to them (paragraphs 40 to 42).

18. Paragraphs 44 to 52 are concerned with the three-dimensional shapes claimed by SiSi-Werke in connection with the generic appearance of a stand-up pouch, concluding that these are mere variations on that appearance and that the sum of their specific features does not make the whole markedly different from the standard appearance of any similar container, apart from which the average consumer appears unable to retain the association of the various design features capable of identifying the whole.

19. The Court dismisses the applicant company's claim on the basis of a further argument relating to the risk of a monopoly being created by registration of the three-dimensional forms at issue, even though the interest that competitors of an applicant for a mark may have in being able freely to choose the form of their own products cannot be a ground for refusing registration, nor a criterion for assessing the distinctive

4 — Case T-323/00 *SAT.1* v *OHIM (SAT.2)* [2002] ECR II-2839.

5 — Case T-194/01 *Unilever* v *OHIM (Ovoid tablet)* [2003] ECR II-383

character of the sign (paragraph 32). It therefore holds that the Board of Appeal of OHIM was entitled to mention that risk and confirms that the pouches at issue do not have distinctive character (paragraph 54).

After listing the causes of its disagreement, of which there are five, it sets down a disordered and unsystematic cluster of arguments, not specifying which of the pleas the arguments refer to, requiring the Court to engage in a complex operation to work out the true sense of the appeal.

III — Procedure before the Court of Justice

20. The appeal from SiSi-Werke was lodged at the Registry of the Court on 8 April 2004; OHIM lodged its response on 28 June 2004; the reply was given in a document of 22 October 2004 but there was no rejoinder.

21. The representatives of both parties attended the hearing, which was held on 16 June 2005.

IV — Analysis of the pleas in law

22. The appellant company puts forward three pleas in law, all relating to the interpretation of Article 7(1)(b) of Regulation No 40/94, in an ill-structured document.

A — *The frame of reference for assessing the distinctive character of a sign (first limb of the first plea)*

23. SiSi-Werke complains that the Court of First Instance was in error, when delimiting the sector of container products that must be considered in assessing the distinctive character of a mark, in choosing the forms of packaging existing on the world market for liquids for human consumption in general. In its opinion, the territorial element should relate to the Community alone and the material element should mean only packagings for fruit juices and drinks.

24. In reality, the appellant wishes to clarify whether, in assessing the distinctiveness of this type of sign, one must be concerned solely with the appearance of the packagings specific to the products referred to or with that of similar goods. The latter option is more appropriate.

25. The style or shape of an item may comprise a trade mark provided that, pursuant to Article 4 of Regulation No 40/94, it is capable of being represented graphically and of distinguishing the item as required by this legal concept. [6]

26. If it cannot be so represented and distinguished, registration must be refused or a previous registration must be revoked, under Articles 7(1)(b), 38(1) and 51(1)(a) of the Regulation.

27. 'Distinctive character', therefore, is seen to be an imprecise legal concept referring to the essential function of this particular property, which is to afford the end user or consumer a guarantee of the origin of an object or a service, and to assist in identifying it without any possibility of confusion with those from any other source. Consequently, this concept means that the mark must be such as to fulfil that task by attaching an unmistakable commercial origin to the goods which it designates. [7]

28. To give concrete expression to that imprecise notion in a specific instance requires examination of two complementary elements. We have to consider, first, the goods or the services which the sign is intended to represent and, second, how it will be perceived by the relevant public, taking as a model an average consumer who is reasonably well informed and reasonably observant and circumspect. [8]

29. These assessment criteria do not change [9] but, clearly, the assessment is decisively affected by the nature of the indication. It seems obvious that the intensity with which and the extent to which a person receives a message depend upon its nature and the sense by which it is perceived; [10] visual observation of a two-dimensional figure does not give the same picture as observing a three-dimensional object.

30. The difference becomes more marked if this three-dimensional representation is the

6 — See the judgments in Case C-299/99 *Philips* [2002] ECR I-5475, paragraph 73; in Joined Cases C-53/01 to C-55/01 *Linde and Others* [2003] ECR I-3161, paragraph 38; and in Case C-218/01 *Henkel* [2004] ECR I-1725, paragraph 29: these interpret First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1)

7 — Similar terms are used in the judgments in *Henkel*, paragraph 30, and in *Linde and Others*, paragraph 40. See also the judgment of 23 September 2004 Case C-107/03 P *Procter & Gamble* v *OHIM*, not published in the ECR, paragraph 28.

8 — Judgments in *Linde and Others*, paragraph 41, and *Procter & Gamble* v *OHIM*, paragraph 29. To the same effect see Case C-136/02 P *Mag Instrument* v *OHIM* [2004] ECR I-9165, paragraph 19.

9 — Thus in *Philips* (paragraph 48) and in *Linde and Others* (paragraph 42), already much cited.

10 — In the Opinion in Case C-273/00 *Sieckmann* [2002] ECR I-11737, I had the opportunity of examining the capacity of perception of the different physical senses (points 22 et seq.).

shape of a product or of its container [11] since it is more difficult to weigh the distinctive character of a shape devoid of any graphical or textual elements, because an average consumer is not used to guessing the origin of goods from their appearance. [12]

31. Accordingly, SiSi-Werke's complaint would be pertinent if it were not founded on a very simplistic analysis of the case-law of the Court. One has of course to consider the goods or services for which registration has been sought, but not only those specifically affected, also those belonging to the same class, type or kind, meaning those which, being distributed through similar channels and aimed at the same consumers, may for the purposes of choice come into conflict.

32. In my Opinion of 18 January 2001, given in *Merz & Krell*, [13] referring to the instrumental nature of the rights derived from ownership of a trade mark, I suggested that, in order to assess its capacity to distinguish, regard must be had to 'the impression made on the average consumer of the type of goods or services in question' (points 44 and 43). And, in my Opinion, of 2 July 2002, [14] in the *Ansul* case, I noted that this special property requires a link between the sign and the item which it denotes so that, as a result of its perception by customers and the association between it and those goods, it will find a place on the market (point 64). Hence, in order to decide whether the mark has a distinctive character and thereby achieves its principal purpose, it is important to consider the structure of the sector and the marketing channels. In the *Ansul* Opinion I noted by way of example that using a mark for edible preserves is entirely different from using some other mark for electronic computer components.

33. Thus, in order to show whether an indication of the place of manufacture is capable of being distinctive, it is proper to observe the range of articles that the relevant public will encounter when making a choice. In that connection, it seems reasonable to assume that, as regards the shape of a container for fruit drinks and fruit juices, the field of assessment is restricted by reference to foodstuffs in the liquid state

11 — In the Opinion delivered on 14 January 2003, in the *Henkel* case, I explained that, for liquids, gases and some granulated or very friable substances without a definite size or appearance, the packaging cannot be dissociated from the product, since the packaging is the only form which the consumer is able to perceive or which can be represented graphically (point 12). The judgment in the case adopted this indicator and stated that, in such cases, the packaging chosen gives its shape to the product and must therefore be identified with it (paragraph 33).

12 — Judgments in *Procter & Gamble* v *OHIM* (paragraph 50) and in *Mag Instrument* v *OHIM* (paragraph 30). Nonetheless, as I considered in the Opinion delivered on 24 October 2002, in *Linde and Others*, the foregoing does not require examination of the distinctiveness of three-dimensional marks to be narrower or stricter than that of any other type of sign (paragraph 46 of the judgment is in similar terms).

13 — The judgment was given on 4 October 2001 (Case C-517/99, ECR I-6959).

14 — This judgment was given on 11 March 2003 (Case C-40/01, ECR I-2439).

which, being aimed at a similar type of consumer and being distributed through similar channels, are relevant in establishing the potential of a sign in identifying goods. The reductionist theory of SiSi-Werke leads to absurdity, since restricting the examination to the goods designated would make it impossible to see whether the trade mark is properly fulfilling its role of identifying the goods on the basis of their commercial origin.

36. Briefly, no legal rule required the Court of First Instance to adjudicate in the terms suggested by SiSi-Werke, so it made no error of law in its ruling.

B — *Describing the pouches as 'basic shapes' (second limb of the first plea)*

34. OHIM rightly notes that a person accustomed to a particular type of packaging for given goods will, on first encountering the same kind of container for other goods, believe that this is a form of packaging and not an indication of its origin. It would therefore not be legitimate to inquire into consumer reaction in respect only of the containers used for the category of goods referred to in the application for registration.

37. The appellant also claims that the Court of First Instance erred in law by referring to the pouches at issue as 'basic geometric shapes', since SiSi-Werke is the only firm to have put them on the European fruit-juice market and they cannot be described as a paradigm of packaging for that class of beverages. It considers it wrong to find them devoid of distinctive character on the basis that they are commonly used in trade for such juices, since that is the premiss on which registration is refused pursuant to Article 7(1)(b) of Regulation No 40/94, in defence of a general interest which is not governed by that provision but by Article 7(1)(c).

35. The appellant company's complaint regarding the geographic dimension is likewise unfounded since, although it is relevant to restrict it to the Community for the purposes of the relative grounds for refusal in Article 8(1)(b) of Regulation No 40/94, in order to establish whether there is a likelihood of confusion between two trade marks, it is not justified when seeking to establish the abstract distinguishing potential of a sign.

38. To the extent that it runs counter to the considerations in paragraph 46 et seq. of the judgment, regarding the forms claimed and their characteristics, this plea is inadmissible,

since it requests the Court to interfere in assessment of the evidence, an area closed to it on appeal and an aspect which lies outside this special form of challenge to court decisions.

39. Nor does the complaint gain in relevance if it is accepted, as SiSi-Werke proposes, that the Court of First Instance finds the forms claimed devoid of distinctive character because they are capable of being used frequently for fruit juices, since this statement, made at the end of paragraph 41 of the judgment, does not question that distinctive character on the basis of a general interest which is unusual under Article 7(1)(b) of the Regulation.[15] If the judgment is read with care, it can be seen that its scope has a different dimension.

40. The basis for that statement is the argument in justification of the objective context chosen for evaluating distinctive character, explaining that, being in general use for the packaging of liquids for human consumption, the sign is not sufficiently unusual for the average consumer to perceive it as an indication of a specific commercial origin (paragraph 42). Furthermore, this problem has a link with the second plea, which considers whether the trade marks applied for are sufficiently different from the basic design of a stand-up pouch for juices.

41. In brief, the Court of First Instance does not hold that the mark is devoid of distinctive character on the basis of the interest of competitors in preventing a monopoly being created for certain forms, as I explain later in examining the final plea: it refers to the common use on the market of the packagings at issue, with the intention of emphasising the difficulties for a purchaser in identifying them as representing certain specific products. As a consequence, this second limb of the first plea must also be rejected.

C — Alleged stricter comparison of three-dimensional trade marks (first limb of the second plea)

42. SiSi-Werke complains that the judgment under appeal sets a very high threshold for three-dimensional trade marks consisting of the packaging of a product to become distinctive whilst, for two-dimensional

15 — It should be noted that the public interest differs according to the absolute ground that is used for refusal (judgment in Joined Cases C-456/01 P and C-457/01 P *Henkel* v *OHIM* [2004] ECR I-5089, paragraphs 45 and 46) and Article 7(1)(b) of the Regulation cannot be interpreted as prohibiting the registration of marks which are capable of being used commonly in trade for the services or goods concerned, the criterion relevant to Article 7(1)(c) (judgment in Case C-329/02 P *SAT.1* v *OHIM* [2004] ECR I-8317, paragraph 36).

forms, signs which deviate slightly from simple geometrical figures may be registered. In its opinion, by not accepting this, the Court of First Instance infringes Article 7(1)(b) of Regulation No 40/94.

43. This complaint also must fail. Certainly, as I have already said, the distinctiveness of a trade mark is to be established according to the same criteria, whatever its nature, but the fact remains that the particular nature of the mark renders assessment more complicated in respect of certain signs, such as three-dimensional signs (points 29 and 30 of this Opinion) [16] because, as I have also said, average consumers are not used to presuming the origin of goods presented to them on the basis of the shape, ignoring any graphical or textual element.

44. In such circumstances, the closer a shape for which registration is sought approaches that of the product in question, the less it is distinctive. [17] The packaging of a liquid reflects its image, so that a drawing of a container is not appropriate for use as a trade mark unless simple variants of the common shape are sufficient to give it distinctive character, for it is only necessary for the consumer to distinguish the product, without conducting an analysis or making a comparison or paying particular attention. [18]

45. In that task it is advisable to turn to experience, reverting to empirical principles in comparing the shapes and containers on the market; thus the appearance of any one in trade would be a valid criterion for establishing its distinctive character, [19] since the extent of its distribution may affect consumers' perception which, for this class of signs, does not seem particularly high, [20] especially if the signs relate to everyday products which differ very little in appearance from similar goods, in which circumstances the purchaser pays more heed to labelling than to shapes. [21] Similarly it is useful to assess the containers commonly used, or to assess certain basic creations, although that does not mean setting stricter criteria for this class of trade marks but, rather, weighing their particular features.

16 — Ströbele, P., *Absolute Eintragungshindernisse im Markenrecht, Gewerblicher Rechtsschutz und Urheberrecht*, 2001, p. 665, notes that there is no legal basis for changing the rules which establish the distinctive character of three-dimensional packagings and products.

17 — Judgment in *Mag Instrument*, paragraphs 31 and 32.

18 — Judgment in *Mag Instrument*, paragraph 32.

19 — Pollaud-Dulian, F., 'Les marques tridimensionnelles en droit communautaire', *Revue de jurisprudence de droit des affaires*, No 8-9 (2003), p. 712, and Hetzelt, N., *Dreidimensionale Marken — Freihaltebedürftigkeit, Unterscheidungskraft und Schutzumfang*, Cologne 2004, p. 146.

20 — Hetzelt, N., p. 141.

21 — Ströbele, P., p. 666, and Hetzelt, N., p. 146.

46. The test carried out in the judgment follows these norms, since it is pointed out that the pouches at issue are commonly used in trade for liquids for human consumption in general, among which one finds beverages such as fruit juices, and that prevents the average consumer from perceiving the packaging as an indication of the commercial origin of the goods. Furthermore, the appellant company offers a number of designs which correspond to the generic image of that type of packaging, containing features which are too insignificant to be capable of being memorised by the relevant public. The judgment then considers the three features involving differences apparent to the eye: the basic shapes of the pouches (rectangular, oval and triangular), the concave sides and the metallic finish, analysing them both together and individually [22] (paragraphs 41, 42 and 46 to 52).

47. Thus the Court of First Instance turned to appropriate sources of information which, in objective terms, give no reason to question the lawfulness of the methodology chosen. It had regard to certain factors, such as the class of product and the complexity of the design, which comply with the parameters set out above. The judgment deserves no reproach on this point and the appellant's complaint should be rejected.

22 — The judgment in Case C-251/95 *SABEL* [1997] ECR I-6191, paragraph 23, in comparing two marks to establish whether they have similarities that are open to challenge, adopted a similar method, referring to the overall impression given by the marks, bearing in mind their distinctive and dominant components.

48. Lastly, this plea should be dismissed to the extent that it relates to factual assessments in paragraphs of the judgment cited above since, as I said earlier, the nature of an appeal precludes review of the facts established at first instance.

D — *Failure to state reasons (second limb of the second plea)*

49. The appellant company asserts that OHIM and certain national bodies have registered trade marks like those at issue for goods from the same commercial sector and thus, in these circumstances, the Court of First Instance and also OHIM are required to state why these marks are incapable of fulfilling the essential functions of this type of intellectual property.

50. This plea calls for different approaches according to whether the earlier registration of similar signs occurred under a national system or within the Community system.

51. In the first case, an answer is found, by implication, in the judgment in *Henkel* (Case C-218/01) which stated, in paragraphs 63 and 64, that registration of a mark for certain

goods in one Member State does not entail the grant or refusal in another Member State of registration for a like or similar mark for the same or similar products.

52. I pointed out, in point 24 of the Opinion in that case, that this approach stems from the absence of organic links between the national systems, which are not obliged to achieve identical results, [23] and it applies also in the relationship between OHIM and a national body, so that decisions adopted under the national systems of the Member States are not binding at Alicante.

53. Registration of a mark is subject to the particular rules applying in specific circumstances, and a sign that is capable of being distinctive within a given territory may not be able to serve that function for a different geographical area.

54. That is the response in paragraph 56 of the judgment under appeal, stating that registrations made in the Member States 'are only factors which may merely be taken into consideration, without being given decisive weight, for the purposes of registering a Community trade mark'. The Court held further that 'the Board of Appeal correctly took account of those national registrations, stating that they did not persuade it to alter its findings'. Thus, firstly, OHIM was able lawfully to disregard those external precedents without needing to explain why and, secondly, the Court of First Instance did not fail to state the reasons for its decision.

55. As regards the registrations made in Alicante, paragraph 55 of the judgment under appeal affords sufficient reasoning in noting that, in accordance with the case-law of the Court of First Instance, previous decisions are not binding on OHIM since the registrability of a sign is assessed on the basis of the relevant legislation and is not subject to the approach taken in the past by the Boards of Appeal. The appellant has indicated its assent to that approach.

56. Even if that response were to be considered unsatisfactory, the defect would be immaterial since the registrations to

23 — But the partially harmonising effects of the Trade Marks Directive do require national legislation to be interpreted in accordance with the letter and the spirit of this rule of Community law.

which SiSi-Werke refers in the appeal are later[24] than the administrative decisions challenged. OHIM therefore could not be bound by acts which did not exist at the time.

E — *The interests of competitors, as a basis of the judgment (third plea)*

57. SiSi-Werke protests that, in applying Article 7(1)(b) of Regulation No 40/94, the judgment under appeal has regard only to the general interests of competitors without considering, as it should have, that of consumers, forgetting that the appellant has for years been using the containers without any hindrance.

58. That complaint stems from an incorrect analysis of the judgment under appeal. Reading paragraphs 32 and 54 together gives the opposite conclusion, since paragraph 32 notes that the interest of competitors is not a ground for refusing to register a mark nor is it sufficient for assessment of the mark's distinctive character, and lack of distinctive character is assessed in the paragraphs following (33 to 53). Paragraph 54 points out that the reason for the reference in the Board of Appeal's decision to the risk of creating a monopoly in stand-up pouches is that it confirms that their shape cannot fulfil the essential function of the trade mark, 'reflecting the general interest underlying the absolute ground for refusal founded on Article 7(1)(b) of Regulation No 40/94'.

59. Therefore it cannot be asserted that the Court of First Instance denied the distinctiveness of the marks claimed with regard only to competitors, because the core of the judgment lies in consumers' inability to choose juices with certainty about their origin because the sign does not give them adequate information as to their commercial origin. It is precisely the interest of consumers which justifies the refusal to register marks devoid of distinctiveness.

60. Having regard to all of the foregoing, the final plea must also be rejected.

24 — Trade marks 2662781 and 2662765 were applied for on 22 April 2002 and were granted on 1 and 19 March 2004, respectively; the latest mark, number 2899078, was applied for on 21 October 2002 and was registered on 23 January 2004.

V — Costs

61. Taking Article 122 of the Rules of Procedure together with Article 69(2), which applies to appeals by virtue of Article 118, costs are to be ordered against the unsuccessful party. Therefore if, as I suggest, the pleas in law put forward by the appellant are rejected, it would be proper to order the appellant to pay the costs incurred in this appeal.

VI — Conclusion

62. On the grounds given, I propose that the Court should dismiss the appeal brought by SiSi-Werke against the judgment given by the Court of First Instance on 28 January 2004, in Joined Cases T-146/02 to T-153/02 and order the appellant to pay the costs incurred in hearing it.