JUDGMENT OF THE COURT (Fifth Chamber)

14 November 1996 *

In Case C-333/94 P,

Tetra Pak International SA, whose seat is in Pully, Switzerland, represented by Michel Waelbroeck and Alexandre Vandencasteele, of the Brussels Bar, and by Vivien Rose, Barrister, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Second Chamber) of 6 October 1994 in Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by Julian Currall, of its Legal Service, acting as Agent, assisted by Nicholas Forwood QC, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

* Language of the case: English.

THE COURT (Fifth Chamber),

composed of: L. Sevón, President of the First Chamber, acting for the President of the Fifth Chamber, C. Gulmann, D. A. O. Edward, J.-P. Puissochet and P. Jann (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 21 May 1996,

after hearing the Opinion of the Advocate General at the sitting on 27 June 1996,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 20 December 1994, Tetra Pak International SA ('Tetra Pak') brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of 6 October 1994 in Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755 ('the judgment under appeal'), in which the Court of First Instance dismissed Tetra Pak's application for annulment of Commission Decision 92/163/EEC of 24 July 1991 relating to a proceeding pursuant to Article 86 of the EEC Treaty (IV/31.043 — Tetra Pak II) (OJ 1992 L 72, p. 1, 'the contested decision').

2 In the judgment under appeal (paragraphs 1 to 21) the Court of First Instance found that:

— Tetra Pak, whose registered office is in Switzerland, coordinates the policy of a group of companies, originally Swedish, which has acquired a global dimension. The Tetra Pak group specializes in equipment for the packaging of liquid or semi-liquid food products in cartons. Its activities cover both the aseptic and the non-aseptic packaging sectors. They consist essentially in manufacturing cartons and carton-filling machines.

— In 1983, 90% of cartons were used for the packaging of milk and other liquid dairy products. In 1987 that share was approximately 79%. Approximately 16% of cartons were at that time used for packaging fruit juice. Other products (wine, mineral water, tomato-based products, soups, sauces and baby food) accounted for the remaining 5%.

— In the aseptic sector, Tetra Pak manufactures the 'Tetra Brik' system, designed for packaging UHT milk. In that sector, only one competitor of Tetra Pak, PKL, also manufactures a comparable system of aseptic packaging. Possession of an aseptic-filling technique is the key to market entry both for machines and for aseptic cartons.

— In contrast, non-aseptic packaging calls for less sophisticated equipment. The 'Tetra Rex' carton, used by Tetra Pak on the market for non-aseptic cartons, is in direct competition with the 'Pure-Pak' carton produced by the Norwegian group Elopak.

— During the period in question, various standard-form contracts for the sale and leasing of machines and the supply of cartons were in force between Tetra Pak and its customers in the various Member States of the Community. The clauses which had an effect on competition were summarized in recitals 24 to 45 of the contested decision as follows:

'2.1. Conditions of sale of Tetra Pak equipment (Annex II.1)

(24) Standard purchase contracts exist in the following five countries: Greece, Ireland, Italy, Spain and the United Kingdom. For each clause, the country or countries in which it is applicable are indicated in brackets.

2.1.1. *Equipment configuration*

(25) In Italy, Tetra Pak reserves an absolute right of control over the equipment configuration by prohibiting the buyer:

(i) from adding accessories to the machine (Italy);

(ii) from making modifications to the machine, and adding or removing anything to or from it (Italy);

(iii) from moving the machine (Italy).

2.1.2. *Operation and maintenance of equipment*

(26) There are five clauses concerning the operation and maintenance of equipment, which are intended to give Tetra Pak an exclusivity and a right of inspection in this area:

(iv) it has an exclusive right to maintain and repair equipment (all countries except Spain);

(v) it has an exclusive right to supply spare parts (all countries except Spain);

(vi) it has the right to provide, free of charge, assistance, training, maintenance and updating services not requested by the client (Italy);

(vii) there is a sliding scale for part of the charges made for assistance, maintenance and technical updating (with a possible discount of up to 40% of the basic monthly charge) depending on the number of cartons used on all Tetra Pak machines of the same type (Italy);

(viii) the purchaser is required to inform Tetra Pak of any improvements or modifications to the equipment and to grant Tetra Pak ownership of any resulting intellectual property right (Italy).

2.1.3. *Cartons*

(27) There are four clauses relating to cartons which also give Tetra Pak an exclusive right of control over the product:

(ix) the purchaser must use only Tetra Pak cartons on the machines (all countries);

(x) the purchaser must obtain supplies of cartons from Tetra Pak or a supplier designated by Tetra Pak (all countries);

(xi) the purchaser is required to inform Tetra Pak of any improvements or technical modifications made to the cartons and to grant Tetra Pak ownership of any resulting intellectual property rights (Italy);

(xii) Tetra Pak reserves the right to inspect the wording to be used on cartons (Italy).

2.1.4. *Inspections*

(28) Two clauses are more specifically concerned with monitoring the purchaser's compliance with his contractual obligations:

(xiii) the purchaser is required to submit a monthly report (Italy);

(xiv) Tetra Pak has the right to carry out inspections without notice (Italy).

2.1.5. *Transfer of ownership or use of equipment*

(29) Two clauses in the contract limit the purchaser's right to resell or transfer the equipment to third parties:

(xv) the purchaser is required to obtain Tetra Pak's agreement before selling or transferring the use of the equipment (Italy), resale is subject to conditions (Spain), and Tetra Pak reserves the right to repurchase the equipment at a pre-arranged fixed price (all countries); failure to comply with this clause may give rise to a specific penalty (Greece, Ireland, United Kingdom);

(xvi) the purchaser must ensure that any third party to whom he resells the equipment assumes all his obligations (Italy, Spain).

2.1.6. *Guarantee*

(30) (xvii) The guarantee given on the equipment applies only if the purchaser complies with all of his contractual obligations (Italy) or, at the very least, uses only Tetra Pak cartons (other countries).

2.2. Conditions for the leasing of Tetra Pak equipment (Annex II.2)

(31) Standard lease contracts exist in all countries within the Community except Greece and Spain.

These contracts include the majority of the clauses contained in purchase contracts, adapted to the circumstances of leasing.

Other conditions are specific to leasing but invariably pursue the same goal, i.e. maximum reinforcement of the links between Tetra Pak and its customer.

2.2.1. *Equipment configuration*

(32) Clauses (i), (ii) and (iii) (Italy in the case of clause (i); all countries in the case of clause (ii); France, Ireland, Italy, Portugal, United Kingdom in the case of clause (iii)) are included.

(xviii) An additional clause requires the leaseholder to use only cases, outer packages and/or containers supplied by Tetra Pak for transport purposes (Germany, Belgium, Italy, Luxembourg, the Netherlands) or if the conditions are equal to give preference to obtaining supplies from Tetra Pak (Denmark, France).

2.2.2. *Operation and maintenance of equipment*

(33) Clauses (iv) and (v) (all countries) are included, granting Tetra Pak exclusive rights.

Likewise, clause (viii) appears, conferring on Tetra Pak ownership of the intellectual property rights to any modifications made by the user (Belgium, Germany, Italy, Luxembourg, the Netherlands) or, at the very least, requiring the leaseholder to grant an operating licence to Tetra Pak (Denmark, France, Ireland, Portugal, United Kingdom).

2.2.3. *Cartons*

(34) Contracts also contain clauses (ix) (all countries) and (x) (Italy) concerning the exclusive use of Tetra Pak cartons, clause (xi) conferring on Tetra Pak ownership of the rights to any improvements (Denmark, Italy) or, at the very least, requiring leaseholders to grant an operating licence to Tetra Pak (France, Ireland, Portugal, United Kingdom), and clause (xii) giving Tetra Pak the right to inspect the wording or brand names which the client wishes to use on the cartons (Germany, Spain, Greece, Italy, the Netherlands, Portugal, United Kingdom).

2.2.4. *Inspections*

(35) In the case of sale, the leaseholder must return a monthly report (clause (xiii) — all countries), failure to do so giving rise to fixed-rate invoicing (Belgium, Luxembourg, the Netherlands), and allow the premises at which the equipment is installed to be inspected (clause (xiv) — all countries) without notice (all countries except Denmark, Germany, Ireland, Portugal and the United Kingdom).

(xix) A further clause allows Tetra Pak to examine — at any time (Denmark, France) — the accounts of the company leasing the equipment (all countries) and (depending on the country) its invoices, correspondence or any other documents necessary to check the number of cartons used.

2.2.5. *Transfer of the lease, sub-leasing, transfer of use or use on behalf of third parties*

(36) In the case of sale, ownership may be subsequently transferred only where very restrictive conditions are complied with.

(xx) The terms of lease contracts likewise exclude the transfer of the lease, subleasing (all countries) or even simple commission work on behalf of third parties (Italy).

2.2.6. *Guarantee*

(37) The wording of lease contracts is less precise than that of purchase contracts: they link the guarantee to compliance with "instructions" given by Tetra Pak concerning the "maintenance" and "proper handling" of the machine (all countries). However, the terms "instructions", "maintenance" and "proper handling" are sufficiently broad to be interpreted as also including at least the sole use of Tetra Pak spare parts, repair and maintenance services and packaging materials. Such an interpretation is confirmed by the written and oral replies given by Tetra Pak to the statement of objections.

2.2.7. *Fixing of rental and conditions of payment*

(38) The rental is made up of the following components (all countries):

(a) (xxi) A "base rental" payable at the time the machine is placed at the leaseholder's disposal. Its amount is not necessarily any lower than the selling price of the machines concerned and in fact makes up almost the total sum of present and future rental payments (more than 98% in some cases);

(b) an annual rent, payable quarterly in advance;

(c) (xxii) a monthly production rental, the amount of which decreases according to the number of cartons used on all Tetra Pak machines of the same type.

This component replaces the sliding scale of charges — set at a similar level — for part of the maintenance costs payable in the case of sale (see clause (vii));

In some countries (Germany, France, Portugal), there is a specific penalty if this fee is not paid within the prescribed period.

2.2.8. *Term of the lease*

(39) The term of the lease and the conditions for its termination vary from one Member State to another:

(xxiii) The minimum term of the lease ranges from three years (Denmark, Ireland, Portugal, United Kingdom) to nine years (Italy).

2.2.9. *Penalty clause*

(40) (xxiv) Over and above the usual damages and interest, Tetra Pak reserves the right to impose a penalty on any leaseholder who infringes any of his obligations under the contract, the amount of such penalty being fixed at Tetra Pak's discretion, up to a maximum threshold, according to the gravity of the case (Italy).

2.3. Conditions for the supply of cartons (Annex II.3)

(41) Standard supply contracts exist in Greece, Ireland, Italy, Spain and the United Kingdom: they are compulsory whenever a client purchases rather than leases a machine.

2.3.1. *Exclusive supplies*

(42) (xxv) The purchaser must undertake to obtain supplies of all packaging materials to be used on the given Tetra Pak machine(s) (all countries) and on any other Tetra Pak machine purchased subsequently (Italy) solely from Tetra Pak.

2.3.2. *Contract term*

(43) (xxvi) The contract is signed for an initial period of nine years, renewable for a further period of five years (Italy) or for the period during which the purchaser remains in possession of the machine (Greece, Ireland, Spain, United Kingdom).

2.3.3. *Fixing of prices*

(44) (xxvii) Cartons are delivered at the price applicable at the time of order. No system of adjustment or indexing is provided for (all countries).

2.3.4. *Wording*

(45) Contracts again include Tetra Pak's right to inspect the wording or brand names which the client wishes to use on cartons (clause (xii)).'

— The structure of supply in the aseptic sector was, according to the contested decision, quasi-monopolistic, with Tetra Pak holding 90 to 95% of the market. Its only real competitor, PKL, held almost all of the remaining market share of 5 to 10%.

— The structure of the non-aseptic sector was oligopolistic. At the time when the contested decision was adopted, Tetra Pak held 50 to 55% of the market in the Community. In 1985, Elopak held some 27% of the market in non-aseptic machines and cartons, followed by PKL which had approximately 11% of that market. The remainder of the market in cartons was divided between three companies, and the remainder of the market in non-aseptic machines between ten or so small manufacturers.

— On 27 September 1983, Elopak Italia filed a complaint with the Commission against Tetra Pak Italiana and its associate companies in Italy, accusing it of having engaged in trading practices amounting to an abuse within the meaning of Article 86 of the EEC Treaty. Those practices essentially involved, according to Elopak, the sale of cartons at predatory prices, the imposition of unfair conditions on the supply of machines for filling those cartons and, in certain cases, the sale of that equipment at prices which were also predatory.

— On 16 December 1988, the Commission decided to initiate proceedings in this matter. In the contested decision, those infringements were summarized as follows:

'1. the pursuit of a marketing policy aimed at severely restricting supply and compartmentalizing the national markets within the Community;

2. the imposition on users of Tetra Pak products in all Member States of numerous contractual clauses [...] having the essential object of unduly binding them to Tetra Pak and of artificially eliminating potential competition;

3. the charging of prices for cartons which have been shown to discriminate between users in different Member States and, at least in Italy, eliminate competitors;

4. the charging of prices for machines which have been shown to

— discriminate between users in different Member States,

— discriminate, at least in Italy, between users within the same country, and

— eliminate competitors, at least in Italy and the United Kingdom;

5. various specific practices aimed, at least in Italy, at eliminating competitors and/or their technology from certain markets.'

— The Commission ordered Tetra Pak to adopt certain measures to put an end to the infringements found, and imposed a fine of ECU 75 million.

3 At first instance, Tetra Pak sought annulment of the contested decision and an order that the Commission pay costs.

4 The Court of First Instance dismissed Tetra Pak's application and ordered it to pay costs.

5 Tetra Pak claims that the Court should:

— quash the judgment under appeal, in whole or in part;

— annul the contested decision, in whole or in part;

— in the alternative, annul or substantially reduce the fine imposed on Tetra Pak;

— order the Commission to pay the costs of this appeal as well as those relating to the proceedings before the Court of First Instance.

The Commission contends that the Court should:

— dismiss the appeal as in part inadmissible and in any event unfounded;

— order Tetra Pak to pay the costs.

6 Tetra Pak puts forward five pleas in law in support of its appeal.

The first plea

7 In its first plea, Tetra Pak submits that the definition of the relevant product markets in the judgment under appeal is contradictory. Furthermore, it claims, that definition is based on the use of the wrong legal standard.

8 The first part of the plea relates to paragraphs 64 and 73 of the judgment, in which the Court of First Instance found:

'64. In this case, the "interchangeability" of aseptic packaging systems with non-aseptic systems and of systems using cartons with those using other materials must be assessed in the light of all the competitive conditions on the general market in systems for packaging liquid food products. Accordingly, in the specific context of this case, the applicant's approach of dividing that general market into differentiated sub-markets depending on whether the packaging systems are used for packaging milk, dairy products other than milk or non-dairy products by virtue of the specific characteristics of the packaging of those different categories of products, in which the possibility exists that various kinds of substitutable equipment may be used, would lead to a compartmentalization of the market which would not reflect

economic reality. There is a comparable structure of supply and demand for both aseptic and non-aseptic machinery and cartons, however they are used, since all belong to one sector, the packaging of liquid food products. ...

...

73. Analysis of the markets in the milk-packaging sector thus shows that the four markets concerned, defined in the Decision, were indeed separate markets.'

9 In Tetra Pak's submission, those two statements are mutually exclusive. Either the general market in systems for packaging liquid food products is the one to be taken into consideration or there are four separate markets. If the relevant market had been the general market in systems for packaging liquid food products, the Court of First Instance should have upheld Tetra Pak's argument that the Commission had erred in distinguishing between the aseptic and non-aseptic markets. If, on the other hand, the aseptic and non-aseptic markets were to be regarded as separate, it should not have rejected Tetra Pak's argument that the Commission had erred in including packaging systems for non-dairy products within the relevant product market.

10 At paragraph 60 of its judgment the Court of First Instance explained that it had to consider whether the definition of the four aseptic and non-aseptic markets given in the contested decision was valid. Then, at paragraph 63, it noted that, according to settled case-law, the definition of the market in the relevant products must take account of the overall economic context, so as to make it possible to assess the actual economic power of the undertaking in question and that, for that purpose, it was necessary first to define the products which, although not capable of being substituted for other products, are sufficiently interchangeable with the undertaking's own products, not only in terms of their objective characteristics but also in terms of the competitive conditions and the structure of supply and demand on the market.

11 Thus, by paragraph 64 of its judgment, the Court of First Instance had not yet made any finding as to the relevant market. At that stage in its examination, it had merely established that the interchangeability of aseptic and non-aseptic systems must be assessed on the general market in systems for packaging liquid food products. It thus rejected Tetra Pak's argument that the markets should be distinguished according to the type of product packaged. Only after a detailed analysis of the situation on that general market did the Court of First Instance reach, at paragraph 73, the conclusion that the four markets concerned, defined in the contested decision, were indeed separate markets.

12 The second part of the first plea, alleging that the Court of First Instance used the wrong legal standard, raises three points. First, Tetra Pak submits that the market for machines and cartons used for packaging non-dairy products should have been excluded from the relevant market. The Court of First Instance should have examined, as the Court of Justice did in Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, at paragraph 37, whether the products in question were particularly suitable for satisfying constant needs and only to a limited extent interchangeable with other products. In Tetra Pak's submission, the Court of First Instance should not have contented itself, as it did in paragraphs 65, 74 and 75 of its judgment, with finding first that the milk-packaging sector was much bigger than that for non-dairy products and then that non-aseptic cartons for packaging fruit juice had only a 'marginal share' of the market.

13 However, as this Court held at paragraph 37 of its judgment in *Michelin*, cited above, the competitive conditions and the structure of supply and demand on the market are relevant criteria for determining whether certain products are interchangeable with others. The Court of First Instance was therefore right in this case to take the structure of demand into consideration. It first found, at paragraph 65 of its judgment, that the majority of cartons, both aseptic and non-aseptic, were used for packaging milk and that the Commission was not obliged to carry out a separate analysis of the non-dairy product packaging sector. Thereafter, at paragraph 75, it took the stability of demand for aseptic and non-aseptic cartons used for packaging fruit juice as its basis for demonstrating that there was very little interchangeability in that sector too.

14 Secondly, Tetra Pak submits that the Court of First Instance erred in law when it considered, in paragraph 71 of its judgment, that a finding that aseptic packaging using materials other than carton accounted for a marginal share of the market was enough to rule out interchangeability with systems using cartons.

15 In paragraph 71 of the judgment under appeal, the Court of First Instance found that, between 1976 and 1991, packaging materials other than carton were able to gain only a marginal share of the UHT-milk packaging market. As has been noted above, such stability in demand is a relevant criterion for determining whether carton is interchangeable with other materials.

16 Thirdly, Tetra Pak challenges the reasoning of the Court of First Instance in paragraphs 66 to 68 of its judgment, to the effect that 'the test of sufficient substitutability of products' had to be applied 'at the stage of the packaging systems themselves, which constitute the market in intermediate products on which Tetra Pak's position must be assessed, and not at the stage of the finished products, in this case the packaged liquid food products'. The Court added, however, at paragraph 67, that the Commission had had to take account of the repercussions of the final consumers' demand on the packers' intermediate demand and had found that to alter consumer habits in the choice of types of product packaging was a long and costly process, extending over several years. In paragraph 68, the Court of First Instance endorsed the Commission's reasoning that small but significant changes in the relative price of the different packages would not be sufficient to trigger shifts between the different types of milk with which they are associated because the substitution of different milks is less than perfect.

17 In Tetra Pak's submission, the Court of First Instance erred in law in taking account only of the possibility of short-term substitution when defining the relevant market, whereas it should have considered whether aseptic packaging systems were exposed to competition from non-aseptic systems only in a way that is

hardly perceptible. Tetra Pak submits that the considerations relied on by the Court of First Instance in paragraphs 69 and 70 of its judgment do not indicate the absence of any perceptible competition between the two types of packaging system.

18 It is common ground that, in the part of its judgment in question, the Court of First Instance examined whether aseptic systems were sufficiently interchangeable with non-aseptic systems. It relied on various criteria to establish that they were not.

19 While the Court of First Instance did refer in that context to a long and costly process, it did so only in order to qualify the possibility of influencing consumer habits. The other factors which it considered pertinent, such as the extra cost involved in moving from one packaging system to another as a result of differences between distribution systems, the need for complex technology to manufacture machinery for the aseptic packaging of UHT milk in cartons and the difficulties encountered by manufacturers of non-aseptic systems in entering the market for aseptic systems, demonstrated a sufficient lack of interchangeability, even in the medium and long terms. Thus, contrary to Tetra Pak's submission, the Court of First Instance did not confine itself to examining short-term substitutability.

20 For all the above reasons, the first plea in law must be dismissed.

The second plea

21 In its second plea, Tetra Pak principally casts doubt on the reasoning followed by the Court of First Instance in paragraph 122 of the judgment under appeal, which reads:

'It follows from all the above considerations that, in the circumstances of this case, Tetra Pak's practices on the non-aseptic markets are liable to be caught by Article 86 of the Treaty without its being necessary to establish the existence of a

dominant position on those markets taken in isolation, since that undertaking's leading position on the non-aseptic markets, combined with the close associative links between those markets and the aseptic markets, gave Tetra Pak freedom of conduct compared with the other economic operators on the non-aseptic markets, such as to impose on it a special responsibility under Article 86 to maintain genuine undistorted competition on those markets.'

22 In Tetra Pak's submission, the case-law cited by the Court of First Instance at paragraphs 114 and 115 of its judgment does not justify the conclusion that conduct on a market other than the dominated market, which is not intended to reinforce the position on the dominated market, is covered by Article 86. Tetra Pak maintains that such a conclusion cannot even be justified by the associative links between the various markets found by the Commission and the Court of First Instance.

23 In developing its argument, Tetra Pak refers particularly to the fact that in its previous case-law the Court of Justice has always examined either abuses which took place on the dominated market and whose effects were felt on another market or abuses which were committed on a market on which the undertaking did not hold a dominant position but which strengthened its position on the dominated market.

24 It must first be stressed that there can be no question of challenging the Court of First Instance's assessment, at paragraph 113 of its judgment, that Article 86 gives no explicit guidance as to the requirements relating to where on the product market the abuse took place. That Court was therefore correct in stating, at paragraph 115, that the actual scope of the special responsibility imposed on a dominant undertaking must be considered in the light of the specific circumstances of each case which show a weakened competitive situation.

25 In that regard, the case-law cited by the Court of First Instance is relevant. Joined Cases 6/73 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223 and Case 311/84 *CBEM* v *CLT and IPB* [1985] ECR 3261 provide examples of abuses having effects on markets other than the dominated markets. In Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359 and Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, the Community judicature found certain conduct on markets other than the dominated markets and having effects on the dominated markets to be abusive. The Court of First Instance was therefore right in concluding from that case-law, at paragraph 116 of the judgment under appeal, that it must reject the applicant's arguments to the effect that the Community judicature had ruled out any possibility of Article 86 applying to an act committed by an undertaking in a dominant position on a market distinct from the dominated market.

26 Nor, for the reasons set out by the Advocate General at point 61 of his Opinion, can Tetra Pak derive any support from the judgments in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461 or *Michelin* v *Commission*, cited above.

27 It is true that application of Article 86 presupposes a link between the dominant position and the alleged abusive conduct, which is normally not present where conduct on a market distinct from the dominated market produces effects on that distinct market. In the case of distinct, but associated, markets, as in the present case, application of Article 86 to conduct found on the associated, non-dominated, market and having effects on that associated market can only be justified by special circumstances.

28 In that regard, the Court of First Instance first considered, at paragraph 118 of its judgment, that it was relevant that Tetra Pak held 78% of the overall market in packaging in both aseptic and non-aseptic cartons, that is to say seven times more than its closest competitor. At paragraph 119, it stressed Tetra Pak's leading

position in the non-aseptic sector. Then, in paragraph 121, it found that Tetra Pak's position on the aseptic markets, of which it held nearly a 90% share, was quasi-monopolistic. It noted that that position also made Tetra Pak a favoured supplier of non-aseptic systems. Finally, at paragraph 122, it concluded that, in the circumstances of the case, application of Article 86 was justified by the situation on the different markets and the close associative links between them.

29 The relevance of the associative links which the Court of First Instance thus took into account cannot be denied. The fact that the various materials involved are used for packaging the same basic liquid products shows that Tetra Pak's customers in one sector are also potential customers in the other. That possibility is borne out by statistics showing that in 1987 approximately 35% of Tetra Pak's customers bought both aseptic and non-aseptic systems. It is also relevant to note that Tetra Pak and its most important competitor, PKL, were present on all four markets. Given its almost complete domination of the aseptic markets, Tetra Pak could also count on a favoured status on the non-aseptic markets. Thanks to its position on the former markets, it could concentrate its efforts on the latter by acting independently of the other economic operators.

30 The circumstances thus described, taken together and not separately, justified the Court of First Instance, without any need to show that the undertaking was dominant on the non-aseptic markets, in finding that Tetra Pak enjoyed freedom of conduct compared with the other economic operators on those markets.

31 Accordingly, the Court of First Instance was right to accept the application of Article 86 of the Treaty in this case, given that the quasi-monopoly enjoyed by Tetra Pak on the aseptic markets and its leading position on the distinct, though closely associated, non-aseptic markets placed it in a situation comparable to that of holding a dominant position on the markets in question as a whole.

32 An undertaking in such a situation must necessarily be able to foresee that its conduct may be caught by Article 86 of the Treaty. Thus, contrary to the appellant's argument, the requirements of legal certainty are observed.

33 It follows from the foregoing considerations that the second plea in law must be dismissed.

The third plea

34 In its third plea, Tetra Pak submits that the Court of First Instance erred in law in holding that the tied sales of cartons and filling machines were contrary to Article 86 in circumstances where there was a natural link between the two and tied sales were in accordance with commercial usage.

35 Tetra Pak interprets Article 86(d) of the Treaty as prohibiting only the practice of making the conclusion of contracts dependent on acceptance of additional services which, by nature or according to commercial usage, have no link with the subject-matter of the contracts.

36 It must be noted, first, that the Court of First Instance explicitly rejected the argument put forward by Tetra Pak to show the existence of a natural link between the machines and the cartons. In paragraph 82 of the judgment under appeal, it found: 'consideration of commercial usage does not support the conclusion that the machinery for packaging a product is indivisible from the cartons. For a considerable time there have been independent manufacturers who specialize in the manufacture of non-aseptic cartons designed for use in machines manufactured by other concerns and who do not manufacture machinery themselves'. That assessment, itself based on commercial usage, rules out the existence of the natural link claimed

by Tetra Pak by stating that other manufacturers can produce cartons for use in Tetra Pak's machines. With regard to aseptic cartons, the Court of First Instance found, at paragraph 83 of its judgment, that 'any independent producer is quite free, as far as Community competition law is concerned, to manufacture consumables intended for use in equipment manufactured by others, unless in doing so it infringes a competitor's intellectual property right'. It also noted, at paragraph 138, rejecting the argument based on the alleged natural link, that it was not for Tetra Pak to impose certain measures on its own initiative on the basis of technical considerations or considerations relating to product liability, protection of public health and protection of its reputation. Those factors, taken as a whole, show that the Court of First Instance considered that Tetra Pak was not alone in being able to manufacture cartons for use in its machines.

37 It must, moreover, be stressed that the list of abusive practices set out in the second paragraph of Article 86 of the Treaty is not exhaustive. Consequently, even where tied sales of two products are in accordance with commercial usage or there is a natural link between the two products in question, such sales may still constitute abuse within the meaning of Article 86 unless they are objectively justified. The reasoning of the Court of First Instance in paragraph 137 of its judgment is not therefore in any way defective.

38 For those reasons, the third plea in law must also be dismissed.

The fourth plea

39 In its fourth plea, Tetra Pak submits that the Court of First Instance erred in law when, at paragraph 150 of the judgment under appeal, it characterized Tetra Pak's prices in the non-aseptic sector as predatory without accepting that it was necessary for that purpose to establish that it had a reasonable prospect of recouping the losses so incurred.

40 Tetra Pak considers that the possibility of recouping the losses incurred as a result of predatory sales is a constitutive element in the notion of predatory pricing. That is clear, it claims, from paragraph 71 of the *AKZO* judgment, cited above. Since, however, both the Commission and the Court of First Instance accept that sales below cost took place only on the non-aseptic markets, on which Tetra Pak was not found to hold a dominant position, it had no realistic chance of recouping its losses later.

41 In *AKZO* this Court did indeed sanction the existence of two different methods of analysis for determining whether an undertaking has practised predatory pricing. First, prices below average variable costs must always be considered abusive. In such a case, there is no conceivable economic purpose other than the elimination of a competitor, since each item produced and sold entails a loss for the undertaking. Secondly, prices below average total costs but above average variable costs are only to be considered abusive if an intention to eliminate can be shown.

42 At paragraph 150 of the judgment under appeal, the Court of First Instance carried out the same examination as did this Court in *AKZO*. For sales of non-aseptic cartons in Italy between 1976 and 1981, it found that prices were considerably lower than average variable costs. Proof of intention to eliminate competitors was therefore not necessary. In 1982, prices for those cartons lay between average variable costs and average total costs. For that reason, in paragraph 151 of its judgment, the Court of First Instance was at pains to establish — and the appellant has not criticized it in that regard — that Tetra Pak intended to eliminate a competitor.

43 The Court of First Instance was also right, at paragraphs 189 to 191 of the judgment under appeal, to apply exactly the same reasoning to sales of non-aseptic machines in the United Kingdom between 1981 and 1984.

44 Furthermore, it would not be appropriate, in the circumstances of the present case, to require in addition proof that Tetra Pak had a realistic chance of recouping its losses. It must be possible to penalize predatory pricing whenever there is a risk that competitors will be eliminated. The Court of First Instance found, at paragraphs 151 and 191 of its judgment, that there was such a risk in this case. The aim pursued, which is to maintain undistorted competition, rules out waiting until such a strategy leads to the actual elimination of competitors.

45 For those reasons, the fourth plea in law must be dismissed.

The fifth plea

46 Finally, Tetra Pak claims that the Court of First Instance did not deal with its arguments as to the mitigating circumstances which the Commission should have taken into account when fixing the amount of the fine. At paragraph 239 of its judgment, Tetra Pak submits, it merely examined whether the infringements were committed intentionally or negligently. It should also, in Tetra Pak's submission, have taken account of the circumstances of the case, including the absence of precedent. Since the Court of First Instance confused the issues of whether the infringement was intentional or negligent and whether the absence of precedent constituted a mitigating factor, Tetra Pak submits that the fine should be annulled or at the very least substantially reduced.

47 It must first be noted that the Court of First Instance did indeed take into consideration, at paragraph 228 of its judgment, Tetra Pak's argument concerning the unprecedented nature both of the method of defining the product market and of the justification of applying Article 86 of the Treaty to the non-aseptic sector.

48 Then, at paragraph 239, the Court of First Instance weighed the seriousness of the infringement against the circumstances invoked by Tetra Pak. It considered that, even if in some respects defining the relevant product markets and the scope of Article 86 may have been a matter of some complexity, Tetra Pak could not have been unaware, given its quasi-monopoly on the aseptic markets and its leading position on the non-aseptic markets, that the practices in issue contravened the rules in the Treaty. The Court of First Instance concluded that the manifest nature and particular gravity of the restrictions on competition resulting from the abuses in question justified upholding the fine, notwithstanding the allegedly unprecedented nature of certain legal assessments in the contested decision.

49 By that reasoning, the Court of First Instance dealt adequately with Tetra Pak's argument based on the mitigating circumstances on which it could rely.

50 The fifth plea in law must therefore also be dismissed.

51 For all the foregoing reasons, the appeal must be dismissed in its entirety.

Costs

52 Under Article 69(2) of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since the appellant has been unsuccessful, it must be ordered to pay the costs of these proceedings.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Dismisses the appeal;

2. Orders the appellant to pay the costs.

Sevón Gulmann Edward

Puissochet Jann

Delivered in open court in Luxembourg on 14 November 1996.

R. Grass J. C. Moitinho de Almeida

Registrar President of the Fifth Chamber