JUDGMENT OF THE COURT (Grand Chamber)

15 February 2005 *

In Case C-12/03 P,

APPEAL under Article 49 of the EC Statute of the Court of Justice lodged on 8 January 2003,

Commission of the European Communities, represented by M. Petite, A. Whelan and P. Hellström, acting as Agents, with an address for service in Luxembourg,

appellant,

the other party to the proceedings being:

Tetra Laval BV, established in Amsterdam (Netherlands), represented by A. Vandencasteele and D. Waelbroeck of the Brussels Bar, M. Johnsson of the Swedish Bar, and A. Weitbrecht and S. Völcker, Rechtsanwälte,

applicant at first instance,

* Language of the case: English.

THE COURT (Grand Chamber),

composed of P. Jann, President of the First Chamber, acting for the President, C.W.A. Timmermans and A. Rosas (Rapporteur), Presidents of Chambers, C. Gulmann, J.-P. Puissochet, R. Schintgen, N. Colneric, S. von Bahr and J.N. Cunha Rodrigues, Judges,

Advocate General: A. Tizzano,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 27 January 2004,

after hearing the Opinion of the Advocate General at the sitting on 25 May 2004,

gives the following

Judgment

1 By its appeal, the Commission of the European Communities asks the Court to set aside the judgment of the Court of First Instance of the European Communities in Case T-5/02 *Tetra Laval* v *Commission* [2002] ECR II-4381 ('the judgment under appeal'), by which the Court of First Instance annulled Commission Decision 2004/124/EC of 30 October 2001 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case No COMP/M. 2416 — Tetra Laval/Sidel) (OJ 2004 L 43, p. 13, 'the contested decision').

Regulation (EEC) No 4064/89

2 Article 2 of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1, corrected version in OJ 1990 L 257, p. 13), as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1), ('the Regulation') provides:

'1. Concentrations within the scope of this Regulation shall be appraised in accordance with the following provisions with a view to establishing whether or not they are compatible with the common market.

In making this appraisal, the Commission shall take into account:

(a) the need to maintain and develop effective competition within the common 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.

2. 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.

3. 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.

...'

The contested decision

3 It is apparent from the contested decision that four types of packaging are used for liquid food: carton packaging, plastic packaging (the material being either polyethylene terephthalate, 'PET', or high-density polyethylene, 'HDPE'), cans and glass. The type of packaging used for a product is dependent on several factors. The most important factors are the technological characteristics of the product, those of the packaging material and those relating to the method of packaging.

4 The contested decision focuses on 'sensitive' products. These include milk and liquid dairy products ('LDPs'), fruit juices and nectars, fruit-flavoured still drinks (FFDs) and tea and coffee drinks. In some cases, the products must be protected against light, as in the case of milk, or against oxygen, as in the case of fruit juices and, to a lesser extent, FFDs and tea and coffee drinks. Since PET is a porous resin

through which oxygen and light can pass, it is less appropriate for such products than carton. Nevertheless, research is being carried out into methods of 'barrier' technology, that is to say, methods which ensure protection against oxygen and light.

5 The packaging technology is also an important factor in choosing the type of packaging. Certain acidic products, such as milk and fruit juices, must either be packaged in aseptic conditions or distributed in chilled form. It is apparent from the file that aseptic conditions can be better maintained if those types of products are packaged in carton because the packaging process is carried out in a single step by the producer of the liquid food in question. In the majority of cases, the producer has an integrated packaging line. It purchases the carton in reels and then cuts, shapes, fills and seals the packaging.

6 By contrast, the packaging of a liquid product in PET is, in most cases, carried out in several stages, which makes it more difficult to guarantee aseptic conditions. First of all, a plastic tube made of resin called a perform must be produced, then an empty bottle must be formed by placing the preform in a 'stretch blow moulding' machine ('SBM machine') containing the appropriate mould for the desired shape and, in a final step only, the bottle must be filled and closed. These various stages may be carried out by different undertakings. Thus, there are 'converters', who manufacture empty packaging and supply it to liquid producers. However, integrated production lines and production techniques whereby packaging in aseptic conditions can be more easily guaranteed are currently being developed.

7 By the contested decision, the Commission declared incompatible with the common market and the functioning of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) the acquisition of Sidel SA by Tetra Laval BV ('the

notified merger'). Tetra Laval BV ('Tetra') is a holding company of the Tetra group, which also includes the Tetra Pak company, which is the world leader in the carton-packaging sector and is regarded as holding a dominant position in aseptic packaging on that market, whereas Sidel SA ('Sidel') is a leading company in the sector of production and supply of SBM machines and is active in the area of 'barrier' technology. The decision was adopted pursuant to Article 8(3) of the Regulation.

8 In the contested decision, the Commission concluded that the markets for carton and PET packaging systems are distinct but closely related and potentially converging markets which have a growing number of common customers. It also found that there are, in particular, distinct markets for high and low capacity SBM machines and that those markets can, in turn, be subdivided into markets for sensitive and non-sensitive products. This distinction according to end use can be explained by the differences in the specifications for those machines, since their producers may charge different prices according to the end use, which can be determined at the time of purchase. Such price discrimination cannot be avoided by way of arbitrage.

9 According to the Commission, the notified merger would encourage Tetra to 'leverage' its dominant position on the market for equipment and consumables for carton packaging so as to persuade its customers on that market who are switching to PET in order to package certain sensitive products to choose Sidel's SBM machines, thereby excluding much smaller competitors and turning Sidel's leading position on the market for SBM machines for sensitive products into a dominant position. Tetra would be helped in this by its close and sustained relationship with its customers, its financial strength, its know-how and its reputation in the aseptic and ultra-clean sector, by Sidel's current strength, technology and reputation for quality and by the vertical integration from which the entity emerging from the notified merger ('the merged entity') will profit in relation to the three packaging systems (carton, PET and HDPE).

10 The Commission also concluded that, given the weak competition on the markets for equipment and consumables for carton packaging, the merger of Tetra with the leading producer on the growing market for PET equipment, a market which is closely related to that for carton, would eliminate an important source of potential competition. This would strengthen Tetra's dominant position on the carton-packaging markets and reduce its incentive to adjust its prices and innovate to face the threat which PET poses to its position.

11 Tetra entered into a number of commitments, including a commitment to keep Tetra and Sidel separate for 10 years, not to make joint offers for both its carton products and SBM machines made by Sidel and to comply with its obligations under 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 Commission took the view that such commitments were insufficient to resolve the structural competition concerns raised by the notified merger and argued that it would be virtually impossible to monitor compliance with them. Therefore, in Article 1 of the contested decision, the Commission declared the merger incompatible with the common market and the functioning of the Agreement on the European Economic Area.

The judgment under appeal

12 By application lodged at the Registry of the Court of First Instance on 15 January 2002, Tetra brought an action for annulment of the contested decision. In the judgment under appeal, the Court of First Instance held that the Commission had committed manifest errors of assessment in its findings as to leveraging and the strengthening of Tetra's dominant position in the carton sector and therefore annulled the contested decision.

13 As regards the Commission's claims that the notified merger would have anti-competitive conglomerate effects and, in particular, give the merged entity the capacity and incentive to engage in leveraging by exploiting its overall position in the carton sector with a view to attaining a dominant position on the market for SBM machines, the Court of First Instance observed that the Commission itself had taken the view that such a dominant position would not arise from the merger itself but rather from the foreseeable conduct of the merged entity. However, the Court of First Instance held that, where the Commission takes the view that a merger should be prohibited because it will create or strengthen a dominant position within a foreseeable period, it is incumbent upon it to produce convincing evidence thereof.

14 The Court of First Instance also stated that in order to assess the foreseeability of the merged entity's conduct the Commission must examine all the circumstances which might determine that conduct. Given that, in the case of a dominant undertaking such as Tetra, the supposed leveraging could constitute an abuse of the pre-existing dominant position, the Court of First Instance held that, when examining the likelihood of the adoption of anti-competitive conduct, the Commission must have regard not only to the incentives to adopt such conduct but also to the factors liable to reduce, or even eliminate, those incentives, such as the probability of legal action against and penalties for such conduct. Since the Commission had failed to carry out such an examination, its findings could not be upheld. Consequently, the Court of First Instance examined whether the Commission could nevertheless establish the merits of its argument in the absence of those findings.

15 The Court of First Instance found that there was, in principle, a possibility of leveraging by the merged entity. Nevertheless, it also found that the Commission had overestimated the likely level of growth in the PET sector and that, for the reasons set out above, the leveraging methods which could be taken into consideration by the Court of First Instance were limited to those which do not infringe Community law. It concluded that the Commission had on the whole failed to fulfil its obligation to establish that the potential leveraging would lead to the creation or strengthening of a dominant position on the relevant markets by 2005.

With regard, in particular, to SBM machines, the Court of First Instance held that the contested decision did not contain sufficient evidence to justify the definition by the Commission of distinct SBM-machine markets for sensitive and for non-sensitive products.

16 As regards the Commission's claim that '[Tetra's] current dominant position in carton packaging' would be strengthened by the elimination of a source of constraints on competition from neighbouring markets as a result of the elimination of competition from Sidel on the PET-packing market, the Court of First Instance held that the Commission had to prove that strengthening, which cannot be inferred automatically from the fact that there is a dominant position. It found that the Commission had failed to provide such proof.

The appeal

17 The Commission relies on five grounds of appeal. The first ground alleges an error in law as to the standard of proof which it is required to satisfy and as to the scope of the Court of First Instance's power of judicial review. The second ground alleges infringement of Articles 2 and 8 of the Regulation in so far as the Court of First Instance required the Commission, first, to take account of the impact which the illegality of certain conduct has on the incentives for the merged entity to engage in leveraging and, secondly, to assess, as a potential remedy, the commitments not to adopt any abusive conduct. The third ground alleges that the Court of First Instance erred in law by applying an erroneous test of judicial review and infringed Article 2 of the Regulation by failing to uphold the definition of distinct markets for SBM machines according to end use. The fourth ground alleges 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 failed to recognise the

merits of the Commission's finding that Tetra would strengthen its dominant position in the carton sector. The fifth ground alleges infringement of Article 2(3) of the Regulation in that the Court of First Instance rejected the Commission's conclusions as to the creation of a dominant position on the market for SBM machines.

18 In its reply, Tetra requested, as a measure of inquiry, an order that a French version of the appeal be produced. The Court rejected that request by order of 24 July 2003.

The first ground of appeal

19 By its first ground of appeal, the Commission complains that the Court of First Instance, whilst claiming to apply the test of manifest error of assessment, in fact applied a different test requiring the production of 'convincing evidence'. In doing so, the Court of First Instance infringed Article 230 EC by failing to take account of the discretion conferred on the Commission with regard to complex factual and economic matters. It also infringed Article 2(2) and (3) of the Regulation in that it applied a presumption of legality in respect of concentrations with conglomerate effect. Taking the example of the review of the Commission's forecast of significant growth in the use of PET packaging for sensitive products, the Commission claims that the Court of First Instance distorted the facts, failed to give adequate reasons for the rejection of its arguments and failed to take account of factors, arguments and evidence put forward by it in the contested decision and in its defence, and even refrained from referring to that defence.

20 In paragraph 119 of the judgment under appeal, the Court of First Instance set out as follows the criteria for judicial review of a Commission decision on a concentration:

'As a preliminary point, it must be recalled that the substantive rules of the Regulation, in particular Article 2, 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 (Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission ('Kali & Salz')* [1998] ECR I-1375, paragraphs 223 and 224; Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraphs 164 and 165; and Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585, paragraph 64).'

21 In paragraph 120 of the judgment under appeal, the Court of First Instance interpreted Article 2(3) of the Regulation as follows:

'It must also be recalled that under Article 2(3) of the Regulation 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 must be declared incompatible with the common market. Conversely, the Commission is bound to declare a concentration falling within the scope of application of the Regulation compatible with the common market where the two conditions laid down in that provision are not fulfilled (Case T-2/93 *Air France* v *Commission* [1994] ECR II-323, paragraph 79; see also, to this effect, *Gencor* v *Commission*, paragraph 170; and *Airtours* v *Commission*, paragraphs 58 and 82). If, therefore, a dominant position is not created or strengthened, the transaction must be authorised and there is no need to examine the effects of the transaction on effective competition (*Air France* v *Commission*, paragraph 79).'

22 The first ground of appeal relied on by the Commission relates to a number of paragraphs in the judgment under appeal. However, it is appropriate to reproduce the passages from that judgment which relate to the conglomerate nature of the notified merger, which is defined in paragraph 142 of that judgment as 'a merger of undertakings which, essentially, do not have a pre-existing competitive relationship, either as direct competitors or as suppliers and customers', a merger which does not give rise to true horizontal overlaps between the activities of the parties to it or to a vertical relationship between the parties in the strict sense of the term and in respect of which it therefore cannot be presumed, as a general rule, that it produces anti-competitive effects.

23 In paragraph 146 of the judgment under appeal, the Court of First Instance interpreted the Regulation, in so far as it applies to conglomerates, as follows:

'It should be observed, first, that the Regulation, particularly at Article 2(2) and (3), does not draw any distinction between, on the one hand, merger transactions having horizontal and vertical effects and, on the other hand, those having a conglomerate effect. It follows that, without distinction between those types of transactions, a merger can be prohibited only if the two conditions laid down in Article 2(3) are met (see paragraph 120 above). Consequently, a merger having a conglomerate effect must, like any other merger (see paragraph 120 above), be authorised by the Commission if it is not established that it creates or strengthens a dominant position in the common market or in a substantial part of it and that, as a result, effective competition will be significantly impeded'.

24 With respect to the impact on competition of a conglomerate-type merger and to the Commission's analysis in that regard, the Court of First Instance held as follows:

'148 It is necessary first to determine whether a merger transaction creating a competitive structure which does not immediately confer on the merged

entity a dominant position may nevertheless be prohibited under Article 2 (3) of the Regulation, when in all likelihood it will allow that entity, as a result of leveraging by the acquiring party from a market in which it is already dominant, to obtain in the relatively near future a dominant position on another market in which the party acquired currently holds a leading position, and when the acquisition in question has significant anti-competitive effects on the relevant markets.

...

150 The Court observes that, in principle, a merger between undertakings which are active on distinct markets is not usually of such a nature as immediately to create or strengthen a dominant position due to the combination of the market shares held by the parties to the merger. The factors which are of significance for the relative positions of competitors within a given market are generally to be found within the market itself, namely in particular the market shares held by the competitors and the conditions of competition on the market. It does not follow, however, that the conditions of competition on a market can never be affected by factors external to that market.

151 Thus, by way of example, in a case where the markets in question are neighbouring markets and one of the parties to a merger transaction already holds a dominant position on one of the markets, the means and capacities brought together by the transaction may immediately create conditions allowing the merged entity to leverage its way so as to acquire, in the relatively near future, a dominant position on the other market. This could especially be the case where the relevant markets are tending to converge and where, in addition to the dominant position held by one of the parties to the transaction on a market, the other party, or one of the other parties, to the transaction holds a leading position on another market.

152 Any other interpretation of Article 2(3) of the Regulation could deprive the Commission of the power to exercise control over merger transactions which have solely or principally a conglomerate effect.

153 Consequently, in a prospective analysis of the effects of a conglomerate-type merger transaction, if the Commission is able to conclude that a dominant position would, in all likelihood, be created or strengthened in the relatively near future and would lead to effective competition on the market being significantly impeded, it must prohibit it (see, in this regard, *Kali & Salz*, paragraph 221; *Gencor* v *Commission*, paragraph 162; and *Airtours* v *Commission*, paragraph 63).

154 In this context, 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, 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.

155 The Commission's analysis of a merger producing a conglomerate effect is conditioned by requirements similar to those defined by the Court with

regard to the creation of a situation of collective dominance (*Kali & Salz*, paragraph 222; and *Airtours* v *Commission*, paragraph 63). Thus the Commission's analysis of a merger transaction which is expected to have an anti-competitive conglomerate effect calls for a particularly close examination of the circumstances which are relevant for an assessment of that effect on the conditions of competition in the reference market. As the Court has already held, where the Commission takes the view that a merger should be prohibited because it will create or strengthen a dominant position within a foreseeable period, it is incumbent upon it to produce convincing evidence thereof (*Airtours* v *Commission*, paragraph 63). Since the effects of a conglomerate-type merger are generally considered to be neutral, or even beneficial, for competition on the markets concerned, as is recognised in the present case by the economic writings cited in the analyses annexed to the parties' written pleadings, the proof of anti-competitive conglomerate effects of such a merger calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects (see, by analogy, *Airtours* v *Commission*, paragraph 63).'

Arguments of the parties

25 The Commission claims that the Court of First Instance departed from principles laid down by the Court in its judgment in *Kali & Salz* in terms of both the nature of the judicial review carried out by it and the standard of proof which it required the Commission to satisfy. It submits that the following paragraphs of that judgment are relevant in this regard:

'220 As stated above, under Article 2(3) of the Regulation, concentrations which 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 must be declared incompatible with the common market.

221 In the case of an alleged collective dominant position, the Commission is therefore obliged to assess, using a prospective analysis of the reference market, whether the concentration which has been referred to it leads to a situation in which effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, in particular because of correlative factors which exist between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and also of consumers.

222 Such an approach warrants close examination in particular of the circumstances which, in each individual case, are relevant for assessing the effects of the concentration on competition in the reference market.

223 In this respect, however, 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.

224 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.'

26 The Commission concludes from the principles referred to in *Kali & Salz* and from the review carried out by the Court in that case that it is required to examine the relevant market closely, weigh up all the relevant factors, and base its assessment on evidence which is factually accurate, is not clearly insignificant and is capable of substantiating the conclusions drawn from it and that it must reach its conclusions on the basis of consistent reasoning.

27 The Commission takes the view, first of all, that the standard of 'convincing evidence' differs substantially, in degree and in nature, both from the obligation to produce 'cogent and consistent' evidence, established in *Kali & Salz*, and from the principle that the Commission's assessment must be accepted unless it is shown to be manifestly wrong. The standard is different in degree because, unlike the standard of 'convincing evidence', that of cogent and consistent evidence does not rule out the possibility that another body might reach a different conclusion if it were competent to give a decision on the matter. The standard required is likewise different in nature inasmuch as it transforms the role of the Community Courts into that of a different body which is competent to rule on the matter in all its complexity and which is entitled to substitute its views for those of the Commission. The Court of First Instance was inconsistent in that it referred to the test of manifest error of assessment yet applied a very different test.

28 Next, the Commission submits that a margin of discretion is inherent in any prospective analysis. The likelihood of certain market developments within a foreseeable time-frame must be determined on the basis of the current market situation, observable trends and other appropriate indicators. To require that the Commission's assessment be, in effect, based on undisputed or virtually unequivocal evidence, irrespective of its merit, would deprive the Commission of its function of evaluating the evidence and attaching, for justifiable reasons, more weight to some sources than to others.

29 Finally, the Commission submits that the standard of proof required by the Court of First Instance means that it is placed under an obligation to authorise the transaction in cases in which the evidence does not meet the requisite standard, which is tantamount to a general, de facto presumption of the legality of certain concentrations or, at the very least, to the establishment of a bias in their favour. However, Article 2(2) and (3) imposes on the Commission a double obligation, namely either to prohibit a concentration if it creates or strengthens a dominant position or, as a symmetrical but opposite obligation, to approve it if it neither creates nor strengthens such a position. That obligation reflects the intention of the Community legislature to protect equally the private interests of the parties to the concentration and the public interest in maintaining effective competition and in consumer protection. This symmetrical double obligation calls for the application of a symmetrical test in relation to the standard of proof required of the Commission since it must prove the merits of its assessment equally in both cases.

30 By way of illustration of the judicial review carried out by the Court of First Instance in the judgment under appeal, the Commission refers, in particular, to the assessment of the growth in the use of PET packaging for sensitive products. In that connection, the Court of First Instance held as follows:

> '210 At the hearing, the Commission stated that its reasoning is not based on the precise accuracy of its forecasts, inasmuch as it is accepted that there will be significant future growth. It also acknowledged there that, in the light of the remaining uncertainties surrounding the commercial applicability of the necessary barrier technologies, it could not assume significant PET growth for the [non-flavoured] UHT milk market, and that even the weak growth predicted in the contested decision could turn out to be an overestimation. It did, however, emphasise that its forecasts for probable strong growth in the use of PET for fresh milk, juices, FFDs and particularly tea/coffee drinks in the period up to 2005 were entirely plausible.

211 The Court finds that the use of PET will not actually increase for UHT milk and, consequently, for approximately half of the LDP market.

212 As regards the rest of the LDP market, it must be found that the PCI report, [entitled "The Potential for PET in the Packaging of Liquid Dairy Products (2001)"] 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 milk market in 2005 (PCI, p. 64). In addition there is the fact that, for aseptic packaging, the Warrick report [entitled "Warrick Research Report Packaging Markets — Aseptic Packaging Markets World and Western Europe — 2000"] predicts only minimal growth, of 1%, for flavoured milk, and a slight decline for other milk-based drinks, whilst the Pictet report [entitled "Analysts' Report Pictet — European Packaging Machinery, Move into PET"] does not give any specific forecasts for LDPs. On the basis of that evidence, the Commission has not shown what it claims to have shown in its defence, namely that its forecasts for LDPs are based on a prudent analysis of the independent studies or on a solid, coherent body of evidence obtained by it through its market investigation. The growth estimates adopted by the Commission (paragraph 209 above) are not really very convincing. The PCI report, on the other hand, provides the only proof which might possibly support the forecast of a 25% market share for PET in other milk-based drinks (namely flavoured milk and drinks based on milk and yoghurt) by 2005 (PCI, pp. 63 and 64). However, if that growth were to be realised, the relevant volume would increase only by 62 000 tonnes for 2000, to reach 92 800 tonnes in 2005, an increase which is not very significant in relation to the roughly 120 million tonnes of milk produced in the Community each year (PCI, p. 9). More 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. It must be pointed out that the Commission does not dispute either the overall figure of 17.3% for the use of HDPE for LDPs given by [the consulting company] Canadean for 2000 (see table 3 in recital 66) or the forecast that that figure could reach 19.5% by 2005 (see table 5 in recital 105).

213 As regards juices, the Commission's forecast is even less convincing. 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. In the absence of such an analysis, the Court is unable to ascertain the accuracy of the Commission's forecasts for juices. An analysis of that kind would have been indispensable to enable the Court to determine the likely level of switch from glass to carton, PET and HDPE. It was all the more indispensable given the differences between the relevant forecasts made in the Canadean and Warrick studies, on the one hand, and the Pictet study, on the other, as regards levels of growth and the time periods used in the analyses.

214 It follows 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 extent of the growth is lacking.

215 By contrast, the independent studies do show that, by 2005, there will in all likelihood be a significant increase in the use of PET for packaging FFDs and tea/coffee drinks, including isotonic drinks. Since the level of growth forecast in the contested decision was not seriously called into question by the applicant at the hearing and is not overestimated compared with the forecast in the studies, the Court finds that the Commission did not commit an error on this point.'

31 The Commission complains, in essence, that the Court of First Instance failed to demonstrate that the Commission's estimates of the growth in use of PET were based, first, on factual errors, secondly, on findings of fact which were not established or on conclusions drawn from manifestly insignificant evidence, thirdly, on inconsistencies or errors in reasoning or, fourthly, on the omission of relevant factors. The Court of First Instance rejected, without explanation, the Commission's assessment of the evidence, distorted the factual evidence, for example in finding, in paragraph 213 of the judgment under appeal, that the Commission had failed to analyse the glass market, and imposed its own findings, which were contrary to those of the Commission and manifestly wrong, for example in finding, in paragraph 289 of the judgment, that 'fresh milk is not a product for which the marketing advantages offered by PET have any particular importance' or, in paragraphs 288 and 328, that PET is more expensive than carton.

32 Tetra contends that the Commission's first ground of appeal is merely a semantic discussion of the terms used in the judgment under appeal and does not relate to the substantive examination carried out by the Court of First Instance. The Commission's argument is to no avail since there is no consistent terminology with regard to the requisite standard of proof.

33 Tetra also points out that the terminology used by the Court in the judgment in *Kali & Salz*, to which the Commission refers in connection with the rules on evidence, did not preclude the Court, in that case, from examining in detail both the facts relied on by the Commission in support of its arguments and the conclusions which it had reached in the decision at issue.

34 According to Tetra, the Court of First Instance respected the Commission's margin of discretion and did not exceed the bounds of its power of judicial review by rejecting the statement of reasons for the contested decision, but merely found that the Commission had failed to establish leveraging.

35 Tetra contends that the Commission has misinterpreted paragraph 153 of the judgment under appeal in inferring from it that it establishes an asymmetrical standard of proof and a de facto presumption of the legality of concentrations. In that paragraph, the Court of First Instance merely set out the rules governing the obligation to prove the effects of concentrations.

36 With regard to the example put forward by the Commission in relation to the Court of First Instance's analysis of the growth in the use of PET for packaging sensitive products, Tetra carries out a comparative analysis of the appeal and the judgment under appeal with a view to showing that the Commission has misread or distorted the judgment and has quoted certain passages out of context.

Findings of the Court as to the first ground of appeal

37 By its first ground of appeal, the Commission contests the judgment under appeal in so far as the Court of First Instance required it, when adopting a decision declaring a concentration incompatible with the common market, to satisfy a standard of proof and to provide a quality of evidence in support of its line of argument which are incompatible with the wide discretion which it enjoys in assessing economic matters. It thus complains that the Court of First Instance infringed Article 230 EC by exceeding the limits of its power of review established by case-law and, as a result, misapplied Article 2(2) and (3) of the Regulation by creating a presumption of legality in respect of certain concentrations.

38 It should be observed that, in paragraph 119 of the judgment under appeal, the Court of First Instance correctly set out the tests to be applied when carrying out judicial review of a Commission decision on a concentration as laid down in the judgment in *Kali & Salz*. In paragraphs 223 and 224 of that judgment, the Court

stated that the basic provisions of the Regulation, in particular Article 2, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature, and that, consequently, review by the Community Courts of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the margin of discretion implicit in the provisions of an economic nature which form part of the rules on concentrations.

39 Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. Such a review is all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect.

40 Thus, the Court of First Instance was right to find, in paragraph 155 of the judgment under appeal, in reliance on, in particular, the judgment in *Kali & Salz*, that the Commission's analysis of a merger producing a conglomerate effect is subject to requirements similar to those defined by the Court with regard to the creation of a situation of collective dominance and that it calls for a close examination of the circumstances which are relevant for an assessment of that effect on the conditions of competition on the reference market.

41 Although the Court of First Instance stated, in paragraph 155, that proof of anti-competitive conglomerate effects of a merger of the kind notified calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects, it by no means added a condition relating to the

requisite standard of proof but merely drew attention to the essential function of evidence, which is to establish convincingly the merits of an argument or, as in the present case, of a decision on a merger.

42 A prospective analysis of the kind necessary in merger control must be carried out with great care since it does not entail the examination of past events — for which often many items of evidence are available which make it possible to understand the causes — or of current events, but rather a prediction of events which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted.

43 Thus, the prospective analysis consists of an examination of how a concentration might alter the factors determining the state of competition on a given market in order to establish whether it would give rise to a serious impediment to effective competition. Such an analysis makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely.

44 The analysis of a 'conglomerate-type' concentration is a prospective analysis in which, first, the consideration of a lengthy period of time in the future and, secondly, the leveraging necessary to give rise to a significant impediment to effective competition mean that the chains of cause and effect are dimly discernible, uncertain and difficult to establish. That being so, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the common market is particularly important, since that evidence must support the Commission's conclusion that, if such a decision were not adopted, the economic development envisaged by it would be plausible.

45 It follows from those various factors that the Court of First Instance did not err in law when it set out the tests to be applied in the exercise of its power of judicial review or when it specified the quality of the evidence which the Commission is required to produce in order to demonstrate that the requirements of Article 2(3) of the Regulation are satisfied.

46 With respect to the particular case of judicial review exercised by the Court of First Instance in the judgment under appeal, it is not apparent from the example given by the Commission, which relates to the growth in the use of PET packaging for sensitive products, that the Court of First Instance exceeded the limits applicable to the review of an administrative decision by the Community Courts. Contrary to what the Commission claims, paragraph 211 of the judgment under appeal merely restates more concisely, in the form of a finding by the Court of First Instance, the admission made by the Commission at the hearing, which is summarised in paragraph 210 of the judgment, that its forecast in the contested decision with regard to the increase in the use of PET for packaging UHT milk was exaggerated. In paragraph 212 of the judgment under appeal, the Court of First Instance gave the reasons for its finding that the evidence produced by the Commission was unfounded by stating that, of the three independent reports cited by the Commission, only the PCI report contained information on the use of PET for milk packaging. It went on, in that paragraph, to show that the evidence produced by the Commission was unconvincing by pointing out that the increase forecast in the PCI report was of little significance and that the Commission's forecast was inconsistent with the undisputed figures on the use of HDPE contained in the other reports. In paragraph 213 of the judgment under appeal, the Court of First Instance merely stated that the Commission's analysis was incomplete, which made it impossible to confirm its forecasts, given the differences between those forecasts and the forecasts made in the other reports.

47 Amongst the other examples given by it, the Commission challenges the Court of First Instance's finding, in paragraph 289 of the judgment under appeal, that 'fresh milk is not a product for which the marketing advantages offered by PET have any particular importance' and its conclusions as to the cost of PET in comparison to that of carton, which are set out in paragraphs 288 and 328 of the judgment under appeal. It should be noted that these are findings of fact, which are not subject to

review by the Court in appeal proceedings. It is therefore unnecessary to give a ruling on the merits of those findings by the Court of First Instance and it need be stated only that the Court of First Instance was able to base those findings on various items in the contested decision.

48 It follows from these examples that the Court of First Instance carried out its review in the manner required of it, as set out in paragraph 39 of this judgment. It explained and set out the reasons why the Commission's conclusions seemed to it to be inaccurate in that they were based on insufficient, incomplete, insignificant and inconsistent evidence.

49 In doing so, the Court of First Instance observed the criteria to be applied in exercising the Community Courts' power of judicial review and, accordingly, complied with Article 230 EC.

50 Consequently, the above analyses do not show that the Court of First Instance infringed Article 2(2) and (3) of the Regulation.

51 It follows from all of the above considerations that the first ground of appeal is unfounded.

The second ground of appeal

52 By its second ground of appeal, the Commission complains that the Court of First Instance infringed Articles 2 and 8 of the Regulation in that it required the

Commission to take account of the impact which the illegality of certain conduct would have on the incentives for the merged entity to engage in leveraging and to assess, as a possible remedy, the commitment not to engage in abusive conduct.

53 The contested parts of the judgment under appeal are in the section examining the plea alleging a lack of foreseeable conglomerate effect, in which, more specifically, the Court of First Instance analysed the likelihood of leveraging. According to the Commission's line of argument, the merged entity would have been capable of exploiting its dominant position on the market for aseptic carton and would have been encouraged to do so in order to leverage its leading position on the market for PET equipment, in particular that for high and low capacity SBM machines used for sensitive products, so as to create a dominant position.

54 The forms of leveraging are described as follows in recital 364 in the contested decision (reproduced in paragraph 49 of the judgment under appeal):

'Leveraging [this position] ... in a number of ways, Tetra/Sidel ... would have the ability to tie carton packaging equipment and consumables with PET packaging equipment and, possibly, preforms (in particular barrier-enhanced preforms). Tetra/Sidel would also have the ability to use pressure or incentives (such as predatory pricing or price wars and loyalty rebates) so that its carton customers buy PET equipment and, possibly, preforms from ... Tetra/Sidel and not from its competitors or converters.'

55 In response to the Commission's criticisms, Tetra proposed to enter into various commitments. However, the Commission took the view that those commitments could not be regarded as eliminating the competition concerns identified by it

effectively. With respect to the behavioural commitments, the following reasons were stated for the contested decision in recitals 429 to 432, under the heading 'Separation of Sidel from Tetra and Article 82 Commitments':

'429 The behavioural commitment, namely the separation of Sidel from Tetra Pak, together with the confirmation of pre-existing Article 82 undertakings, are submitted in particular with regard to the concerns on the ability of the merged entity to leverage its dominant position in carton packaging to gain a dominant position in PET packaging equipment. This commitment and the pre-existing Article 82 commitments are, however, purely behavioural. As such, they are not suitable to restore conditions of effective competition on a permanent basis, since they do not address the permanent change in the market structure created by the notified operation that causes these concerns.

430 The "separation" of Sidel from Tetra Pak companies does not alter the fact that, as expressly acknowledged in the commitment itself, Sidel's board will "be held responsible directly by the Tetra Laval Group board". It cannot be expected that such separation will prevent Sidel from implementing the commercial strategy of the Tetra Laval Group. In addition Sidel's legal status could be changed, i.e. Sidel might be de-listed and turned into a private company like Tetra Laval which would make monitoring of "firewalls" virtually impossible.

431 The commitment not to "bundle" as well as the confirmation of the pre-existing Article 82 commitments constitute pure promises not to act in a certain manner, indeed not to act in contravention of Community law. Such behavioural promises are in contrast with the Commission's stated policy on

remedies and with the purpose of the Merger Regulation itself ... and are extremely difficult if not impossible to monitor effectively.

432 Overall, in addition to being complex in their implementation and in their monitoring, these commitments cannot be considered as capable of removing effectively the competition problems identified.'

56 The Commission's argument challenges paragraphs 156 to 162 of the judgment under appeal, which immediately follow paragraphs 148 to 155, which were likewise challenged by the Commission and were examined by the Court in connection with the first ground of appeal. In those paragraphs, the Court of First Instance held as follows:

'156 In the present case, the leveraging from the aseptic carton market, as described in the contested decision, 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 (recitals 345 and 365) — firstly, by the probability of predatory pricing by the merged entity (recital 364, cited in paragraph 49 above); secondly, by price wars; and, thirdly, by the granting of loyalty rebates. Engaging in these practices would enable the merged entity to ensure, as far as possible, that its customers on the carton markets obtain from Sidel any PET equipment they may require. The contested decision finds that Tetra holds a dominant position on the aseptic carton markets, that is to say, the markets for aseptic carton packaging systems and aseptic cartons (recital 231, see paragraph 40 above), a finding which is not disputed by the applicant.

157 It should be recalled that, according to settled case-law, where an undertaking is in a dominant position it is in consequence obliged, where appropriate, to modify its conduct so as not to impair effective competition on the market regardless of whether the Commission has adopted a decision to that effect (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 57; Case T-51/89 *Tetra Pak* v *Commission* [1990] ECR II-309, paragraph 23; and Joined Cases T-125/97 and T-127/97 *Coca-Cola* v *Commission* [2000] ECR II-1733, paragraph 80).

158 Moreover, in response to the questions put by the Court at the hearing, the Commission did not deny that leveraging by Tetra through the conduct described above could constitute abuse of Tetra's pre-existing dominant position in the aseptic carton markets. This could also be the case, according to the concerns expressed by the Commission in its defence, in circumstances where the merged entity refused to participate in the installation and any necessary conversion of Sidel SBM machines, to provide after-sales service or to honour the guarantees for such machines when sold by converters. However, the Commission went on to state that the fact that a type of conduct may constitute an independent infringement of Article 82 EC does not preclude that conduct from being taken into account in the Commission's assessment of all forms of leveraging made possible by a merger transaction.

159 In this regard, it must be stated that, although the Regulation provides for the prohibition of a merger creating or strengthening a dominant position which has significant anti-competitive effects, these conditions do not require it to be demonstrated that the merged entity will, as a result of the merger, engage in abusive, and consequently unlawful, conduct. Although it cannot therefore be presumed that Community law will not be complied with by the parties to a conglomerate-type merger transaction, such a possibility cannot be excluded by the Commission when it carries out its control of mergers. Accordingly, when the Commission, in assessing the

effects of such a merger, relies on foreseeable conduct which in itself is likely to constitute abuse of an existing dominant position, it is required to assess 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 (recital 359), 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.

160 Since the Commission did not carry out such an assessment in the contested decision, it follows 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.

161 Moreover, the fact that the applicant offered 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. There 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.

162 It follows from the foregoing that it is necessary to examine whether the Commission based its analysis of the likelihood of leveraging from the aseptic carton markets, and of the consequences of such leveraging by the merged entity, on sufficiently convincing evidence. In the course of that examination it is necessary, in the present case, to take account only of conduct which would, at least probably, not be illegal. In addition, since the anticipated dominant position would only emerge after a certain lapse of time, by 2005 according to the Commission, its analysis of the future position must, whilst allowing for a certain margin of discretion, be particularly plausible.'

57 Examining the forms of leveraging in detail, the Court of First Instance held as follows:

'217 The leveraging methods referred to in recital 364 of the contested decision (cited in paragraph 49 above) are based on Tetra's dominant position on the aseptic carton markets. Given, in particular, Tetra's commitment to divest itself of its preforms operations, the leveraging would be carried out by two types of measures: first, through pressure leading to tied sales or sales which bundle equipment and consumables for carton packaging jointly with PET packaging equipment. That pressure could be put on Tetra customers needing to continue to use carton packaging for some of their production and especially those customers with long-term agreements with Tetra for their carton packaging needs (recital 365, cited in paragraph 50 above). Second, measures could be adopted to offer incentives, such as predatory pricing, price wars and loyalty rebates.

218 However, the use, by an undertaking with a dominant position like Tetra's on the aseptic carton markets, of pressure in the form of tied sales or incentives such as predatory pricing or loyalty rebates that are not objectively justified, would usually constitute an abuse of that position. As this Court has already held, the possible recourse to such strategies cannot be presumed by the Commission, as it has done in the contested decision, in order to justify a

decision prohibiting a merger transaction which has been notified to it in accordance with the Regulation (see paragraphs 154 to 162 above). It follows 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.

219 It is, therefore, necessary merely to consider strategies for tied or bundled sales which are not in themselves forced, for loyalty rebates that are objectively justified on the carton markets, and for offers of reduced prices for carton or PET packaging equipment that are not predatory within the meaning of well-established case-law (Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, particularly paragraphs 102, 115, 156 and 157; judgment in Case C-333/94 P *Tetra Pak* v *Commission* [[1996] ECR I-5951], paragraphs 41 to 44, upholding the judgment in Case T-83/91 [*Tetra Pak* v *Commission* [1994] ECR II-755], and the Opinion of Advocate General Fennelly in Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others* v *Commission* [2000] ECR I-1365, particularly paragraphs 123 to 130). Against that background, it is necessary to examine whether the Commission took account of the commitment concerning separation between Sidel and Tetra Pak companies, agreed in principle for a 10-year period, according to which "no joint offerings of any of Tetra Pak's carton products together with Sidel's SBM machines are to be made".

220 It is apparent from the contested decision that Tetra asked the Commission to take note of its existing obligations under Article 3(3) of ... Decision 92/163 ..., which provides:

"Tetra Pak shall not practice predatory or discriminatory prices and shall not grant to any customer any form of discount on its products or more favourable payment terms not justified by an objective consideration. Thus, discounts on cartons should

be granted solely according to the quantity of each order, and orders for different types of carton may not be aggregated for that purpose."

221 It follows that Tetra gave a clear indication of its willingness to comply fully with the special obligations imposed on it by Article 82 EC as a result of the dominant position it holds on the aseptic carton markets. It also reiterated its acceptance of all of the relevant obligations imposed on it following the finding in Decision 92/163 of an infringement of Article 82 EC as regards those markets. It also undertook, in the context of the present proceedings, to make no joint offers of its carton products together with Sidel's SBM machines.

222 Consequently, the only methods of tied or bundled sales which would actually be feasible for the merged entity would be offers made by Tetra to its current customers on the carton markets which would not be compulsory or forced and which would only be in respect of carton packaging equipment and/or carton products, on the one hand, and PET packaging equipment other than SBM machines, on the other. It must also be observed that, notwithstanding the emphasis placed by the Commission in the contested decision (recitals 177 and 369), in its written observations and oral pleadings on the significance of the merged entity's ability to offer almost all of the equipment necessary for setting up an integrated PET production line, it is clear from the commitments that it would not be possible for that entity to make a joint offer to a customer for carton packaging equipment and an integrated PET production line, at least not one containing a Sidel SBM machine.

223 Moreover, although the finding in the contested decision regarding the price discrimination allegedly practised in the past by Sidel is not, having regard to the parties' written pleadings and the oral pleadings of the Commission concerning the underlying econometric analysis, vitiated by a manifest error

of assessment, it cannot constitute sufficiently convincing evidence that the merged entity will continue to behave in a similar way. Unlike 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.

224 It must therefore be found that the merged entity's possible means of leveraging would be quite limited. An examination of the foreseeable consequences of its resorting to such conduct must take account of this.'

Arguments of the parties

58 The Commission submits, first, that the approach taken by the Court of First Instance with regard to the conglomerate effects and the unlawful conduct of Tetra is contrary to Article 2 of the Regulation and to merger control in general.

59 It argues, first of all, that that approach runs counter to a meaningful interpretation of Article 2. If Article 82 EC were sufficient to prevent abuses, it would not have been necessary to make provision for *ex ante* control of concentrations. More specifically, the Commission challenges paragraph 218 of the judgment under appeal, in which the Court of First Instance held that 'the possible recourse to such [abusive] strategies cannot be presumed by the Commission', and submits that, on the contrary, the presumption that a dominant undertaking may find it rational to exclude competitors and/or exploit customers and thus, in some cases, actually to violate Article 82 EC is enshrined in the Regulation.

60 The Commission submits, moreover, that the Court of First Instance's approach is mistaken in that it is based on unwarranted distinctions between different types of mergers, which are contrary to Article 2 of the Regulation. It criticises paragraph 154 of the judgment under appeal, in which the Court of First Instance took the view that 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) but rather the future conduct of the merged entity. The Commission argues that that finding is inconsistent with paragraph 94 of the *Gencor* judgment, in which the Court of First Instance held that a merger would have had an immediate effect where it 'would have had the direct and immediate effect of creating the conditions in which abuses were not only possible but economically rational, given that the concentration would have significantly impeded effective competition in the market by giving rise to a lasting alteration to the structure of the markets concerned'. It submits that there is no justification for drawing a distinction, as the Court of First Instance did in the judgment under appeal, according to whether the dominant position on the second market is created immediately or in the medium term. Otherwise, there would be a risk that vertical mergers or those with conglomerate effect might escape the scope of the Regulation because those types of merger give the merged entity the potential to use — and abuse — its dominant position on a market and the incentives to do so in order to exclude its competitors on a second market. The Commission concludes that, in the present case, it ought to have been found that the merger would immediately alter the structure and conditions of competition.

61 Finally, the Commission submits that there are insuperable legal and practical obstacles to engaging in the analysis of the disincentives created by the illegal nature of certain abusive commercial practices. The Commission would be required to examine, not the structural aspects of an undertaking, but rather its propensity to comply with the law. Such an analysis would constitute a breach of the principle of equality and the presumption of innocence. It would also be impossible to apply the test because it could be difficult to quantify the risk, which would vary according to the strictness of the competition policy in each Member State. Given the standard of proof required by the Court of First Instance, the Commission concludes that it would be impossible for it to control vertical mergers and those with conglomerate effect properly in accordance with the Regulation.

62 Secondly, the Commission alleges that Court of First Instance infringed Articles 2 and 8(2) of the Regulation by finding that it ought to have taken account of the behavioural commitments entered into by Tetra. It compares the position adopted by the Court of First Instance in paragraph 161 of the judgment under appeal with that taken in paragraphs 316 and 317 of the *Gencor* judgment, in which the Court of First Instance ruled out the consideration of behavioural commitments where the merger appears likely to create or strengthen a dominant position. The Commission argues that, even though non-structural commitments may be acceptable in certain cases, commitments that amount to a mere promise to behave in a certain way, for example a commitment not to abuse a dominant position created or strengthened by the proposed concentration, are not as such regarded as suitable to render the concentration compatible with the common market.

63 The Commission submits that the Court of First Instance distorted the contested decision by finding, in paragraph 161 of the judgment under appeal, that it was not apparent from that decision that the Commission had taken account of the implications of Tetra's commitments in its assessment. The Commission asserts that it assessed those commitments but rejected them (recitals 423 to 451 in the contested decision). The Court of First Instance cannot properly claim that the contested decision is vitiated by a manifest error of assessment as regards the conclusion that the concentration must be prohibited if it has not examined the Commission's arguments that the commitments are unviable and, in any event, insufficient to address the competitive concerns raised by the notified merger.

64 By contrast, Tetra contends, first, that the Court of First Instance did not err in law by requiring the Commission to take account of the unlawfulness of the abusive conduct. The test applied by the Court of First Instance in paragraph 159 of the judgment under appeal is that of the rational and foreseeable conduct of an undertaking. When assessing such conduct, account must be taken both of the incentives to engage in unlawful conduct and the factors which might diminish, or even eliminate, such incentives.

65 Tetra contends that the comparisons drawn with the *Gencor* case are irrelevant. It submits that, in that case, the collective dominant position was created immediately by the horizontal merger, which is not the situation in the present case, in which a dominant position can arise only after a certain period of time and requires prior abusive conduct.

66 According to Tetra, the Commission's interpretation of the Regulation is based on the false premiss that its purpose is to prevent abuses. However, it follows from the wording of Article 2(2) of that regulation that its purpose is to prohibit the creation of any dominant position which, by itself and without any abuse, would result in the creation of a significant impediment to competition.

67 Tetra does not see why there are insuperable legal and practical obstacles to assessing the impact of the illegal nature of certain conduct or how such an assessment poses difficulties different from those relating to the assessment of incentives to adopt abusive conduct. It observes that the Commission considers itself perfectly capable of quantifying the probability of detecting an infringement of Articles 81 EC and 82 EC and takes account of that assessment when fixing fines.

68 Secondly, with respect to consideration of its commitments, Tetra submits that paragraph 161 of the judgment under appeal contains no more than a finding that the Commission ought to have taken account of the commitments offered when assessing the foreseeable future conduct of the merged entity. It states that the Court of First Instance did not itself assess the commitments offered and that at no point in the judgment under appeal did it, contrary to what the Commission claims, require the Commission to 'take into account behavioural commitments consisting of mere promises not to engage in abusive conduct'.

69 Tetra argues that the Commission has misinterpreted the judgment in *Gencor*. Contrary to the Commission's interpretation, the Court of First Instance, in paragraph 319 of that judgment, found that the categorisation of commitments was immaterial and that behavioural commitments may be equally capable of preventing the emergence or strengthening of a dominant position.

70 Finally, Tetra contends that, contrary to its claims, the Commission did not carry out an assessment *in concreto* of the impact of the commitments offered by the company but merely expressed an objection in principle to the treatment of behavioural commitments as measures capable of constituting a valid means of remedying the creation of a dominant position within the meaning of the Regulation.

Findings of the Court as to the second ground of appeal

71 It should be observed, first of all, that paragraphs 148 to 162 of the judgment under appeal, which the Commission challenges under both its first and its second ground of appeal, form a section in which the Court of First Instance described certain specific aspects of conglomerate effects, in particular temporal aspects, and inferred from them certain general rules as to the evidence which the Commission must produce when it considers that a proposed concentration must be declared incompatible with the common market.

72 It was in the context of this reminder of the need for 'convincing evidence' that the Court of First Instance made reference to the obligation to examine all the relevant information.

73 Such an examination must be carried out in the light of the purpose of the Regulation, which is to prevent the creation or strengthening of dominant positions capable of significantly impeding effective competition in the common market or a substantial part thereof.

74 Since the view is taken in the contested decision that adoption of the conduct referred to recital 364 in that decision is an essential step in leveraging, the Court of First Instance was right to hold that the likelihood of its adoption must be examined comprehensively, that is to say, taking account, as stated in paragraph 159 of the judgment under appeal, both of the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful.

75 However, it would run counter to the Regulation's purpose of prevention to require the Commission, as was held in the last sentence in paragraph 159 of the judgment under appeal, to examine, for each proposed merger, the extent to which the incentives to adopt anti-competitive conduct would be reduced, or even eliminated, as a result of the unlawfulness of the conduct in question, the likelihood of its detection, the action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue.

76 An assessment such as that required by the Court of First Instance would make it necessary to carry out an exhaustive and detailed examination of the rules of the various legal orders which might be applicable and of the enforcement policy practised in them. Moreover, if it is to be relevant, such an assessment calls for a high probability of the occurrence of the acts envisaged as capable of giving rise to objections on the ground that they are part of anti-competitive conduct.

77 It follows that, at the stage of assessing a proposed merger, an assessment intended to establish whether an infringement of Article 82 EC is likely and to ascertain that it

will be penalised in several legal orders would be too speculative and would not allow the Commission to base its assessment on all of the relevant facts with a view to establishing whether they support an economic scenario in which a development such as leveraging will occur.

78 Consequently, the Court of First Instance erred in law in rejecting the Commission's conclusions as to the adoption by the merged entity of anti-competitive conduct capable of resulting in leveraging on the sole ground that the Commission had, when assessing the likelihood that such conduct might be adopted, failed to take account of the unlawfulness of that conduct and, consequently, of the likelihood of its detection, of action by the competent authorities, both at Community and national level, and of the financial penalties which might ensue. Nevertheless, since the judgment under appeal is also based on the failure to take account of the commitments offered by Tetra, it is necessary to continue the examination of the second ground of appeal.

79 With respect to the argument that the Court of First Instance departed from the approach taken by it in the *Gencor* judgment, it must be held that, contrary to what the Commission claims, the Court of First Instance did not depart from the position taken by it in paragraph 94 of that judgment, namely that there will be a significant impediment to effective competition if there is a lasting alteration of the structure of the relevant markets as a result of a concentration having the direct and immediate effect of creating conditions in which abusive conduct is possible and economically rational.

80 The situation in the *Gencor* case was entirely different from that addressed in the contested decision. As is clear from paragraph 91 of the judgment in that case, the concentration would have led to the creation of a dominant duopoly in the platinum and rhodium markets, as a result of which effective competition would have been significantly impeded in the common market.

81 It was therefore the concentration which would have given rise to a lasting alteration of the structure of the relevant markets in that case and thus would have made abuses possible and economically rational.

82 In the present case, it is true that the notified merger was capable of slightly altering the structure of the market for carton inasmuch as the merged entity could strengthen the dominant position which Tetra had held for some time on that market and which, moreover, had been the subject of a Commission decision pursuant to Article 82 EC. However, it was not effective competition on the carton market which the Commission intended to protect by prohibiting the merger but competition on the market for PET equipment, in particular that for low and high capacity SBM machines used for sensitive products.

83 The structure of that market would not have been immediately and directly affected by the notified merger but it could have been so affected only as a result of leveraging and, in particular, abusive conduct by the merged entity on the carton market.

84 It follows from the above considerations that the situation examined in the *Gencor* case is not sufficiently comparable to that on which the Court of First Instance ruled by the judgment under appeal for that court to have been able to draw any useful inferences from it. The structure of the market on which the Commission intended, by the contested decision, to preserve effective competition was, in the *Gencor* case, directly altered by the merger whereas, in the present case, it could be altered only by leveraging.

85 With respect to consideration of the behavioural commitments offered by Tetra, the Court of First Instance was right to hold, in paragraph 161 of the judgment under appeal, that the fact that Tetra had, in the present case, offered commitments

relating to its future conduct was a factor which the Commission had to take into account when assessing the likelihood that the merged entity would act in such a way as to make it possible to create a dominant position on one or more of the relevant markets for PET equipment.

86 In that regard, the Court points to the considerations set out by the Court of First Instance in paragraphs 318 and 319 of the judgment in *Gencor*. Contrary to what the Commission claims, it is not apparent from that judgment that the Court of First Instance ruled out consideration of behavioural commitments. On the contrary, in paragraph 318, the Court of First Instance laid down the principle that the commitments offered by the undertakings concerned must enable the Commission to conclude that the concentration at issue will not create or strengthen a dominant position within the meaning of Article 2(2) and (3) of the Regulation. Then, in paragraph 319, it inferred from that principle that the categorisation of a proposed commitment as behavioural or structural is immaterial and that the possibility cannot automatically be ruled out that commitments which are prima facie behavioural, for instance a commitment not to use a trade mark for a certain period or to make part of the production capacity of the entity arising from the concentration available to third-party competitors or, more generally, to grant access to essential facilities on non-discriminatory terms, may also be capable of preventing the emergence or strengthening of a dominant position.

87 With respect to the Commission's consideration of the behavioural commitments, the Court of First Instance merely found, in paragraph 161 of the judgment under appeal, that there is no indication in the contested decision that the Commission took account of the implications of those commitments when it assessed the possibility that a dominant position might be created in future through leveraging.

88 Nevertheless, it is not apparent that the Court of First Instance distorted the contested decision or failed to give sufficient reasons for the judgment under appeal

in that regard. It is clear from recitals 429 to 432 in the contested decision, the only ones concerning the behavioural commitments submitted by Tetra, that the Commission refused to accept such commitments, as a matter of principle, and found, in recital 429, that 'as such, they are not suitable to restore conditions of effective competition on a permanent basis ..., since they do not address the permanent change in the market structure created by the notified operation that causes these concerns' and, in recital 431, that 'such behavioural promises are in contrast with the Commission's stated policy on remedies and with the purpose of the Merger Regulation itself ... and are extremely difficult if not impossible to monitor effectively'.

89 It follows from the examination of the second ground of appeal as a whole that, although the Court of First Instance erred in law by rejecting the Commission's conclusions as to the adoption by the merged entity of conduct likely to result in leveraging, it was nevertheless right to hold, in paragraph 161 of the judgment under appeal, that the Commission ought to have taken account of the commitments submitted by Tetra with regard to that entity's future conduct. Accordingly, whilst the ground of appeal is well founded in part, it cannot call into question the judgment under appeal in so far as it annulled the contested decision since that annulment was based, inter alia, on the Commission's refusal to take account of those commitments.

The third ground of appeal

90 By its third ground of appeal, the Commission submits that the Court of First Instance erred in law by applying an erroneous test of judicial review and infringed Article 2 of the regulation in so far as it held, in paragraph 269 of the judgment under appeal, that 'the contested decision does not provide sufficient evidence to justify the definition of distinct sub-markets among SBM machines with reference to their end-use' and that, 'consequently, the only sub-markets it is necessary to consider are those for low- and high-capacity machines'.

Arguments of the parties

91 The Commission points out that the definition of the markets for SBM machines is a key aspect of the contested decision. It submits that the proportion of the relevant market represented by a common PET-carton customer base, in respect of which Tetra is likely to exploit its dominant position on the carton markets by leveraging, has a decisive influence on the likelihood of foreclosure of competitors and domination of that market by the merged entity.

92 The Commission states that, in recitals 176 to 183 in the contested decision, which are supplemented by recitals 347 to 358 and 381 to 383, it defined distinct markets for SMB machines according to whether they are used to package sensitive or non-sensitive products and, in doing so, relied on both supply-side and demand-side factors. In regard to the latter, recital 178 in the contested decision is worded as follows:

'In any event, 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. This 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.'

93 In paragraph 259 of the judgment under appeal, the Court of First Instance summarised the Commission's line of argument in the contested decision, a summary not contested by the Commission, as follows:

'In the contested decision, the Commission finds, firstly, that "even for an allegedly 'generic' piece of equipment such as an SBM machine it is justified to examine the

equipment market with reference to the end-use segments", which is "even more relevant when comparing whole packaging systems in order to assess whether or not they may belong in the same product market" (recital 43). It goes on to state that each liquid product intended for packaging has "its very particular characteristics which dictate the availability of a given form of packaging", before concluding that end-use segmentation constitutes a meaningful analytical tool for assessing the liquid food packaging equipment market (recital 44, cited in paragraph 30 above). Thus it distinguishes between sensitive products belonging to "common product segments" and other products, on the basis of the ability of the former to be packaged, at least from a technical standpoint, in either carton or PET, unlike non-sensitive products such as water and carbonated drinks, which cannot be packaged in carton (recital 58). Whilst accepting that "the majority of SBM machines are 'generic'" (recital 177), the Commission states in the same recital that "a PET packaging line, of which the SBM machine is only one component, is usually tailored to the specific products filled by the customer", which is especially the case for sensitive products, an argument reiterated in its assessment of the consequences of leveraging (recital 369). It refers by way of example to Sidel's "SRS G Combi", "which is designed for carbonated drinks [and] cannot be a substitute for a beverage producer wanting to fill juices" (recital 177), for which an aseptic "Combi SRA" machine is required. Referring to the Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5, point 43), it then finds that the two conditions which normally must be met for a finding of a distinct group of customers and thus of a narrower product market are met in the present case: it is possible to identify clearly which group an individual customer belongs to at the moment it purchases an SBM machine, and the trade in the machines among customers or arbitrage by third parties is not feasible (recital 178).'

94 In paragraphs 260 to 269 of the judgment under appeal, the Court of First Instance held as follows:

'260 The Court finds, firstly, that the emphasis placed in the contested decision on sensitive products belonging to "common product segments" is based on

an objective criterion, namely the fact that these products belong to the category of carton-packaged products and the possibility, at least from a technical standpoint, of them being packaged in PET, which, in the light of the growth to be expected (see paragraphs 201 to 216 above), is likely to become a fairly widespread commercial reality by 2005, at least for FFDs and tea/coffee drinks.

261 However, the contested decision fails to provide sufficiently convincing evidence to demonstrate the allegedly specific characteristics of SBM machines used for packaging sensitive products. Admittedly, a combined machine specifically designed for filling carbonated drinks cannot be used for juices. However, that far from proves that low- and high-capacity SBM machines, even ones tailored before sale to the specific wishes of their purchasers, do not remain generic machines, as argued in essence by the applicant, that is to say, capable of packaging several types of products.

262 As for the alleged specificity of packaging moulds according to the product intended for them, as argued by the Commission, whilst the applicant does not dispute that the number of moulds determines the capacity of the machine, this specific fact does not prove that SBM machines, of which moulds are merely a component, differ significantly from each other. It is clear from the notification that moulds last on average for three years, whilst an SBM machine lasts for up to 15 years (recital 304). Although Sidel makes its own moulds, the contested decision does not dispute the information on the moulds market provided in the notification, according to which Sidel is not active in that market (that is, as a supplier of moulds to third parties) and the competition amongst those undertakings which are active is very strong, especially from SIG, which claims on its internet site that it is a world leader (recital 309).

263 Nor does the contested decision call into question the statement in the notification that, in a large facility, a customer can use several SBM machines in order to combine them for its various production needs. The contested decision does not contain any examination of whether the flexibility required by some customers for SBM machine moulds can be explained by needs relating to such uses.

264 In its defence, the Commission refers to a number of changes which can be made to an SBM machine to enhance its performance or make it more useful in an integrated PET production line, such as the addition of a special blow air filtration system or ultraviolet treatment to reduce the risk of contamination before the preforms enter the SBM machine. At the hearing, the Commission stated that these changes are evidence of the very specific characteristics of an SBM machine used in a PET packaging line to which the contested decision refers (recital 177). Tetra, whilst disputing the Commission's approach of attributing specific characteristics of other components of a PET production line to SBM machines, none the less stated that these changes represented a mere 5% of the cost of an SBM machine.

265 The Court finds, first, that the contested decision makes no reference to this information. Although the decision correctly stresses the importance of the individual needs of customers who require an aseptic PET filling line in particular, namely a basic guarantee of aseptic conditions, this cannot justify the definition of a distinct sub-market for SBM machines used in filling lines for the sensitive products at issue here. The 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.

266 There is all the more reason to accept the generic nature of SBM machines, inasmuch as at the hearing the Commission was unable to rebut Tetra's assertion regarding the relatively low cost, when compared to the cost of a so-called "standard" SBM machine, especially a high-capacity SBM machine, of making any necessary changes to render the machine more compatible for use with aseptic and non-aseptic PET filling machines, or possibly with aseptic filling machines capable of conversion from PET to HDPE.

267 The parties agree, moreover, that combined machines, which are still only rarely used for aseptic filling (see paragraphs 248 and 249 above), do not constitute a distinct market, as is also clear from the contested decision.

268 As regards the possibility of determining exactly which group a given customer belongs to when he purchases an SBM machine and whether or not that customer may, at least currently within the [European Economic Area], be able to find a better price through arbitrage between the available suppliers, it is clear that those possibilities, if established, would apply as much to SBM machines used for non-sensitive products as to those used to package sensitive products. The possibility for the merged entity to identify the group to which a customer belongs is due to the fact that many customers in the carton markets who will switch to PET will be current Tetra customers. However, this possible benefit, resulting from the first-mover advantage which the merged entity will foreseeably have, 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.

269 Therefore, 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" (recital 177) and, second, by distinguishing between them according to end-use. The contested decision does not provide sufficient evidence to justify the definition of distinct sub-markets among SBM machines with reference to their end-use. Consequently, the only sub-markets it is necessary to consider are those for low- and high-capacity machines.'

95 The Commission takes the view that the Court of First Instance erred in law in requiring, in paragraph 265 of the judgment under appeal, that it set out in the contested decision all of the technical information gathered in the course of its investigation. It observes that the question whether the statement of reasons for a decision meets the requirements of Article 253 EC must be assessed in the light not only of its wording but also its context and, in particular, the degree of prior knowledge of the relevant facts and the period available for adoption of that decision.

96 Moreover, the Court of First Instance failed to observe the limits of its power of judicial review, distorted the contested decision and substituted its own assessment for that of the Commission, without even explaining the reasons for the rejection of the latter's analysis, by holding, in paragraph 265, that the need for a guarantee of aseptic conditions does not justify the definition of a distinct sub-market for the SBM machines used in filling lines for the sensitive products at issue. Similarly, in paragraph 266 of the judgment under appeal, the Court of First Instance rejected the Commission's findings as to the importance of the adaptation of SBM machines to use for aseptic packaging on the sole basis of the information on the cost of the necessary adaptation, without examining the other factors taken into account by the Commission, which include the question whether suppliers of SBM machines to traditional customers in the water and carbonated soft drink sectors have the necessary expertise to thus adapt the machines and to offer the necessary guarantees.

97 The Commission likewise challenges the rejection of its argument that price discrimination may constitute evidence of distinct sub-markets. In paragraph 223 of the judgment under appeal, the Court of First Instance took the view that such

discrimination, allegedly practised by Sidel in the past, cannot constitute sufficiently convincing evidence that the merged entity will continue to behave in a similar way since that entity, unlike Sidel prior to the merger, would be bound not only by the commitments but also by the various obligations limiting Tetra's conduct. The Commission submits that the Court of First Instance erred in law for three reasons. The first is that, according to the Commission, price discrimination is in itself evidence of the existence of distinct conditions of supply and demand in respect of the sale of a product to different customers and therefore the evidence of the existence of distinct markets. The second reason lies in the fact that the Court of First Instance required the Commission not to take account of unlawful conduct, even if it would be economically rational. The third reason put forward by the Commission is that, as follows from paragraphs 161 and 162 of the judgment under appeal, the Court of First Instance failed to take account of Tetra's dominant position on the carton market and ruled on the basis that the merged entity will not have a dominant position on the PET market and that, therefore, any price discrimination on that market cannot constitute an abuse of a dominant position within the meaning of Article 82 EC.

98 Finally, the Commission criticises the Court of First Instance's finding that it will be possible for customers to turn to suppliers other than Tetra. It submits that the Court of First Instance ignored its arguments relating to the impossibility of arbitrage in respect of machines of the same supplier (purchase of second-hand machines and in-house transfer of a machine from a 'non-sensitive production' to a 'sensitive production' division).

99 Tetra contends, generally, that this ground of appeal must be declared inadmissible inasmuch as it relates to findings of fact.

100 It points out that the Commission itself acknowledged, in recital 177 in the contested decision, that SBM machines are 'generic' and that it is the PET packaging line which is specially adapted to the products packaged by the customer. It argues that it is pointless for the Commission to rely on information not contained in the

contested decision because, as is clear from case-law, a decision must contain all the factual and legal elements on which the Commission has based its findings so as to allow effective judicial review of that decision. The contested decision contains no reference to the need to regard the SBM machine as a component of a particular type of packaging line. In any event, the Court of First Instance responded to all the arguments put forward by the Commission during the judicial proceedings. Thus, paragraph 266 of the judgment under appeal contains a response to a new argument relied on by the Commission in its defence.

101 Tetra submits that the Commission has taken paragraph 223 of the judgment under appeal out of context. In that paragraph, the Court of First Instance did not address whether it is possible to rely on price discrimination to prove that there are distinct markets but merely examined whether Sidel's past conduct constituted sufficiently convincing evidence that the merged entity would continue to behave in the same way. Not until paragraphs 258 to 269 of that judgment did the Court of First Instance examine the definition of the market.

Findings of the Court as to the third ground of appeal

102 First of all, the Commission's argument based on the fact that the Court of First Instance found, in paragraph 265 of the judgment under appeal, that there was no reference in the contested decision to certain technical explanations of the allegedly highly individual features of the SBM machines used in PET packaging lines, which the Commission supplied only in its defence and at the hearing, must be rejected as immaterial. On reading paragraphs 266 and 267 of the judgment under appeal, it is clear that the Court of First Instance did not base its findings solely on the fact that there was insufficient convincing evidence in the contested decision of the allegedly individual features of those machines but that it took account of the arguments put forward by the Commission in its defence and at the hearing and responded to them.

103 The argument alleging that the Court of First Instance held that price discrimination was not proof of the existence of distinct sub-markets must likewise be rejected as irrelevant. On reading the final sentence of paragraph 259 and paragraph 268 of the judgment under appeal, it is clear that, in connection with the definition of distinct markets, the Court of First Instance did not give a ruling on the direct probative value of price discrimination but focused its analysis on the circumstances in which a possibility of price discrimination may be regarded as proven, those circumstances having been defined in recital 178 in the contested decision as being (i) that it is possible to identify clearly the group to which a given customer belongs and (ii) that trade among customers or arbitrage by third parties is not feasible.

104 The other arguments raised by the Commission in support of its third ground of appeal, by which it challenges the Court of First Instance's findings as to the generic nature of SBM machines, the possibility of identifying the group to which a customer belongs and the impossibility of trade among customers or arbitrage by third parties in relation to those machines, must be declared inadmissible since they call into question the Court of First Instance's assessment of the evidence, which cannot be the subject of review by the Court in appeal proceedings.

105 It follows from those considerations that the third ground of appeal is, in part, inadmissible and, in part, unfounded.

The fourth ground of appeal

106 By its fourth ground of appeal, the Commission submits that the Court of First Instance infringed Article 2 of the Regulation, distorted the facts and failed to take account of certain of its arguments by refusing to recognise the merits of its finding that Tetra would strengthen its dominant position in the carton sector.

107 Recitals 390 to 401 in the contested decision are intended to show that the dominant position held by Tetra in the carton sector could be strengthened by the notified merger as a result of the elimination, on the market for sensitive-product packaging, of the potential competition provided by Sidel, the largest supplier on the PET market. Thus faced with weaker competition, Tetra would have no incentive to lower the price of its carton packaging and might be encouraged to cease innovation.

108 As the Court of First Instance observed in paragraphs 311 and 317 of the judgment under appeal, the Commission relied on the judgment in Case T-51/89 *Tetra Pak* v *Commission*, cited above, which was upheld by the Court on appeal in Case C-333/94 *Tetra Pak* v *Commission*, cited above ('*Tetra Pak II*'), in support of its argument that the weakening of potential competition would enable Tetra to feel less threatened on the markets for aseptic carton, which had to be regarded as a strengthening of its dominant position on those markets for the purposes of Article 2 of the Regulation.

109 In paragraph 312 of the judgment under appeal, the Court of First Instance held as follows:

'... when the Commission relies on the elimination or significant reduction of potential competition, even of competition which will tend to grow, in order to justify the prohibition of a notified merger, the factors which it identifies to show the strengthening of a dominant position must be based on convincing evidence. The mere fact that the acquiring undertaking already holds a clear dominant position on the relevant market may constitute an important factor, as the contested decision finds, but does not in itself suffice to justify a finding that a reduction in the potential competition which that undertaking must face constitutes a strengthening of its position'.

110 In paragraph 322 of the judgment under appeal, the Court of First Instance found that there is, in principle, nothing to prevent the application in merger control of the 'associative links' theory, which was recognised in the context of applying Article 82 EC in *Tetra Pak II*. The case underlying *Tetra Pak II* concerned conduct on a given market which was considered to constitute an abuse of a dominant position on an associated market. The present case concerns neighbouring markets. However, in paragraph 323 of the judgment under appeal, the Court of First Instance held that the reference to *Tetra Pak II* was irrelevant since 'the present case concerns simply the effect of the elimination, or the significant reduction, of potential competition which is, according to the Commission, sizeable and growing'.

111 In paragraph 323, the Court of First Instance also pointed out that 'amongst the criteria laid down in Article 2(1) of the Regulation, which the Commission is bound to apply in assessing notified merger transactions, are 'the structure of all the markets concerned and the ... potential competition from undertakings'. The Court of First Instance went on to hold as follows:

'Thus 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.'

112 In paragraph 324 of the judgment under appeal, the Court of First Instance stated that, as its own analysis shows, the growth in the use of PET to package sensitive products would probably be much less marked than the Commission believes. Therefore, it was no longer 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 implementation of the notified merger would

place Tetra in a situation in which it could be more independent in relation to its competitors on the aseptic carton markets than has been the case in the past.

113 In paragraph 325 of the judgment under appeal, the Court of First Instance examined the two pieces of factual evidence relating to the future conduct of Tetra on which the Commission had relied in order to prove the alleged negative effects of the notified merger on the markets for aseptic carton.

114 In paragraphs 326 to 328, the Court of First Instance examined the evidence produced by the Commission in relation to price competition and found, in the final sentence of paragraph 328, that the finding in the contested decision that, if it were authorised to acquire Sidel, Tetra would be exposed to less pressure to lower its carton prices is not based on convincing evidence.

115 In paragraphs 329 to 331, the Court of First Instance examined the evidence submitted by the Commission to substantiate its claim that the notified merger would reduce Tetra's incentive to innovate. In paragraph 332, it found that the contested decision did not establish to the requisite legal standard that the merged entity would have less incentive than Tetra at present to innovate in the carton sector.

116 In paragraph 333, the Court of First Instance concluded as follows:

'It follows that the evidence relied on in the contested decision does not establish to the requisite legal standard that the effects of the [notified] 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. It follows from the foregoing that it has not been shown that the merged entity's position would be strengthened vis-à-vis its competitors on the carton markets.'

Arguments of the parties

117 By its fourth ground of appeal, which consists of several parts, the Commission contests paragraphs 312 and 323 of the judgment under appeal. It submits, first of all, that the way in which the Court of First Instance presented the question of the relevance of potential competition resulted in a distortion of the facts. According to the Commission, potential competition is unrelated to the competitive relationship between the undertaking regarded as dominant and other undertakings active on the relevant market. The relevant question is whether the structural elimination of a significant source of potential competition frees the dominant undertaking to an even greater extent of any constraint, in particular with regard to its customers and consumers.

118 The Commission goes on to argue that the two factors referred to in paragraph 312 of the judgment under appeal, namely the elimination or significant reduction of potential competition and the fact that the undertaking benefiting from the merger already occupies a dominant position on the relevant market, are sufficient to justify a finding that such a position would be strengthened.

119 The Commission takes the view, moreover, that the Court of First Instance erred in law in rejecting its assessment of the likely growth in the use of PET for packaging sensitive products and in relying exclusively on its own forecast that 'this growth ... will probably be much less marked than the Commission believes'.

120 Finally, the Commission claims that the Court of First Instance erred in law, in paragraphs 316 to 328 of the judgment under appeal, by failing to take account of its arguments regarding the effects on prices of the elimination of Sidel and, in paragraphs 329 to 332, by rejecting its conclusion that the merged entity would have less incentive than Tetra at present to innovate in the carton sector.

121 Tetra contends that no error was made in paragraph 312 of the judgment under appeal. It observes that, according to the Regulation, a concentration may be prohibited if it leads to the creation or strengthening of a dominant position. Given that, by definition, a dominant position relates to the dominant undertaking's position on a given market, that is to say, its position relative to its competitors, it is impossible to see how the Commission can take the view that the dominant undertaking's dominant position can be dissociated from the position of its competitors on the same market.

122 In Tetra's view, to claim that the two factors referred to in paragraph 312 of the judgment under appeal are sufficient to justify a finding that a dominant position is strengthened is tantamount to establishing a *per se* rule by virtue of which any reduction in potential competition will always strengthen a dominant position. Article 2(3) of the Regulation, however, requires that it be shown not only that a dominant position will be strengthened by the concentration, but also that effective competition will be significantly impeded as a result of that strengthening. Neither of those two requirements can be presumed to be satisfied, particularly in a case in which, like that at hand, the potential competition in question is that exercised by one market on a second, distinct but neighbouring, market.

123 In any event, the Commission relied on a number of factors in the contested decision and, therefore, it cannot complain that the Court of First Instance analysed those factors in the judgment under appeal. With regard to the likely growth in the use of PET, Tetra refers to the line of argument which it has already put forward on that point.

124 Finally, with respect to the arguments based on the fact that the Court of First Instance failed to uphold the Commission's findings concerning the effect of the merger on Tetra's incentives with regard to prices and innovation, Tetra submits that the Commission is challenging the Court of First Instance's assessment of the facts, which is not subject to review by the Court in appeal proceedings.

Findings of the Court as to the fourth ground of appeal

125 As is clear from Article 2(1) of the Regulation, the Commission, when assessing the compatibility of a concentration with the common market, must take account of a number of factors, such as the structure of the relevant markets, actual or potential competition from undertakings, the position of the undertakings concerned and their economic and financial power, possible options available to suppliers and users, any barriers to entry and trends in supply and demand.

126 The Court of First Instance was therefore right to point out in paragraph 312 of the judgment under appeal — and, in doing so, did not infringe Article 2 of the Regulation — that, although constituting an important factor, as the contested decision finds, the mere fact that the acquiring undertaking already holds a clear dominant position on the relevant market does not in itself suffice to justify a finding that a reduction in the potential competition which that undertaking must face constitutes a strengthening of its position.

127 The potential competition represented by a producer of substitute products on a segment of the relevant market (namely in the present case the competition, in relation to aseptic carton packaging, from Sidel, as a supplier of PET packaging, on the market segment for sensitive products) is only one of the set of factors which

must be taken into account when assessing whether there is a risk that a concentration might strengthen a dominant position. It cannot be ruled out that a reduction in that potential competition might be compensated by other factors, with the result that the competitive position of the already dominant undertaking remains unchanged.

128 It is apparent from the Court of First Instance's summary of the parties' arguments in paragraphs 313 to 320 of the judgment under appeal that Tetra challenged the argument that the merged entity's dominant position on the aseptic carton markets would be strengthened, by claiming, inter alia, that a lack of innovation in the carton sector would essentially benefit Tetra's current competitors on the carton markets. The Court of First Instance was therefore right to state, in paragraph 323 of the judgment under appeal, in connection with the discussion and assessment of the parties' arguments in that regard, that the Commission has to show that, if there is a reduction in potential competition, this will tend to strengthen Tetra's dominant position in relation to its competitors on the aseptic carton markets.

129 Thus, the Court of First Instance relied on the potential reactions of Tetra's competitors on the carton markets, which are also active on the PET market, as a basis for refuting, in paragraph 327 of the judgment under appeal, the Commission's argument that Tetra might be encouraged, once the merger has been completed, to increase its prices on the aseptic carton markets and, in paragraph 330, the argument that the merged entity might decide to innovate less.

130 Accordingly, the part of the fourth ground of appeal in which the Commission claims that the potential competition is unrelated to the competitive relationship between the undertaking regarded as dominant and other undertakings active on the relevant market cannot be regarded as well founded.

131 It should be observed that the Commission's line of argument with respect to the likely growth in the use of PET for packaging sensitive products was examined in connection with the first ground of appeal, in paragraph 46 of this judgment, with a view to establishing whether the Court of First Instance had infringed Article 230 EC by failing to apply the test of manifest error of assessment and failing to respect the margin of discretion enjoyed by the Commission in relation to complex factual and economic matters. In so far as the Commission, by this part of the ground of appeal, contests the Court of First Instance's findings in that regard, it must be held that it calls into question the Court of First Instance's assessment of the evidence, which is not subject to review by the Court in appeal proceedings.

132 The same applies to the part of the ground of appeal by which the Commission challenges paragraphs 316 to 328 and 329 to 332 of the judgment under appeal, in which the Court of First Instance assessed the evidence submitted by the Commission in relation to the effect on prices of the elimination of Sidel and to the lesser incentive for the merged entity to innovate in the carton sector.

133 It follows from all of the above considerations that the fourth ground of appeal is, in part, inadmissible and, in part, unfounded.

The fifth ground of appeal

134 By its fifth ground of appeal, the Commission claims that the Court of First Instance infringed Article 2(3) of the Regulation by rejecting its findings as to the creation of a dominant position on the market for SBM machines.

Arguments of the parties

135 The Commission submits that the Court of First Instance's finding, in paragraph 307 of the judgment under appeal, 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' is based on errors of law challenged in connection with the preceding grounds of appeal, namely the inclusion of SBM machines for non-sensitive products and for beer in the same market as that for SMB machines used for sensitive products and the finding that Tetra's commitment not to link the sale of those machines to the sale of carton products was sufficient. To complete its line of argument, the Commission deems it necessary to demonstrate the errors made by the Court of First Instance in relation to the creation of a dominant position on the market for SBM machines.

136 With respect to low-capacity SBM machines, the Commission submits, first of all, that the Court of First Instance failed to take account of certain relevant factors set out in the contested decision, such as the growth in the market share held by Sidel (recital 266 in the contested decision) and the immediate strengthening of its position as a result of the combination of its leading position, in terms of market shares, with the financial strength, sales force, established superiority in the field of aseptic packaging, the first-mover advantage with customers in the carton-packaging sector and the dominant position already enjoyed by Tetra in that sector (recitals 376 to 387).

137 Moreover, the Commission claims that the Court of First Instance based its findings on irrelevant facts. Thus, the importance of low-capacity SBM machines for the packaging of non-sensitive products is irrelevant if the definition of the market proposed by the Commission is upheld. Similarly, the Court of First Instance's finding, in paragraph 279 of the judgment under appeal, that 'a significant proportion of the SBM machines used to package sensitive products will, in all likelihood, be low-capacity machines' is irrelevant in assessing whether Tetra might

exploit its dominant position in the carton-packaging sector to acquire a dominant position in the sector of low-capacity SBM machines.

138 As regards high-capacity SBM machines, the Commission submits that the Court of First Instance failed to take account of the relevant factors, particularly, in paragraph 284 of the judgment under appeal, the growth in Sidel's market share as a result of the notified merger. It also claims that the Court of First Instance was wrong to take account of the possibility that the growth in the use of PET for sensitive products might be lower than predicted and of the possibility that customers producing sensitive products might switch to HDPE rather than to PET, even though those factors are irrelevant in determining whether Tetra will enjoy a first-mover advantage in its dealings with customers opting for PET.

139 Similarly, with respect to customers switching from glass packaging, the Court of First Instance's reasoning overlooks certain factors and distorts the facts. First, the Court of First Instance failed to take account of the fact that a customer using that type of packaging only rarely packages his products exclusively in glass. Secondly, the Court of First Instance misrepresents the facts in asserting that Tetra/Sidel's competitors in the glass-packaging sector will benefit from the first-mover advantage, because, in so finding, it overlooks the fact that suppliers of glass and can equipment do not have close ongoing relations with beverage producers because virtually all glass and can manufacturing is carried out by converters.

140 With regard to competitors' positions, the Commission argues that the Court of First Instance distorted the contested decision in holding, in paragraph 294 of the judgment under appeal, that the decision did not adequately examine the competition to be faced by Sidel on the market for high-capacity machines and underestimated the competition provided by its three major competitors. According to the Commission, the contested decision contains a detailed analysis of the relative

positions of the merged entity and its competitors, in particular in recitals 232 to 248, 293 to 300, 303 to 310 and 369 to 387 in that decision. Moreover, the Court of First Instance's findings of fact are inaccurate in that it held, first, that the competitor SIG has an advantage because it is active on the downstream preform market even though, according to the Commission, it is not active on the downstream market as a supplier of preforms to undertakings using PET bottling and, secondly, that SIG enjoys a first-mover advantage on account of its activities in the glass sector even though it manufactures machines and is not active on the downstream market for glass bottles.

141 Finally, the Commission takes the view that the Court of First Instance's statement, in paragraph 305 of the judgment under appeal, that 'the finding of the converters' dependency on Sidel is not convincing', which is based solely on the 'current level of existing competition', does not contain clear or adequate reasoning for overturning the Commission's complex assessment of this point in recitals 303 to 310 in the contested decision.

142 Tetra contends that the various — apparently unrelated — criticisms raised by the Commission under its fifth ground of appeal must be declared inadmissible for two reasons. First, the Commission relies on factors which were not referred to in the contested decision and, secondly, it is directly challenging the Court of First Instance's assessment of the facts.

Findings of the Court as to the fifth ground of appeal

143 Assessment of the arguments put forward by the Commission shows that the majority of them relate to the Court of First Instance's assessment of the evidence,

which is not subject to review by the Court in appeal proceedings. This is true of the Commission's complaint that the Court of First Instance failed to take account of certain factors which it considers to be relevant or took account of other factors which it considers to be irrelevant, whether that be in relation to low or high-capacity SBM machines or to the consideration of customers switching from glass packaging.

144 By other arguments advanced in support of its fifth ground of appeal, the Commission expressly challenges factual findings or assessments made by the Court of First Instance. This is true of the argument relating to Tetra/Sidel's competitors in glass packaging and of the assessment of the position of the competitor SIG.

145 With respect to the alleged distortion of the contested decision in paragraph 294 of the judgment under appeal, the Commission fails to refer to any specific recital whose content was distorted by the Court of First Instance and, in reality, the argument is directed at the Court of First Instance's assessment of the facts and evidence.

146 Finally, with regard to the argument alleging a failure to state reasons for the finding, in paragraph 305 of the judgment under appeal, that the converters' dependency on Sidel had not been established convincingly, it need be stated only that the Court of First Instance gave concise but adequate reasons for that finding in the final sentence of paragraph 305.

147 It follows from those considerations that the fifth ground of appeal is, in part, inadmissible and, in part, unfounded.

Conclusion

148 Since none of the grounds of appeal raised by the Commission in support of its appeal could be upheld, the appeal must be dismissed.

Costs

149 Under Article 69(2) of the Rules of Procedure, which is applicable to the procedure on appeal by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Tetra has applied for costs and the Commission has been unsuccessful in all its grounds of appeal, the latter must be ordered to pay the costs.

On those grounds, the Court (Grand Chamber) hereby:

1. Dismisses the appeal;

2. Orders the Commission of the European Communities to pay the costs.

[Signatures]