JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)
22 March 2000 *

In Joined Cases T-125/97 and T-127/97,

The Coca-Cola Company, established in Wilmington, Delaware, United States, represented by M. Siragusa, of the Rome Bar, and N. Levy, of the Bar of England and Wales, with an address for service in Luxembourg at the Chambers of Elvinger and Hoss, 15 Côte d'Eich,

Coca-Cola Enterprises Inc., established in Atlanta, Georgia, United States, represented by P. Lasok QC, and M. Reynolds, Solicitor of the Supreme Court of England and Wales, with an address for service in Luxembourg at the Chambers of Zeyen, Beghin and Feider, 56-58 Rue Charles Martel,

applicants,

v

Commission of the European Communities, represented by W. Wils, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: English.

supported by.

The Virgin Trading Company Ltd, established in London, represented by I. Forrester QC, of the Scots Bar, with an address for service in Luxembourg at the Chambers of A. May, 31 Grand-Rue,

and

Federal Republic of Germany, represented by W.-D. Plessing, Ministerialrat in the Federal Ministry of Finance, and C.-D. Quassowski, Regierungsdirektor in that Ministry, acting as Agents, Graurheindorfarstraße 108, Bonn, Germany,

interveners,

APPLICATION for annulment of part of the statement of reasons for Commission Decision 97/540/EC of 22 January 1997 declaring a concentration compatible with the common market and with the functioning of the European Economic Area Agreement (Case IV/M.794 Coca-Cola/Amalgamated Beverages GB) (OJ 1997 L 218, p. 15),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(First Chamber, Extended Composition),

composed of: B. Vesterdorf, President, V. Tiili, J. Pirrung, A.W.H. Meij and M. Vilaras, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 8 July 1999,

gives the following

Judgment

1 The applicant, The Coca-Cola Company, (hereinafter 'TCCC') and Cadbury Schweppes plc (hereinafter 'CS'), a company incorporated under English law, own rights to various trade marks for carbonated soft drinks marketed in Great Britain and elsewhere. They supply to independent bottling firms the concentrates and ingredients used to prepare the beverages marketed under those trade marks and authorise them to distribute and market their beverages within a specific territory.

2 Amalgamated Beverages Great Britain (hereinafter 'ABGB'), a subsidiary of TCCC and CS, was contracted to bottle, distribute, promote and market the beverages of those companies and it arranged for the operations to be carried out by its subsidiary, Coca-Cola & Schweppes Beverages Limited (hereinafter 'CCSB').

3 Coca-Cola Enterprises Inc. (hereinafter 'CCE') is the world's largest bottler of the products of TCCC. It was created in 1986 when TCCC began consolidating its bottling operations in the United States and offered 51% of CCE's shares to the public. In addition to its operations in the United States CCE became, following a

series of acquisitions from 1993 onwards, the bottler of TCCC's products in Belgium, France and the Netherlands.

Legal and factual background to the dispute

4 The present application must be viewed against the wider background of the competition proceedings initiated by the Commission under Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC) involving TCCC and/or its bottlers in Europe. The first such proceeding was that initiated in September 1987 under Article 86 of the Treaty against an Italian subsidiary of TCCC, The Coca-Cola Export Corporation (hereinafter 'TCCEC'), in the course of which the Commission expressed the view that the company held a dominant position on the market in cola-flavoured carbonated soft drinks (hereinafter 'colas'). In the course of that proceeding, TCCEC, whilst reserving its position on the existence of a relevant cola market and its alleged dominant position on that market, undertook to comply with certain obligations regarding the agreements concluded with distributors in the Member States (press release IP/90/7). A like undertaking was given by CCE in the decision which is the subject of this action.

5 Documents on the file show that the alleged dominant position of TCCC on the cola market was again raised in the wake of a complaint of breach of Article 86 of the Treaty, lodged in 1993,... [1] against the French bottler and subsidiary of TCCC, Coca-Cola Beverages SA (hereinafter 'CCBSA'). The documents on the file also show that, in August 1995, the Commission claimed that CCBSA held a dominant position on the French cola market and had abused that position within the meaning of Article 86 of the Treaty.

1 — Confidential data withheld.

6 On 9 August 1996, the Commission received from CCE notification pursuant to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1).

7 The notified operation concerned the agreement between CS and TCCC to liquidate ABGB by selling their respective shares in it to CCE which, at the material time, carried out no commercial operations in Great Britain.

8 By its Decision 97/540/EC of 22 January 1997 the Commission declared the notified operation compatible with the common market under Article 8(2) of Regulation No 4064/89 and with the functioning of the European Economic Area Agreement (Case IV/M.794 — Coca-Cola/Amalgamated Beverages GB) (OJ 1997 L 218, p. 15, hereinafter 'the decision' or 'the contested decision').

9 In that decision, the Commission found *inter alia* that: first, TCCC is in a position to exercise a decisive influence over CCE and therefore controls that company within the meaning of Article 3(3) of Regulation No 4064/89; second, colas sold in Great Britain constitute a relevant market for purposes of assessing the notified concentration, and, third, CCSB holds a dominant position on the British cola market. However it concluded (paragraph 214) that:

'[A]lthough the proposed operation leads to a structural change which may also lead to a change in the market behaviour of CCSB... it is not possible to

differentiate sufficiently between the opportunities which would be derived directly from the proposed operation and the opportunities which already exist within the current structure of CCSB in order to conclude that the proposed operation results in a strengthening of CCSB's dominant position in the cola market in Great Britain within the meaning of Article 2 of the Merger Regulation [No 4064/89].'

10 In its decision, the Commission also took note of the fact that CCE undertook that, so long as CCE controlled CCSB, CCSB would adopt the undertakings given to the Commission by TCCEC in 1989 (see above, paragraph 4) to refrain from certain forms of commercial practices considered illegal when employed by an undertaking in a dominant position. According to paragraph 212 of the decision, '[t]hat undertaking would alleviate some of the concerns raised by third parties in the course of the procedure'.

Procedure

11 It is against that background that, by applications lodged at the Registry of the Court of First Instance on 22 April 1997, TCCC and CCE each brought an action for annulment of the decision, Cases T-125/97 and T-127/97 respectively.

12 By documents lodged at the Registry of the Court of First Instance on 2 June 1997, the Commission raised an objection of inadmissibility in both cases. On 5 and 8 September 1997, CCE and TCCC lodged their observations on that objection.

13 By applications lodged at the Registry of the Court of First Instance on 29 September 1997, Virgin Trading Company Limited (hereinafter 'Virgin') applied for leave to intervene in both cases in support of the forms of order sought by the Commission.

14 By letters of 16 October 1997, TCCC and CCE challenged Virgin's interest in intervening, and requested, pursuant to Article 116(2) of the Rules of Procedure, that a number of documents lodged at the Court of First Instance in the course of the present proceedings be treated as confidential.

15 By letters of 30 October 1997, the Federal Republic of Germany applied for leave to intervene in both cases in support of the forms of order sought by the Commission.

16 By applications lodged at the Registry of the Court of First Instance on 3 November 1997, CCE and TCCC each applied for leave to intervene in Cases T-125/97 and T-127/97 in support of the forms of order sought by the other.

17 By letters of 10 November 1997 the Commission expressed the view that there was no justification for the requests by TCCC and CCE for confidential treatment with regard to the applications for leave to intervene by Virgin, and that it was not possible to grant confidential treatment vis-à-vis the Federal Republic of Germany.

18 By letter of 12 November 1997, the Commission objected to the applications for leave to intervene by CCE and TCCC.

19 By applications lodged at the Registry of the Court of First Instance on 19 and 21 November 1997, CCE and TCCC each requested that certain documents be treated as confidential vis-à-vis the other.

20 By letter of 7 July 1998, TCCC referred, in support of the admissibility of its application, to documents emanating from certain competition authorities to demonstrate that the contested decision, in particular the findings it contained on the definition of the relevant market, had already been taken into account by the courts and competition authorities in France, in Italy and in Lithuania to its detriment... By letter of 28 August 1998, the Commission expressed its view on the content of those documents.

21 By orders of 18 March 1999, the President of the First Chamber of the Court of First Instance granted the applications for leave to intervene in both cases by Virgin and the Federal Republic of Germany and dismissed those by TCCC and CCE.

22 The requests for confidential treatment made by TCCC and CCE vis-à-vis one another were provisionally granted by the same order for the purpose of the procedure on the objection of inadmissibility.

23 By decision of the Court of First Instance of 9 April 1999, both cases were assigned to the First Chamber, Extended Composition.

24 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure in order to rule on the objection of inadmissibility. As a measure of organisation of procedure under Article 64 of its Rules of Procedure, it asked the Commission and CCE to reply to certain written questions and the Commission to lodge the minutes of the meeting of the Advisory Committee of 7 January 1997 together with all other documents given to the members of that committee for the purposes of that meeting. The parties presented oral argument and replied to questions put to them orally by the Court at the hearing on 8 July 1999.

25 Pursuant to Article 50 of the Rules of Procedure, Cases T-125/97 and T-127/97 were joined for the purposes of the judgment.

Forms of order sought

26 In its application TCCC claims that the Court should:

— declare the decision void in so far as the Commission finds in that decision that the supply of cola-flavoured carbonated soft drinks in Great Britain

comprises a relevant market, that CCSB holds a dominant position on that market and that TCCC controls CCE within the meaning of Article 3(3) of Regulation No 4064/89;

in the alternative,

— declare the decision void in its entirety in so far as such a declaration is necessary to annul the findings identified above and declare the acquisition of ABGB by CCE approved in accordance with Article 10(6) of Regulation No 4064/89;

and, in either case,

— declare the undertaking given to the Commission by CCE on 17 February 1997 void along with the finding on the basis of which the Commission requested and obtained that undertaking, namely that CCSB holds a dominant position on a relevant market comprising the supply of cola-flavoured carbonated soft drinks in Great Britain;

— order the Commission to pay the costs;

— take any other measures that the Court considers appropriate.

27 In its observations on the objection of inadmissibility TCCC asks the Court, first, either to dismiss the objection of inadmissibility or to declare that the undertaking and the contested findings of the Commission contained in the contested decision lack any legal effect and, second, to order the Commission to pay the costs pursuant to Article 87(3) of the Rules of Procedure.

28 In its application CCE claims that the Court should:

— declare that the decision is void in so far as the Commission finds in that decision that TCCC controls CCE within the meaning of Article 3(3) of Regulation No 4064/89, that the supply of cola-flavoured carbonated soft drinks in Great Britain comprises a distinct market, and that CCSB is in a dominant position in that market;

in the alternative;

— declare that the 'decisions' that TCCC controls CCE within the meaning of Article 3(3) of Regulation No 4064/89, that the supply of cola-flavoured carbonated soft drinks in Great Britain comprises a distinct market, and that CCSB is in a dominant position in the market for colas in Great Britain, contained in the decision are void;

— order the Commission to pay the costs.

29 In its observations on the objection of inadmissibility, CCE asks the Court to declare the application admissible and, in any event, order the Commission to pay the costs pursuant to Article 87(3) of the Rules of Procedure.

30 In both cases the Commission contends that the Court should:

— dismiss the applications as inadmissible;

— order the applicants to pay the costs.

31 In its statements in intervention lodged on 12 May 1999, Virgin claimed that the Court should:

— dismiss the applications as inadmissible;

— order the applicants to pay the costs.

32 In its statements in intervention lodged on 12 May 1999 the Federal Republic of Germany claims that the Court should dismiss the applications as inadmissible.

The objection of inadmissibility

Arguments of the parties in Case T-125/97

33 TCCC submits that it is directly and individually concerned by the contested decision and that it constitutes an act open to challenge pursuant to the fourth paragraph of Article 173 of the EC Treaty (now, after amendment, the fourth paragraph of Article 230 EC).

34 As regards its standing, TCCC argues, first, that the contested decision is plainly of concern to it. The principal finding of the Commission that CCSB, in its capacity as the sole British bottler of TCCC's products, holds a dominant position on the cola market in Great Britain, is based on the fact that CCSB bottles and distributes its product, 'Coca-Cola'. Second, both the finding that CCSB has a dominant position and CCE's undertaking have no effect of severely restricting CCSB's commercial behaviour, thereby adversely affecting sales of TCCC's products.

35 Finally, if the contested finding of the Commission that TCCC controls CCE were founded, it would follow that it was individually and directly concerned by the contested decision (Case 113/77 *NTN Toyo Bearing Company* v *Council* [1979] ECR 1185, paragraph 9, and Joined Cases 228/82 and 229/82 *Ford* v *Commission* [1984] ECR 1129, paragraph 13).

36 As to the question of the existence of an act open to challenge, TCCC submits that the finding of the existence of a dominant position in the decision entails

significant and lasting consequences for CCSB, capable of having adverse legal effects within the meaning of the judgment of the Court of Justice in Case 60/81 *IBM* v *Commission* [1981] ECR 2639 (hereinafter 'the *IBM* judgment').

37 First, a dominance finding imposes a 'special responsibility' on CCSB, such that behaviour generally considered lawful on the market in question might be considered to be an abuse of a dominant position, which, in the present case, has the effect of restricting that company's commercial freedom.

38 Second, that finding may be employed by the Commission in pending and future cases. On that point, TCCC maintains that it is unaware of any instance in which the Commission has changed its views concerning market definition or dominance in successive cases involving the same undertaking (Commission decisions 80/182/EEC of 28 November 1979 (IV/29.672 — Floral) and 82/203/EEC of 27 November 1981 (IV/30.188 — Moët et Chandon (London) Ltd), relating to a proceeding under Article 85 of the EEC Treaty (OJ 1980 L 39, p. 51, and OJ 1982 L 94, p. 7, respectively). According to TCCC, the possibility of an action being brought both against it and against CCSB is not purely theoretical. Virgin Cola Company, TCCC's competitor, made a complaint to the Commission regarding abuse of a dominant position in the United Kingdom in breach of Article 86 of the EC Treaty. The finding in the contested decision that CCSB held a dominant position thus had the effect of depriving TCCC of the opportunity to challenge that allegation in the complaint by Virgin Cola Company. Similarly, in August 1995 the Commission initiated a proceeding against CCBSA, claiming that it had abused its dominant position on a French cola market. The crucial question of definition of the product market was left unanswered pending the outcome of the proceeding that resulted in the contested decision.

39 TCCC adds that the contested finding increases the probability of its being fined in a later case and cites, in that connection, the judgment of the Court of

Justice in Case 8/66 *Cimenteries CBR and Others* v *Commission* [1967] ECR 75.

40 Third, TCCC submits that there is serious risk that national courts, particularly those of the United Kingdom, will treat the contested finding as binding, thereby placing it at a disadvantage *vis-à-vis* rival brand owners and CCSB at a disadvantage *vis-à-vis* future plaintiffs (Commission Notice of 13 February 1993 on cooperation between national courts and the Commission in applying Articles 85 and 86 of the Treaty, OJ 1993 C 39, p. 6, paragraph 20, and Case C-234/89 *Delimitis* v *Henninger Brau* [1991] ECR I-935). In that connection TCCC cites the judgment in Case 77/77 *BP* v *Commission* [1978] ECR 1513, in which the Court of Justice declared an application admissible in so far as it was claimed that the Commission's finding of abuse of a dominant position could be used against the applicant before the national courts by a potential complainant in a later action (see also Case 17/78 *Deshormes* v *Commission* [1979] ECR 189, Case 223/85 *RSV* v *Commission* [1987] ECR 4617, Case 167/86 *Rousseau* v *Court of Auditors* [1988] ECR 2705, paragraph 7, and Case T-353/94 *Postbank* v *Commission* [1996] ECR II-921).

41 Fourth, TCCC points out that the laws of certain Member States, such as the United Kingdom, may require national courts to treat Commission decisions as binding. On that point TCCC refers to the judgment of the High Court of Justice of England and Wales in *British Leyland Motor Corp. Ltd* v *Wyatt Interpart Co. Ltd* according to which, first, where a judgment of the Court of Justice reviews a finding by the Commission that an undertaking had abused a dominant position, it has binding authority by virtue of the European Communities Act of 1972, and, second, a decision of the Commission which is not challenged before the Community judicature must be treated as having the same effect as a judgment of the Court of Justice itself (1979 CMLR 79). It also cites *Iberian UK Limited* v *BPB Industries Limited* in which the High Court concluded that it would be contrary to public policy to allow persons who have been involved in competition proceedings in Europe to challenge afresh in the national court the merits of a decision of the Commission (1996 CMLR 601).

42 TCCC submits that the undertaking given by CCE produces legal effects and therefore creates a separate and independent basis for the admissibility of its application according to case-law (Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö* v *Commission* [1993] ECR I-1307, '*Woodpulp*'). The effect of that undertaking is to deprive CCSB of the benefit of potentially profitable commercial strategies that remain open to its competitors and increase its susceptibility to fines.

43 TCCC submits, next, that the fact that the contested decision cleared the notified transaction does not undermine the admissibility of its application and that nothing in the judgment of the Court of First Instance in Case T-138/89 *NBV and NVB* v *Commission* [1992] ECR II-2181 (hereinafter '*NBV and NVB*') suggests a contrary conclusion.

44 First, both the finding of dominance and the contested undertaking by CCE have adverse effects, notwithstanding the decision to authorise the notified concentration, and affect that company inasmuch as they require it to accept special obligations and to cease any conduct that might be deemed abusive.

45 Second, unlike the applicants in *NBV and NVB*, TCCC is not a party which has obtained satisfaction from the Commission proceeding.

46 Third, in *NBV and NVB* the applicants' claim that the recitals to the contested decision could be used against them in national court proceedings was based on the premiss that the national court would accept the Commission's assessment of the restrictive effect of the notified agreement but would reject its findings as to the lack of impact on intra-Community trade. In the present case the prospect

that national courts might employ the findings of dominance against TCCC does not imply that those courts would at the same time reject any other aspect of the contested decision.

47 In the alternative, in the event that the application is declared inadmissible, in order to avoid the risks described above, TCCC asks the Court of First Instance to rule that the Commission's finding of dominance was unnecessary and devoid of legal effect in the present case.

48 In that connection TCCC observes that, in adopting the contested decision on the basis of Article 8(2) of Regulation No 4064/89, the Commission did not need to reach a final determination on the issues of dominance and the scope of the relevant market. In its view, findings are necessary only in the event that the Commission issues a decision under Article 8(3) of Regulation No 4064/89 declaring a concentration incompatible with the common market (see Case 7/82 *GVL* v *Commission* [1983] ECR 483, paragraph 23). On that point TCCC refers to the Commission's practice of refraining from opining on issues the discussion of which is unnecessary, in particular where it is obvious that the notified operation has no anti-competitive effect on the market, as was the case here.

49 TCCC concludes that if there is no judicial review of the contested findings legal certainty would be undermined, since the undertakings concerned would have to either accept such findings or treat them as lacking legal force. TCCC considers that it is entitled to know without ambiguity what are its rights and obligations so that it may take steps accordingly (Case 169/80 *Gondrand* [1981] ECR 1931, paragraph 17, and Case 78/74 *Deuka* [1975] ECR 421).

50 The Commission submits that, inasmuch as it does not relate to the operative part of the decision but only to some of its grounds, the application must be dismissed as manifestly inadmissible. It observes that the grounds of an act can be contested only to the extent to which they constitute the necessary support for the operative part of an act adversely affecting a person's interests (*NBV and NVB*, cited above, paragraph 31). The operative part of the contested decision, inasmuch as it declares the notified operation compatible with the common market, without attaching any condition or obligation within the meaning of the second subparagraph of Article 8(2) of Regulation No 4064/89, does not produce any legal effect which could adversely affect the interests of the applicant.

51 The Commission argues that the special responsibility of CCSB not to allow its conduct to impair undistorted competition on the common market (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461) follows from the direct effect of Article 86 of the Treaty without any need for the Commission to take a decision on the question. In that connection the Commission adds that the operative part of the contested decision does not contain any finding of dominance.

52 As regards the possible consequences of such a finding in the grounds of the contested decision on the treatment of future cases under Article 86 of the Treaty, the Commission points out that any decision applying that article contains a reasoned assessment as to the existence of a dominant position and of abuse of it which could be challenged before the Community judicature.

53 As regards the applicant's argument that the finding of a dominant position exposes the applicant to the risk of fines in other cases, the Commission submits that, as is clear from the case-law on this subject, such a finding is not in itself a recrimination against the undertaking concerned (*Michelin* v *Commission*, cited above, paragraph 57). Nor, in any event, since this is an interest which relates to

an uncertain future legal situation, can it constitute grounds for the admissibility of the application (*NBV and NVB*, cited above, paragraph 33).

54 The Commission submits that, contrary to the applicant's arguments, the national court is bound only by the operative part of a decision declaring a concentration operation compatible with the common market, and not by findings which do not constitute the necessary support for its operative part. Moreover, as the Court observed in *NBV and NVB*, national courts could always apply to the Court of Justice for a preliminary ruling in case of doubts.

55 As regards the argument that under the legislation of certain Member States, such as that of the United Kingdom, its decisions are binding on the national courts, the Commission counters that the case-law cited by the applicant concerns decisions finding abuse of a dominant position, which, by definition, cannot be contested before a national court if they have not been contested in the Community courts or if the application has been dismissed, which is not the case here. Moreover, it would be incompatible with the autonomy and primacy of Community law to make the admissibility of applications for annulment depend on particularities of national law.

56 The Commission disputes, finally, that the undertaking given by CCE might constitute grounds for the admissibility of the application, since that undertaking is not part of the operative part of the decision, is subject to no obligation or condition within the meaning of the second subparagraph of Article 8(2) of Regulation No 4064/89 and does not constitute necessary support for the operative part. That analysis is, moreover, confirmed by two letters from Mr Drauz, Head of the Merger Task Force (hereinafter 'MTF'), of 8 and 9 January 1997, addressed to CCE.

57 In its observations on the objection of inadmissibility, TCCC submits that, in so far as the Commission's chief argument focuses on the placement of the challenged findings in the decision rather than on their potential legal effects, it is contrary to the judgment in *IBM*. Furthermore, in the *Woodpulp* judgment, cited above, the Court of Justice, focusing on the intrinsic legal effects of undertakings generally and without reference to the fact that the contested undertaking was not mentioned in the operative part of the contested decision but was annexed to it, held that the undertaking constituted an act open to challenge.

58 TCCC also challenged the Commission's argument that the contested findings do not constitute necessary support for the operative part of the decision and cannot therefore be subject to judicial review. First, that argument disregards the fact that a finding of dominance in a Commission decision, if founded, has legal effects, even if it does not constitute 'necessary support' for the operative part of that decision. Second, it is on the basis of the finding that CCSB holds a dominant position that the Commission concludes that, in the absence of sufficient evidence that the notified operation would strengthen that dominant position, it had to be declared compatible with the common market (point 215 of the Decision).

59 TCCC also argues that, contrary to the Commission's submissions, the fact that Article 86 of the Treaty has direct effect does not preclude an application to annul a decision applying it being held admissible.

60 In particular, the question whether a firm holds dominant position can only be answered after a complex legal, economic and factual investigation, based on analysis of a number of factors. In the present case, the fact that investigation of the question of dominance ran to 63 paragraphs in the contested decision, demonstrates the significance of the contested finding in this case and suggests that the question will not be investigated afresh by the Commission in future proceedings involving CCSB. Moreover, the members of the Advisory Committee did not unanimously agree that there was a dominant position (Opinion of the Advisory Committee on Concentrations given at the 42nd meeting on 7 January

1977 concerning a preliminary draft decision relating to Case IV/M.794 — Coca-Cola Enterprises/Amalgamated Beverages Great Britain, OJ 1997 C 243, p. 12).

61 According to TCCC, the Commission's argument that any future decision taken pursuant to Article 86 of the Treaty finding that there is a dominant position must always include a statement of reasons is irrelevant, since the question which arises in the present case is whether such a statement of reasons will be based on findings contained in previous decisions involving the same firm, as was the case in decision 92/163/EEC of 24 July 1991 (IV/31.043 — Tetra Pak II) (OJ 1992 L 72, p. 1, paragraphs 93 and 98). Moreover, in its statement of objections in a subsequent case, Case IV/M.833 — The Coca-Cola Company/Carlsberg A/S, the Commission has already referred to the findings relating to the definition of the relevant market contained in the contested decision.

62 As regards the effects of the contested decision in national court proceedings, TCCC submits that, contrary to the Commission's argument, it does not follow from *NBV and NVB* that a national court must take account only of the operative part of a decision applying the competition rules. In support of its argument, the applicant cites both the decision of the Belgian Conseil de la Concurrence of 23 May 1997 No 97-C/C-12 in the P&G/Tambrands Case, and the decision of the Italian competition authority in Finmeccanica/Aviofer (Bollettin No 52/26, 1997) in which those authorities relied on findings and considerations relating to the relevant market contained in previous Commission decisions.

63 It adds that, even if a Commission decision does not bind national courts, the fact remains that they, like national competition authorities, are bound *de facto* by previous decisions of the Commission involving the same parties. As regards the Commission's argument that the preliminary reference procedure under Article 177 of the EC Treaty (now Article 234 EC) allows TCCC to subject the contested findings to judicial review, this is of no relevance either since, if a

national court in future proceedings involving the same parties, decided to take account of findings contained in the contested decision, no issue as to the validity or interpretation of the decision itself would arise within the meaning of Article 177 of the Treaty.

64 Finally, TCC disputes that the contested undertaking was given voluntarily and that it was merely intended to alleviate the concerns of third parties. It is clear from the decision initiating the second stage of the proceeding that the Commission initially viewed the observations of third parties as the principal concern as far as competition was concerned (paragraphs 24 to 27). In any event, it is clear from the *Woodpulp* judgment that an undertaking is not a unilateral act unconnected to a decision applying the competition rules because the obligations created by such an undertaking for the applicant must be deemed equivalent to orders requiring an infringement to be brought to an end. The Court thus held that, in giving that undertaking, the applicants merely assented, for their own reasons, to a decision which the Commission was empowered to adopt unilaterally.

65 The intervening party, Virgin, supports the arguments of the Commission.

66 The Federal Republic of Germany also maintains that the contested findings are not acts open to challenge as defined in the case-law. It refers, in that connection, to German case-law, according to which the finding in a decision of an undertaking's participation in an oligopoly does not have adverse effects for that undertaking, since to have achieved such market strength is in fact proof of high performance and often vaunted in advertising. Moreover, in the process of merger control in Germany, the undertakings concerned have to accept findings relating to market strength such as a finding that a market is dominated by an oligopoly.

Arguments of the parties in Case T-127/97

67 CCE submits that the three findings made by the Commission in the contested decision, that is to say (i) that TCCC controls CEE, (ii) that there is a distinct 'cola' market and (iii) that CCSB holds a dominant position on that market, and the undertaking concerning the competitive behaviour of CCSB are decisions or parts of a decision and are open to challenge under Article 173 of the Treaty.

68 CCE submits that the location of the disputed findings in the body of the contested decision is without relevance to the admissibility of the application. In that connection it cites the *IBM* judgment and the order in Case 229/86 *Brother* v *Commission* [1987] ECR 3757 according to which the preamble to a decision may reveal the existence of a reviewable act distinct from the decision itself. It adds that the disputed findings, in contrast to the *NBV and NVB* case, serve to support the operative part of the contested decision.

69 In particular, the finding that CCE is controlled by TCCC clearly alters its legal position since, whenever it wishes to make new acquisitions, the activities and turnover of TCCC must be considered in any analysis of effects on competition. As regards the Commission's argument that this finding is not part of the operative part of the contested decision and does not constitute necessary support for it, CCE counters that the second stage of the proceeding was initiated precisely because the Commission was convinced that it was controlled by TCCC.

70 The same is true of the contested finding that CCSB holds a dominant position on the British cola market. That finding imposes on CCE and CCSB a special responsibility in the terms of *Michelin* v *Commission*, cited above. Moreover that finding, in conjunction with the finding that TCCC exercises control, puts CCE at risk of fines in future proceedings, even where TCCC is responsible for the

breaches of the competition rules. Further, whilst it is true that Article 1 of the contested decision does not expressly refer to the finding of dominance, it must be read as meaning that despite that dominant position, the notified operation is declared compatible with the common market.

71 As regards the contested undertaking, CCE submits that it constitutes an act open to challenge within the meaning of Article 173 of the Treaty. Not only does it have legal effects for CCE and CCSB but it also serves to support the finding that TCCC controls CCE as it only applies to subsidiaries in which TCCC owns more than a 51% share (*Woodpulp*, cited above). CCE points out that, contrary to the Commission's claim, the Commission requested it to give the undertaking the day after the meeting of the Advisory Committee of 7 January 1997 (see letter of 8 January 1997, annex 2 to the application). The Commission presented the contested undertaking as though CCE had already agreed to it. Furthermore, the Commission has already relied on that undertaking in the course of another proceeding applying Article 85(1) of the Treaty (authorisation of licensing arrangements between CS and CCE, IP/97/148).

72 CCE submits, next, that it has a legitimate interest in annulment of the decision in that the decision is likely to constitute a precedent both for the Commission and for national courts and national competition authorities. Contrary to the Commission's assertion, such cases are not future and uncertain, as two complaints involving CCE have already been referred to the Commission. Thus, in decision 95/421/EC of 21 December 1994, declaring a concentration compatible with the common market (Case IV/M.484 — Krupp/Thyssen/Riva/Falck/Tadfin/AST) (OJ 1995 L 251, p. 18), the Commission referred to a previous decision adopted on the basis of the ECSC Treaty in finding that the relevant geographical market was the world market (paragraph 42). In its decision 95/354/EC of 14 February 1995, relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89 (Case No IV/M. 477 Mercedes-Benz/Kässboher) (OJ 1995 L 211, p. 1), the Commission expressly cited two previous decisions to support its conclusion that there were two relevant markets to be distinguished (paragraphs 14 and 65). Further, in its judgment in Case T-46/92 *Scottish Football Association* v *Commission* [1994] II-1039, the Court declared admissible an action in which the applicant was seeking to protect itself from the

risk that it might be confronted with further decisions of the Commission pursuant to Article 11(5) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87, hereinafter 'Regulation No 17'). CCE argues that a Commission decision which contains an appraisal of a particular factual situation, in the light of the competition rules, exercises an undeniable influence over national courts and authorities even if it is not legally binding on them.

73 Finally, CCE considers that, under the principle of primacy of Community law, a national court cannot declare a Commission decision invalid and that Article 5 of the Treaty, which lays down the duty to cooperate in good faith, implies that national authorities should avoid decisions which conflict with those taken by Community institutions (judgment of the High Court of Justice *Iberian UK Limited/BPB Industries* 1996 CLMR 601 and decision of the French Conseil de la Concurrence of 29 October 1996 No 96-D-67).

74 The Commission submits that the action is also manifestly inadmissible since it does not relate to the operative part of the contested decision but only to some of its grounds, which do not constitute acts open to challenge within the meaning of Article 173 of the Treaty. It maintains that the arguments raised by CCE in support of the admissibility of its action must be dismissed for the same reasons as those set out in Case T-125/97.

75 The Commission also rejects CCE's argument that the finding that TCCC effectively controls CCE would have legal effects should CCE make further acquisitions in Europe, pointing out that these are future and uncertain situations. Moreover, the Commission argues, such a finding is not part of the operative part of the contested decision, nor does it constitute necessary support for it.

76 The interveners, Virgin and the Federal Republic of Germany put forward the same arguments as those raised in Case T-125/97.

Findings of the Court

77 It is settled case-law that any measure which produces binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 173 of the Treaty for a declaration that it is void (*IBM* v *Commission*, cited above, paragraph 9, Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraph 62, and Case T-87/96 *Assicurazioni Generali and Unicredito* v *Commission* [1999] ECR II-203, paragraph 37).

78 To determine whether an act or decision produces such effects, it is necessary to look to its substance (order in Case C-50/90 *Sunzest* v *Commission* [1991] ECR I-2917, paragraph 12, and *France and Others* v *Commission*, cited above, paragraph 63).

79 In the present case it follows that the mere fact that the contested decision declares the notified operation compatible with the common market and thus, in principle, does not have an adverse effect on the applicants does not dispense the Court from examining whether the contested findings have binding legal effects such as to affect the applicants' interests.

The finding of a dominant position

80 It should first be observed that, as the Commission pointed out, the obligations imposed on undertakings by Article 86 of the Treaty (*Michelin* v *Commission*, cited above, paragraph 57, Case T-51/89 *Tetra Pak* v *Commission* [1990] ECR II-309, paragraph 23, Case T-111/96 *ITT Promedia* v *Commission* [1998] ECR II-2937, paragraph 139, and Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraph 112,) do not require a finding in a Commission decision that those undertakings are in a dominant position but derive directly from Article 86. According to the above case-law, where an undertaking is in a dominant position it is obliged, where appropriate, to modify its conduct accordingly so as not to impair effective competition on the market regardless of whether the Commission has adopted a decision to that effect.

81 Second, a finding of a dominant position by the Commission, even if likely in practice to influence the policy and future commercial strategy of the undertaking concerned, does not have binding legal effects as referred to in the *IBM* judgment. Such a finding is the outcome of an analysis of the structure of the market and of competition prevailing at the time the Commission adopts each decision. The conduct which the undertaking held to be in a dominant position subsequently comes to adopt in order to prevent a possible infringement of Article 86 of the Treaty is thus shaped by the parameters which reflect the conditions of competition on the market at a given time.

82 Moreover, in the course of any decision applying Article 86 of the Treaty, the Commission must define the relevant market again and make a fresh analysis of the conditions of competition which will not necessarily be based on the same considerations as those underlying the previous finding of a dominant position.

83 Thus, in the present case, the fact that, in the event of a decision applying Article 86 of the Treaty, the Commission may, as it stated itself at the hearing, be influenced by the contested finding does not mean that, for that reason alone, that finding has binding legal effects in the terms of *IBM*. Contrary to the argument of

TCCC, it is not deprived of its right to bring an action for annulment before the Court of First Instance to challenge any Commission decision finding CCSB's conduct to be an abuse.

84 As regards the effects which a finding of a dominant position may have on the application of the competition rules by national courts, it must be borne in mind that the contested decision was not taken on the basis of Article 86 of the Treaty but on that of Regulation No 4064/89 and in no way affects the power of national courts to apply Article 86.

85 Nor, in any event, does the possibility that a national court applying Article 86 of the Treaty directly in the light of the decision-making practice of the Commission might reach the same finding that CCSB holds a dominant position mean that the contested finding has binding legal effects. A national court which has to assess action taken by CCSB after the contested decision in the context of a dispute between CCSB and a third party is not bound by previous findings of the Commission. There is nothing to prevent it from concluding that CCSB is no longer in a dominant position, contrary to the Commission's finding at the time when the contested decision was adopted.

86 Those conclusions are not undermined by the case-law cited by TCCC in support of the admissibility of its action. First, as regards *BP* v *Commission*, cited above, that judgment clearly concerns the right of an undertaking to challenge in the Community courts the legality of a Commission decision charging it with a breach of Article 86 of the Treaty, even where no fine is imposed. Since a decision finding that there has been an abuse of a dominant position can serve as a basis for an action for damages brought by a third party before a national court, the addressee of that decision undeniably has an interest in bringing an action for its

annulment. In the present case the applicants do not have such an interest as the contested decision neither calls into question the compatibility of the notified operation with the common market nor claims that CCSB's conduct constitutes an abuse.

87 As to the relevance of *Deshormes* v *Commission*, cited above, it must be observed that, in that judgment, the applicant, who was placed in a complex situation as regards the course of her career, was acknowledged to have a legitimate, present and vested interest in challenging a decision the effects of which would not materialise until after her retirement. In the present case, the Court accordingly holds that the mere finding, in the grounds of the contested decision, that CCSB holds a dominant position does not in any way affect the development of its position on the market and has no definitive legal effects for the future. For the same reason, the judgment in *Rousseau* v *Court of Auditors*, cited above, is of no relevance either.

88 In the judgment in *RSV* v *Commission*, cited above, the Court of Justice did accept that the applicant had a legitimate interest in bringing an action for annulment against a Commission decision ordering the repayment of unlawful aid granted to it by the Kingdom of the Netherlands, even though it was bound, under Netherlands law and the national procedures already instituted against it, to repay the aid received in the event of insolvency or suspension of payments. However that solution was justified by the consideration that if the applicant were to succeed in its action on the basis of submissions in domestic law, the contested decision would constitute for the Netherlands Government the sole justification for its request for reimbursement (paragraphs 9 and 10). In the present case the contested finding does not form the basis for any other decision taken by the Commission against CCSB for breach of competition rules.

89 As regards the judgment in *Postbank* v *Commission*, cited above, it must be observed that the action against a Commission decision allowing third parties to produce documents containing information classified by the applicant as confidential in national legal proceedings was declared admissible because the Court of First Instance took the view that such a decision could represent a breach of Article 214 of the EC Treaty (now Article 287 EC) and Article 20 of

Regulation No 17. In the present case, the mere finding as to the existence of a dominant position cannot constitute a finding as to a breach of provisions of Community law.

90 TCCC's argument that a finding of a dominant position is only necessary if the Commission takes a decision on the basis of Article 8(3) of Regulation No 4064/89, declaring a notified operation incompatible with the common market, must be dismissed as irrelevant. Where the Commission intends to declare a notified operation compatible with the common market it is bound, in the light of the particular characteristics of each operation, to provide sufficient reasons for its decision in order to permit third parties, where necessary, to challenge the merits of its analysis in the Community courts. Whilst it is true that, as TCCC pointed out, under the Commission's decision-making practice it generally only makes a detailed analysis of the definition of the relevant market and those operating on it if it intends to decide that an operation is incompatible, there is nothing to prevent it, in view of the obligation to state reasons referred to above, from carrying out such an analysis when it adopts a decision that an operation is compatible, particularly if it is a decision taken under Article 8(2) of Regulation No 4064/89.

91 As regards the applicants' reference to the risk that they will have fines imposed on them for breach of competition rules, it should be borne in mind that it is not the mere finding that CCSB holds a dominant position at a given time that may, possibly, give rise to that risk, but the applicants' resorting to conduct which constitutes an abuse of that position. The reference by TCCC to the judgment in *Cimenteries CBR and Others* v *Commission*, cited above, is not relevant in that respect. When the Court of Justice held that it was admissible for parties to an agreement to dispute a Commission decision taken under Article 15(6) of Regulation No 17 it did so because such a decision deprived them definitively of the legal protection conferred on them by Article 15(5) and exposed them to a serious risk of financial penalties (pages 82 to 84; see also Case T-19/91 *Vichy* v *Commission* [1992] ECR II-415, paragraph 16). However, that exception is granted solely in respect of the activity described in the notification and confers no protection in respect of future activities other than those covered by that agreement. In the present case the contested finding does not deprive the

applicants of legal protection granted to them by a specific provision nor is it intended to single out particular conduct of CCSB which has already been submitted for examination by the Commission.

92 It is clear from the foregoing considerations that the mere finding in the contested decision that CCSB holds a dominant position has no binding legal effects so that the applicants' challenge to its merits is not admissible.

The finding relating to the definition of the relevant market

93 As the applicants' challenge to the finding of a dominant position is not admissible, *a fortiori* their challenge to the preliminary finding that there is a cola market is not admissible either.

The contested undertaking

94 On a preliminary point, it should be borne in mind that although CCE argued in its pleadings that the undertaking in question had legal effects as far as it was concerned, only TCCC, in its application, sought the annulment of the contested decision because of the inclusion in its grounds of the said undertaking. In its replies to the written questions of the Court of First Instance, CCE stated that it had not sought the annulment of the undertaking in question because 'it [was] an integral part of the contested decision and not a separate act'. At the hearing it added that the undertaking in question was in fact a measure which it had taken itself and could not, therefore, be the subject of an action for annulment.

95 It follows that, since CCE did not seek the annulment of the decision in so far as it related to the undertaking in question, only the arguments of TCCC concerning the alleged legal effects of that undertaking will be taken into account for the purposes of the Court's appraisal.

96 In that connection, first of all, the Commission's objection to the admissibility of the applicants' challenge to the legality of the undertaking on the ground that it was not the subject of a formal condition within the meaning of Article 8(2) of Regulation No 4064/89 must be rejected. According to the case-law on this subject such an undertaking can be the subject of an action for annulment if it is clear from an analysis of its substance that it seeks to produce binding legal effects in the sense of the *IBM* judgment (see also *France and Others* v *Commission*, cited above, paragraphs 60 to 69). Moreover, it must be observed that the Commission itself stated, in its written replies to the questions of the Court of First Instance that certain undertakings, mentioned only in the grounds of decisions taken under Article 6(1)(b) of Regulation No 4064/89 could on occasion have such effects.

97 Accordingly, in order to determine whether the undertaking in question produces such effects, it is necessary to consider whether the declaration that the notified operation is compatible was affected by it in the sense that, in the event of breach of its terms, the Commission could revoke its decision, as it declared it could in its written replies to the questions of the Court of First Instance on the subject of certain decisions confirming compatibility adopted under Article 6(1)(b) of Regulation No 4064/89.

98 It is clear from consideration of the file and the replies of the parties to the oral questions of the Court of First Instance that the Commission's decision of 13 September 1996 to initiate the procedure under Article 6(1)(c) of Regulation No 4064/89 was taken *inter alia* because of serious concerns expressed by third parties during the first stage of the procedure, concerning the compatibility of the notified operation with the common market (see annex 3 to the observations of

TCCC on the objection of inadmissibility and, in particular, paragraph 23 et seq. of the Commission decision pursuant to Article 6(1)(c) of Regulation No 4064/89).

99 It is also clear from the file that, by letter sent to the Commission the day after a meeting between the applicants and the Commissioner responsible for competition matters, Mr Van Miert, on 19 December 1996, CCE proposed to give a series of undertakings in so far as they were necessary for the Commission to authorise the notified operation. That letter read as follows:

'These proposals are designed to address the concerns expressed in the Statement of Objections in the event that it is considered appropriate to propose that the transaction be prohibited.... However, without prejudice to this position, the parties have at all times expressed their willingness to try to meet the concerns expressed by the Commission in the Statement of Objections through the presentation of reasonable and proportionate modifications to the transaction that are fundamentally structural in character... It is the parties' belief that the proposed undertakings, set out below, which have far-reaching business consequences for them, achieve this purpose and address the specific concerns identified in the Statement of Objections... If these proposals are acceptable to the Commission, the parties are prepared to develop them formally in the form of full written undertakings. On this basis we trust that it will be possible to present the transaction to the full Commission for a clearance under Article 8(2) of the merger control Regulation' (attached as Annex 13 to the application in Case T-125/97).

100 The day after the meeting of the Advisory Committee of 7 January 1997 at which the undertaking proposed by CCE was discussed in detail, by letter of 8 January 1997, the Director of the MTF replied to the above letter as follows:

'I refer to the letter dated 20 December 1990 to Commissioner Van Miert which formally offered certain undertakings that the parties were prepared to make. We

invite you to confirm in writing the undertaking concerning future behaviour namely that so long as CCE controls CCSB, CCSB shall adopt the restrictions of the undertaking given to the Commission by the Coca-Cola Export Corporation in 1989.... We believe that such undertaking, if correctly implemented would address some of the concerns expressed by third parties.'

101 As is clear from the Opinion of the Advisory Committee, that committee expressly requested the Commission to take 'full account of the comments made during the meeting of the Committee, especially with regard to the undertaking given by the Coca-Cola Export Corporation to the Commission in 1989', and the letter of 8 January 1997 could be interpreted as expressing the Commission's intention to make authorisation of the notified operation conditional upon CCSB's complying with the same obligations. However, it is clear that the Director of the MTF none the less took pains to dispel any doubt in that regard by emphasising in that letter that the decision authorising the notified operation would not be conditional upon the undertaking by CCE. ('The clearance would not be conditional upon your confirmation but the undertaking would be noted in the final decision. The Advisory Committee has endorsed this line' (see Annex 13 to the application in Case T-125/97)).

102 On 9 January 1997, the Director of the MTF sent to CCE for approval an extract from the draft of the contested decision concerning the undertaking at issue. By letter of 13 January 1997, CCE's General Counsel confirmed in writing that it gave that undertaking whilst approving the Commission's decision to authorise the notified operation without attaching that condition ('CCE and the other parties welcome the decision to approve the proposed transaction without condition and I am pleased to confirm that so long as CCE controls CCSB, CCSB shall adopt the undertakings given to the Commission by The Coca-Cola Export Corporation in 1989. We anticipate that this assurance will result in resolving all outstanding issues with the Commission related to this transaction').

103 The substance of that correspondence between the Commission and CCE was thus reproduced in paragraph 212 of the contested decision. It is clear from that paragraph that the Commission noted the undertaking given by CCE without making it a formal obligation within the meaning of Article 8(2) of Regulation No 4064/89. ('In any event, however, the Commission takes note of the fact that CCE undertakes that, so long as CCE controls CCSB, CCSB will adopt the undertakings given to the Commission by The Coca-Cola Export Corporation in 1989. That undertaking would alleviate some of the concerns raised by third parties in the course of the procedure.')

104 It is thus clear from the foregoing that, in adopting the contested decision, the Commission, as it stated in its correspondence with CCE, did not intend to make the authorisation granted conditional upon the undertaking at issue.

105 In any event, TCCC's argument that the undertaking was required by the Commission is contradicted by the fact that a month after the adoption of the contested decision, CCE again proposed to adopt the same undertaking in order, on that occasion, to obtain authorisation for exclusive licensing arrangements concluded between itself and CS which, although an integral part of the notified operation, had to be examined in the light of Article 85 of the Treaty (see letter from CCE to the Commission of 17 February 1997, '[e]nclosed in final form as agreed is the undertaking that CCE gives voluntarily in this case', and Commission Press Release IP/97/148).

106 It follows that the contested undertaking has no binding legal effects in the sense that a breach of its terms would not affect the contested decision in any way and would not entail its revocation. Accordingly, it is not an act open to challenge within the meaning of Article 173 of the Treaty, so that TCCC's application must be declared inadmissible in so far as it concerns the legality of that undertaking.

The finding that TCCC controls CCE

107 As to the question whether the Commission's finding that TCCC controls CCE constitutes an act open to challenge within the meaning of the case-law cited above (see paragraph 96 above), it must be borne in mind that, in finding that the notified operation had a Community dimension within the meaning of Article 1(2) of Regulation No 4064/89, the Commission based itself exclusively on the worldwide and Community-wide turnover of CCE and ABGB. Since the turnover of TCCC, as the undertaking concerned within the meaning of Article 5(1) and (4) of Regulation No 4064/89, was not taken into account by the Commission as the basis for its exclusive authority to monitor the notified operation, the contested finding has no legal effects with regard to the applicants (Case T-3/93 *Air France* v *Commission* [1994] ECR II-121, paragraphs 45 to 47).

108 That conclusion is not undermined by CCE's argument that the contested finding has legal effects in that it obliges it to notify the Commission of any future merger plans because of the combined turnover of itself and TCCC, on penalty of fines under Articles 4 and 14 of Regulation No 4064/89, and in that it exposes it to the risk of fines under Regulation No 17 for TCCC's anti-competitive conduct. Like the finding of a dominant position, the finding that TCCC exercises a decisive influence over CCE, within the meaning of Article 3(3) of Regulation No 4064/89, is determined by a series of factors which are constantly changing, such as the participation of shareholders in annual general meetings of CCE. Consequently, the contested decision does not result in paralysing for the future the nature of the commercial relationship or the structural or other links between TCCC and CCE. Thus, it cannot serve as a basis for involving the applicants in any future proceedings in application of the competition rules because of the control which the Commission asserts TCCC exercised over CCE at the time when the contested decision was adopted.

109 It follows that the applications are inadmissible in so far as they seek the annulment of the Commission's finding that TCCC controls CCE,

The alternative claims for annulment by TCCC

110 Since the contested findings of the Commission concerning the definition of the relevant market, the holding of a dominant position by CCSB and the control of CCE by TCCC have no binding legal effects affecting the applicant's interests and thus do not constitute acts open to challenge within the meaning of Article 173 of the Treaty, the claims in the alternative by TCCC seeking the annulment of the contested decision as a whole, in so far as such annulment is necessary to annul those findings, must also be declared inadmissible.

111 It follows from all the foregoing that the applications must be dismissed as inadmissible in their entirety.

Costs

112 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under the third subparagraph of Article 87(4) thereof, the Court may order an intervener other than a Member State to bear its own costs.

113 In accordance with the forms of order sought by the parties, TCCC and CCE must, therefore, be ordered to pay the costs in Cases T-125/97 and T-127/97 respectively. The intervener, Virgin, must bear its own costs.

114 In accordance with Article 87(4) of the Rules of Procedure, the Federal Republic of Germany must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber, Extended Composition)

hereby:

1. **Dismisses the applications as inadmissible.**

2. **Orders the Coca-Cola Company and Coca-Cola Enterprises Inc. to pay the costs in Cases T-125/97 and T-127/97 respectively.**

3. **Orders The Virgin Trading Company Ltd and the Federal Republic of Germany to bear their own costs.**

Vesterdorf Tiili Pirrung

Meij Vilaras

Delivered in open court in Luxembourg on 22 March 2000.

H. Jung B. Vesterdorf

Registrar President