

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 24 July 1991

relating to a proceeding pursuant to Article 86 of the EEC Treaty
(IV/31043 — Tetra Pak II)

(only the English and French texts are authentic)

(92/163/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 ⁽²⁾,

Having regard to the Treaty establishing the European Economic Community,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 3 and 15 (2) thereof,

A. THE FACTS

Having regard to the application made to the Commission on 7 September 1983 by Elopak Italia SRL of Milan, Italy, to find, pursuant to Article 3 of Regulation No 17, that Tetra Pak Italiana of Modena, Italy, and its associated companies had infringed Article 86 of the Treaty,

INTRODUCTION

I. The Tetra Pak group of companies

Having regard to the Commission's Decision of 9 December 1988 to initiate proceedings in this case,

- (1) The Tetra Pak group of companies (Tetra Pak) is one of the world leaders in the field of the packaging of liquid and semi-liquid foods in cartons. The group operates both in the field of the non-aseptic packaging of fresh products and in the field of the aseptic packaging of long-life products, and holds a virtual monopoly in the latter.

Having given the undertaking concerned the opportunity to make known its views on the objections raised by the Commission, in accordance with Article 19 (1) of Regulation No 17 and with Commission Regulation No

Originally Swedish, Tetra Pak has acquired a global dimension and interests throughout the world. Its consolidated turnover amounted to ECU 2 billion in

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

1985, to ECU 2,4 billion in 1987 and to ECU 3,6 billion approximately in 1990. Some 90 % of the group's turnover is in the carton sector and the remaining 10 % in the field of packaging equipment and associated operations. The Community share in this turnover amounts to a little more than 50 %. Tetra Pak international SA (formerly Tetra Pak Rausing SA), located in Pully in Switzerland, is currently responsible for coordinating the policies of the group, whose companies are spread throughout the world.

- (2) Tetra Pak's first commercial operations in Italy — the country originally involved in the Elopak complaint — date back to 1955. In 1965 the first carton production unit was opened, to be followed in 1980 by a machine assembly plant. Italy is one of the countries, if not the country, in the Community in which Tetra Pak is most firmly established. The consolidated turnover of the seven Italian companies within the group stood at ECU 204 million in 1987.

II. Elopak's Complaint

1. The Elopak group of companies

- (3) The Elopak group of companies (Elopak) is Tetra Pak's main competitor in the field of the packaging of liquid foods in cartons, but its operations have not so far extended into the aseptic sector.

Formed in 1957, Elopak is of Norwegian origin. It can be estimated that the ratio between Tetra Pak and Elopak as far as their respective turnover figures are concerned was approximately 7,5 to 1 in 1987 (Elopak had a consolidated worldwide turnover of some ECU 320 million).

- (4) Elopak operates in Italy via a subsidiary, Elopak Italia (Milan), founded in 1969. This company does not produce cartons in Italy but imports them from other subsidiaries of the group. A production unit was in fact constructed at Pisa in 1982 but, in view of the poor development of Elopak's operations in Italy, carton production never got off the ground and the buildings were sold in 1987.

2. The complaint

- (5) On 27 September 1983, Elopak Italia filed a complaint with the Commission against Tetra Pak Italiana and its associate companies in Italy.

The group considered that Tetra Pak had attempted over the years to reduce Elopak's competitiveness in Italy by engaging in trading practices which, for an undertaking in a dominant position, must be deemed to be abuses.

According to Elopak, these practices essentially involved the sale of a certain type of carton ('Rex' cartons) ⁽¹⁾ at predatory prices, the imposition of unfair conditions on the supply of machines for filling these cartons and, in certain cases, the sale of this equipment at predatory prices as well. Elopak finally reported attempts at excluding it from certain advertising media.

The various elements of Elopak's complaint were explained in detail in the statement of objections ⁽²⁾. (pp. 3 to 7)

III. Markets and products ⁽³⁾

1. The packaging of liquid foods

- (6) Although the carton is in theory suited to the packaging of a variety of liquid and semi-liquid foods, the latest available figures (1987) show that some 79 % of cartons are in fact used for packaging milk (72 %) and other liquid milk products (7 %), 16 % for fruit juice, with other food products — wine, mineral water, tomato-based products, soup, sauces and baby food — together accounting for only 5 % or so of cartons used. At the time the complaint was filed, some 90 % of cartons were used for the packaging of milk or milk products.
- (7) Intended originally for the packaging of milk, the carton is in fact the type of packaging most widely used at present for this product: it is estimated that over 60 % of milk within the Community is sold in cartons, and this percentage is increasing. Practically the only other forms of packaging used for milk are glass and plastic bottles. Although there are fairly major differences between countries in this respect, these are due essentially to differences in consumer preferences.

The use of cartons for packaging fruit juice is also widespread, although this is a much more recent phenomenon. It is estimated that some 50 % of fruit

(1) For a description of the various types of carton, see recitals (14) and (15) below.

(2) Letter of 20 December 1988 from Mr Caspari, Director-General of the Directorate-General for Competition, to Tetra Pak Rausing SA.

(3) Cf. Commission Decision 88/501/EEC, (Tetra Pak I (BTG)) (OJ No L 272, 4. 10. 1988) p. 27, (hereinafter referred to as Tetra Pak I (BTG)), points 9 to 14, 22 to 25, and 29 to 41. For the Judgment of the Court of First Instance, see footnote ⁽¹⁾, p. 18.

juice consumed in the Community is packaged in cartons (against some 34 % in glass bottles and some 13 % in plastic bottles). However, fruit juice accounts for only a relatively small market share (some 16 %, cf. recital 6 above) of the market for this type of packaging, a share which seems to be stabilizing.

For the other liquids referred to in paragraph 6 above, the use of the carton as a form of packaging remains marginal. However, it is likely to increase in future as consumer habits evolve.

2. Milk packaging

- (8) Milk is essentially sold in a pasteurized form (fresh milk) or after ultra-high temperature treatment under aseptic conditions (UHT milk), the latter making it possible to attain a storage period of several months in a non-refrigerated environment ⁽¹⁾.
- (9) For each of these two milk processing techniques, there are different methods and forms of packaging. The corresponding products (packaging machines and cartons) in turn form separate markets in the sense that their substitution flexibility in relation to prices is low, this being due to a combination of factors: the marginal nature of packaging in the total cost price of the packaged products ⁽²⁾, the specific nature of the various types of packaging in the eyes of the consumer, and the inflexibility encountered on the supply side ⁽³⁾.
- (10) The cartons used for packaging fresh milk are generally of the 'gable top' variety: these have an elongated shape and can be grasped at the top, which is opened out to form a pouring spout. The cartons used to package UHT milk are normally 'brick'-type cartons: these are in the shape of a brick and are produced from a finer card lined with aluminium film.

3. Markets and competitors

- (11) Four separate markets must be identified as regards the packaging in cartons of liquid and semi-liquid foods:
 - (a) the market for machinery incorporating technology for the sterilization of cartons and

the packaging in those cartons, under aseptic conditions, of UHT-treated liquid foods ⁽⁴⁾;

and

- (b) the corresponding market for packaging cartons;
- (c) the distinct but neighbouring market for machinery enabling fresh liquid foods to be packaged in cartons;
- and likewise,
- (d) the corresponding market for packaging cartons;

For the sake of convenience, markets (a) and (b) will hereinafter be referred to as the 'aseptic sector' and the latter markets (c) and (d) as the 'non-aseptic sector'.

- (12) The structure of the aseptic sector in the Community is quasi-monopolistic, with Tetra Pak holding a market share of approximately 90 to 95 % ⁽⁵⁾ for both cartons and packaging machines.

Tetra Pak's only real competitor in the aseptic sector is PKL — controlled by a Swiss company, SIG (Société industrielle générale) — which accounts for almost all the remaining market share, i. e. approximately 5 to 10 %.

- (13) The structure of the non-aseptic sector in the Community is more open but is still oligopolistic. Here too, Tetra Pak is the market leader, currently holding some 50 to 55 % of the market.

In the non-aseptic sector, Tetra Pak's main rival is Elopak, which held, in 1985, some 27 % of the market, followed by PKL with around 11 % (1985) ⁽⁶⁾.

The rest of the market — approximately 12 % — was, at that time, to all intents and purposes divided, as far as cartons were concerned, between three other companies: Schouw Packing (Denmark, ± 7 % ⁽⁷⁾), Mono-Emballage/Scalpak (France/Netherlands, $\pm 2,5$ %) and Van Mierlo (Belgium, $\pm 0,5$ %). These companies, whose respective markets remain concentrated in one or more countries, manufacture their own cartons, but generally under licence (Ex-Cell-O, ⁽⁸⁾ Nimco, Sealright, etc.), and act only as distributors as far as machines are concerned.

⁽⁴⁾ Including some semi-liquid foods.

⁽⁵⁾ See Annex I.1 and I.2 for detailed data for 1985, the only year for which the Commission has data for Tetra Pak's smallest competitors.

⁽⁶⁾ Including Bowater PKL, a jointly-owned British subsidiary of PKL and Bowater, manufacturing under a licence from PKL.

⁽⁷⁾ Now half-owned by Elopak.

⁽⁸⁾ Now Elopak since the purchase by that company of the packaging machine division of Ex-Cell-O in 1987 (see recital (16) below).

⁽¹⁾ Sterilized milk now occupies only a relatively small market share.

⁽²⁾ Less than 10 % for milk and even less for most other liquids and semi-liquids.

⁽³⁾ See Tetra Pak I (BTG), recitals (29) to (41).

The 13 % or so of the non-aseptic machines market left in the Community, once Tetra Pak, Elopak and PKL had been accounted for, was shared between some ten producers, the main ones being Nimco (USA, 4 %), Cherry Burrell (USA, 2,5 %), and Shikoku (Japan, 1 %). In this connection, it is to be noted that Tetra Pak, Elopak and PKL operated, even if only occasionally, as distributors for these other producers.

Although access to the aseptic packaging sector is, mainly for technological reasons ⁽¹⁾, still difficult for a producer in the non-aseptic field — although many attempts at penetration have been made ⁽²⁾ — it would on the other hand be relatively easy for a producer from the aseptic sector to enter the non-aseptic sector for the packaging of fresh liquid foods.

4. Products

4.1 Cartons

- (14) Tetra Pak originally developed the continuous packaging process using (form-fill-seal) its Tetrahedron cartons (in the shape of a tetrahedron, as the name suggests) (1952), but this technology really took off with the use of brick cartons (1963). This originally non-aseptic packaging process has proved to be particularly well suited for aseptic packaging techniques, for which Tetra Pak developed its own technology during the sixties. The cartons are delivered to the user in the form of a roll (roll-fed), which is sterilized in the machine itself by being soaked in a hydrogen peroxide bath, and is then used to package the liquid as it flows in an aseptic environment. PKL also produces aseptic cartons of the brick type, so-called Combibloc cartons, but these are pre-shaped at the time of packaging.
- (15) On the non-aseptic carton market, Tetra Pak initially used brick cartons and continues to do so, but its main product on this market is now a gable-top carton known as the Rex carton. This carton is in direct competition with the Pure-Pak carton produced by Elopak. Mention must also be made of the presence on this market of PKL's non-aseptic Combibloc, Quadrobloc and Pergabloc cartons, with other producers' cartons holding only a marginal market share.

4.2 Machines

- (16) Tetra Pak manufactures its own machines for both the aseptic and non-aseptic markets. On the latter, however, it also occasionally sells Cherry Burrell and Nimco machines.

Although Elopak has been producing cartons for a long time, it was, until it purchased the packaging machine division of Ex-Cell-O in 1987, only a distributor of machines on the market, manufacturing only accessory equipment (handling equipment, etc.) itself. It should also be remembered that Elopak's operations are limited entirely to the non-aseptic sector.

With the exception of PKL, which manufactures its own machines and cartons for the aseptic and non-aseptic markets, other manufacturers hold a marginal share of the European market.

5. Manufacture and distribution of cartons

- (17) Packaging cartons are manufactured from a basic card, delivered in the form of a roll known as a board. The market for this product — which alone represents 60 to 70 % of the cost of cartons ⁽³⁾ — is itself oligopolistic, and the carton manufacturers obtain supplies from the same suppliers.

For the manufacture of gable-top and certain brick cartons (e.g. PKL's Combibloc), the rolls of board are printed with the customer's colours and text, and subsequently cut, pre-folded and partly glued by the manufacturer, to make what are known as blanks. These blanks are delivered to the customers (dairies or fruit juice producers etc.) where they take their final shape before being filled and sealed.

For the manufacture of Tetra Pak brick cartons, the rolls of board are only printed and cut into narrower rolls by the manufacturer, and it is not until the liquid is packed on the customer's premises that the rolls — possibly after having been soaked in a concentrated hydrogen peroxide bath to sterilize them — are folded in a continuous operation around the liquid and then cut, glued and folded into shape.

⁽¹⁾ But not exclusively: see recital (18) below.

⁽²⁾ See in particular Tetra Pak's written reply of 15 May 1987 to the Statement of objections in case Tetra Pak I (BTG), part II. See also recitals (71), (76) to (83), and (89) to (91) below.

⁽³⁾ All raw materials combined may account for as much as 80 % or so of these costs.

6. Entry barriers

- (18) For technological reasons⁽¹⁾ and because of the existence of a large number of patents and restrictive trade practices⁽²⁾, barriers to entry into the aseptic sector are very high. They are considerably less so in the non-aseptic sector, at least as far as the technological barriers are concerned⁽³⁾.

IV. Tetra Pak's trading policy

Methodological approach

- (19) In this section, consideration will be given to the various aspects of the trading policy implemented by Tetra Pak on the four aseptic and non-aseptic markets defined at point 11. For most of these aspects, the study will cover the Community as a whole, thus going beyond the geographical area to which Elopak's complaint relates (Italy). However, in certain cases the Commission has been required to concentrate more specifically on Tetra Pak's conduct in Italy, either because it has been necessary to examine certain aspects of Elopak's complaint more closely or because the results of the initial general study have directed the Commission's further enquiries towards Italy⁽⁴⁾.

1. Production and marketing of products

- (20) In the Community, Tetra Pak has a machine assembly plant in Italy and carton production units in Germany, France, the United Kingdom, Italy, the Netherlands, Portugal and Spain. Nowhere in the world has Tetra Pak granted any manufacturing licences for its machines. This also applies to its cartons, except in a few non-Community countries.

- (21) Throughout the Community, distribution of both cartons and machines to dairies or other end users is undertaken directly by companies within the

Tetra Pak group. There are no independent distributors⁽⁵⁾ and there is therefore no possibility of intra-brand competition.

- (22) Finally, Tetra Pak has pursued a particularly extensive patents policy. The group has not merely patented all the basic technology which it has developed in relation to machines, cartons and processes, but has also patented all modifications, however minor, made subsequently to these products, as well as certain secondary techniques (e. g. the method of folding the carton). As a result, although the basic technology for the aseptic brick cartons was developed in the 1960s and has remained basically the same ever since, the latest patents relating to these cartons expire in the early years of the next century. This is of course assuming that no new patents are registered which would extend protection even further. At present, Tetra Pak claims over 100 patents for cartons and a further 100 or more patents for machines.

2. Contractual conditions governing the sale and leasing of Tetra Pak equipment and cartons

- (23) Tetra Pak's conditions for the sale and leasing of packaging equipment and for the supply of cartons, as described below, have been extracted from standard contracts in force within the various Member States of the Community. In some countries, Tetra Pak will only lease equipment; in others, the user has the choice between buying or leasing⁽⁶⁾. There therefore exist standard purchase contracts and standard lease contracts for machines (including associated equipment and accessories) and standard supply contracts for cartons.

(1) The technology required to construct machines able to sterilize the cartons and to operate continuously in an aseptic environment is relatively complex and requires considerable expertise and experience.

(2) For practices involving in particular the sale of cartons and machines: see Chapter IV, section 2, below.

(3) For a detailed description of technological aspects and entry barriers, see Tetra Pak I (BTG), in particular recitals (9) to (25), (36), (38) and (44).

(4) In determining the penalties to be imposed, account will obviously be taken of the fact that analysis of some of Tetra Pak's practices has been limited to that country (see in particular recitals (180) to (183) below).

(5) With the exception of distributors working for Liquipak, recently taken over by Tetra Pak.

(6) The respective percentages for machine sales (S) and leasing operations (L) in 1986 were as follows:

Belgium:	[...]	(*)
Denmark:	[...]	
France:	[...]	
Germany:	[...]	[...]
Greece:	[...]	[...]
Ireland:	[...]	[...]
Italy:	[...]	[...]
Netherlands:	[...]	
Portugal:	[...]	
Spain:	[...]	
United Kingdom:	[...]	[...]

(*) In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

Although differences exist from one country to another in the wording of the standard contracts, the most important conditions relating to the group's policy are included in the majority of them. Mention will be made below of any clause which has implications for competition and which appears in one wording or another in any of the contracts. These clauses are identified by a roman numeral, and a summary table in the Annex (Annex II) indicates the articles in the standard national contracts to which these clauses refer.

Details of the content of these clauses are given in the statement of objections (pp. 14 to 26).

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

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

2.1.1. Equipment configuration

- (25) In Italy, Tetra Pak reserves an absolute right of control over the equipment configuration by prohibiting the buyer:
- (i) from adding accessories to the machine (Italy);
 - (ii) from making modifications to the machine, and adding or removing anything to or from it (Italy);
 - (iii) from moving the machine (Italy).

2.1.2. Operation and maintenance of equipment

- (26) There are five clauses concerning the operation and maintenance of equipment, which are intended to give Tetra Pak an exclusivity and a right of inspection in this area:
- (iv) it has an exclusive right to maintain and repair equipment (all countries except Spain);
 - (v) it has an exclusive right to supply spare parts (all countries except Spain);
 - (vi) it has the right to provide, free of charge, assistance, training, maintenance and updating services not requested by the client (Italy);

- (vii) there is a sliding scale for part of the charges made for assistance, maintenance and technical updating (with a possible discount of up to 40 % of the basic monthly charge) depending on the number of cartons used on all Tetra Pak machines of the same type (Italy);
- (viii) the purchaser is required to inform Tetra Pak of any improvements or modifications to the equipment and to grant Tetra Pak ownership of any resulting intellectual property right (Italy).

2.1.3. Cartons

- (27) There are four clauses relating to cartons which also give Tetra Pak an exclusive right of control over the product:
- (ix) the purchaser must use only Tetra Pak cartons on the machines (all countries);
 - (x) the purchaser must obtain supplies of cartons from Tetra Pak or a supplier designated by Tetra Pak (all countries);
 - (xi) the purchaser is required to inform Tetra Pak of any improvements or technical modifications made to the cartons and to grant Tetra Pak ownership of any resulting intellectual property rights (Italy);
 - (xii) Tetra Pak reserves the right to inspect the wording to be used on cartons (Italy).

2.1.4. Inspections

- (28) Two clauses are more specifically concerned with monitoring the purchaser's compliance with his contractual obligations:
- (xiii) the purchaser is required to submit a monthly report (Italy);
 - (xiv) Tetra Pak has the right to carry out inspections without notice (Italy).

2.1.5. Transfer of ownership or use of equipment

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

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

2.1.6. *Guarantee*

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

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

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

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

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

2.2.1. *Equipment configuration*

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

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

2.2.2. *Operation and maintenance of equipment*

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

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

2.2.3. *Cartons*

- (34) Contracts also contain clauses (ix) (all countries) and (x) (Italy) concerning the exclusive use of Tetra Pak

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

2.2.4. *Inspections*

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

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

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

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

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

2.2.6. *Guarantee*

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

2.2.7. *Fixing of rental and conditions of payment*

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

(a) (xxi) A 'base rental' payable at the time the machine is placed at the leaseholder's disposal. Its amount is not necessarily any lower than the selling price of the machines concerned and in fact makes up almost the total sum of present and future rental payments (more than 98 % in some cases) ⁽¹⁾;

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

(c) (xxii) a monthly production rental, the amount of which decreases according to the number of cartons used on all Tetra Pak machines of the same type. This component replaces the sliding scale of charges — set at a similar level — for part of the maintenance costs payable in the case of sale (see clause (vii));

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

2.2.8. *Term of the lease*

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

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

2.2.9. *Penalty clause*

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

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

(41) Standard supply contracts exist in Greece, Ireland, Italy, Spain and the United Kingdom: they are

compulsory whenever a client purchases rather than leases a machine.

2.3.1. *Exclusive supplies*

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

2.3.2. *Contract term*

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

2.3.3. *Fixing of prices* ⁽²⁾

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

2.3.4. *Wording*

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

3. *Trading policy in relation to the sale of cartons*

(46) A vital aspect of Elopak's complaint related to the prices charged by Tetra Pak for Rex cartons in Italy, these prices being considered predatory. Tetra Pak rejected this accusation, supplying in its defence a profitability study for this product relating to Italy in 1983.

The Commission has considered it necessary to widen the scope of its inquiry on this matter and, in order to have a better understanding of the policy pursued by the group, to carry out a complete analysis of 1. sales, 2. profitability and 3. prices of the various Tetra Pak products, over a number of years (1981 to 1984) and for all Community countries. This analysis — which is based on the

⁽¹⁾ See recital (59) below.

⁽²⁾ The question of prices actually charged is dealt with in the third section of this chapter. Here reference is made only to the way in which they are fixed.

operating accounts supplied by Tetra Pak — was dealt with in detail in the statement of objections ⁽¹⁾, and only the main conclusions reached are summarized here.

3.1. Carton sales and their profitability

3.1.1. Carton sales (*Annexes III.1 and III.2*)

(47) 1. Geographical breakdown of sales:

Three countries, each having almost equal shares, account for 70 % of sales of Tetra Pak cartons in the Community (1984) ⁽²⁾: Germany (24,8 %), France (23,5 %) and Italy (20,3 %). The United Kingdom is in fourth place, with a share approximately half as large as those three countries (12 %).

2. Breakdown of sales by type of carton:

The aseptic brick alone accounts for nearly 80 % of carton sales and more than 70 % of the group's total turnover. The Rex and non-aseptic brick account for only 11 and 7 % respectively of carton sales. The various other models (Tetrahedron, Tetra King, etc.) make up the remaining 2 % and are therefore of only marginal importance (1984).

3. Growth rate of products:

Over the period under review, the Rex carton is the product with the highest growth rate, and it is gradually supplanting the non-aseptic brick as the main carton for fresh products. Italy is becoming the principal producer of this type of carton.

3.1.2. Carton profitability (*Annexes III.3 to III.5*)

- (48) 1. The aseptic brick, which faces virtually no effective competition, is proving to be by far the most profitable product, with a net margin of [...] to [...] of turnover [...] to [...] in Italy, contributing in itself to [...] of the group's total profits in all countries represented and to more

than 100 % ⁽³⁾ in the United Kingdom throughout the period under review and, in 1983 to 1984, in France ⁽⁴⁾. Taking cartons in isolation, the contribution to profits of the aseptic brick varies from [...] to 102 % for all Member States represented, with the 100 % rate being reached or exceeded in Germany, Italy and the United Kingdom (114 %) in 1981, again in the United Kingdom in 1982, and in Belgium/Luxembourg in 1983.

2. The non-aseptic brick has a low but, with a few exceptions, still positive profitability (net margin of [...] to [...]).

3. The same cannot be said of the Rex carton, the profitability of which is frequently negative: this was the case in 1981 and 1982 in Italy, Germany, France and the United Kingdom, in 1983 in Belgium/Luxembourg, and in 1984 in Denmark, Belgium/Luxembourg and again in the United Kingdom. In 1981, profitability was negative overall (-11,2 %) in all the Member States considered. The figures also show that this phenomenon has been particularly apparent in Italy (net margin of -34,4 % in 1981).

3.1.3. Profitability of Rex cartons in Italy (*Annexes IV.1 to IV.5*)

- (49) This latter observation has led the Commission to examine the situation in Italy more thoroughly and to ask Tetra Pak to supply it with the necessary data for a calculation of the profitability of its products since the year in which Rex was introduced into that country (1976). An analysis of these figures has produced the following main findings:

1. the losses recorded on Rex cartons were not of an accidental nature: they extended over a period of seven years (1976 to 1982) and amounted to between -10 and -34 % of turnover (net profit margin);
2. these losses were so great that the selling price came nowhere near to covering even direct

⁽¹⁾ Statement of objections, pp. 27 to 39 and Annexes IV to VII.

⁽²⁾ Excluding Ireland, Greece, Spain and Portugal.

⁽³⁾ A rate of more than 100 % means that, overall, Tetra Pak's other products are loss-making and the aseptic brick subsidizes them.

⁽⁴⁾ Up to 154 % in France in 1982, and 160 % in the United Kingdom in 1984.

variable costs (with the gross margin⁽¹⁾ permanently⁽²⁾ and substantially negative: between -9,8 and -33 %) and even, in some years, covering no more than the cost of raw materials;

3. from 1976 to 1980, Tetra Pak (which did not produce its Rex cartons in Italy but imported them from group companies) resold these cartons on the Italian market at prices which were 10 to 34 % lower than their purchase price;
4. during the period under review, Tetra Pak sold its Rex cartons at prices which were considerably lower than those charged by Elopak for its rival Pure-Pak carton, and the difference in price between the two has been growing (up to 30 % and, at one time, as much as 50 %);
5. during this period, sales of Rex cartons progressed slowly at first, even stagnating to a certain extent (index 100 in 1976, 215 in 1977, 177 in 1978 and 259 in 1979), but then increased at an exceptional rate (index 6 353 in 1984), while Elopak saw sales of its Pure-Pak carton stop increasing and then begin to decrease (index 69 in 1986 against 100 in 1981), although there was a certain time-lag between these two developments.

Elopak's share of the Italian market⁽³⁾ in non-aseptic cartons, which increased from 9 % in 1977 to some 25 % in 1981, fell to 17,5 % in 1986, while that of Tetra Pak's other competitors fell from 12 to 6 %, and then to some 2 %. Conversely, Tetra Pak's market share, which had fallen from 79 to some 70 % between 1977 and 1981⁽⁴⁾, increased to 80,5 % by 1986, while that of Rex cartons taken in isolation increased from 2 to 7,5 % and then to 38,5 % respectively.

- (50) During an inspection visit on 27 and 28 January 1987 at Tetra Pak's premises in Italy, Commission

⁽¹⁾ Reminder:

- Net margin = margin over total costs (fixed and variable costs),
- Semi-gross margin = margin over direct and indirect variable costs,
- Gross margin = margin over direct variable costs,
- Direct (fixed or variable) costs are those which may be entirely attributed to a given product. Indirect costs are those which, being, on the contrary, common to several products, cannot be allocated to them other than by the use of rates which, invariably, involve a degree of arbitrariness.

- (2) Except in 1982, but even in that year the semi-gross margin was negative.

- (3) Sources: Tetra Pak for its actual sales; Elopak for its own and for the sales of third parties.

- (4) Tetra Pak contests this fall in market share.

officials collected documents dating from 1981 and relating to orders involving 420 000 one-litre Rex cartons, 235 000 two-litre Rex cartons, 253 000 quarter-litre Rex cartons and 102 500 quarter-litre Rex cartons imported from Sweden and resold at prices which were 24, 17, 29 and 23 % lower respectively than the purchase price. These documents therefore corroborate what has been established on the basis of accounting data.

- (51) Reports issued by the Board of Directors of Tetra Pak Italiana in 1979 and 1980 refer, moreover, to the need to make major financial sacrifices in the area of prices and supply terms in order to fight competition, in particular from Pure-Pak. The 1979 report indicates that 'sacrifices of an economic and financial nature involving considerable sums' are necessary, and the 1980 report that an attempt should be made to forestall competition 'even by means of special supply terms and prices'. This last sentence refers to the non-aseptic market.

3.2. Prices charged in different Member States

3.2.1. Average prices (Annex V.1)

- (52) Annex V.I gives a comparison of average prices (turnover/number of cartons sold) charged in the various Member States between 1981 and 1984 (figures given in ecus and indexed in relation to Italy) for the three main types of Tetra Pak carton: Rex, the non-aseptic brick and the aseptic brick. This table gives rise to the following observations:

1. there are considerable price disparities between Member States;
2. these are particularly great between Italy and the other Member States, easily reaching 50 % with a minimum of some 20 to 25 % (with a few exceptions);
3. these disparities are neither uniform nor one-way in all cases: from one country to another, they vary in size and sometimes in direction depending on the product concerned;
4. for all types of carton, however, Italy is the country in which prices are the lowest.

3.2.2. Price lists (Annexes V.2 and V.3)

- (53) In order for data relating to average prices to be fully comparable, the breakdown of turnover by cartons of different sizes and average quantities ordered would have to be the same for each country, which

is not the case. However, the differences observed are too great to be explained by such objective material differences. Furthermore, figures taken from the price lists⁽¹⁾ in the Commission's possession and given in Annexes V.2 and V.3 reveal, over longer periods of time (1978 to 1984) that disparities exist between Member States on a scale comparable to that reported for average prices, which confirms the assertions made at point 52 above.

4. *Trading policy in relation to the sale and lease of machines* ⁽²⁾

4.1. *Machine sales and leasing operations and their profitability*

4.1.1. *Machine sales and leasing operations (Annexes III.1 and III.2)*

(54) 1. *Geographical breakdown of sales/leasing operations:*

Four countries account for 88 % of turnover from machine sales and leasing operations: Germany (24,8 %), Italy (23,5 %), France (20,3 %) and the United Kingdom (19 %) (1984). These are the same principal markets as for cartons, although the turnover in the United Kingdom is much the same as in the other countries. This is a recent development, however. Up to 1981, machine sales and leasing operations in the United Kingdom (11 % of total turnover) were only a third of what they were in Germany and a half of the equivalent figures for France and Italy.

It is moreover in the United Kingdom that the contribution of machines to total turnover has grown to the highest level [...] against an average of [...] (1984).

(55) 2. *Growth rate:*

It can be seen in all countries, with the exception of the United Kingdom, that there is a fairly clear trend towards reducing the relative importance of machines in Tetra Pak's total turnover figures. Overall, it fell from [...] in 1981 to [...] in 1984, during which time the growth rate for machines was only 12 compared to 60 % for all Tetra Pak

products combined. Here again, the United Kingdom is an exception with a growth rate of [...] for machines, seven times greater than recorded in all countries examined.

4.1.2. *Machine profitability (Annexes III.3 to III.5)*

- (56) Over the period under review, the profitability of machine operations was positive overall, except in 1984 [...]. There is, moreover, a not insignificant number of exceptions. For example, machine operations in Germany showed a deficit in 1984 [...]. The same applied to the Netherlands in 1983 and 1984 [...] and [...], where receipts were considerably lower than direct variable costs in 1984 (gross profit margin of [...]). In France, one of the two Tetra Pak companies had a negative net margin in 1981, 1982 and 1984 [...], [...] and [...] and a negative gross margin in 1982 [...]. However, the United Kingdom differs from these other countries by showing constant and growing losses: there was a net margin of -0,1 %, -12,5 %, -20,2 % and -42,2 % over the period 1981 to 1984 and, according to Tetra Pak estimates,⁽³⁾ a semi-gross profit margin of -1,3, -8,1 and -28 % approximately over the period 1982 to 1984.

4.2. *Prices charged*

4.2.1. *Prices charged in the various Member States (Annexes VI.1 to VI.3)*

- (57) Annexes VI.1 and VI.3 show, respectively, the selling and leasing prices charged for in the main machines produced by Tetra Pak, i.e. Rex, aseptic brick and non-aseptic brick machines, for the years 1984 to 1986.

The figures supplied by Tetra Pak are not uniform since, as far as sales are concerned, the prices quoted for some countries are average prices whereas others are prices taken from price lists. Despite these shortcomings, the following conclusions may be drawn.

(a) *Selling prices of machines in the various Member States (Annex VI.1)*

- (58) 1. Major price differences exist between the Member States: in most cases they are around 50 %, rising to between 70 and 100 % in some cases.

⁽¹⁾ The figures taken from these lists are based on comparable calculations (same carton sizes and same quantities ordered).

⁽²⁾ For a detailed description see the statement of objections, pp. 34 to 54 and Annexes VIII to X.

⁽³⁾ Tetra Pak, 'Machine sales in the United Kingdom — supplementary memorandum', November 1989. Tetra Pak has not given any estimate of the gross margin.

2. As in the case of cartons, the country in which machine prices are clearly at their lowest is again Italy. Conversely, it is in Ireland that the highest prices are charged.
3. In the case of Italy, where prices are lowest, the figures submitted are for average prices, while for the other countries (except Greece) they are taken from price lists. It must be deduced that Tetra Pak grants considerable discounts on its standard list prices, and probably in more cases than have been indicated to the Commission⁽¹⁾. However, the price differences between Italy and the other countries are so great that they cannot reasonably be the result of price discounts alone.

(b) *Leasing prices of machines in the various Member States (Annex VI.2)*

1. *The three components of machine rental*

- (59) An analysis of contract terms has shown that machine rental is made up of three components: a base rental payable at the time the machine is installed, a quarterly rental and a monthly production rental calculated on a sliding scale according to the number of cartons used. Consequently, an exhaustive comparison of the leasing prices charged in the various Member States would, in principle; require account to be taken of all three rental components.

Monthly production rentals cannot of course be calculated in advance since they are determined on the basis of the number of cartons used, but they appear to be negligible compared to the base rental⁽²⁾.

With regard to the quarterly rental, it is possible to compare this with the base rental charge by adding together the quarterly charges payable during the entire term of the lease contract and adjusting them on the basis of a given interest rate. It will thus be seen that, although the volume varies according to country and machine concerned, it represents only a very small proportion (a few percent) of the base rental charge. For example, considering that the base rental for a Rex RC4 machine stood in 1986 (Germany) at ECU [...] and the

quarterly rental charge was ECU [...] it can be seen that the adjusted value of the sum of quarterly payments (at an interest rate of 8 %, which is representative for the medium-term ECU market in that year), amounted to ECU [...] for a lease period of three years, i.e. barely 1,52 % of the base rental.

It follows that a valid comparison of leasing prices can be made by comparing base rentals alone since these represent virtually all present and future rental payments. It also follows, since the leaseholder pays virtually the entire rental sum in advance, that the leasing of Tetra Pak machines must, from a financial point of view, be considered equivalent to a sale⁽³⁾.

2. *Leasing prices of machines*

(60)

An analysis of Annex VI.2 gives rise to the same general observations as those made for selling prices:

- the difference between leasing prices (base rentals) charged in the various Member States are considerable; indeed they are much greater (by up to 200, 300 or even 400 %) than those observed for selling prices;
- with a few exceptions, the countries in which the lowest leasing prices are charged (Belgium, Denmark) are those for which the figures supplied by Tetra Pak relate to average prices (as opposed to prices taken from price lists).

It should also be noted that, although the size and sometimes the direction of these differences between the Member States may vary from one type of machine to another, rentals are, overall, highest in France and then Germany.

(c) *Comparison of selling and leasing prices in the various Member States (Annex VI.3)*

(61)

The comparison made in Annex VI.3 between the prices charged in Member States in which Tetra Pak sells its machines and those in which it leases them also shows that in some countries the base rental is alone far higher than the selling price charged in other countries.

(1) Tetra Pak has advised the Commission of cases in which discounts of more than 15 % have been granted, but without indicating the amounts concerned.

(2) But not necessarily compared to the price of cartons.

(3) It will be seen below what conclusions should be drawn from this regarding certain of the obligations contained in leasing contracts (see in particular recitals (131), (135), (137) to (139) and (141)).

Solely by way of example, the base rental for a B8 machine in Germany in 1985 was more than double the average selling price for these machines in Italy during the same year. The former is no doubt a price taken from price lists and the latter an average price. But as we have seen, these disparities, whilst suggesting the existence of very large discounts, are so great that it cannot be assumed that discounts are the only explanation.

Furthermore, comparing only the prices taken from price lists (for countries where such lists exist), it can be seen that, although the disparities are smaller, it is not rare to find cases in which base rental charges are considerably higher than the selling prices indicated on such lists, with differences rising to 40 % or more in some cases.

4.2.2. Prices charged in Italy

- (62) One of the points raised in Elopak's complaint of 27 September 1983 related to the policy pursued by Tetra Pak in Italy in relation to selling and leasing prices for machines. Elopak complained in particular of the excessive discounts granted by Tetra Pak to win contracts, and considered that in some cases the size of these discounts could only amount to predatory prices.

Apart from comparing prices at Community level, the Commission has therefore conducted a more thorough analysis of the prices charged by Tetra Pak in Italy. In this context, it analysed the bulk of contracts (more than 200) placed by Tetra Pak with Italian dairies and then went on to examine more closely the conditions governing a number of sales and leasing operations in Italy.

4.2.2.1. Nominal prices and payment terms appearing in contracts

1. Payment terms

- (63) The standard terms for payment of the selling price or base rental, as revealed by an analysis of contracts, are as follows: one-third is payable upon signing the contract, one-third upon delivery of the machine, and one-third after complete installation of the machine. However, it appears upon reading the contracts that deviations from these standard provisions are numerous and varied. In view of the absence of a reference standard (average payment period in

usual cases), it is not possible to calculate the effect that these deviations have on the selling price or base rental. However, it must be considered *a priori* that it is generally very small since the differences relate in the majority of cases only to very short payment periods compared to the lifespan or lease period of machines. It will be seen in the following section, however, that more major deviations do not normally appear in contracts but are covered by counter-agreements, and that in these cases the conclusions to be drawn may be quite different.

2. Prices (Annex VI.4)

- (64) Annex VI.4 shows nominal selling and leasing prices, as obtained from an analysis of contracts. These prices have been broken down by machine type and arranged in chronological order for each of these types. Columns (A) and (B) give current values, columns (C) and (D) constant values, calculated in order to eliminate the bias of inflation from the comparison over time ⁽¹⁾.

(a) Chronological series at current prices

- (65) A glance at the chronological series at current prices (columns A and B) is enough to identify a number of anomalies. It is, for example, not rare for some sales or leasing operations to have occurred at prices considerably lower — often by 25 to 50 % — than those charged for other operations concluded either at about the same time or indeed much earlier. Only a few cases will be cited here.

Item 1, Rex RC6 machines: Sales 19 and 20 concluded in February 1983 at a price of Lit [...] each, against Lit [...] for sales 16 to 18 concluded at the end of 1982, i.e. a difference of over 30 %.

Item 9, AB/1000 machines: Sales 42 and 43 (January and March 1982) at prices of Lit [...] and [...] million, against Lit [...] million for sale 41 (November 1981), i.e. differences of 26 and 31 %. It can also be seen that sales 42 and 43 were concluded in 1982 at prices lower than those charged in 1981 and 1980 and the same in fact as in 1979, despite the

⁽¹⁾ Current prices have been reduced according to the price index for manufactured products in Italy (Source: Eurostat).

fact that the general price index for industrial products (referred to in footnote (1), page 13) rose during that period by more than 50 %.

Item 14, AB/500 machines: Sales 4 and 5 concluded at prices of Lit [...] and [...] million (September 1983 and November 1984), against Lit [...] million for sale 3 (February 1983), i.e. differences of 50 and 37 %. These prices are in fact lower than those charged in 1982.

A detailed analysis of Annex VI.4 even shows the existence of extreme differences. It is however possible that such cases relate, as Tetra Pak affirms, to second-hand machines, but there is no such indication in the contracts concerned.

(b) Chronological series at constant prices

(66) The chronological series at constant prices (columns C and D) allow comparisons to be made which are valid for the entire series. Analysing them gives rise to the following main conclusions:

1. the series confirms the existence of major differences, some of which were already apparent in the current-price chronological series, and of many cases in which rental charges are higher than selling prices;
2. the differences observed are spread across the entire period covered by these series and amount in the extreme to a doubling or trebling of prices, or even more;
3. finally, a more detailed analysis of these differences (calculation of standard deviations for the two price series) shows that they are greater for Rex machines — which face stiffer competition — than for brick machines.

Although the results obtained in this way must to a certain extent be considered approximate (1), the differences which

emerge are often too great to be attributed solely to the inaccuracies inherent in the method used.

(c) Conclusions

(67) Comparing the prices charged in the various Member States revealed in particular the existence of major differences between them and the frequent existence of base rental charges which in themselves are the same or higher than selling prices. A detailed analysis of Tetra Pak contracts in Italy shows that these same phenomena arise within one and the same Member State. Moreover, the very scale of these differences makes it likely that machines are being sold or leased at a loss in the case of the most disadvantageous transactions.

4.2.2.2. Analysis of a number of machine sales and leasing operations

(68) In order to complete the analysis of prices and payment terms included in the various contracts and to improve its understanding of actual sales and leasing operations, the Commission has carried out detailed investigations with a number of Italian dairies. It would be too long-winded to deal with each case individually in this Decision, and reference should therefore be made to the statement of objections (2). However, the main conclusions can be summarized as follows.

1. Real prices — which often emerge from counter-agreements drawn up alongside the contracts and which contradict their terms — are generally much lower than the nominal prices which appear in the contracts, with differences in some cases of perhaps 50 % or more. The means of reducing them vary considerably and are often used in conjunction with each other:
 - the buying-up of Tetra Pak's competitor's machines, with little or no residual value at extravagantly exaggerated prices (nearly equal to or even exceeding their original purchase prices),
 - trading in old Tetra Pak machines equally at exaggerated prices,
 - fictitious buying-up of old machines which are in fact left at the client's disposal,

(1) The general nature of the price index for industrial products cannot reflect precisely the more specific variations affecting the machines in question (machines intended for the packaging of liquid foods), and price deflation is applied arbitrarily on a yearly basis.

(2) See Annex 10 of the statement of objections. The factual aspects of the transactions described therein were not disputed by Tetra Pak during administrative proceedings before the Commission.

- payment by Tetra Pak of transport and installation costs,
- payment by Tetra Pak of high advertising costs,
- reductions — over and above those included under the contract — on carton prices (by fixing those prices for a given period),
- leasing of a machine being subsequently changed upon its purchase to availability free of charge.

However, the most frequent method of reduction or discount is the first one mentioned, i.e. the purchase of the client's old machines at inflated prices.

2. Moreover, actual payment terms are often more advantageous than those specified in the contract, thus reducing the real cost of the transaction. They take the form of payment periods which are considerably longer and on which no interest is payable. In certain cases, this free credit runs for one or several years and is accompanied by an exemption from repayment.
3. When it is remembered that the net profit margin on sales of machines in Italy is between 8 and 17 % and the gross margin between 16 and 24 % ⁽¹⁾, those operations for which discounts of up to 50 % or more (sometimes 75 %), compared to the prices indicated in the contracts, were granted could clearly be nothing other than sales at a loss.
4. Finally, the price paid by Tetra Pak to purchase its old machines (or those of its competitors) when selling or leasing new machines, bears no relation to the price fixed contractually (see clause (xv) by the group for the purpose of exercising its right of pre-emption (where the client wishes to resell his machine to a third party), the former being greatly above, and the latter possibly below, the going rate.

4.2.2.3. Reports of the Board of Directors ⁽²⁾

- (69) The reports issued by the board of directors of Tetra Pak Italiana in 1979 and 1980 referred generally to the need to make major financial sacrifices with regard to prices and conditions of supply in order to fight competition, in particular from Pure-Pak (see recital (52) above). Subsequent reports give details of such sacrifices as regards machines. The 1981,

1983 and 1985 reports refer to the application of special prices and/or payment terms which would considerably strengthen the company's position as a creditor with its clients. The 1985 report also explains that, where existing machines are replaced by machines of a new design, part of the costs are borne by the container manufacturer.

In the same year, the report by the board of directors of Tetra Pak Carta mentioned, moreover, that this sister company of Tetra Pak Italiana, a carton producer, had agreed to accept losses of Lit 728 million suffered by Tetra Pak Italiana with regard to the marketing of machines: 'Such an acceptance reflects the benefits we draw from the installation of Tetra Pak machines', the report explains.

The reports for 1986 from the boards of directors of these two companies contain similar remarks.

5. Other practices affecting competitors

- (70) During the inspection visit on 27 and 28 January 1987, the Commission collected a number of documents ⁽³⁾ regarding the various activities carried out or contemplated by this group to fight its rivals. These are described below for each of the competitors concerned.

5.1. Elopak/Pure-Pak

- (71) In a letter dated 17 January 1976, the Tetra Pak group congratulated Tetra Pak Italiana on its activities relating to the Resolvo, aseptic Pure-Pak, pasteurized Pure-Pak and Combiblok machines. This letter refers to a telex dated 7 January 1976 which, apparently, described these activities. The Tetra Pak representatives present during the inspection visit claimed that they were no longer in possession of this telex. With regard to Resolvo aseptic machines (developed by Buitoni), it will be seen below (recitals (76) to (83)) that Tetra Pak took various steps to prevent their distribution in Italy. As regards the Pure-Pak aseptic machines, it is only known that attempts made at the time to develop such machines were unsuccessful.

- (72) In a report dated 4 November 1978, an employee of Tetra Pak Italiana explained that he had been

⁽¹⁾ See Annexes VI.1 and VI.3.

⁽²⁾ See statement of objections, pp. 52 to 54.

⁽³⁾ Not including the documents referred to in recital (75).

instructed by the General Manager to 'carry out a survey amongst Pure-Pak's best customers' in order to 'examine specifically what the cost of taking over these customers would be'.

(73) A report by a Tetra Pak Italiana salesman dated 11 December 1981 advised of the withdrawal, as part of a sale, of four Selfpak/Resolvo machines, two Zupak machines and two Tetra Pak machines; of the undertaking obtained to stop using an Elopak machine and to return or at least refrain from using a Resolvo machine outside the premises (see also recital (79) below and Annex 10 of the statement of objections, dairy E).

(74) In a telex dated 30 November 1984, Tetra Pak informed Tetra Pak Italiana of the receipt by Elopak-Europe of four aseptic machines and asked for its help in identifying their final destination. It will be seen below (recitals (76) to (83)) that this kind of inquiry has in some cases been the first stage of a process aimed at eliminating these machines, generally by buying them up.

(75) On one of the points of Elopak's complaint of 27 September 1983 concerned Tetra Pak's appropriation of an advertising medium, the journal *Il Mondo del Latte*, by entering into an exclusive rights agreement. From correspondence exchanged on this subject at the time between Elopak representatives and the association which edited this journal, as well as from the replies given by this association to the Commission's requests for information, it emerges that Tetra Pak did indeed obtain, if not a written, at least an oral exclusive rights agreement covering a long period (at least for 1982) with regard to the journal *il Mondo del Latte*. During this period it was impossible for Elopak to advertise in that publication.

5.2. Poligrafico Buitoni/Resolvo

(76) At the beginning of the 1970s, the company Poligrafico Buitoni developed an aseptic packaging process called the Resolvo System. Subsequent research, carried out in collaboration with other companies, led to the Systempak system, the patent for which was bought from Buitoni by the International Paper Group in 1981. It emerges from what follows that Tetra Pak attempted by various means to prevent the distribution of this system in Italy and indeed managed to purchase all or virtually all the Resolvo machines installed in dairies.

(77) A report dated 30 October 1975 refers to the possibility of the sale at a reduced price of a Tetra Pak aseptic machine in order to persuade La Centrale Latte di Perugia not to purchase a Resolvo machine.

(78) See recital (71) above: letter of congratulations dated 17 January 1976 from Tetra Pak to Tetra Pak Italiana on its activities relating to the Resolvo aseptic machines.

(79) See recital (73) above: purchase of four Systempak/Resolvo machines and undertaking to return or no longer use another Resolvo machine outside the premises (report of 11 December 1981).

(80) In a telex dated 7 October 1981, Tetra Pak advised Tetra Pak Italiana of the supposed intention of International Paper to market the Resolvo process, which the latter had just bought from Buitoni, aggressively throughout the world. It therefore considered it strategically important to 'throw out all Resolvo machines in Italy' so as to deny International Paper any trade references in its respect. It consequently asked Tetra Pak Italiana to 'try to buy out the machine to prevent Resolvo from placing them in other dairies'.

(81) In a letter dated 4 December 1981, Tetra Pak Italiana informed Tetra Pak that it was doing its best to 'throw out Resolvo machines in Italy' but that it was experiencing major difficulties. It asked Tetra Pak to exert pressure on Kornas Marma, the supplier of paper to both Tetra Pak and Buitoni, to stop supplying Buitoni. It suggested that Tetra Pak could, for example, buy up the quantities normally supplied by Kornas Marma to Buitoni. The letter concluded that an intelligent approach could greatly contribute to placing Buitoni in great difficulties.

(82) In a letter dated 28 October 1982, Tetra Pak advised Tetra Pak Italiana that the commercial development of the Systempak/Resolvo process was not very 'flattering'. Since Portugal and Italy might in fact be the only references, it considered it 'vital' that Tetra Pak Italiana do its utmost to stop the development of these machines in Italy and 'substitute' them in order to give International Paper a 'crushing negative reference'.

(83) In a letter dated 19 September 1983, Tetra Pak Italiana announced to Tetra Pak that the Centrale Latte di Perugia had withdrawn its new Resolvo machine and purchased a Tetra Pak machine. This contract had 'cost a certain financial sacrifice' but it considered that this had been 'really worthwhile' since Buitoni had lost its only point of reference for the possible continuation of tests. The aim of removing all Resolvo machines from the Italian market, as defined in the telex from Tetra Pak dated 7 October 1981 (see recital (80)), appeared therefore to have been achieved.

5.3. PKL

- (84) Many documents confirm that PKL's development is closely monitored probably because it is now Tetra Pak's only real competitor in the field of aseptic packaging. But in view of PKL's low level of penetration in Italy, Tetra Pak's Italian subsidiaries have apparently experienced very few cases of direct or concrete competition from PKL.

- (85) Reference should however be made to the letter from Tetra Pak to Tetra Pak Italiana congratulating it on its activities concerning in particular the Combiblok (PKL's cartons): see recital (71) above.

- (86) On 7 November 1978, a Tetra Pak Italiana salesman reported on the offers submitted as part of an invitation to tender for the purchase of a machine by a public dairy where Tetra Pak had found itself in competition with PKL and IBP. Tetra Pak was prepared to reduce its price, but only within fairly tight limits (from Lit [...] to [...] million). However, the document shows that this salesman attempted to influence the committee responsible for awarding the contract.

5.4. ICA

- (87) In a telex dated 23 April 1982, Tetra Pak informed Tetra Pak Italiana that the company ICA of Bologna was attempting to develop a machine similar to Tetra Pak's aseptic machines and that it appeared to be seeking cooperation. The group concluded that it could not imagine that it would be 'in Tetra Pak's interests to seek collaboration', but that it would be of benefit 'to hinder resolutely any competition'.

5.5. Burgopak

- (88) In a letter dated 10 January 1983, Tetra Pak asked Tetra Pak Italiana to approach Burgopak to request that it increase its export prices to the Middle East in order to relieve the pressure on Tetra Pak, whose prices were 40 % higher than those of Burgopak. It concluded that it would be 'ridiculous to have some kind of price war, if neither party — except the customer! — gets an advantage'.

6. Takeover of rival companies

- (89) In 1970, Tetra Pak took over Selfpack, an Austrian manufacturer of packaging equipment. Selfpack had

also developed, in collaboration with Buitoni, a brick-type carton and an aseptic packaging system. Buitoni would later find inspiration in this system when developing its Resolvo system. Tetra Pak, having bought Selfpack, used the company's technology to improve its own sterilization technology. The group subsequently withdrew Selfpack products from the market. Selfpack's turnover at the time it was taken over by Tetra Pak was ÖS 1,4 billion (ECU 64,1 million).

- (90) In 1982, Tetra Pak took over Zupack, a German competitor, which also produced a carton similar to Tetra Pak's brick carton and had also developed or was developing an aseptic packaging process. After its takeover by Tetra Pak, Zupack ceased its operations in this field and its machines disappeared from the market. Zupack's turnover, according to Tetra Pak, was DM 2,6 million in 1981 (ECU 1,03 million).

- (91) In 1986, Tetra Pak took control of Liquipak, one of the main suppliers of its rival Elopak. Liquipak held a patent and exclusive know-how licence for a new aseptic packaging technique intended for gable-top cartons. This technology had been developed in collaboration with Elopak. By taking control in this way, Tetra Pak took over the licence and also became the supplier of its main competitor. At the time of its takeover by Tetra Pak, Liquipak's turnover was US\$ 9,9 million (ECU 10,1 million) (1986).

B. LEGAL ASSESSMENT

I. Article 86 of the Treaty

1. Relevant markets

1.1. Product market

- (92) Tetra Pak operates on the four markets of aseptic and non-aseptic machines and cartons, as described in paragraph (II) of this Decision.

- (93) The reasons which have led the Commission to adopt this definition of the relevant markets were explained in detail at points 29 to 39 of the abovementioned Tetra Pak I (BTG) Decision, to

which reference should be made ⁽¹⁾. It emerges from these explanations that, although types of packaging as diverse as glass bottles, plastic bottles, plastic bags, metal tins, aseptic cartons, non-aseptic cartons, etc., form part of what is commonly known in the broad sense of the term as the packaging market for the liquid foods, this is not the 'relevant market' within the meaning of Article 86, since these different types of packaging compete with each other only in the long term ⁽²⁾. In the short, and probably even the medium term, the conditions of supply and demand are such that the elasticity of substitution for products in relation to prices is almost zero.

At the level of demand, this low elasticity of substitution can be explained by the marginal share accounted for by packaging in the retail price of liquid foods ⁽³⁾ and by the fairly high stability of consumer preferences over a short period. At the level of supply, it can be traced essentially to the financial cost to the producer/packager of the investment involved in changing over from one type of packaging to another, the acquisition of technological know-how needed and the repercussions for marketing ⁽⁴⁾, particularly, for all these factors, in view of the very low substitution elasticity of demand.

In a given situation of technology and consumer preferences, therefore, it must be considered that the various types of packaging and associated equipment, often requiring their own technology, form distinct markets responding to their respective conditions of supply and demand.

- (94) The reason why the Commission considers that the analysis used to define a market should cover only a short period is that over a long period, during which technological progress may occur and consumer habits evolve, structures will change and the very boundaries between the various markets shift. A short period corresponds more to the economic

operative time during which a given company exercises its power on the market ⁽⁵⁾ and, consequently, on which one must concentrate in order to assess that power.

- (95) It is confusion about such operative times which has led Tetra Pak to take the view that there is one vast market taking in all existing forms of packaging for liquid foods, irrespective of the material from which they are made (glass, plastic, cardboard, etc.) ⁽⁶⁾. However, the replacement on the market of one type of packaging material by another is essentially the result of changes in consumer habits which, as Tetra Pak moreover acknowledges in its reply to the statement of objections, is clearly a long-term process. During a short period, however, it has been explained above that the possibility of substituting the various types of liquid-foods packaging for each other, given the nature of supply and demand for such products, is not non-existent but rather very small, which tallies well with the concepts enshrined in the case law of the Court, which in no case requires the total absence of substitutability for separate markets to exist ⁽⁷⁾.

- (96) The Commission does not deny that producers can to a certain extent hasten or delay the evolution of consumer habits through measures aimed at influencing the consumer in his choice of packaging but, as Tetra Pak again acknowledges ⁽⁸⁾, this is a 'costly' and 'long-term' process, 'which may extend over many years' and of which the outcome remains uncertain.

- (97) It does not therefore matter whether the packaging is one of the few costs that the producer/packager of the liquid can influence: in view of the inelasticity of

(1) It should however be pointed out that, although the Court of First Instance has passed judgment concerning Tetra Pak I (BTG) (Judgment of 10 July 1990 in Case T-51/89 — [1990] ECR p. II 347), it did not consider the question of the definition of the relevant markets nor that of Tetra Pak's position on those markets (see in particular points 12 and 13 of the said Judgment).

(2) In the economic sense of the terms.

(3) Some 10 % for milk, and even less for most other liquid foods. This implies that a significant change of 10 % in the price of packaging will have only a negligible impact of approximately 1 % on the selling price of milk and a generally more negligible impact still as regards other liquid foods.

(4) The need to change marketing policy, handling and storage processes, and even distribution system (changeover from packaging on which a deposit is payable to packaging on which no deposit is payable, or vice versa).

(5) Which does not mean that it cannot maintain any dominant position it may have and the resultant economic benefit if, for example, it overtakes its competitors in the area of technological progress or in anticipating changes to consumer preferences, or indeed by using its dominant position to maintain artificial barriers to the detriment of healthy competition.

(6) Written reply to the statement of objections, in particular paragraph 8.2. During the proceeding, Tetra Pak has shifted from one definition of the relevant market, similar to, but more restrictive than, that of the Commission, to this opposite definition. When the assessment of the case began, Tetra Pak took the view that, in view of the rigidity of supply, each type of carton (gable-top, non-aseptic brick, aseptic brick, etc.) formed a distinct market; see the 'Comments of Tetra Pak Italiana SpA on the complaint submitted by Elopak SRL', 12 March 1984.

(7) *United Brands v. Commission*, Judgment of 14 February 1978, Case 27/76 [1978] ECR 207; *Michelin v. Commission*, Judgment of 9 November 1983, Case 322/81 [1983] ECR 3461.

(8) Written reply to the statement of objections, sections 7.3.15. and 7.3.16.

final demand, the latter is not going to change his type of packaging because of variations in relative costs but rather according to the acceptability of his packaging to the consumer. Packaging does not constitute substitutable goods or factors of production whose more or less intensive use would be neutral in the eyes of the end consumer. Packaging is intended to end up in the hands of the consumer and in part determines his choice of the main product. There can be no elasticity of intermediate demand if there is no elasticity of final demand. It is final demand which governs the attitude of the producer/packager of liquids, and it is therefore at that level that the analysis should be carried out.

1.2. Geographical market

- (98) It was made clear in the Tetra Pak I (BTG) Decision that even though, for various reasons and in view particularly of the marginal nature of transport costs, demand conditions may differ from one Member State to another, the relevant geographical market covered the entire Community ⁽¹⁾.

2. Dominant position

- (99) The data supplied by Tetra Pak relating to market shares in 1985, given in Annexes I.1 and I.2, illustrate not only Tetra Pak's dominant and indeed almost monopolistic position on the aseptic markets, but also show that it is likewise in the leading position on the non-aseptic markets, with a market share which could be considered even on its own as demonstrating the existence of a dominant position (see recital (104)).
- (100) In 1985, Tetra Pak held 92 % of the Community Market for aseptic packing machines (Annex I.2) and 89 % of that for cartons (Annex I.1). In no Member State was its market share less than 57 % for machines or cartons (except perhaps in Ireland). Its share was 100 % in four countries as regards machines and in three countries as regards cartons. An analysis of the chronological data (for 1976, 1980, 1985 to 1987) shows, that Tetra Pak's dominant position, indeed virtual monopoly, on these markets already existed in 1976 (87 % of the carton market) and was subsequently strengthened slightly (with market shares fluctuating around 90 to 95 %). It should also be remembered that Tetra Pak

has only one competitor on these markets, PKL, with market shares of 5 to 10 % ⁽²⁾, and that the technological and other entry barriers are extremely high (at least, in the case of technological barriers, as far as machines are concerned) ⁽³⁾.

- (101) With regard to the non-aseptic markets, Tetra Pak held market shares of 48 % for cartons and 52 % for machines in 1985. In no country was its market share for machines less than 35 % or for cartons less than 30 % (except perhaps in Greece). The chronological data show that Tetra Pak held 43 % of the non-aseptic carton market in 1976, and 42 % of that market in 1980, the corresponding share for the non-aseptic machine market in 1980 being 37 %. The group therefore seems to have gained an extra 10 % of these markets in the first half of the 1980s and this advance seems to have continued (± 55 % of the market in 1987). It should also be borne in mind that Tetra Pak has only two main competitors on those markets, Elopak and PKL, with market shares of some 27 and 11 % respectively. Not only does Tetra Pak therefore occupy half or more of the non-aseptic market, but it also is 10 to 15 percentage points ahead of its two main rivals combined, the largest of which has about half Tetra Pak's market share and the other a share five times smaller.

Other factors further increase Tetra Pak's strength compared to its competitors on the non-aseptic market, in particular:

- Tetra Pak's virtual monopoly in the aseptic sector, which makes it almost the inevitable supplier for those companies — the large majority — producing both long-life, aseptically packaged, and fresh liquid foods ⁽⁴⁾,
- Tetra Pak's long experience in these two sectors, the fact that it was (besides PKL until the recent takeover of Ex-Cell-O by Elopak) the only integrated producer/distributor of machines and cartons,

⁽²⁾ See recitals (11) to (13) above.

⁽³⁾ See recitals (13) and (18) above.

⁽⁴⁾ On the basis of Tetra Pak's estimates, one must deduce that, in 1987, some 60 %, or nearly 60 %, of customers active in the non-aseptic sector were equally active in the aseptic sector. This again related to figures about the numbers of clients; figures for volume would show a much larger percentage since the larger number of big dairies of producers or bottlers of fruit juice are active in both sectors. (This appears to be confirmed, for all that confirmation is needed, by a recent Commission inquiry among 50 large Community dairies; the first results show a proportion of about 80 % of those dairies, active in the non-aseptic sector, operating also in the aseptic sector.) To this one must add that the dairies active only in the non-aseptic sector are above all those in the United Kingdom or Ireland, where there is very little consumption of UHT milk.

⁽¹⁾ See recitals (40) and (41) of the Commission Decision.

- the diversity of its products and geographical locations, which makes it less dependent on various fluctuations and allows it, if necessary, to make financial sacrifices on one or other of its products without affecting the overall profitability of its operations,
- on the same lines, Tetra Pak's ability to concentrate all its competitive efforts on the non-aseptic markets without fearing repercussions on the markets where it is practically the only producer and where very high entry barriers virtually prevent the emergence of potential competitors.

Even though it cannot therefore be considered that Tetra Pak enjoys a position on the non-aseptic markets which allows it to behave as independently as on the aseptic markets, it is certain that it is far less affected by market forces than any of its competitors. For the reasons outlined below (paragraph (104)), it is not however necessary to establish in the context of this proceeding whether the power on the market which gives Tetra Pak its position of leader on the non-aseptic markets should be considered equivalent to its directly occupying a dominant position within the meaning of Article 86.

- (102) It is also worth noting that if consideration is given to the entire market for the packaging in cartons of liquid foods, comprising the separate but neighbouring and associated ⁽¹⁾ markets for aseptic and non-aseptic packaging, Tetra Pak's 'market share' was 73 % in 1985 for both cartons and machines. A chronological analysis reveals a constant increase since, starting at some 60 to 65 % in 1976, its share rose to 65 to 70 % in 1980, 70 to 75 % in 1985 and to more than 75 % in 1987 (78 % for cartons).
- (103) Tetra Pak disputes that it holds any kind of dominant position, basing its defence of that assertion on its definition of the relevant market, i.e. all types of packaging (cartons, glass, plastic, etc.) for all liquid foods, a definition which obviously gives it a small market share of only 14 %.

It should first be noted that this definition leads to the inclusion in the same market of a whole range of forms of packaging which, simply from a technical point of view, are not substitutable. Tetra Pak includes, for example, all packages used for

carbonated liquids, a sector in which the market share of cartons is clearly zero since they are technically not suited to containing such liquids.

In any case, it has been demonstrated that the various types of packaging, even where they are technically substitutable, are not adequately substitutable from an economic point of view for them to be considered to form part of one and the same market ⁽²⁾.

The degree of interchangeability is perhaps greater within the carton packaging sector taken in isolation. But even if it is considered great enough to justify taking the large single market constituted by aseptic and non-aseptic cartons combined as the basis for assessing market shares, taking account too of the identity of the firms concerned, Tetra Pak would unquestionably still hold a dominant position since, as we have seen, its overall market share for cartons would be some 78 %, against some 10 to 11 % for Elopak, some 8 % for PKL and some 4 % for all other producers combined. Moreover, this dominant position would not exist solely for the packaging of milk — a product on which, in Tetra Pak's view, the Commission has placed too much emphasis in its analysis — but indeed for the three groups of liquids and semi-liquids for which virtually all (95 %) cartons are used: on the basis of figures supplied by Tetra Pak itself ⁽³⁾, it can be estimated that this group holds 80 % of the market for the packaging of milk in cartons (accounting on its own for 72 % of cartons used), 76 % as regards fruit juice (16 % of cartons used) and 56 % as regards dairy products other than milk (7 % of cartons used).

3. Abuses

Markets on which abuses have been committed and summary of the policy pursued by Tetra Pak in that context

(A) Markets

- (104) The Commission takes the view that Tetra Pak has committed abuses of its dominant position, within the meaning of Article 86 of the EEC Treaty, on both the aseptic markets and the non-aseptic machine and carton markets. Its position in each of these markets in 1985 may be summarized as follows:

- On the aseptic markets, Tetra Pak occupies a dominant position throughout the

⁽¹⁾ See paragraph (104) below.

⁽²⁾ See recital (93) above.

⁽³⁾ Written reply to the statement of objections, Chapter 6.

Community as regards both cartons and machines, accounting as it does for some 90 % or more of Community sales of both these products ⁽¹⁾. The abuses described in this decision, where they are or have been committed on the aseptic markets, are consequently caught by the prohibition laid down by Article 86 of the EEC Treaty,

- On the non-aseptic markets, on which the shares held by Tetra Pak are much smaller than those seen on the aseptic markets, i.e. 48 % for cartons and 52 % for machines in all Member States combined ⁽²⁾, the existence of a dominant position is less clear-cut if these markets are considered in isolation.

It should in any case be remembered that the Court of Justice has recognized market shares smaller than those in the case in hand as constituting a dominant position ⁽³⁾, and Tetra Pak's market shares on the non-aseptic markets in some Member States are such that there can be no doubt as to whether a dominant position exists even if these markets are considered in isolation.

However, the Commission takes the view that such an approach would be too restrictive in the case in hand because it is impossible to disregard the links which exist between the non-aseptic and the aseptic markets. This is because, far from being completely separate from each other, the four markets identified by the Commission, although remaining distinct, are adjacent to and indeed associated with each other. Unlike the link created by Tetra Pak between the machine and carton markets — a link which the Commission considers to be artificial and unjustified because it is formed by the contractual obligation to use on the machines supplied by Tetra Pak only the cartons manufactured by the group ⁽⁴⁾ — the association between the two aseptic markets, on the one hand, and the two non-aseptic markets, on the other, is real for the following reasons:

1. the key products which the cartons are used to package are the same on both the aseptic and non-aseptic markets, i.e. liquid milk products and fruit juices ⁽⁵⁾;
2. at the level of demand, the large majority of users ⁽⁶⁾ of the products offered by Tetra Pak in non-aseptic market are active also in the aseptic market;
3. at the level of supply, the conduct of the main carton producers confirms the link which exists between the two aseptic and two non-aseptic markets in that two of them are already present (albeit to quite different extents) on all four markets, i.e. Tetra Pak itself and PKL, whilst the third, Elopak, has been trying for a number of years to become established on them ⁽⁷⁾ ⁽⁸⁾. Moreover, some of the cartons on offer, e.g. the brick, may be used, and indeed are used, for both types of packaging (subject to adaptation of the materials of which they are made).

Under these circumstances, the Commission considers that the four markets, i.e. the two aseptic and two non-aseptic markets, are not only neighbouring but also associated to an extent that the abuses described in this decision are caught by Article 86 of the EEC Treaty even where they are or have been committed by Tetra Pak on the non-aseptic markets. This is the consequence of Tetra Pak's dominant position on the aseptic markets, combined with the association which exists between all four markets. There is therefore no need to demonstrate separately the existence of a dominant position held by Tetra Pak on the non-aseptic markets taken in isolation since the links between the four markets described above show that such a compartmentalized approach is unjustified ⁽⁹⁾.

⁽¹⁾ See recitals (12) and (100) above.

⁽²⁾ See recitals (13) and (101) above.

⁽³⁾ For example, *Hoffmann-La Roche v. Commission*, Judgment of 13 February 1979, Case 25/76, [1979] ECR 461 (point 50); in any event 'very large market shares are in themselves, in the absence of exceptional circumstances, proof of the existence of a dominant position. This is so where the market share amounts to 50 p.c.' Judgment of the Court of Justice of 3 July 1991 in Case C-62/86 *Akzo* (unpublished), at ground 60 (unofficial translation from the French) — in the Commission's view, no such exceptional circumstance is present in this case.

⁽⁴⁾ See recital (27) above and recitals (116) to (120) below.

⁽⁵⁾ 95 % of cartons sold in the Community in 1987 (aseptic and non-aseptic combined) were used for the following products: milk (72 %), other dairy products (7 %) and fruit juice (16 %). If one considers the sales of milk, about 60 % are affected in cartons (see recitals (6) and (7) above). On the basis of figures also provided by Tetra Pak in its written reply to the Statement of Objections (Chapter 6), one could estimate that about 90 % of Tetra Pak's sales (1987) involved liquid dairy products and fruit juices.

⁽⁶⁾ See footnote 4, p 19.

⁽⁷⁾ See recital (71) above and the Tetra Pak I (BTG) Decision.

⁽⁸⁾ It should also be remembered that regular attempts are made by other, smaller producers to penetrate the aseptic markets: see recital (13) above.

⁽⁹⁾ One can see an illustration of the connection between these markets in the figures produced by Elopak at the hearing; these show that the fall of its sales in Italy, following Tetra Pak's eliminatory practices in that country (see notably recitals (49) to (51) and (68) to (69) above and (147) to (153) and (161) below) is in fact, concentrated in those dairies, producing both fresh and UHT milk, which, in consequence, were already customers of Tetra Pak in the aseptic market.

The Commission would refer in this respect to the judgments of the Court of Justice in Joined Cases 6 and 7/73 *Instituto Chemioterapico Italiano and Commercial Solvents Corporation v. Commission* ⁽¹⁾ and in Case 311/84 *CBEM v. CLT* ⁽²⁾, and in particular to points 23 and 25 of the latter, in which, in the Commission's view, the Court recognized that the existence of a dominant position on a market may create the possibility of controlling the activities of competitors on a neighbouring market. Likewise, in the case in hand Tetra Pak has used the association which exists between the four markets in question to commit abuses on the non-aseptic markets, abuses which it could not have committed in the absence of its dominant position on the aseptic markets, whether they involve practices aimed at eliminating competitors or their products, predatory or discriminatory prices, or indeed the imposition on Tetra Pak product users of unfair contractual terms (see section (B), 'Summary', below).

It is therefore of little importance whether these abuses were committed on the market on which the undertaking holds a dominant position, on the neighbouring (and, in the case in hand, associated) market, or on both: as the Court has acknowledged. Article 86 of the EEC Treaty applies to cases in which the situation of dominance on the market allows abuses to be committed on the other. In the Commission's view, this analysis is confirmed by the judgment of the Court of Justice in Case C-62/86 *Akzo* (above), in particular at grounds 43 to 45, thus demonstrating the existence of the abuse (even assuming that Tetra Pak's dominant position on the non-aseptic markets were not established independently of its position on the aseptic markets); those grounds of the judgment dealt with the same problem as is found here, namely the commission of an abuse on a market other than that on which the undertaking undoubtedly had a dominant position.

(B) Summary

- (105) On the basis, therefore, of its dominant position, indeed virtual monopoly, in the aseptic markets, which, combined with its position of leader in

the non-aseptic markets, makes it the inevitable supplier for a majority of users, Tetra Pak managed to impose on those users certain contractual obligations aimed essentially at binding them to the group and preventing any trade in its products (see point 3.1). Using these contractual obligations to limit as far as possible any possibilities of inter-brand competition, and avoiding any intra-brand competition whatsoever by means of these contractual obligations and by its completely autonomous production and distribution policy (see point 3.4), the group succeeded in imposing a compartmentalization of national markets for its products within the Community which allowed it to practise a differentiated and discriminatory pricing policy for both cartons (see point 3.2) and machines (see point 3.3). All the conditions for an artificial restriction of competition are met, permitting it, in these sectors where its virtual monopoly is established (in the aseptic markets) ⁽³⁾, to pursue a policy of profit maximization (e.g. with regard to aseptic brick cartons) to the detriment of consumers: this enables it in turn to subsidize, in those sectors where competition still persists (essentially in the non-aseptic markets), an aggressive and indeed predatory price policy (e.g. Rex cartons, mainly in Italy) ⁽⁴⁾.

In order to protect or strengthen this position, it will be shown how Tetra Pak has taken care to develop, in support of its contractual policy of autonomous development, a policy of a wide defence of its intellectual property rights (see point 3.4). To the same end or in order to strengthen its position, it continues to use a wide variety of specific methods (see point 3.5), including, where applicable, taking over competitors (see point 3.6) ⁽⁵⁾.

⁽³⁾ See in particular recital (147) below.

⁽⁴⁾ See in particular recitals (147) to (153) below.

⁽⁵⁾ This summary of the strategy followed by Tetra Pak is given here solely for descriptive purposes. Although it is true that a company's strategy normally forms a coherent entity at an economic level, within which each individual policy underlies or complements the others, the assessment which must be made in the light of competition law is not uniform. This is because a distinction must be made between those policies which are legitimate (in this case the autonomous production and distribution policies and the policy pursued with regard to intellectual property) and those which are not. Only the latter will give rise to sanctions pursuant to this Decision, although it must be stated that the former have made it possible or easier to put some of the abuses denounced herein into effect.

⁽¹⁾ 'Zoja Judgment' of 6 March 1974, [1974] ECR 223.

⁽²⁾ 'Télémarting' Judgment of 3 October 1985, [1985] ECR 3261.

3.1 Contractual conditions governing the sale and leasing of Tetra Pak equipment and cartons (*recitals (23) to (45)*)

(106) The abuses referred to below flowing from the conditions governing the sale and leasing of Tetra Pak equipment and the sale of its cartons concern both the aseptic and non-aseptic markets. They have been committed either in all the Member States or in only some of them, depending on the contractual clauses applicable (see recitals (23) to (45) above). As stated above (see recital (104)), most of these clauses are intended to bind the customer to the group to the maximum extent possible and to eliminate any possibility of trade in the goods which have been supplied to it. For this purpose, a number of obligations are imposed on the customer which have no link with the purpose of the contracts, and that some of these obligations distort the very nature of those contracts, be they for the purchase or leasing of machines ⁽¹⁾.

3.1.1. *Conditions governing the sale of Tetra Pak equipment (recitals (24) to (30))*

1. Equipment configuration

- (i) Prohibition from adding accessory equipment to the machine
- (ii) Prohibition from modifying the machine, from adding or removing parts
- (iii) Prohibition from moving the machine

(107) These clauses could certainly have the effect of limiting production or technical development to the detriment of the consumer.

Moreover, they constitute additional obligations which have no connection with the purpose of the contract and which deprive the purchaser of certain aspects of his property rights.

Combined with the many other contractual obligations aimed at binding the purchaser to the seller, they have the effect of making the customer totally dependent on Tetra Pak's equipment and services.

2. Equipment operation and maintenance

- (iv) Exclusive maintenance and repair services

(108) This clause applies beyond the guarantee period for the entire life of equipment ⁽²⁾ and is therefore not justified by the contractual responsibility which the guarantee imposes on Tetra Pak.

Such a requirement that the customer obtain maintenance and repair services exclusively from Tetra Pak closes the door to any competitor on the maintenance and repair services market.

It also binds the customer completely to Tetra Pak, not allowing him any freedom to make his own choice — whatever it may be — and not even giving him, except in certain limited cases of small-scale maintenance specifically referred to, any possibility of having maintenance and repair services provided by his own technical staff.

Finally, it gives Tetra Pak an indirect means of control over the customer to ensure that he complies with various other contractual obligations (such as those relating to equipment configuration analysed in recital (107)).

(v) Exclusive supply of spare parts

(109) The above assessment concerning clause (iv) also applies to the clause guaranteeing Tetra Pak (or a supplier designated by Tetra Pak) the exclusive right to supply spare parts, which increases still further the customer's dependence on the group

(vi) The right to provide, free of charge, assistance, training, maintenance and technical updating services not requested by the client

(110) The fact that these services are free of charge cannot conceal the real purpose of the clause, which is again intended to create a close, permanent bond between Tetra Pak and the customer. If this were not the case, the clause would at least be of an optional nature, allowing the client to accept or refuse such services. Like clauses (iv), (xii), (xiii) and (xiv), it in fact gives Tetra Pak a further means of control by which to check that the purchaser is complying with his contractual obligations. This too must be considered an abuse since the client has no right to refuse the services offered by Tetra Pak even though he owns the machine.

⁽¹⁾ Some contractual obligations which would normally form part of a lease contract are also found in purchase contracts, and vice versa.

⁽²⁾ For the term of the contract in the case of leasing.

- (vii) The sliding scale of charges for assistance, maintenance and technical updating services depending on the number of cartons used
- (111) In its contracts, Tetra Pak presents this sliding scale of monthly fees as being a contribution to meeting the fixed costs associated with maintenance and assistance services, etc. If this is the case, there is no reason why this contribution has to be paid as a monthly fee rather than being included in the hourly service charge, as is usual practice, or collected in the form of a standard charge for each call-out. It must therefore be considered that the monthly payment of this charge is a means of persuading the customer to use Tetra Pak's maintenance services.
- (112) There is barely any more economic justification for making the scale of charges a sliding one depending on the number of cartons used. This must in fact be perceived as a means of encouraging the client to comply with his obligation to use and obtain supplies of packaging exclusively from Tetra Pak (clauses (ix) and (x))⁽¹⁾. This involves a system of reductions equivalent to the loyalty rebates denounced on several occasions in respect of undertakings in a dominant position by the Commission and the Court of Justice⁽²⁾.
- (113) If the charging of monthly sums is intended to ensure compliance with Tetra Pak's exclusive rights in the area of equipment maintenance, and the sliding scale to ensure compliance with its exclusive rights in the area of the supply of cartons, the possibility offered to the user of adding together the quantities of containers prepared on all the machines of the same type in its possession for the purpose of calculating the discount applicable is intended to encourage the customer to obtain his equipment exclusively from Tetra Pak.
- (114) Finally, the system provides Tetra Pak with information on the customer's production operations, which places it in a privileged position towards the customer compared to its competitors who are unable to impose a similar system.
- (viii) The obligation to advise Tetra Pak of any technical improvements or modifications
- made to equipment and to grant Tetra Pak ownership of the intellectual property rights to such improvements or modifications
- (115) This clause limits the purchaser's potential use of goods of which Tetra Pak has supposedly granted him full ownership. Not only does it have no connection with the purpose of the purchase contract, but also distorts its very nature. It also limits outlets and technical development by granting Tetra Pak sole ownership of the rights to any improvements made by the client. The fact that the purchaser is deprived of the right to use his invention as he wishes must also be considered unfair, even if compensation — the terms of which are undefined — is theoretically provided for.
- ### 3. Cartons
- (ix) The obligation that only Tetra Pak cartons be used on machines
- and
- (x) the obligation to obtain supplies exclusively from Tetra Pak
- (116) These two clauses are complementary and make the system airtight: not only is it not possible for the purchaser of a machine to use packaging other than that bearing the Tetra Pak mark, but moreover he may not obtain supplies of packaging from any source other than Tetra Pak itself (or a company designated by Tetra Pak)⁽³⁾. Once the equipment has been acquired, not only is inter-brand competition ruled out, but intra-brand competition too. These restrictions on intra-brand competition are particularly serious on the aseptic markets, where Tetra Pak has a virtual monopoly.
- (117) Such a system of tied sales, which again limits outlets and makes contracts subject to acceptance of conditions (the purchase of cartons) which have no connection with their purpose (the sale of machines), constitutes a serious infringement of Article 86 and a practice which has been denounced on many occasions by the Commission and the Court of Justice⁽⁴⁾. In

⁽¹⁾ In financial terms, this incentive may amount to a discount of several percent on the price of cartons.

⁽²⁾ *Suiker Unie and others v. Commission*, Joined Cases 40-48, 50, 54-56, 111, 113 and 114/73 [1975] ECR 1663; *Hoffmann-La Roche v. Commission*, op. cit.

⁽³⁾ It should be noted that as the Tetra Pak distribution system stands at present (i.e. no independent distributors), clause (x) is superfluous.

⁽⁴⁾ See in particular the abovementioned *Hoffmann-La Roche* Judgment; more recently the Commission Decision 88/138/EEC of 22 December 1987 concerning the Eurofix-Bauco/Hilti case, (OJ No L 65, 11. 3. 1998, p. 19); and the Judgment in Case C-62/86 *Akzo* (recital (104) above), at ground 149.

the case in hand, the restrictions on competition which it entails are further strengthened by Tetra Pak's integrated distribution system and patents policy (i.e. the patenting of the various minor technical characteristics of products or the slightest modification made to them)⁽¹⁾. It makes the carton market completely dependent on the equipment market and favours the charging of discriminatory prices or indeed loss-making operations on the latter market⁽²⁾. On the one hand, the fact that the sale of machines inevitably involves the sale of cartons as well will quite normally encourage the seller, where necessary, to make major concessions which will vary considerably depending on the weight of the partner in negotiations. On the other hand, the prospect of a guaranteed income from future carton sales — one which, as we have seen in the case of the brick carton, is particularly remunerative — will enable him readily to consider selling equipment at a loss, within the profitability threshold for machine sales and carton sales combined. The reverse, i.e. the subsidizing of carton sales by profits made on machine sales, is clearly possible too. Although constituting abuses in their own right, clauses (ix) and (x) may therefore potentially generate further abuses. They place competitors, and chiefly those which market only one or other of the products which are tied by Tetra Pak, and who cannot therefore, unlike Tetra Pak itself, subsidize possible losses on a given product through profits made on another product, in an extremely uncomfortable position.

- (118) The arguments put forward by Tetra Pak in defence of its system of tied sales have shifted in the course of the proceeding in the sense that emphasis has been switched in turn from one aspect to another. However, Tetra Pak's position may be summarized more or less as follows⁽³⁾.

Tetra Pak does not consider itself to be a supplier of packaging equipment and containers but rather of 'integrated distribution systems for liquid and semi-liquid foods intended for human consumption'. These systems comprise know-how, equipment, containers, servicing and training.

In addition to the economies of scale and cost savings at the level of raw materials and distribution which may result from stable relations with customers over a long period, the exclusive purchasing obligation is, in Tetra Pak's view, justified for technical reasons, considerations of product liability and health, and by the need to protect its reputation⁽⁴⁾.

At a technical level, Tetra Pak considers that the high technology of its machines demands the use of cartons specifically designed for them, which in turn requires a thorough knowledge of the machines and their peculiarities, of the products to be packaged, and of the possible interactions between those machines and products. The obligation to obtain supplies exclusively from Tetra Pak, by means of the link it establishes between the equipment and type of packaging, leads to synergistic effects at the level of research and development and after-sales service. There is therefore a 'natural link' between the machine and the type of packaging it uses, which justifies the exclusive supply obligation — a principle recognized in Article 3(c) of Commission Regulation (EEC) No 1984/83⁽⁵⁾ — and excludes — according to Tetra Pak — the possibility of an infringement of Article 86 of Treaty.

Tetra Pak takes the view that the system of tied sales also benefits the user if products are defective, since it enables Tetra Pak to offer the consumer a comprehensive performance guarantee and eliminates the difficult question of dividing responsibility between the supplier of machines and the supplier of containers (single source of responsibilities).

On the question of health, Tetra Pak considers that, in view of the specific interactions between the machines and the packaging intended for them, only the use of Tetra Pak cartons can prevent the emergence of public health problems which might prove extremely detrimental to the consumer, above all in the aseptic sector.

Finally, Tetra Pak believes that it has a legitimate interest, for the defence of its reputation and in view of the technical and public-health aspects

(1) See recital (22) above.

(2) See recitals (47) to (53) above.

(3) Position expressed in a letter to the Commission dated 12 March 1984, in its written reply to the Statement of Objections (section 11.2) and at the hearing.

(4) Tetra Pak likewise justifies the other exclusive rights clauses (maintenance, repairs, spare parts) and the clauses concerning equipment configuration with reference to considerations of the same type. The assessment made here also applies *mutatis mutandis* to these clauses.

(5) OJ No L 173, 30. 6. 1983, p. 5.

referred to above, in seeking to ensure that only packaging coming from its own sources is used on its machines.

Tetra Pak also refers to 'commercial usage' and the absence of effective competition for the cartons which may be used on Tetra Pak machines.

- (119) It is *a priori* very difficult to conceive of the existence between products having totally distinct physical characteristics and resulting from completely different production processes of 'natural links' which justify, directly or by analogy, an exemption based on Article 3 (c) of Regulation (EEC) No 1984/83 and rule out any possibility of an infringement of Article 86. There therefore remains only the hypothesis of functional, reciprocal and exclusive links relating to the use of machines and cartons in the packaging process. The Commission wonders why, if the claim that only Tetra Pak cartons may, for technical reasons, be used on Tetra Pak machines is true, this group sees the need to make such use the subject of a contractual obligation. If there is genuinely no technical alternative, such an obligation is unnecessary. However, if such an alternative does exist, the choice should be left to the user, and any obligation to purchase solely from an undertaking which is in a position such as that occupied by Tetra Pak should be prohibited.

Moreover, there is a degree of competition in the non-aseptic market, where there are, and always have been, manufacturers or distributors of cartons usable on different makes of machine; this fact alone contradicts Tetra Pak's thesis and invalidates its arguments. If such competition has not existed for cartons used on Tetra Pak's machines (aseptic or non-aseptic), the reason is to be found precisely in the tied-sales system and the patent policy pursued by Tetra Pak which, by denying all prospects of an outlet, discourage any potential producer or distributor.

But, by its very conduct, Tetra Pak itself contradicts its assertion that the technical and other reasons invoked imply that only cartons manufactured by the manufacturer of a given machine may be correctly used on that machine. This is because Tetra Pak sells, and indeed imposes on its clients, its own cartons for machines of other manufacturers — Cherry Burrell and Nimco — which have perhaps been adapted slightly but were certainly not designed for Tetra Pak cartons. Furthermore, since Tetra

Pak is not — as it has itself stated — an agent for these manufacturers but merely an occasional intermediary, it can only have a passive and superficial knowledge of this equipment, which moreover rules out in this case the synergistic effects referred to above.

In any case, if the 'synergies' which, according to Tetra Pak, result at an economic and technical level from the combination within one and the same undertaking of equipment and container sales operations are of benefit solely to the producer, and if real advantages exist for the user in an integrated supply system, they will be apparent without it being necessary to make recourse to contractual obligations: it is up to the user, and not the producer, to compare such advantages with those offered by open systems, and to make his choice freely ⁽¹⁾.

Moreover, the Commission is well aware of the technical and, perhaps, public-health problems which might result from packaging not meeting the particular specifications of Tetra Pak machines and the related problems of determining reciprocal responsibilities and protecting the good name of the undertakings in question. However, these are problems which arise with any production process which uses equipment and accessories of various origins, and which have repercussions for public health whenever products intended for human consumption or, more generally, products which may directly or indirectly affect public health are involved. For such problems, which are commonplace and familiar to users, there are adequate technical solutions (publication of standards and specifications to be complied with) and a legal framework (general legal liability) intended specifically to solve the problems which arise from the failure on the part of the parties concerned to implement these technical solutions. The proportionality rule excludes the use of restrictive practices where these are not indispensable. This rule is all the more vital in the case in hand since the restrictions of

⁽¹⁾ It emerges from a survey carried out by the Commission among the majority of dairies in Italy that, although a large number are satisfied with an integrated supply system of this nature, others would have preferred to have a free choice and enjoy the benefits of free competition, which they had been unable to do (replies to letters requesting information sent to virtually all Italian dairies in 1984 to 1985).

competition involved are particularly serious and are brought to bear on markets on which — even without them — competition is already extremely limited.

Finally, it is difficult to invoke commercial usage when, in the non-aseptic sector, this tied products clause is not the general rule and when, in the aseptic sector, there are only two producers. It is also odd to mention the absence of effective competition for cartons usable on Tetra Pak machines when operating a system of tied sales which specifically prevents the emergence of any competition.

- (120) Tetra Pak's particular attachment to the tied products ⁽¹⁾ clauses is due to the fact that, more than any other conventional tied sales practice, this system has proved to be one of the essential components of the group's trading policy. As we have seen, it enables competition to be limited to the sale (or leasing) of machines since such operations guarantee, through the application of clauses (ix) and (x), that Tetra Pak can sell cartons to the user during the entire life of machines or the term of the lease relating to them. Tetra Pak thereby limits competition to the area which is most favourable to it, i.e. that of machines, where the technological entry barriers are very high, especially on the aseptic market, where it enjoys a virtual monopoly. By the same token, these same contractual clauses prevent the emergence of any competition in the cartons sector, where the technological barriers are much lower.

Because of the income from the sale of cartons (accounting for [...] to more than 100 % of the group's profits over the period 1981 to 1984) which this system guarantees, it also makes it financially easier, as we have seen, to place Tetra Pak machines because it enables the group to sell at a loss if necessary, even to the extent of placing them at the disposal of dairies free of charge in some cases. It thus allows a trading policy to be pursued which no longer respects the economic reality of prices.

- (xi) The obligation to advise Tetra Pak of any technical improvements or modifications made to equipment and to grant Tetra Pak ownership of the intellectual property rights to such improvements or modifications: see the assessment given with regard to clause (viii) (recital 115).

- (xii) Right to inspect the wording to be used on cartons

- (121) Although Tetra Pak is justified in wishing to protect its brand name and associated rights, such protection can however be ensured by defining in advance the wording reserved for Tetra Pak to be printed on the cartons, and does not require the text which the client itself wishes to appear on the packaging to be approved and possibly amended each time by Tetra Pak. This obligation, which gives Tetra Pak a further means of controlling the client's trading policy, has no connection with the purpose of the contract.

4. Inspections

- (xiii) and (xiv) Monthly reports and right of inspection

- (122) The obligation to submit a monthly report detailing carton consumption, machine operation, etc., and Tetra Pak's right to carry out surprise inspections of equipment and packaging are further obligations which have no connection with the equipment sales contract. These clauses, which in themselves constitute abuses, are yet another means by which Tetra Pak can check the client's compliance with other requirements which also constitute abuses (e.g. clauses (i), (ii), (iii), (iv), (v), (vii), (viii), (ix), (x), (xi) and (xii)).

5. Transfer of ownership (or use) and transfer of other contractual rights and obligations

- (xv) Requirement that Tetra Pak's agreement be obtained for the resale (or transfer of use) of equipment (Italy), conditional resale and Tetra Pak's right of repurchase

- (123) The requirement that the purchaser obtain Tetra Pak's agreement before he can exercise his right to dispose of an asset in his property or even to transfer its use (Italy) not only has no connection with the purpose of the previously signed sales contract but also, in view of the effect it has on the very essence of the right of ownership, constitutes an unfair condition of the transaction. This is in addition to the fact that such a clause limits the client's outlets (in that, for example, he is forced to retain equipment which has become unsuitable for his production process or is unable to maximize the profitability

⁽¹⁾ Tetra Pak has defended its position in this respect at length in its written and oral replies.

of his investment by transferring its use) and/or those of Tetra Pak's competitors (since they find it impossible to place their own products).

(124) The contract admittedly states that, unless it exercises its own right of repurchase, Tetra Pak cannot ultimately oppose the transaction without an objective reason. The term 'objective reason' is not defined, however, and even assuming that Tetra Pak systematically authorizes resale (or transfer of use), the simple fact that it is necessary to ask and thus allow Tetra Pak to know of the user's intention to conduct such a transaction, and all the more so to know who will receive the equipment, constitutes an abuse.

(125) Doubts emerge, moreover, about whether Tetra Pak does indeed systematically authorize resale in Italy when one considers the conditions attached to such a transaction in Spain. These conditions prohibit export of the machine and forbid third parties which are potential purchasers from being offered conditions of resale which are more favourable than those which apply to Tetra Pak. Such conditions directly affect trade between the Member States and again limit the purchaser's outlets.

(126) Tetra Pak's automatic right of pre-emption must in itself be considered to constitute an abuse in so far as it again unduly limits the ability of the user, who does after all own the machine, to dispose of his asset as he wishes, and constitutes one of the instruments by which Tetra Pak is able to compartmentalize national markets.

An even greater abuse can be seen in the conditions under which Tetra Pak's right of pre-emption must be exercised, i.e. on the basis of a scale of charges fixed in advance in the sales contract (all countries except Spain), which prevents the customer from accepting better offers.

It must also be considered that the very level of the repurchase price may, in many cases, prove to constitute abuse. In view of what is known about the life of machines, the scale fixed by Tetra Pak appears in fact to underestimate the repurchase value (e.g. repurchase of a four-year-old machine at 5 % of its value). Moreover, the scale of charges represents only the maximum repurchase price payable (Greece, Ireland, United Kingdom), which will apply only if the equipment has been 'satisfactorily'

maintained. The level of charges is above all derisory compared to the prices applied by Tetra Pak, in Italy at least, to the repurchase of used machines when new machines are installed on clients premises ⁽¹⁾. It is therefore a deterrent intended to remove any interest in a transfer of Tetra Pak equipment not carried out as part of a fresh purchase from the group.

(127) Finally, Tetra Pak's right to impose a specific and disproportionate penalty (US\$ 100 000, an amount equivalent to between 20 and 80 % of the cost of a new machine, which may be added to the usual damages and interest) if this clause is not complied with by the purchaser (Greece, Ireland, United Kingdom) makes the system intended to prevent Tetra Pak equipment from being transferred without the group's knowledge completely airtight, and constitutes further abuse.

(xvi) Requirement to ensure that any third party purchasing equipment assume the obligations of the initial purchaser

(128) This clause, which aims in the case of resale to prevent breaches opening up in the Tetra Pak marketing system, also impinges on the purchaser's ownership of equipment and limits his outlets. This is true even if one disregards the fact that the abuse inherent in this clause may also stem from the fact that it obliges the initial purchaser to ensure that the third party accepts a series of obligations which themselves constitute abuse.

6. Guarantee

(xvii) The link between the guarantee and compliance with contractual obligations

(129) Although it might be acceptable to link the guarantee to compliance with certain rules relating to the seller's responsibility regarding the proper operation of the machine during its running-in period (maintenance, spare parts), the fact that the guarantee is subject to compliance with all obligations (Italy), most of which bear no relation to such operation, must be considered to constitute abuse, regardless of the fact that many of these obligations constitute abuses in their own right.

(1) See recital (68) above.

- (130) Further abuse can be seen in the clause linking the guarantee on the machine to the exclusive use of Tetra Pak cartons or those of a supplier designated by Tetra Pak (Greece, Ireland, Spain, United Kingdom) since this obligation has no connection with the purpose of the contract, relating as it does to a different product, and is in fact intended as an additional means of ensuring compliance with the clause — itself an abuse — under which the purchaser must use only Tetra Pak cartons.

3.1.2. Conditions for leasing Tetra Pak equipment (recitals (31) to (40))

1. Equipment configuration

- (i) to (iii) Prohibitions concerning the addition of accessories, modifications and moving of equipment

- (131) The clauses intended to ensure respect for the machine's integrity form part of the attributes of ownership and do not therefore in themselves constitute abuses within the meaning of Article 86 when they are imposed on a leaseholder by an undertaking in a dominant position. In the case in hand, however, any assessment of these clauses in relation to Article 86 must also take account of the clauses on rental payments, or else those concerning the term of the lease (Italy), which in fact make leasing equivalent in economic terms to sale. To this extent, Tetra Pak is guilty of abuse in maintaining ownership rights whilst, in economic terms, it must be considered that it relinquishes its property to the leaseholder because the latter must pay an amount not only equivalent to almost all present and future rental payments combined but moreover roughly the same as, and sometimes even higher than, selling prices⁽¹⁾.

- (xviii) Requirement that only Tetra Pak transport cases, outer packaging and/or containers be used, and that preference be given to Tetra Pak for supplies

- (132) A further clause in the lease contract requires the leaseholder to use only Tetra Pak transport cases, outer packaging and/or containers (or those authorized by Tetra Pak) or to give

preference to Tetra Pak, on equal terms, for the purposes of obtaining supplies. Such an exclusive supply obligation again has no connection with the purpose of the contract and also constitutes abuse within the meaning of Article 86, in the same way as the preference clause (English clause)⁽²⁾.

2. The operation and maintenance of equipment: clauses (iv), (v), (viii): see the assessment given in recitals (108), (109) and (115).

3. Cartons: clauses (ix), (x), (xi) and (xiii): see the assessment given in recitals (116) to (121)⁽³⁾.

4. Inspections: clauses (xiii) and (xiv): see the assessment given in recital (122).

- (xix) The requirement that Tetra Pak or an approved auditor be authorized to examine, in some cases without notice, the accounts, invoices, correspondence and other company documents

- (133) This supplementary obligation relating to inspections, which comes on top of those contained in sales contracts, must enable Tetra Pak to check the accuracy of data relating to carton consumption, which as we have seen, determines in part the amount of rental payable. An obligation of this nature constitutes an abuse since its purpose is to allow a check to be made of compliance with a practice which is itself an abuse.

- (134) The very methods of carrying out this check must also be considered to constitute an abuse in so far as they make available to Tetra Pak means of investigation which exceed those which are necessary to check carton consumption alone, and enable it to gain information about the client undertaking's financial situation and even, in some countries, its marketing policy and entire internal management. Having no connection with the purpose of the contract or even check itself, these methods further increase the user's dependence on Tetra Pak and give the latter a

⁽²⁾ Already denounced by the Court of Justice: see *Hoffmann-La Roche* Judgment, op cit.

⁽³⁾ NB, clause (x) is found only in Italian leases. Unlike the sales contracts, the other leases do not exclude necessarily the possibility of competing brands of cartons. However, as there are no independent distributors of Tetra Pak's product, this possibility remains academic.

⁽¹⁾ See in particular recitals (59), (61) and (66) above.

further advantage over its competitors by opening up not only the possibility of obtaining information on the customer which its competitors would not normally have, but also by giving it, where applicable, a better knowledge of its competitors' position with the customer, thus strengthening its ability to win the day in future commercial transactions.

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

(xx) Prohibition on transferring the lease, sub-leasing, transferring the use of the machine or carrying out commission work on behalf of third parties

- (135) It might be considered acceptable in a lease contract for the owner to prohibit the transfer of the lease, sub-leasing or indeed the transfer of use. It should again be remembered, however, that the base rental payable at the start of the contract is so high that the transaction must, from the point of view of the financial investment involved, be considered equivalent to a sale.

As a result, the leaseholder may not, without suffering heavy financial loss, terminate his lease contract with Tetra Pak before he has adequately written off this investment. It is in this respect that the prohibition on transferring the lease or sub-leasing the machine constitutes an abuse because again it unduly binds the client to Tetra Pak, in the same way as the prohibition on reselling equipment laid down in the sales contracts.

- (136) The prohibition on transferring the use of the machine and on carrying out commission work on behalf of third parties constitutes an even greater abuse since it has no connection with the purpose of the lease contract and again unduly limits the user's outlets. This clause rules out even indirect intra-brand competition.

6. Guarantee: clause (xvii): see the assessment given in recitals (129) and (130).

7. Fixing of rental and conditions of payment

(xxi) Charging of a base rental fee virtually equal to the selling price and amounting to almost the entire sum of present and future rental charges

- (137) The charging of this base rental completely distorts the nature of the lease contract since it requires the leaseholder to pay in advance, at the time the machine is placed at his disposal, almost the entire sum of present and future rental payments (up to more than 98 %). Such a

requirement makes the lease contract equivalent to a purchase contract in terms of the financial commitment required of the user, but does not confer ownership rights on that user. Conversely, the transaction gives Tetra Pak the benefit of sale by providing an equivalent and immediate financial return and guaranteeing that the transaction is virtually irrevocable: the financial loss to the leaseholder would be too great for him to consider terminating the lease before the end of the machine's useful life. In particular, this enables Tetra Pak to receive income from the system of tied sales of cartons throughout that life, but the group avoids having to transfer ownership of the machine.

- (138) The clause also discriminates against customers in those Member States in which only lease contracts exist as opposed to customers in other Member States who are able to escape the abuse which this financial condition represents by opting for a purchase contract.

(xxii) Sliding scale of monthly rental charges according to the number of cartons used

- (139) This clause in fact replaces clause (vii) (which no longer appears in lease contracts), and the legal assessment given in its respect is therefore also applicable here (see recitals (26), (38) and (111) to (114)).

8. Term of the lease

(xxiii) Term of the lease: minimum of three to nine years

- (140) This duration is in any case excessive and therefore constitutes a further abuse in the terms of Article 86. This is certainly true in the case of Italy, where the initial term of the lease (nine years), even without renewal, equals or exceeds the technological (up to obsolescence) if not physical life of machines: in that case, the clause again alters the very nature of the lease contract. But the minimum term of three years should also be considered to constitute an abuse in so far as, in a sector in which there is rapid technological development, it unduly binds the leaseholder to Tetra Pak, preventing him — instead of authorizing him, as the type of contract he has chosen should in principle do — to seize opportunities which may emerge on the market, and conversely makes it more difficult for Tetra Pak's rivals to penetrate the market.

- (141) It should be added that this minimum duration is quite theoretical: the base rental payable upon installation is, as we have seen, fixed by Tetra Pak at such a level as to encourage the leaseholder to write off the financial investment it represents over the longest possible period, and indeed to deter him, quite logically, from cancelling his contract before the end of the equipment's life ⁽¹⁾.

9. Penalty

- (xxiv) Tetra Pak's right to fix a penalty at its own discretion in the event of any contractual obligation being infringed

- (142) It is unacceptable for an undertaking to take advantage of its dominant position by unilaterally (this clause applies in one direction only) imposing large penalties (depending on the case, up to some 5 to 10 % of the base rental, or equivalent to approximately one year's rental payments) fixed at its own discretion according to its own assessment of the gravity of the infringement and, moreover, for any infringement of any contractual obligation. This constitutes an unfair trading condition within the meaning of Article 86, again imposed with the aim of enforcing compliance with obligations which often constitute abuses themselves. It is of little importance here whether the clause has or has not — as Tetra Pak affirms — been implemented, given the simple threat which its existence already holds over the user.

3.1.3. Conditions of supply of Tetra Pak cartons (recitals (41) to (45))

1. Exclusivity of supplies

- (xxv) Requirement that supplies be obtained exclusively from Tetra Pak
- (143) This obligation incorporates into the carton supply contract the exclusivity requirement already referred to in relation to equipment purchase contracts (clause (x)). The legal assessment given in that respect is therefore applicable ⁽²⁾. In the case of Italy, the obligation restricts competition even more and has even less

connection with the purpose of the contract than the exclusivity clauses which appear in the sales and lease contracts, since the purchaser must give an undertaking not only for the machine he has just bought but also for all other Tetra Pak machines he might buy in future.

2. Term of the contract

(xxvi) Term of the contract

- (144) The term of the exclusive supply contract for Tetra Pak cartons is, contractually or in actual fact (minimum term of nine years in Italy), linked to the period during which the machine remains in the purchaser's possession. This additional means of ensuring the airtight operation — even in the case of machine sale — of the tied-sales system, aimed at guaranteeing the permanence of income involved, must be considered to constitute an abuse.

3. Fixing of carton prices

(xxvii) Unilateral fixing of prices by Tetra Pak, without a contractual reference framework

- (145) The fact that, in a long-term supply contract, the system allows Tetra Pak to fix and amend prices unilaterally without being required to follow any indexing or adjustment system laid down by contract, even though Tetra Pak's dominant position places it to a large extent above the laws of the market in this respect, must be considered an unfair trading condition ⁽³⁾.

3.1.4. Conclusions

- (146) Beyond the specific assessment of the various contractual clauses, a number of more general points emerge from the above analysis.

1. It is barely conceivable that undertakings whose conduct is dictated by the laws of the market would be able to impose contractual clauses on their clients as restrictive as those outlined above. This confirms, if there is still a need to do so, the quasi-monopolistic power which Tetra Pak wields on the aseptic markets. The fact that Tetra Pak is able to impose these conditions as regards not only its aseptic but also its non-aseptic products also

⁽¹⁾ The terms imposed by Tetra Pak are such that they have given rise to a kind of vicious circle. The longer the term of the lease, the more it should be considered an abuse. The shorter this term on the other hand, the more it is the abuse constituted by, and the inequitable nature of, the base rental which is reinforced.

⁽²⁾ See recitals (116) *et seq.* above.

⁽³⁾ Such a system also makes it considerably easier to implement a price policy aimed at eliminating competitors.

illustrates the group's power on the market in this latter sector owing to the association — discussed above ⁽¹⁾ — which exists between the four markets in question. This is because, as we have seen ⁽²⁾, the majority of producers/packagegers operate on both of the neighbouring and associated aseptic and non-aseptic markets. On the latter, Tetra Pak has therefore managed, by dint of its position as the virtually inevitable supplier of aseptic products, to impose, via its clients common to both markets, the same restrictive contractual conditions on the non-aseptic markets too, which its competitors operating on only one of those markets are clearly unable to do.

2. An analysis also shows that the many obligations imposed on trading partners are geared, to varying degrees, to the same end and indeed form part of a strategy aimed, once machines have been sold or leased, at making the customer totally dependent on Tetra Pak for the entire life of the machine, thus ruling out any possibility of competition at the level of associated products (technical services, spare parts) and cartons.

3. Consequently, the only time when there is any possibility of genuine competition coming into play is at the time of sale of equipment, and not of cartons. Tetra Pak thus artificially limits competition to the area in which its position is strongest because equipment, in particular aseptic equipment, is the area in which its technological lead is greatest and entry barriers are at their highest. This is why Tetra Pak is so attached to the system of tied machine/carton sales. It enables it to secure virtually all its profits (some 95 %) in the form of income from cartons (as a result of their purchase being compulsory) as soon as the machine is placed with the customer. And as far as this latter operation is concerned, the advantage which Tetra Pak obtains from its technological lead may be complemented, if necessary to win an order, by selling or leasing the machine at a loss, which in any event will have only a very marginal effect on financial results.

4. In view, finally, of the market position of Tetra Pak and the independent distribution system it has set up, the restrictions of competition which stem from the abovementioned contractual clauses are sufficient to enable national markets to be compartmentalized within the Community.

3.2. Trading policy in relation to carton sales

3.2.1. Carton profitability (recitals (47) to (51))

- (147) Analysing the sales of Tetra Pak cartons and of their respective profitability has revealed that the aseptic brick, sheltered as it is from virtually any competition, was both the most sold and most profitable carton, alone accounting for [...] of the group's total profits in all Member States represented, and for [...] 102 % if cartons are taken in isolation. The breakdown by Member State shows that it is not rare for this contribution to profits, be they total profits or profits obtained from the sales of cartons alone, to exceed 100 %. This means in the former case that Tetra Pak's other products (non-aseptic cartons and machines) are loss-making overall ⁽³⁾ and that the aseptic brick subsidizes them. In the latter case, it (together with the generally small contribution of machines) subsidizes the non-aseptic cartons.

Conversely, the Rex carton, the one most exposed to competition, proved to be the least profitable form of packaging produced by Tetra Pak, with frequent sales at a loss in seven of the eight Community countries investigated: Italy, United Kingdom, Belgium/Luxembourg, Germany, France and Denmark.

For the reasons outlined in the statement of objections (p. 34), the Commission has not looked further into the question of carton profitability except as regards Italy. It has, however, gathered sufficiently clear and unequivocal data to be able to conclude that, in that country at least, sales at a loss were the result of a deliberate policy aimed at eliminating competition.

- (148) Indeed, it has emerged that Tetra Pak sold Rex cartons in Italy at considerably below cost price (-10 to -34 % depending on the year), and this over a significantly long period (seven consecutive years: 1976 to 1982).

Although it is difficult to conceive how behaviour so opposed to the logic of economic profitability on the part of an extremely efficient multinational company can possibly be the result of a simple management error, it should be examined whether exceptional circumstances independent of Tetra Pak's free will

⁽¹⁾ See recital (104) above.

⁽²⁾ See footnote 4, p. 19.

⁽³⁾ And that, without the aseptic brick, the group or some of its national subsidiaries would thus make losses.

have forced the group to make such losses on sales of this product. This hardly seems to be the case, however.

1. On the one hand, the beginning of the period under review does admittedly correspond to the launch of the Rex product on the Italian market. However, it is hardly plausible that teething troubles should be the sole reason for losses on such a large scale and over such a long period. This is all the more unrealistic when one considers that Tetra Pak had long been present — and in a dominant position — on the Italian market for brick-type cartons when the Rex was introduced, and already had at its disposal all the technical and commercial infrastructure it required ⁽¹⁾.

2. The hypothesis should also be dismissed that Tetra Pak was unable to increase its prices to the break-even point and was compelled by the existing competition on the market to sell Rex at below cost price. Throughout the period under review, Tetra Pak sold the Rex at prices significantly below the prices charged by Elopak for the Pure-Pak, and the difference between them only became greater, rising from a few percent in the period 1976 to 1978 to 30 % and more during the years 1980 to 1981 (50 % at one time), even though Tetra Pak's losses on the Rex carton were increasing. It is therefore impossible to imagine that this was a response by Tetra Pak to price pressure from Elopak.

(149) Further analysis also shows that, throughout the period under review, Tetra Pak sold its Rex cartons in Italy not only well below cost price — or their total average cost — but also below their average variable cost and even, except in 1982, their average direct variable cost (i.e. with an extremely negative net margin, semi-gross margin and gross margin respectively). This again confirms that Tetra Pak's conduct was opposed to any economic rationality other than as part of an eviction strategy.

In certain circumstances the pursuit of activities having inadequate profitability to cover all the costs involved may indeed be economically justified in the short term, provided income remains above variable

costs and the said activities contribute in part to covering fixed costs; but, on the contrary, any entrepreneur must normally give up any activities whose profits remain permanently inadequate to cover variable costs, let alone those which do not even cover direct variable costs.

This is precisely the opposite of what Tetra Pak did for a full seven years in Italy in selling its Rex cartons at prices considerably below their variable and indeed direct variable costs ⁽²⁾ (except in 1982), prices which in some years were too low to cover even the cost of raw materials and which, the cartons being imported, were 10 to 34 % lower than their purchase price (over a period of eight years this time).

(150) The sale of Rex cartons at considerably below cost price and indeed below their simple direct variable cost, the scale of the losses sustained with regard to this product, which moreover is in remarkable contrast to the profits made on the aseptic brick carton (+ [...]) for which Tetra Pak holds a virtual monopoly, the length of the period concerned, the differences in price between the Italian Rex carton and Rex cartons sold in other European countries ⁽³⁾, the abovementioned price differences between the Rex and the Pure-Pak (Elopak's rival carton) on the Italian market, Tetra Pak's need to launch a gable-top carton on that market to meet the breakthrough achieved by Elopak's Pure-Pak carton, which was better suited (as Tetra Pak itself admits) ⁽⁴⁾ to the needs of customers — or some of them — than the non-aseptic brick, the documents obtained during the inspection of Tetra Pak's premises in Italy and the reports of the Board of Directors all go to show the Tetra Pak deliberately

⁽¹⁾ Which, moreover, was in all probability not even accounted for at its actual price by Tetra Pak in Rex costs (fixed costs assessed at 0,1 to 0,2 of the cost price), and this could only have the effect of undervaluing costs and therefore losses.

⁽²⁾ Although differences do exist with regard to the definition of predatory prices, they essentially relate to situations different to that encountered here, i.e. in which the selling prices charged are between the average cost and the marginal cost. However, there can be hardly any disputing the predatory nature of prices deliberately fixed (with the aim of eliminating competition) below the marginal cost or, *a fortiori*, the marginal variable cost. Although it is difficult in practice to identify the marginal variable cost, it is known that, within the company's wide operating thresholds, this is equated with the direct variable cost referred to in this Decision; it will be remembered that the Court of Justice considered, at ground 71 of its judgment in Case C-62/86 *Akzo* (recital (104) above), that even prices below average variable costs were to be treated as an abuse if they were a means whereby a dominant undertaking attempted to eliminate a competitor.

⁽³⁾ The former being, let us remember, considerably below the latter: see recitals (52) and (53) above.

⁽⁴⁾ See in particular the written reply to the statement of objections, sections 12.4.32-33.

sold at a loss ⁽¹⁾ as part of a strategy of conquering or reconquering the Italian non-aseptic packaging market, on which the Pure-Pak had succeeded in acquiring a position which might prove dangerous. Owing to its dominant position on the aseptic packaging market, from which it drew virtually all its resources, Tetra Pak could afford to sell at prices which must be described as 'eliminary' in a sector which was of marginal importance to it, and the compartmentalization of national markets which it had established also allowed it to limit geographically its action and the resultant losses. This policy in fact cost the group very little: with losses of 34,4 % on the Rex carton in 1981 (the year in which they were at their highest), it saw its total profits in Italy fall by barely 3,7 %, because of the small volumes involved ⁽²⁾. In other words, if Tetra Pak had not made losses on sales of Rex cartons, its overall profit on sales would have been [...] instead of the [...] actually made. In these circumstances, Tetra Pak could — by virtue of its dominant position on the aseptic markets and the profits it makes there — have continued to pursue this policy until the total disappearance from the Italian market of Elopak — whose Pure-Pak carton is virtually its only product — without suffering major financial damage.

(151) Tetra Pak's strategy certainly paid off. The policy described above, combined with its machine sale and leasing policy and the contractual obligations it imposed on its clients (in particular tied sales) led, as seen above, to a rapid increase in Rex sales during the 1980s to the detriment of rival cartons. One of the consequences of Elopak's decline on the Italian market was to be the closing, before even it went into production, of a carton production plant which the group built in Pisa: as a result of its worsening market position, Elopak continues to this day to import the cartons it sells in Italy.

(152) Tetra Pak's fixing of Rex carton prices in Italy at a level intended to eliminate competition and to strengthen the group's position on the non-aseptic carton market, which resulted in major losses being incurred on this product from 1976 to 1982, must be considered to constitute an abuse within the meaning of Article 86.

(153) Tetra Pak first denied having sold Rex cartons at a loss and attempted to give other explanations for Elopak's difficulties on the Italian market. After the Commission's analysis had been carried out, Tetra Pak no longer disputed that these practices had taken place, but the justifications it gave in its written and oral replies to the statement of objections are considered implausible by the Commission, the main ones being: its claims that it followed Elopak's 'price leadership' (even though, as we have seen, Tetra Pak sold its cartons at prices considerably lower than Elopak's); that it wished for commercial reasons not to pass on the increased price of raw materials to its clients (which no producer selling at a loss does on a buoyant market); and that Rex prices were linked to those charged for the non-aseptic brick carton (even though the production costs of the former were considerably higher than those of the latter, and they were perceived differently by the consumer) ⁽³⁾.

3.2.2. Prices charged in different Member States (recitals (52) and (53))

(154) Tetra Pak's charging of selling prices for its cartons which vary considerably from one Member State to another is discriminatory and constitutes an abuse within the meaning of Article 86 of the EEC Treaty. It has been demonstrated that the relevant geographic market ⁽⁴⁾ in this case, bearing in mind that transport costs are negligible, is the Community as a whole. The price differences observed cannot be explained in economic terms. This is even more true when one considers that raw materials — the prices of which are determined on a world scale — account for more than 70 % ⁽⁵⁾ of the cost of cartons. These differences were made possible by the market compartmentalization policy which Tetra Pak managed artificially to maintain, thereby creating the right conditions for the success of policies such as a profit maximization policy, based on discrimination, or a policy of eliminary prices intended to preserve or strengthen a dominant position.

(155) Whilst taking the view that these differences result from historical factors and structural peculiarities (without expanding on this point however), Tetra Pak has announced its intention to pursue a policy — which it claims has already started — of harmonizing prices between the various Member States.

⁽¹⁾ Which is, moreover, no longer disputed by Tetra Pak, see recital (153) below.

⁽²⁾ See Annex IV.5.: -3,7 % contribution to the net margin.

⁽³⁾ See written reply to the statement of objections, sections 12.4.32-34.

⁽⁴⁾ See recital (98) above.

⁽⁵⁾ See recital (17) above.

3.3. Trading policy in relation to the sale and leasing of machines

3.3.1. Machine profitability (recitals (54) to (56) and (62) to (68))

(156) Although of relatively marginal importance in terms of turnover, as we have seen, the sale and leasing of machines are nevertheless crucial to Tetra Pak's commercial strategy. This is because, by dint of the system of tied sales which the group operates, they constitute the key which opens up access to the carton market.

(157) An analysis of data from Tetra Pak's analytical accounts for the years 1981 to 1984 has revealed that machine operations were loss-making in a not insignificant number of cases. Given the variations seen from one year to another, however, it does not seem that definitive conclusions can be drawn on the basis of these data alone, except in the case of the United Kingdom, where machine operations were consistently and increasingly loss-making over a period of at least four years. Receipts from the sale/leasing of machines come nowhere near covering the costs of those operations and, according to Tetra Pak's own estimates, they did not even cover variable costs in three of the four years. The permanence and scale of losses (-42 and -28 % for net and semi-gross margins respectively in 1984) can only be the result of a deliberate policy. This policy did produce results, however: the growth rate of sales/leasing operations in the United Kingdom was seven times greater than that recorded in the other countries during the period under review.

The additional information supplied by Tetra Pak⁽¹⁾ confirms the above conclusions. Whilst denying that it had any 'eliminator intention', Tetra Pak acknowledges that these loss-making sales/leasing operations were deliberate, resulting not from management errors but rather from intensive price competition. The fact pointed out by Tetra Pak that they occurred essentially on the non-aseptic machines market on which Tetra Pak does not hold a dominant position does not preclude application of Article 86 since, as we have seen, it is Tetra Pak's virtual monopoly on the aseptic markets which enables it to wage a price war on the neighbouring and associated non-aseptic markets which its competitors are not up to⁽²⁾ and, unlike

the latter, to sell at a loss over long periods without jeopardizing the overall profitability of its activities. It thus transpires that, throughout the period under review, the overall results of Tetra Pak's UK subsidiary were largely positive ([...] to [...] Annex III.3), even though virtually all its products recorded losses, with the exception of the aseptic brick, which subsidized these losses and indeed more than compensated for them (contribution to net margin varying between 109 and 160 %: Annex III.5).

Such practices, intended to eliminate competitors from certain markets by artificial means, constitute abuse under the terms of Article 86.

(158) Moreover, an analysis of a number of specific sales and leasing transactions in Italy reveals the existence of sizeable discounts granted on nominal selling or leasing prices. In some cases, these discounts are so large that the sales or leasing transactions in question must have made a loss.

This is also confirmed by a comparison of the data relating to these discounts and figures taken from the group's analytical accounts. The net margin for machine operations in Italy varies from 8 to 17 % of turnover, and the gross margin from 16 to 24 % (1981 to 1984). Any discount significantly above these percentages in principle⁽³⁾ gives rise to loss-making sales/leasing transactions in the former case (discounts above the net margin), and in the latter case to losses which are so great that the selling/leasing price does not even cover direct variable costs (discount above the gross margin). Analysing specific transactions in Italy has shown that discounts of the order of 50 % and even more (up to 75 % in one case) on the selling/leasing price were not rare.

The context within which these loss-making sales/leasing transactions occurred⁽⁴⁾ — i.e. in specific cases where it was necessary to win prospective contracts or win back contracts already acquired by competitors — shows that these sales at 'eliminator' prices were deliberate.

The incentive to pursue such practices could only be considerably reinforced by the system of tied sales

(1) Tetra Pak *Machine Sales in the United Kingdom — Supplementary Memorandum*, November 1989.

(2) Chiefly those which are not present on the non-aseptic markets; this is the same situation as the one which the Court held to be an abuse in Case C-62/86 *Akzo* (recital (104) above) — see in particular grounds 42 and 43.

(3) There is of course a certain margin of approximation since the accounting figures indicate results for all types of machines combined.

(4) See in particular Annex 10 of the statement of objections. The Court's Judgment in Case C-62/86 *Akzo* (see recital (104) above) fully confirms that practices of this kind contravene Article 86 — see in particular grounds 108 and 109.

which, once a machine has been placed with a client, offers a guaranteed income from the sale of cartons for practically the entire life of the machine, and thereby eliminates any possibility of competition on the carton market.

- (159) When one considers in this respect that, as in Italy, the contractual clauses in the other Member States are such that once one of its machines has been sold or leased out, Tetra Pak is guaranteed a virtually permanent income from carton sales, and when one realizes that in some countries the overall profitability of machine operations is itself negative — although it remains positive in Italy despite the loss-making sales observed there — it seems unlikely that these same targeted practices of selling at a loss and eliminatory commercial transactions are limited to that country. Given the scale and permanence of losses from machine transactions in the United Kingdom observed above and the explanations provided on this subject by Tetra Pak, it must even be concluded that these practices must have been almost systematic in that country too ⁽¹⁾.

3.3.2. *Prices charged in the various Member States (recitals (57) to (61))*

- (160) Tetra Pak's business conduct with regard to the fixing of machine prices contravenes Article 86 in several respects.

1. The major price differences for Tetra Pak machines observed between the Member States are not the result of objective economic factors. Even more than in the case of cartons, the transport costs of machines are quite negligible in relation to the market value of the product, and the facts adequately show that the market has a Community dimension (all producers sell in all Member States). These price differences can be explained only by the system of national market compartmentalization made possible by Tetra Pak's dominant position in the aseptic sector combined with its leading position in the non-aseptic sector.
2. The fact that virtually all the rental for machines must be paid in advance, at the time they are placed at the client's disposal, distorts the very

nature of the lease contract and unduly binds the lessee to Tetra Pak not only for machines but also, indirectly via the system of tied sales, for cartons. It places lessee and purchaser on the same footing as regards the financial burden involved, but does not grant them the same benefits.

3. The fact that the base rental is distinctly higher in some countries than the selling price charged in other countries also gives rise to discrimination between users in different Member States, for the same reason as those indicated in the preceding paragraph.
4. The granting by an undertaking in a dominant position of large discounts determined not by the size of the order but by the desire to eliminate competitors from certain markets also constitutes an infringement of Article 86. It is all the more serious in cases where those discounts are so large that the sale makes a loss.

3.3.3. *The prices charged and payment terms applied in Italy (recitals (62) to (68))*

- (161) Analysis of Italian contracts, and above all the detailed analysis of a number of transactions in that country, which has shown that actual selling/leasing conditions and prices for machines might be totally different to the nominal terms contained in the contracts, has confirmed the existence within one and the same country of discriminatory and eliminatory practices which had already been shown to exist at the level of the various Member States by the analysis of prices:

1. selling or leasing prices and conditions which discriminate between customers with the object of obtaining certain contracts and eliminating competition;
2. sale or leasing at a loss with the same aim;
3. leasing prices which are virtually the same as selling prices;
4. total disparity between the scale of charges laid down for the purposes of Tetra Pak's pre-emptive right of repurchase and the repurchase prices paid for its old machines to obtain new contracts.

These practices likewise constitute abuses pursuant to Article 86.

3.4. *Production and marketing of products (recitals (20) to (22))*

- (162) Tetra Pak has pursued a strategy of almost exclusively autonomous development, granting no

⁽¹⁾ The alternative, i.e. that there was a limited but still considerable number of loss-making sales/leasing transactions, seems less likely, but would equally constitute an abuse within the meaning of Article 86.

manufacturing licences for its machines or cartons (with a few exceptions outside the Community in the case of the latter) and in all cases distributing its products via its subsidiaries' networks (or companies appointed by the group). As a result, there is no possibility at present of intra-brand competition, and the compartmentalization of national markets is total. The absence of intra-brand competition is particularly harmful in the aseptic sector, where Tetra Pak holds a virtual monopoly.

- (163) In addition, the terms of its contracts — in particular relating to the tied sale of machines and cartons, which also rules out any possibility of intra-brand competition for the latter product once the user has decided to install Tetra Pak equipment — enable Tetra Pak to make the system completely airtight. Taking account further of Tetra Pak's patents policy with regard to cartons, the system appears to be almost hermetically sealed in that respect too, even if one rules out the hypothesis that the real aim has in some cases been to eliminate competition rather than to protect inventions. Thus, it is quite obvious that the continual registering of patents for even the most minor alterations has indirectly extended, and continues to extend, the initial period of protection granted to the brick cartons. Consequently, it is perhaps illusory to take the view that sufficient competition could be stimulated on the cartons market simply by eliminating the system of tied sales.

- (164) To the extent that these strategies, legitimate in themselves, are pursued in conjunction with a system of contractual obligations which bind the customer to an undertaking in a dominant position with regard to its various products, they may give rise to practices leading to restrictions of competition, e.g. prevention of inter-brand and intra-brand competition and a compartmentalization of national markets for the products of the undertaking in question, with the effect that these practices strengthen the undertaking's dominant position still further and may thus constitute abuses pursuant to Article 86. Without therefore condemning these practices in themselves, the Commission is duty bound to ensure that they do not lead to the emergence of such practices.

3.5. Other practices affecting competitors (recitals (70) to (88))

- (165) It is clear from the documents obtained during the inspection visit on 27 and 28 January 1987 and the documents submitted by Elopak that Tetra Pak has not hesitated, at least in Italy from 1975 to 1984, to

consider using and/or actually to use the most diverse means of obstructing competition: the buying up of competitor's machines, despite the various financial sacrifices involved, in order to eliminate them from the market or to deprive them of trade references; the approaching of clients in order to obtain undertakings from them that they will no longer use certain rival machines; monopolization of specialist advertising media; pressure on common suppliers to cut off supplies to competitors; attempts to influence members of committees responsible for placing contracts for public dairies. The practices which are considered in this Decision to constitute abuses are those whose effective implementation is proven: the buying up of competitors' machines and the obtaining of undertakings to cease using them (recitals (73), (79) and (83)), the monopolization of advertising media (recital (75)) and the elimination from Italy of virtually all Resolvo machines, which were a major potential danger on the aseptic markets (recitals (76), and (79) to (83)), have been shown to have occurred. They must be considered abusive in the terms of Article 86 in so far as they were intended to strengthen an already dominant position on the aseptic markets and/or as a means of using that position to eliminate competitors on the non-aseptic markets. It will be recalled that the Court of Justice has upheld the Commission's view that it was an abuse for a dominant undertaking, as part of a strategy for eliminating a competitor, merely to collect information from the latter's customers about the prices it was offering them — see ground 148 of the Judgment in Case C-62/86 *Akzo* (recital (104) above). This is true *a fortiori* of exclusionary practices like those just described.

3.6. Takeover of competing companies (recitals (86) and (88))

- (166) It is clear that the takeovers of Selfpak, Zupak and Liquipak formed part of the same strategy as was pursued in the abovementioned Resolvo case. All of them involved the elimination of competitors which, even if some were only modest in size, might in the long term have proved dangerous because they had developed or were seeking to develop packaging systems which might jeopardize Tetra Pak's monopoly in the aseptic sector. In the first case, Tetra Pak eliminated Resolvo machines from the Italian market by purchasing them from the dairies to which they had been sold; in the other cases, Tetra Pak bought up the competitors themselves, thus appropriating their competing or potentially competing technologies.

- (167) In this context, the Liquipak takeover was the most urgent. The sterilization technology which Liquipak was developing with Elopak, under a BTG exclusive

licence, was openly targeted towards gable-top cartons, which the consumer finds more practical than brick-type cartons. Such a prospect, if it had materialized, might have been particularly dangerous since Tetra Pak's sterilization technology was suited only to brick cartons. To keep its virtual monopoly, Tetra Pak therefore had to acquire that technology, directly or indirectly and, moreover, exclusively, in order either to exploit it or simply, as in the other two cases referred to above, to prevent the competition from exploiting it. It was to prevent this long-term abuse that the Commission adopted its Decision in the Tetra Pak I (BTG) case.

4. *Effects on trade between Member States*

- (168) Through the combined effect of its production and marketing system and the terms of the sales/lease contracts which it has managed to impose on users by dint of its dominant position, Tetra Pak has succeeded in maintaining a veritable compartmentalization of the national markets within the Community, thereby preventing any trade in its products between one Member State and another and enabling the group to pursue a policy of discriminatory, indeed sometimes eliminatory, prices ⁽¹⁾.

These price policies, combined with the restrictive clauses of its contracts and with other specific practices, affect the entire structure of supply within the Community and allow Tetra Pak to eliminate its competitors from various markets which would be open to them if these artificial barriers had not been erected.

5. *Conclusions*

- (169) The Commission takes the view that, by taking advantage of its dominant and virtually monopolistic position on the so-called aseptic markets in machines and cartons intended for the packaging of liquid foodstuffs, Tetra Pak has committed and continues to commit abuses within the meaning of Article 86, both on these aseptic markets and on the neighbouring markets in non-aseptic equipment and cartons.

- (170) These abuses, the concrete elements of which and/or the general policy of which they form part have been

described in recitals (104) to (167), may be summarized as follows:

1. the pursuit of a production and marketing policy aimed at severely restricting supply and compartmentalizing the national markets within the Community;
2. the imposition on users of Tetra Pak products in all Member States of numerous contractual clauses aimed at unduly binding them to Tetra Pak and at artificially eliminating potential competition;
3. the charging of prices for cartons which have been shown to:
 - discriminate between users in different Member States (at least from 1978 to 1984) ⁽²⁾,
 - and
 - eliminate competitors, at least in Italy (from 1976 to 1982) ⁽³⁾;
4. the charging of prices for machines which have been shown to:
 - discriminate between users in different Member States (at least from 1984 to 1986) ⁽⁴⁾,
 - discriminate, at least in Italy, between users within the same country (at least from 1976 to 1986) ⁽⁵⁾,
 - and
 - eliminate competitors, at least in Italy and the United Kingdom (at least from 1976 to 1986 in Italy, and from 1982 to 1984 in the United Kingdom) ⁽⁶⁾;
5. various specific practices aimed, at least in Italy, at eliminating competitors and/or their technology from certain markets (at least from 1981 to 1983) ⁽⁷⁾;
6. the buying-up of competitors with a view to appropriating — where appropriate in order to eliminate — actually or potentially competing technologies. These last-mentioned abuses will not, however, be included in the enacting terms of this Decision either because the period of limitation has expired in their respect (Selfpak, Zupak) or because a specific decision has already been adopted (Liquipak).

⁽²⁾ See recitals (52) to (53).

⁽³⁾ See recitals (47) to (51).

⁽⁴⁾ See recitals (57) to (60).

⁽⁵⁾ See recitals (62) to (68).

⁽⁶⁾ See recitals (54) to (56) and (62) to (68).

⁽⁷⁾ See recitals (73) and (75) to (83).

⁽¹⁾ See recital (170) below.

II. Remedies

1. Termination of infringement

- (171) Article 3 of Regulation No 17 states that where the Commission finds that there is an infringement of Article 86 of the Treaty, it may require the undertakings concerned to bring such infringement to an end.

It is justified to require Tetra Pak to put a stop to the infringements described above, in so far as it has not already done so. It is also necessary for Tetra Pak to take a number of measures to prevent the said infringements from being maintained or repeated.

- (172) As regards the contractual clauses, Tetra Pak must amend or, where appropriate, delete from its machine purchase or lease contracts and carton supply contracts the clauses listed under numbers (i) to (xxviii) so as to eliminate the aspects which have been shown above to be abusive. The new contracts must be submitted to the Commission.
- (173) As regards prices, Tetra Pak must take steps to ensure that any price differences between the Member States are justified solely by specific market conditions. All customers must be given access to the prices charged in the other Member States and be able to obtain supplies from the Tetra Pak subsidiary of their choice.
- (174) Further regarding prices, Tetra Pak must undertake not to charge uneconomic prices, and no customer may enjoy, in any form whatever, and whether for equipment or for cartons, discounts or more favourable payment terms not justified by an objective reciprocal concession. 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.
- (175) As regards the marketing of its products, Tetra Pak may not refuse to respond, at prevailing price terms, to orders from undertakings which are not final users of Tetra Pak products.
- (176) As regards more specifically the marketing of its machines, Tetra Pak must inform the customer of the standards and specifications which packaging cartons must meet in order to be used on its machines.
- (177) It appears also to be appropriate to require Tetra Pak to submit periodic reports to the Commission containing the information necessary for the latter to

satisfy itself that Tetra Pak is complying with this Decision.

2. Tetra Pak's attitude during the investigation and since this proceeding was initiated

1. During the investigation

- (178) Although it sometimes shifted the supporting arguments quite substantially⁽¹⁾, Tetra Pak maintained its position and continued the infringements throughout the Tetra Pak I case and during the investigation of Tetra Pak II (1983 to 1988).

At two points, however, Tetra Pak did indicate a willingness to cooperate.

In a letter of 25 January 1985, Tetra Pak said it was prepared to envisage the removal of the clause requiring users of its machines to obtain supplies of cartons exclusively from Tetra Pak, though it would do this only in Italy and only in respect of Rex (non-aseptic) cartons; a few secondary amendments might also be made. But this proposal was never put into effect.

On 2 December 1988, a week before this proceeding was initiated, lawyers for Tetra Pak approached Commission staff saying that Tetra Pak proposed to change its policy with regard to competition in order to meet the Commission's objections, and asking for an explanation of those objections. The Commission staff outlined the essence of the objections, but pointed out that, particularly given the long investigation of the case, Tetra Pak should already be aware of the Commission's view, which would in any event be set out in detail in the forthcoming Statement of Objections.

2. Since the investigation was initiated

- (179) This open attitude did not continue after this proceeding was initiated on 9 December 1988. In its long written reply to the Statement of Objections, and during the two days of the hearing, Tetra Pak contended that the commercial policy it was following was justified; it contested the arguments put forward by the Commission's departments one by one, and denied having committed any infringement whatever of the competition rules of the Treaty. Only at the very end of the two-day hearing did Tetra Pak, while conceding nothing on

⁽¹⁾ An example being the radical change in the definition of the relevant market adopted by Tetra Pak (see recital (95) above, footnote 6, p. 18).

the principle, confirm the few indications of flexibility in its written reply to the Statement of Objections, and make important new proposals regarding contractual clauses and pricing policy; this was stated to be in order to avoid any unnecessary conflict with the Commission. Tetra Pak asked the Commission for talks on the points still in dispute, and in particular the question of the tying of sales of machines and cartons.

- (180) These talks began a few weeks after the hearing on 21 and 22 September 1989. Over the next year, Tetra Pak submitted proposals which the Commission could not accept because they were, first, notably aimed essentially at maintaining the system of tied sales, and, thereafter, because the alternative proposals then put forward, while they would have ended the compulsory character of the system, offered such advantages to anyone opting for the tie-in arrangement that there could be no hope that any user would refuse it, so that the choice left to the customer was a purely theoretical one. In September 1990, however, Tetra Pak abandoned these proposals and gave up the system of tied sales⁽¹⁾. On the other disputed points, too, Tetra Pak gradually fell in line with the Commission's proposal.

On the basis of the documents submitted to it, therefore (Tetra Pak's letter of 1 February 1991), which finalizes its undertakings (Annex VII)⁽²⁾, and the draft contract attached to it the Commission takes the view that Tetra Pak has undertaken to comply substantially with requirements 1, 4 and 5 in Article 3 of this Decision⁽³⁾.

- (1) Tied sales are to be allowed only in the case of new customers with no experience of the use of Tetra Pak machines, which is a rare case given the importance of Tetra Pak on the relevant markets, and for a limited period only, strictly confined to the time needed to train the new customer's inexperienced staff in the use of Tetra Pak technology. For the non-aseptic systems this period has been estimated at 6 months and until five million cartons have been used, and for the aseptic systems at two years and until 20 million cartons have been used.
- (2) The Commission does not however necessarily accept the arguments put forward by Tetra Pak in that letter.
- (3) Tetra Pak told the Commission, by letter of 14 March 1991, that a communication informing its clients of changes in its terms of contract 'such as described in its letter of 1 February 1991' (original French) would be sent to them shortly, that the new machine sales contracts and leases enter into force on 1 April 1991 and that in the same month, it would inform its clients of the physical specifications to which cartons must conform in order to be used on its machines.

III. Fines

- (181) Article 15 (2) of Regulation No 17 states that the Commission may by decision impose fines of from ECU 1 000 to ECU 1 000 000, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year, on undertakings which, either intentionally or negligently, commit an infringement of Article 86. In fixing the amount of the fine, regard shall be had to the gravity and duration of the infringement.
- (182) In 1990 Tetra Pak's turnover reached approximately ECU 3,6 billion. The Commission considers that the first cases of abuse of which it is able to establish the existence, on the basis of the information it has collected, date back at least to 1976, the date on which it is established that Tetra Pak held a dominant position. The abuses concerning the contractual clauses did not cease before March/April 1991 (the date of entry into force of the new contracts). They have therefore extended over a particularly long period. As for the other practices, the durations on which the Commission has based its determination of the amount of the fine are those indicated in recital (170) above, even if some, for example discriminatory prices, were, probably, of a longer duration, and may still continue.
- (183) Tetra Pak could not have failed to be aware that its conduct was abusive. Indeed, it is apparent from the circumstances described above that all these practices formed part of a deliberate policy of the group.
- (184) Consequently, the Commission takes the view that a fine should be imposed on Tetra Pak in respect of the abuses which have been found to exist — except those resulting from the autonomous development policy and the patents policy — of an amount which takes account of their gravity and duration. In setting this amount, the Commission has taken account, in particular, of the following:
1. as indicated at 182 above, the infringement, or at least a number of them (e.g. the contractual obligations) lasted a long time (15 years or more);
 2. the infringements were numerous and diversified concerning all the provisions of Article 86. They concerned all or almost all the group's products and all Member States;
 3. the infringements were particularly serious and arose from a deliberate and well-studied policy whereby the group, by eliminating competitors

and tying clients, maintained artificially or reinforced Tetra Pak's dominance in markets where competition was already limited;

4. the infringements, resulting, as has been shown, from a deliberate policy, had a particularly serious affect on competition. They allowed Tetra Pak to maintain its near-monopoly position in the aseptic sector (market share of 90 to 95 %) and reinforce its position in the non-aseptic sector (market share increasing from ± 40 % in 1980 to ± 50 to 55 % today). The tying of sales of cartons and machines has largely contributed to preventing the development of effective competition in the aseptic sector in as much as Tetra Pak's pricing policy in Italy for Rex cartons would probably have eliminated this company from the market if it had been pursued after Elopak's complaint. In all events, this company had to close the factory it had built. These infringements have equally allowed Tetra Pak to partition completely each national market, thus inhibiting one of the fundamental objects of the Treaty, namely the establishment of a common market;
 5. as described in recitals (178), (179) and (180), Tetra Pak maintained, throughout the Commission's investigations and after the opening of the formal procedure, its position and continued to commit numbers of the infringements described in this Decision. At the beginning of 1991, Tetra Pak did, nonetheless, undertake to comply substantially with the requirements Nos 1, 4 and 5 described in Article 3 of this Decision and declared itself willing to take the steps necessary to this effect,
1. the pursuit of a marketing policy aimed at severely restricting supply and compartmentalizing the national markets within the Community;
 2. the imposition on users of Tetra Pak products in all Member States of numerous contractual clauses — as listed under numbers (i) to (xxvii) — having the essential object of unduly binding them to Tetra Pak and of artificially eliminating potential competition;
 3. the charging of prices for cartons which have been shown to discriminate between users in different Member States and, at least in Italy, eliminate competitors;
 4. the charging of prices for machines which have been shown to
 - discriminate between users in different Member States,
 - discriminate, at least in Italy, between users within the same country, and
 - eliminate competitors, at least in Italy and the United Kingdom;
 5. various specific practices aimed, at least in Italy, at eliminating competitors and/or their technology from certain markets.

Article 2

A fine of ECU 75 000 000 (seventy-five million) is hereby imposed on Tetra Pak in respect of the infringements referred to in Article 1.

This fine shall be paid, in ecus, within three months of notification of this Decision to bank account No 310-0933000-43 of the Commission of the European Communities, Banque Bruxelles Lambert, Agence Européenne, Rond Point Schuman 5, B-1040 Bruxelles. After the expiry of that period, interest shall be automatically payable at the rate charged by the European Monetary Cooperation Fund for transactions in ecu on the first working day of the month in which this Decision is adopted, plus 3,5 percentage points.

HAS ADOPTED THIS DECISION:

Article 1

Taking advantage of its dominant position on the so-called aseptic markets in machines and cartons intended for the packaging of liquid foods, Tetra Pak has, at least since 1976, infringed the provisions of Article 86 of the EEC Treaty on both these aseptic markets and on the neighbouring and associated markets in non-aseptic machines and cartons by means of a variety of practices aimed at eliminating competition and/or maximizing, to the detriment of users, the profits which could be drawn from the positions it had acquired. The essential elements of these infringements may be summarized as follows:

Article 3

Tetra Pak shall immediately bring the infringements referred to in Article 1 to an end, in so far as it has not already done so.

To this end, Tetra Pak shall refrain from repeating or maintaining any act or conduct described in Article 1 and from adopting any measure having equivalent effect.

In particular, Tetra Pak shall take the following measures:

1. Tetra Pak shall amend or, where appropriate, delete from its machine purchase/lease contracts and carton supply contracts the clause listed under numbers (i) to (xxviii) so as to eliminate the aspects which have been found by the Commission to be abusive. The new contracts shall be submitted to the Commission;
2. Tetra Pak shall ensure that any differences between the prices charged for its products in the various Member States result solely from the specific market conditions. Any customer within the Community shall be supplied by any Tetra Pak subsidiary it chooses, and at the price it practices;
3. 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;
4. Tetra Pak may not refuse orders, at prevailing prices, on the ground that the orderer is not an end-user of Tetra Pak products;
5. Tetra Pak shall inform any customer purchasing or leasing a machine of the specifications which packaging

cartons must meet in order to be used on its machines.

Article 4

During the period of five years beginning 1 January 1992, Tetra Pak shall, within the first six months of each year, give the Commission a report allowing it to establish if the actions taken by Tetra Pak pursuant to this Decision have indeed brought the infringements detailed in Article 1 to an end.

Article 5

This Decision is addressed to:

Tetra Pak International SA,
70 avenue Général-Guisan,
PO. Box 446,
CH-1009 Pully/Lausanne;

c/o Tetra Pak Italiana SpA,
Via Delfini 1,
I-41100 Modena.

This Decision shall be enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 24 July 1991.

For the Commission

Sir Leon BRITTAN

Vice-President

ANNEX I

MARKETS FOR THE PACKAGING IN CARTONS OF LIQUID FOODS

Annex I.1

Cartons sold in 1985

	Aseptic				Non-aseptic			
	Tetra Pak		Others		Tetra Pak		Others	
	Millions of units	%	Millions of units	%	Millions of units	%	Millions of units	%
Belgium/Luxembourg	[...] ⁽¹⁾	83,4	[...]	16,6	[...]	29,6	[...]	70,4
Denmark	[...]	100	[...]	—	[...]	34,5	[...]	65,5
France	[...]	93,6	[...]	6,4	[...]	55,8	[...]	44,2
Federal Republic of Germany	[...]	81,3	[...]	18,7	[...]	41,9	[...]	58,1
Greece	[...]	56,9	[...]	43,1	[...]	16,7	[...]	88,3
Ireland	[...]	23,1	[...]	76,9	[...]	69,2	[...]	30,8
Italy	[...]	98,2	[...]	1,8	[...]	76,3	[...]	23,7
Netherlands	[...]	57,4	[...]	42,6	[...]	32,1	[...]	67,9
Portugal	[...]	100	[...]	—	[...]	100	[...]	—
Spain	[...]	100	[...]	—	[...]	55,9	[...]	44,1
United Kingdom	[...]	84,7	[...]	15,3	[...]	40,6	[...]	59,4
Total EEC	13 078	89,1	1 600	10,9	4 392	48,3	4 700	52,7

Source: Tetra Pak

Total sector		Millions of units		%	
Aseptic and non-aseptic	Tetra Pak	[...]		73,5	
	Others	[...]		26,5	
	Total	[...]		100	

⁽¹⁾ In the published version of the Annex, some information has hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

Annex I.2

Packaging machines leased or sold and still in service at the end of 1985

	Aseptic				Non-aseptic			
	Tetra Pak		Others		Tetra Pak		Others	
	Units	%	Units	%	Units	%	Units	%
Belgium/Luxembourg	[...]	92,1	[...]	7,9	[...]	75	[...]	25
Denmark	[...]	100	[...]	—	[...]	34,8	[...]	65,2
France	[...]	95,2	[...]	4,8	[...]	37,7	[...]	62,3
Federal Republic of Germany	[...]	82	[...]	18	[...]	43,6	[...]	56,4
Greece	[...]	83,3	[...]	16,6	[...]	44,4	[...]	55,6
Ireland	[...]	100	[...]	—	[...]	69,3	[...]	30,7
Italy	[...]	98,6	[...]	1,4	[...]	77,4	[...]	22,6
Netherlands	[...]	57,5	[...]	42,5	[...]	37,5	[...]	62,5
Portugal	[...]	100	[...]	—	[...]	80	[...]	20
Spain	[...]	100	[...]	—	[...]	46,7	[...]	53,3
United Kingdom	[...]	93,7	[...]	6,3	[...]	36,2	[...]	63,8
Total EEC	1 570	91,8	141	8,2	807	51,7	753	48,3

Source: Tetra Pak

Total sector		Units	%
Aseptic and non-aseptic	Tetra Pak	[...]	72,7
	Others	[...]	27,3
	Total	[...]	100

ANNEX II

TETRA PAK STANDARD CONTRACTS: CONCORDANCE TABLE OF THE CONTRACTUAL CLAUSES

Annex II.1

Machine purchase contracts: concordance between clauses (i) to (xvii) and the articles of the national standard contracts concerned ⁽¹⁾

Member State	Clauses											
	(i)	(ii)	(iii)	(iv)	(v)	(vi)	(vii)	(viii)	(ix)	(x)	(xi)	(xii)
Spain				cl. (2) 6 of GC ⁽³⁾					cl. 6 of GC	cl. 6 of GC		
United Kingdom/Ireland				cl. IX	IX				cl. IX	cl. IX		
Italy	cl. 1	cl. 13 (a) and (b)	cl. 13 (b)	cl. 13 (d)	cl. 13 (d)	cl. 10	cl. 11 (b)	cl. 14	cl. 6	cl. 11 (a)	cl. 14	cl. 11 (a)
Greece				cl. 9 of GC	cl. 9 of GC				cl. 9 of GC	cl. 9 of GC		

Member State	Clauses						
	(xiii)	(xiv)	(xv)	(xvi)	(xvii)		
Spain			cl. 4 of GC	cl. 4	cl. 5 of GC		
United Kingdom/Ireland			cl. VI		cl. V		
Italy	cl. 12	cl. 12	cl. 15 and 13 (c)	cl. 15 (c)	cl. 17		
Greece			cl. 6 of GC		cl. 5 of GC		

⁽¹⁾ See Part A, Chapter IV, Section 2.⁽²⁾ cl. = clause.⁽³⁾ GC = general conditions.

Annex II.2

Machine lease contracts: concordance between clauses (i) to (xxv) and the articles of the national standard contracts concerned ⁽¹⁾

Member States	Clauses											
	(i)	(ii)	(iii)	(iv)	(v)	(vi)	(vii)	(viii)	(ix)	(x)	(xi)	(xii)
Belgium/Luxembourg		cl. (2) 8 (g) of GC (3)		cl. 6 (c) of GC	cl. 6 (e) of GC			cl. 9 of GC	cl. 8 (c) of GC			
France		cl. 13 of GC	cl. 13 of GC	cl. 10 of GC	cl. 10 (b) of GC			cl. 14 of GC	cl. 12 (b) of GC		cl. 14 of GC	cl. 12 (b) of GC
Italy		cl. 5 (e)	cl. 5 (e)	cl. 11 of GC	cl. 11 of GC			cl. 12 of GC	cl. 5 (b) and (d)		cl. 12 of GC	cl. 5 (b)
Denmark		cl. 15 (c) of GC		cl. 11 of GC	cl. 11 of GC			cl. 18 of GC	cl. 14 of GC		cl. 18 of GC	cl. 14 of GC
Netherlands		cl. 8 (g) of GC		cl. 6 (c) and (d) of GC	cl. 6 (e) of GC			cl. 9 of GC	cl. 8 (c) of GC			cl. 8 (i) of GC
Germany		cl. 8 (h) of GC		cl. 6 (c) and (d)	cl. 6 (e)			cl. 9 of GC	cl. 8 (c) of GC			cl. 8 (i) of GC
Portugal		cl. 13 (b) of GC	VIII	cl. 9 (c) of GC	cl. 9 (c) of GC			cl. 16 of GC	cl. 12 of GC		cl. 16 of GC	
United Kingdom/Ireland		cl. 14 (b) of GC	VIII	cl. 10 (c) of GC	cl. 10 (c) of GC			cl. 17 of GC	cl. 13 of GC		cl. 17 of GC	

	(xiii)	(xiv)	(xv)	(xvi)	(xvii)	(xviii)	(xix)	(xx)	(xxi)	(xxii)	(xxiii)	(xxiv)
Belgium/Luxembourg	cl. 2 (a) and (b) of GC	cl. 6 (h) of GC			cl. 4 (c) of GC	cl. 8 (c) of GC	cl. 2 (c) of GC	cl. 8 (f) of GC	cl. II (a) and (b) of GC	cl. II (2)	cl. III (2) cl. III	
France	cl. 2 (a) of GC	cl. 10 (a) of GC			cl. 8 of GC	cl. 12 (c) and (d) of GC	cl. 3 of GC	cl. 13 and cl. 16 (c) of GC	cl. II (a) and (b)	cl. II (c)	cl. IV	
Italy	cl. 4 of GC	cl. 5 of GC				cl. 5 (c)	cl. 5 of GC	cl. 5 (e)	cl. 2 (e)	cl. 2 (c)	cl. (7)	cl. (6)
Denmark	cl. 9 of GC	cl. 9 and 13 of GC			cl. 5 of GC	cl. 14 (b) and (c) of GC	cl. 9 of GC	cl. VI and 16 of GC	cl. IV (1) and (2)	cl. IV (3)	cl. V	
Netherlands	cl. 2 (a) and (b) of GC	cl. 2 (c) of GC			cl. 4 (c) of GC	cl. 8 (c) of GC	cl. 2 (c) of GC	cl. IV and 8 (f) of GC	cl. II (a) and (b)	cl. II (2)	cl. III (1) and (2)	
Germany	cl. 2 (a) of GC	cl. 6 (g)			cl. 4 (b) of GC	cl. 8 (c) of GC	cl. 2 (d) of GC	cl. IV and 8 (f) of GC	cl. II (a) and (b)	cl. II 3	cl. III (2)	
Portugal	cl. 8 of GC	cl. 11			cl. 4 of GC		cl. 8 of GC	VIII -	cl. VI (a) and (b)	cl. IV (c)	cl. V	
United Kingdom/Ireland	cl. 9 of GC	cl. 12			cl. 5 and 6 of GC		cl. 9 of GC	VIII	cl. IV (a) and (b)	cl. IV (c)	cl. V	

(1) See part A, Chapter 4, Section 2.

(2) cl. = clause.

(3) GC = general conditions.

Annex II.3

Supply contracts: concordance between clauses (xii) and (xxv) to (xxvii) and the articles of the national standard contracts concerned

Member States	Clauses			
	(xii)	(xxv)	(xxvi)	(xxvii)
United Kingdom/Ireland	cl. ⁽¹⁾ 6	cl. 1	cl. 10	cl. 2
Greece	cl. 6	cl. 1	cl. 10	cl. 2
Spain	cl. 4	cl. 1	cl. (i)	cl. 2
Italy	cl. 9	cl. 1	cl. 2	cl. 3

⁽¹⁾ cl. = clause

ANNEX III

TURNOVER AND PROFITABILITY OF TETRA PAK PRODUCTS IN THE COMMUNITY

Annex III.1

Relative importance of turnover by country

(in %)

Product	Year	Italy	Netherlands	Germany	France	United Kingdom	Denmark	Belgium/ Luxembourg	Total
		1	2	3	4	5	6	7	1-7
Rex	1981	[...]	[...]	[...]	[...]	[...]	[...]	[...]	100
	1982	[...]	[...]	[...]	[...]	[...]	[...]	[...]	100
	1983	[...]	[...]	[...]	[...]	[...]	[...]	[...]	100
	1984	[...]	[...]	[...]	[...]	[...]	[...]	[...]	100
Non-aseptic brick	1981	[...]	[...]	[...]	[...]	[...]	[...]	[...]	100
	1982	[...]	[...]	[...]	[...]	[...]	[...]	[...]	100
	1983	[...]	[...]	[...]	[...]	[...]	[...]	[...]	100
	1984	[...]	[...]	[...]	[...]	[...]	[...]	[...]	100
Aseptic brick	1981	[...]	[...]	[...]	[...]	[...]	[...]	[...]	100
	1982	[...]	[...]	[...]	[...]	[...]	[...]	[...]	100
	1983	[...]	[...]	[...]	[...]	[...]	[...]	[...]	100
	1984	[...]	[...]	[...]	[...]	[...]	[...]	[...]	100
Machines	1981	[...]	[...]	[...]	[...]	[...]	[...]	[...]	100
	1982	[...]	[...]	[...]	[...]	[...]	[...]	[...]	100
	1983	[...]	[...]	[...]	[...]	[...]	[...]	[...]	100
	1984	[...]	[...]	[...]	[...]	[...]	[...]	[...]	100
Others	1981	[...]	[...]	[...]	[...]	[...]	[...]	[...]	100
	1982	[...]	[...]	[...]	[...]	[...]	[...]	[...]	100
	1983	[...]	[...]	[...]	[...]	[...]	[...]	[...]	100
	1984	[...]	[...]	[...]	[...]	[...]	[...]	[...]	100
Total	1981	25,3	5,1	31,5	20,3	10,3	4,3	3,2	100
	1982	24,4	4,9	29,7	23,4	10,4	4,0	3,2	100
	1983	24,1	4,5	28,3	24,9	11,1	3,9	3,2	100
	1984	23,9	4,3	26,7	25,8	11,9	3,8	3,6	100

[illegible]

Annex III.3

Net margin of the various Tetra Pak products

(% of turnover)

[illegible]

Annex III.4

Gross margin of the various Tetra Pak products

(% of turnover)

Product	Year	Italy	Netherlands	Germany	France	United Kingdom	Denmark	Belgium/ Luxem- bourg	Total
		1	2	3	4	5	6	7	1—7
Rex	1981	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
	1982	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
	1983	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
	1984	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Non- aseptic brick	1981	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
	1982	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
	1983	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
	1984	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Aseptic brick	1981	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
	1982	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
	1983	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
	1984	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Machines	1981	[...]	[...]	[...]	[...]	[...] ⁽¹⁾	[...]	[...]	[...]
	1982	[...]	[...]	[...]	[...]	[...] ⁽¹⁾	[...]	[...]	[...]
	1983	[...]	[...]	[...]	[...]	[...] ⁽¹⁾	[...]	[...]	[...]
	1984	[...]	[...]	[...]	[...]	[...] ⁽¹⁾	[...]	[...]	[...]
Others	1981	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
	1982	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
	1983	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
	1984	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Total	1981	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
	1982	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
	1983	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
	1984	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

⁽¹⁾ Semi-gross margin (Tetra Pak estimates).

Annex III.5

Contribution to net margin of the various Tetra Pak products

(% of net margin)

[illegible]

ANNEX IV

TURNOVER AND PROFITABILITY OF TETRA PAK PRODUCTS IN ITALY

Annex IV.1

Tetra Pak in Italy 1976 to 1984 — Trend of turnover

Year	Indices					
	Rex	Brick	Aseptic brick	Machine	Others	Total
1976	100	100	100	100	100	100
1977	215	140	124	156	111	128
1978	177	155	131	203	113	138
1979	259	179	152	141	142	154
1980	570	210	182	220	178	189
1981	1 265	285	221	301	202	238
1982	2 422	287	251	567	245	286
1983	4 551	300	291	358	326	320
1984	6 353	342	321	340	371	357

Annex IV.2

Tetra Pak in Italy 1976 to 1984 — Contribution to sales (%) of the various Tetra Pak products

(in %)

Year	Rex	Non-aseptic brick	Aseptic brick	Machine	Others	Total
1976	[...]	[...]	[...]	[...]	[...]	100
1977	[...]	[...]	[...]	[...]	[...]	100
1978	[...]	[...]	[...]	[...]	[...]	100
1979	[...]	[...]	[...]	[...]	[...]	100
1980	[...]	[...]	[...]	[...]	[...]	100
1981	[...]	[...]	[...]	[...]	[...]	100
1982	[...]	[...]	[...]	[...]	[...]	100
1983	[...]	[...]	[...]	[...]	[...]	100
1984	[...]	[...]	[...]	[...]	[...]	100

Annex IV.3

Tetra Pak in Italy 1976 to 1984 — Net margin

(% of turnover)

Year	Rex	Non-aseptic brick	Aseptic brick	Machine	Others	Total
1976	-34,0	[...]	[...]	[...]	[...]	[...]
1977	-13,2	[...]	[...]	[...]	[...]	[...]
1978	-10,0	[...]	[...]	[...]	[...]	[...]
1979	-28,9	[...]	[...]	[...]	[...]	[...]
1980	-32,7	[...]	[...]	[...]	[...]	[...]
1981	-34,4	[...]	[...]	[...]	[...]	[...]
1982	-11,4	[...]	[...]	[...]	[...]	[...]
1983	4,5	[...]	[...]	[...]	[...]	[...]
1984	13,3	[...]	[...]	[...]	[...]	[...]

Annex IV.4

Tetra Pak in Italy 1976 to 1984 — Gross margin

(% of turnover)

Year	Rex	Non-aseptic brick	Aseptic brick	Machine	Others	Total
1976	-33,8	[...]	[...]	[...]	[...]	[...]
1977	-13,1	[...]	[...]	[...]	[...]	[...]
1978	-9,8	[...]	[...]	[...]	[...]	[...]
1979	-28,7	[...]	[...]	[...]	[...]	[...]
1980	-32,4	[...]	[...]	[...]	[...]	[...]
1981	-24,5	[...]	[...]	[...]	[...]	[...]
1982	7,5	[...]	[...]	[...]	[...]	[...]
1983	22,7	[...]	[...]	[...]	[...]	[...]
1984	28,7	[...]	[...]	[...]	[...]	[...]

Annex IV.5

Tetra Pak in Italy 1976 to 1984 — Contribution to net margin

(in %)

Year	Rex	Non-aseptic brick	Aseptic brick	Machine	Others	Total
1976	-0,8	[...]	[...]	[...]	[...]	100
1977	-0,4	[...]	[...]	[...]	[...]	100
1978	-0,2	[...]	[...]	[...]	[...]	100
1979	-1,0	[...]	[...]	[...]	[...]	100
1980	-2,3	[...]	[...]	[...]	[...]	100
1981	-3,7	[...]	[...]	[...]	[...]	100
1982	-1,8	[...]	[...]	[...]	[...]	100
1983	1,2	[...]	[...]	[...]	[...]	100
1984	4,4	[...]	[...]	[...]	[...]	100

ANNEX V

TETRA PAK CARTON PRICES

Annex V.1

Average prices of cartons

Carton	Year	Italy		Netherlands		Germany		France		United Kingdom		Denmark		Belgium	
		A ⁽¹⁾	B ⁽²⁾	A	B	A	B	A	B	A	B	A	B	A	B
Rex	1981	[...]	100	[...]	129	[...]	117			[...]	124	[...]	134	—	
	1982	[...]	100	[...]	151	[...]	136			[...]	122	[...]	146	—	
	1983	[...]	100	[...]	146	[...]	140			[...]	117	[...]	138	[...]	148
	1984	[...]	100	[...]	127	[...]	124			[...]	106	[...]	133	[...]	136
Non-aseptic brick	1981	[...]	100	[...]	102	[...]	122			[...]	105	[...]	128	—	
	1982	[...]	100	[...]	105	[...]	136			[...]	124	[...]	149	—	
	1983	[...]	100	[...]	97	[...]	151			[...]	116	[...]	151		
	1984	[...]	100	[...]	78	[...]	129			[...]	105	[...]	133		
Aseptic brick	1981	[...]	100	[...]	156	[...]	133			[...]	167	[...]	114	[...]	129
	1982	[...]	100	[...]	170	[...]	143			[...]	163	[...]	119	[...]	139
	1983	[...]	100	[...]	162	[...]	142			[...]	142	[...]	113	[...]	140
	1984	[...]	100	[...]	137	[...]	123			[...]	127	[...]	109	[...]	120

⁽¹⁾ A = ECU/million cartons.⁽²⁾ B = Index (Italy = 100).

Annex V.2

Prices of Rex according to price lists — Indices: Italy = 100 ⁽¹⁾

Member State	Year						
	1978	1979	1980	1981	1982	1983	1984
Italy ⁽²⁾	100	100	100	100	100	100	100
Germany ⁽³⁾	152	171—192	180	...	121
Denmark	141	140	132	168	164	150	127
United Kingdom	—	—	—	172	148	138	131
France ⁽⁴⁾	—	—	—	—	—	150	125
Belgium	—	—	—	—	—	144	125
Netherlands	126	125	120	130—165	158	139	115

⁽¹⁾ Indices calculated on the basis of prices converted into ecus.

One-litre Rex cartons, price per order of 200 000 units.

⁽²⁾ Minimum orders of 250 000 units.

⁽³⁾ Minimum orders of 500 000 units.

⁽⁴⁾ Minimum orders of 1 000 000 units.

Annex V.3

Prices of the non-aseptic brick carton according to price lists — Indices: Italy = 100 ⁽¹⁾

Member State	Year						
	1978	1979	1980	1981	1982	1983	1984
Italy	100	100	100	100	100	100	100
Germany	185	187	184	209—213	200	...	133
Denmark	140	132	138	177	165	158	136
United Kingdom	—	—	—	—	176	159	135
France	125	118—126	126—132	155	152	141	116
Belgium	—	—	—	—	—	—	—
Netherlands	159	148	142	164—183	167	151	119

⁽¹⁾ Indices calculated on the basis of prices converted into ecus.

One-litre brick cartons, per order of 200 000 units.

ANNEX VI
TETRA PAK MACHINE PRICES

Annex VI.1

Comparison of machine selling prices in the various Member States — Indices after conversion into ecus
(Index 100 = Country in which the lowest prices are charged)

Machine	Year	Italy ⁽¹⁾	Ireland ⁽²⁾	Spain ⁽²⁾	Greece ⁽¹⁾
<i>Rex machines</i>					
RC 4	1984				
	1985	100	152		
	1986	100	143		
RC 5	1984				
	1985				
	1986				
RC 6	1984				
	1985	100	137	103	
	1986	100	130	122	
RC 7	1984				
	1985	109	127 (158) ⁽³⁾	100	
	1986	104	110 (137) ⁽³⁾	100	
<i>Non-aseptic brick machines</i>					
B 8	1984				
	1985	100	206	197	
	1986		108	100	
B 9	1984				
	1985				
	1986				
B 9 with pulltab	1984				
	1985		110	110	
	1986				
B 10	1984				
	1985				
	1986				
<i>Aseptic brick machines</i>					
AB 3	1984				
	1985	100	114	108	
	1986	100		108	
AB 8	1984				
	1985	100	143	133	
	1986	100	149	142	126
AB 8/500	1984				
	1985				
	1986				
AB 8/SLIM	1984				
	1985				
	1986				
AB 8/750	1984				
	1985				
	1986				
AB 9	1984				
	1985	100	125	125	
	1986	100	124	114	169
AB 9 with pulltab	1984				
	1985				
	1986				
AB 10	1984				
	1985				
	1986				

⁽¹⁾ Average prices.

⁽²⁾ Prices taken from price lists.

⁽³⁾ Roll-fed machines.

Annex VI.2

Comparison of machine leasing prices in the various Member States ('base rental') — Indices after conversion into ecus (Index 100 = Country in which the lowest prices are charged)

Machine	Year	Netherlands ⁽¹⁾	Germany ⁽¹⁾	France ⁽¹⁾	United Kingdom ⁽¹⁾	Portugal ⁽¹⁾	Belgium ⁽²⁾	Denmark ⁽²⁾	Ireland ⁽²⁾
<i>Rex machines</i>									
RC 4	1984		235					100	
	1985	231/254 ⁽³⁾	289	281—285	265			100	269
	1986		373	421	299			100	337
RC 5	1984								
	1985	100/109 ⁽³⁾	115	123	115				118
	1986		100	130					
RC 6	1984		157				100		
	1985	179/179 ⁽³⁾	185	219	190		100		196
	1986		170	191	137		100		158
RC 7	1984		122				100		
	1985	136 (170) ⁽⁴⁾	133	157—160	134 (167) ⁽⁴⁾		100		137 (171) ⁽⁴⁾
	1986		159 (212) ⁽⁴⁾	179 (240) ⁽⁴⁾	131 (163) ⁽⁴⁾		100		149 (186) ⁽⁴⁾
<i>Non-aseptic brick machines</i>									
B 8	1984								
	1985	100	110		100				102
	1986		124		100				112
B 9	1984								
	1985	100/109 ⁽³⁾	109		111				105
	1986		112		100				106
B 9 with pulltab	1984								
	1985	100/109 ⁽³⁾			110				107
	1986								
B 10	1984								
	1985								
	1986								
<i>Aseptic brick machines</i>									
AB 3	1984		127				115	100	
	1985	181/190 ⁽³⁾	189	214	192	183	153	100	193
	1986		191	216		175	136	100	
AB 8	1984		122				100		
	1985	100/106 ⁽³⁾	112	118	106	102			104
	1986		122	139 ⁽⁵⁾	100 ⁽⁵⁾	112 ⁽⁵⁾			109 ⁽⁵⁾
AB 8/500	1984		190					100	
	1985		100	106 ⁽⁶⁾					
	1986								
AB 8/SLIM	1984								
	1985								
	1986								
AB 8/750	1984								
	1985		100	107 ⁽⁶⁾					
	1986								
AB 9	1984		110				100		
	1985	127	126	149 ⁽⁵⁾ ⁽⁶⁾	131		100		132
	1986		145	146/164 ⁽³⁾	115 ⁽⁵⁾		100		131 ⁽⁵⁾
AB 9 with pulltab	1984								
	1985	101	100	119	101				102
	1986		128						100
AB 10	1984								
	1985								
	1986		100	114					

⁽¹⁾ Prices taken from price lists.

⁽²⁾ Average prices.

⁽³⁾ Price changed in the course of the year.

⁽⁴⁾ Roll-fed machines.

⁽⁵⁾ 1985 model.

⁽⁶⁾ 1984 model.

Annex VI.3

Comparison of Tetra Pak machine selling and leasing prices in the various Member States — Indices after conversion into ecus (Index 100 = Country in which the lowest prices are charged)

Sales					Leasing operations								
Machine	Year	Italy ⁽¹⁾	Ireland ⁽²⁾	Spain ⁽²⁾	Greece ⁽¹⁾	The Netherlands ⁽²⁾	Germany ⁽²⁾	France ⁽²⁾	United Kingdom ⁽²⁾	Ireland ⁽²⁾	Portugal ⁽²⁾	Belgium ⁽¹⁾	Denmark ⁽¹⁾
Rex machines RC 4	1984	199					235						100
	1985	191	291			231/254 ⁽³⁾	289	281—285	265	269			100
	1986	255	365				373	421	299	337			100
	1984												100
	1985		131			100/109 ⁽³⁾	115	123	115	118			
RC 5	1986						100	130					
	1984		120				157					100	
RC 6	1985	152	209	157		179/179 ⁽³⁾	185	219	190	196		100	
	1986	129	168	157			170	191	137	158		100	
RC 7	1984						122					100	
	1985	129	151 (174) ⁽⁴⁾	119		136/136 ⁽³⁾ (170) ⁽⁴⁾	133	157—160	134 (167) ⁽⁴⁾	137 (171) ⁽⁴⁾		100	
	1986	155	164 (205) ⁽⁴⁾	149			159 (212) ⁽⁴⁾	179 (240) ⁽⁴⁾	131 (163) ⁽⁴⁾	149 (186) ⁽⁴⁾		100	
Non-aseptic brick machines B 8	1984	100					144						
	1985	100	206	197		185/185 ⁽³⁾	204		186	188			
	1986		123	114			124		100	112			
	1984												
	1985		116			100/109 ⁽³⁾	109		111	105			
B 9 with pulltab	1986		117				112		100	106			
	1984												
	1985		118			100/109 ⁽³⁾			110	107			
1986													
Aseptic brick machines AB 3	1984	116					127					115	100
	1985	180	206	194		181/190 ⁽³⁾	189	214	192	193	183	153	100
	1986	166		179			191	216			175	136	100

Leasing operations													
Machine	Year	Sales											
		Italy ⁽¹⁾	Ireland ⁽²⁾	Spain ⁽²⁾	Greece ⁽¹⁾	The Netherlands ⁽²⁾	Germany ⁽²⁾	France ⁽²⁾	United Kingdom ⁽²⁾	Ireland ⁽²⁾	Portugal ⁽²⁾	Belgium ⁽¹⁾	Denmark ⁽¹⁾
AB 8	1984	100					134						110
	1985	100	143	133		125/132 ⁽³⁾	140	148	133	130	128		
	1986	100	149	142			152	173	125	136	140		
AB 8/500	1984	111					190						100
	1985	100					218	230 ⁽⁵⁾					
	1986												
AB 8/SLIM	1984												
	1985												
	1986	100					146						
AB 8/750	1984												
	1985						100	107					
	1986	100					191						
AB 9	1984						110					100	100
	1985	116	146	146		127	126	149	130	130		100	
	1986	118	146	135	200		145	146/164 ⁽³⁾	115	131		100	
AB 9 with pulltab	1984												
	1985		114	104		101	100	119	101	102			
	1986			120			128			100			
AB 10	1984												
	1985												
	1986						100	114					

(1) Average prices.

(2) Prices taken from price lists.

(3) Price changed in the course of the year.

(4) Roll-fed machines.

(5) 1984 model.

(1) Average prices.

(2) Prices taken from price lists.

(3) Price changed in the course of the year.

(4) Roll-fed machines.

(5) 1984 model.

Annex VI.4

Selling and leasing prices in Italy

Machine	Operation S = sale L = leasing ⁽¹⁾	Date	Current prices		Constant prices ⁽³⁾	
			Lit million	Index ⁽²⁾	Lit million	Index ⁽²⁾
			(a)	(b)	(c)	(d)
1. Rex RC 6						
1	L	17. 7. 80	[...]	100	[...]	100
2	L	17. 7. 80	[...]	100	[...]	100
3	S	18. 7. 80	[...]	67	[...]	67
4	S	18. 7. 80	[...]	67	[...]	67
5	S	25. 2. 81	[...]	103	[...]	90
6	S	17. 3. 81	[...]	130	[...]	114
7	S	27. 11. 81	[...]	130	[...]	114
8	S	12. 5. 81	[...]	140	[...]	123
9	S	17. 6. 81	[...]	140	[...]	123
10	S	20. 7. 81	[...]	130	[...]	114
11	S	6. 10. 81	[...]	140	[...]	123
12	S	6. 10. 81	[...]	140	[...]	123
13	S	8. 1. 82	[...]	145	[...]	109
14	S	10. 5. 82	[...]	130	[...]	97
15	S	8. 10. 82	[...]	145	[...]	109
16	S	29. 11. 82	[...]	218	[...]	163
17	S	6. 12. 82	[...]	218	[...]	163
18	S	30. 12. 82	[...]	218	[...]	163
19	S	4. 2. 83	[...]	166	[...]	111
20	S	4. 2. 83	[...]	166	[...]	111
21	S	9. 2. 83	[...]	228	[...]	152
22	S	10. 6. 83	[...]	218	[...]	145
23	S	10. 9. 84	[...]	218	[...]	134
24	S	20. 12. 84	[...]	238	[...]	147
2. Rex RC 4						
1	L	5. 5. 81	[...]	100	[...]	100
2	S	30. 9. 81	[...]	115	[...]	114
3	S	24. 5. 83	[...]	194	[...]	147
4	S	31. 12. 84	[...]	269	[...]	188
5	S	27. 3. 85	[...]	269	[...]	176
6	S	27. 3. 85	[...]	269	[...]	176
7	S	29. 4. 85	[...]	347	[...]	227
8	S	29. 4. 85	[...]	399	[...]	261
9	S	27. 9. 85	[...]	299	[...]	194
10	S	14. 3. 86	[...]	313	[...]	195
11	S	24. 7. 86	[...]	271	[...]	169
12	S	24. 7. 86	[...]	271	[...]	169
3. Rex RC 5						
1	L	18. 11. 71	[...]	100	[...]	100
2	L	30. 6. 82	[...]	545	[...]	114
3	S	18. 12. 82	[...]	591	[...]	124
4. B/1000						
1	L	24. 2. 70	[...]	100	[...]	100
2	L	25. 3. 70	[...]	100	[...]	100
3	L	10. 4. 74	[...]	129	[...]	84
4	L	26. 7. 74	[...]	143	[...]	94
5	L	26. 7. 74	[...]	143	[...]	94
6	L	2. 6. 77	[...]	268	[...]	107
7	L	4. 7. 77	[...]	286	[...]	114
8	L	4. 7. 77	[...]	286	[...]	114

Machine	Operation S = sale L = leasing ⁽¹⁾	Date	Current prices		Constant prices ⁽³⁾	
			Lit million	Index ⁽²⁾	Lit million	Index ⁽²⁾
			(a)	(b)	(c)	(d)
9	S	28. 2. 78	[...]	268	[...]	95
10	S	28. 2. 78	[...]	268	[...]	95
11	S	19. 10. 78	[...]	304	[...]	107
12	L	27. 3. 79	[...]	329	[...]	101
13	L	7. 6. 79	[...]	321	[...]	99
14	L	19. 6. 81	[...]	429	[...]	112
5. B/500						
1	L	24. 11. 72	[...]	100	[...]	100
2	L	26. 7. 74	[...]	133	[...]	98
3	L	16. 4. 75	[...]	150	[...]	93
4	S	28. 2. 78	[...]	150	[...]	60
5	S	19. 10. 78	[...]	283	[...]	113
6	S	16. 11. 78	[...]	300	[...]	119
7	S	16. 11. 78	[...]	300	[...]	119
8	L	7. 3. 79	[...]	290	[...]	100
9	L	7. 3. 79	[...]	290	[...]	100
10	L	7. 3. 79	[...]	290	[...]	100
11	S	14. 10. 80	[...]	400	[...]	118
12	S	1. 10. 83	[...]	17	[...]	3
6. B 2/1000						
1	S	12. 6. 72	[...]	100	[...]	100
2	S	11. 7. 73	[...]	100	[...]	88
3	L	28. 9. 73	[...]	80	[...]	71
4	S	10. 3. 77	[...]	185	[...]	82
5	L	30. 10. 78	[...]	50	[...]	19
7. B 8/1000						
1	S	1. 3. 82	[...]	100	[...]	100
2	S	1. 3. 82	[...]	100	[...]	100
3	S	1. 3. 82	[...]	100	[...]	100
4	S	28. 6. 82	[...]	113	[...]	113
5	S	28. 6. 82	[...]	113	[...]	113
6	L	7. 9. 83	[...]	117	[...]	104
8. B 8/500						
1	S	25. 5. 81	[...]	100	[...]	100
2	S	25. 5. 81	[...]	100	[...]	100
3	L	27. 9. 83	[...]	117	[...]	88
9. AB/1000						
1	L	15. 7. 71	[...]	100	[...]	100
2	L	30. 9. 71	[...]	107	[...]	107
3	L	18. 1. 72	[...]	107	[...]	101
4	L	18. 2. 72	[...]	107	[...]	101
5	L	20. 11. 72	[...]	117	[...]	111
6	L	24. 11. 72	[...]	112	[...]	106
7	L	4. 1. 73	[...]	117	[...]	99
8	L	22. 3. 73	[...]	128	[...]	107
9	L	9. 4. 73	[...]	128	[...]	107
10	L	21. 9. 73	[...]	128	[...]	107
11	S	24. 7. 73	[...]	144	[...]	121
12	L	7. 12. 73	[...]	155	[...]	130
13	L	6. 2. 74	[...]	160	[...]	110
14	L	26. 3. 74	[...]	160	[...]	110
15	L	10. 6. 74	[...]	166	[...]	115

Machine	Operation S = sale L = leasing ⁽¹⁾	Date	Current prices		Constant prices ⁽³⁾	
			Lit million	Index ⁽²⁾	Lit million	Index ⁽²⁾
			(a)	(b)	(c)	(d)
16	L	16. 1. 75	[...]	192	[...]	112
17	S	30. 12. 75	[...]	205	[...]	119
18	L	10. 2. 76	[...]	224	[...]	110
19	L	10. 2. 77	[...]	333	[...]	141
20	S	14. 3. 77	[...]	347	[...]	147
21	L	4. 5. 77	[...]	347	[...]	147
22	L	22. 6. 77	[...]	341	[...]	144
23	L	21. 10. 77	[...]	298	[...]	126
24	L	23. 12. 77	[...]	336	[...]	141
25	L	6. 1. 78	[...]	368	[...]	138
26	L	6. 4. 78	[...]	307	[...]	115
27	L	19. 4. 78	[...]	387	[...]	145
28	S	28. 4. 78	[...]	400	[...]	150
29	S	19. 5. 78	[...]	400	[...]	150
30	L	9. 10. 78	[...]	400	[...]	150
31	L	4. 12. 78	[...]	373	[...]	140
32	L	4. 6. 79	[...]	440	[...]	144
33	L	[...]	453	[...]	148
34	S	18. 1. 80	[...]	371	[...]	103
35	S	5. 3. 80	[...]	520	[...]	144
36	S	5. 3. 80	[...]	520	[...]	144
37	S	22. 5. 80	[...]	520	[...]	144
38	S	2. 9. 80	[...]	533	[...]	148
39	S	30. 1. 81	[...]	580	[...]	142
40	S	23. 3. 81	[...]	400	[...]	98
41	L	18. 11. 81	[...]	613	[...]	150
42	S	14. 1. 82	[...]	427	[...]	89
43	L	15. 3. 82	[...]	453	[...]	94
10. AB/500						
1	L	7. 4. 72	[...]	100	[...]	100
2	L	19. 7. 72	[...]	100	[...]	100
3	L	3. 10. 72	[...]	100	[...]	100
4	L	22. 3. 73	[...]	126	[...]	112
5	L	17. 12. 73	[...]	158	[...]	140
6	L	17. 12. 73	[...]	158	[...]	140
7	L	2. 1. 74	[...]	153	[...]	112
8	L	6. 2. 74	[...]	158	[...]	116
9	L	22. 2. 74	[...]	158	[...]	116
10	L	23. 2. 74	[...]	158	[...]	116
11	L	4. 3. 74	[...]	158	[...]	116
12	L	10. 6. 75	[...]	197	[...]	122
13	L	23. 9. 75	[...]	205	[...]	126
14	L	20. 11. 75	[...]	189	[...]	117
15	S	28. 6. 76	[...]	276	[...]	144
16	L	30. 8. 76	[...]	279	[...]	145
17	L	3. 2. 77	[...]	329	[...]	147
18	L	31. 12. 77	[...]	382	[...]	171
19	L	31. 12. 77	[...]	382	[...]	171
20	L	7. 6. 78	[...]	395	[...]	157
21	L	4. 12. 78	[...]	368	[...]	147
22	L	27. 3. 79	[...]	126	[...]	43
23	L	23. 6. 79	[...]	471	[...]	163
24	L	25. 6. 79	[...]	434	[...]	150
25	L	18. 7. 79	[...]	447	[...]	155
26	L	22. 7. 79	[...]	382	[...]	131
27	S	27. 12. 79	[...]	474	[...]	164
28	S	27. 12. 79	[...]	474	[...]	164
29	S	18. 1. 80	[...]	376	[...]	111
30	S	17. 2. 80	[...]	460	[...]	136
31	L	10. 3. 80	[...]	474	[...]	140
32	L	28. 5. 80	[...]	513	[...]	151
33	L	24. 6. 80	[...]	526	[...]	155

Machine	Operation S = sale L = leasing ⁽¹⁾	Date	Current prices		Constant prices ⁽³⁾	
			Lit million	Index ⁽²⁾	Lit million	Index ⁽²⁾
			(a)	(b)	(c)	(d)
34	S	26. 10. 81	[...]	658	[...]	171
35	S	14. 1. 82	[...]	421	[...]	93
36	S	22. 6. 82	[...]	395	[...]	87
11. AB/200						
1	L	21. 11. 79	[...]	100	[...]	100
2	L	18. 7. 80	[...]	111	[...]	95
3	S	2. 9. 80	[...]	114	[...]	97
4	L	27. 4. 81	[...]	126	[...]	94
5	S	30. 11. 81	[...]	143	[...]	107
6	S	28. 12. 82	[...]	143	[...]	91
12. AB 2/1000						
1	L	20. 6. 72	[...]	100	[...]	100
2	L	11. 2. 81	[...]	348	[...]	90
13. AB 3/1000						
1	L	23. 12. 75	[...]	100	[...]	100
2	S	14. 7. 78	[...]	188	[...]	121
3	S	14. 1. 82	[...]	200	[...]	72
4	S	10. 7. 82	[...]	338	[...]	121
5	S	4. 2. 83	[...]	275	[...]	88
6	S	25. 1. 84	[...]	350	[...]	103
7	S	20. 11. 84	[...]	413	[...]	122
8	S	12. 3. 85	[...]	438	[...]	120
14. AB 3/500						
1	S	14. 1. 82	[...]	100	[...]	100
2	L	21. 4. 82	[...]	141	[...]	141
3	S	8. 2. 83	[...]	175	[...]	156
4	S	16. 9. 83	[...]	89	[...]	79
5	S	17. 11. 84	[...]	111	[...]	92
15. AB 3/200						
1	L	14. 9. 81	[...]	100	[...]	100
2	L	8. 6. 82	[...]	148	[...]	126
3	L	30. 6. 82	[...]	168	[...]	142
4	L	3. 8. 82	[...]	148	[...]	126
5	L	17. 7. 83	[...]	181	[...]	137
6	S	1. 1. 84	[...]	123	[...]	85
7	L	2. 3. 84	[...]	194	[...]	135
16. AB 8/1000						
1	S	16. 10. 81	[...]	100	[...]	100
2	S	3. 9. 84	[...]	128	[...]	90
3	S	4. 9. 84	[...]	118	[...]	83
4	S	27. 12. 84	[...]	146	[...]	102
5	S	10. 1. 85	[...]	148	[...]	97
6	S	28. 3. 85	[...]	131	[...]	86
7	S	28. 3. 85	[...]	131	[...]	86
17. AT 500/D						
1	L	13. 2. 71	[...]	100	[...]	100
2	L	27. 6. 72	[...]	100	[...]	93
3	S	19. 7. 74	[...]	152	[...]	105
18. NIMCO						
1	S	21. 4. 83	[...]	100	[...]	100
2	S	26. 4. 83	[...]	164	[...]	164

Machine	Operation S = sale L = leasing ⁽¹⁾	Date	Current prices		Constant prices ⁽³⁾	
			Lit million	Index ⁽²⁾	Lit million	Index ⁽²⁾
			(a)	(b)	(c)	(d)
3	S	1. 6. 83	[...]	91	[...]	92
4	S	15. 6. 83	[...]	86	[...]	86
5	S	5. 9. 83	[...]	100	[...]	100
6	S	13. 9. 83	[...]	86	[...]	86
7	S	17. 10. 83	[...]	114	[...]	114
8	S	29. 2. 84	[...]	100	[...]	93
9	S	3. 9. 84	[...]	132	[...]	122
10	S	4. 2. 85	[...]	127	[...]	111
11	S	20. 6. 85	[...]	100	[...]	86
19. Cherry-Burrel QM 80/110						
1	L	23. 9. 81	[...]	100	[...]	100
2	S	12. 5. 81	[...]	100	[...]	100
3	S	27. 1. 82	[...]	130	[...]	111
4	S	9. 2. 83	[...]	125	[...]	95
5	S	21. 11. 83	[...]	145	[...]	110
6	S	21. 11. 83	[...]	145	[...]	110
7	S	16. 4. 84	[...]	143	[...]	99
8	S	14. 5. 85	[...]	150	[...]	98

⁽¹⁾ Base rental.

⁽²⁾ Current prices have been reduced according to the price index for manufactured products in Italy.
1980 = 100 (Source: Eurostat, sectoral data bank).

⁽³⁾ First machine of each series = 100.

ANNEX 7

TETRA PAK
The Tetra Pak Group Management
Christer Hedelin
Company Secretary

EEC Commission
Directorate General for
Competition IV/B
150, Avenue de Cortenbergh
B-1040 Brussels

1 February 1991

Case No IV 31.043 — Tetra Pak II

Letter of Undertaking

With reference to previous correspondence and meetings, Tetra Pak wishes to summarize hereunder its final and substantial commitments related to its future commercial practices. We also enclose herewith copies of the machine rental and machine sales agreements, as well as the packaging material order form, which Tetra Pak will implement in the Community.

Tetra Pak has agreed to drop any element of exclusivity in its contractual relations with its customers, except as provided below.

Any Tetra Pak customer will be offered the choice between renting or buying a filling machine using any of the enclosed agreements and will then be free to buy his requirements of packaging material from whatever supplier he may choose. Should he wish to buy such packaging material from Tetra Pak the enclosed order form will be used.

Any exclusive purchase obligation of Tetra Pak packaging material for users of Tetra Pak filling machines remains only in the following limited cases which the Commission has accepted to be necessary for the protection of public health and the preservation of workers' safety:

- (a) for customers having no previous experience of any Tetra Pak aseptic packaging system, who choose to start using such a system, the initial exclusive purchasing obligation of Tetra Pak packaging material will be for a period of two years and until 20 000 000 packages have been produced.
- (b) for customers having no previous experience of any Tetra Pak packaging system, who choose to start using a Tetra Pak non-aseptic packaging system, the initial exclusive purchasing obligation of Tetra Pak packaging material will be for a period of six months and until 5 000 000 packages have been produced;

In all other cases (including customers switching from aseptic to non-aseptic or between aseptic systems), there will be no exclusive obligations.

Tetra Pak reserves the right to modify the above obligations, in consultation with the Commission, in case Tetra Pak would introduce on the market a wholly new packaging concept or a new family of machines.

Tetra Pak wishes to make it clear that it continues to believe that the exclusive purchase obligation previously contained in its agreements was justified for the reasons given in its Answer to the Statement of Objections and during the hearing and that its suppression, even subject to the exceptions described above, could have very severe potential adverse consequences for public health and workers' safety. Tetra Pak therefore reserves the right to point out that the exclusive purchase obligation was dropped as a result of the Commission's insistence.

Furthermore, Tetra Pak would like to state the following:

- (a) the duration of the contractual relations between the lessee and the lessor will be left open for the Contracting Parties to negotiate at the signing of the contract. It is however not Tetra Pak's intention to have the initial term of the agreement to exceed three years, unless the customer requests a longer duration.

Any subsequent renewal of the agreement would normally be on a yearly basis, with the possibility for either Party to terminate the rental agreement by giving six months notice before the end of each yearly period.

Tetra Pak is willing to communicate *a posteriori* to the Commission on a yearly basis the identity of all customers with whom a lease is made for an initial period of more than three years;

- (b) Tetra Pak will provide all users of a Tetra Pak packaging machine at the time of delivery with the minimum physical specifications required of the packaging material used in that type of packaging machine for the products such user intends to pack and with a list of the packaging machine spare parts, related to the package integrity and the workers' safety, which have to be approved by Tetra Pak;
- (c) Tetra Pak will open its service and maintenance training courses to any qualified person, whether employed or independent, as long as this person bears all the costs related to his/her participation to such courses;
- (d) in case a customer wishes to opt for a rental agreement, Tetra Pak will set the amount of the 'initial payment' at a level which, together with the first 12 monthly rentals, will give Tetra Pak an amount equivalent to, at most, one third of the sales price for the same packaging machine;
- (e) Tetra Pak is willing to supply its packaging systems to any interested customer, whether end-user or not, as long as such customer is creditworthy, reputable, has the required technical and scientific knowledge and qualifications to deal with such sensitive items as Tetra Pak packaging systems and is fully aware of the risk involved if such packaging systems are not correctly handled.

Tetra Pak is willing to communicate *a posteriori* to the Commission on a yearly basis the identity of all interested customers with whom Tetra Pak has refused to contract for one of the reasons mentioned hereabove;

- (f) Tetra Pak will not use its position in the aseptic sector to gain an unfair advantage in the non-aseptic sector.

In proposing the above, we believe that we have now complied with the Commission's objections and we trust that the Commission will endeavour to establish similar ground rules with respect to the practices of Tetra Pak's competitors, in so far as these are contrary to the Community's competition rules.

We respectfully request that the fact that Tetra Pak has willingly agreed to put an end to the infringements alleged by the Commission will be given due consideration by the Commission and will be recorded, together with the substance of this letter, in any possible decision that might be taken against Tetra Pak.

Yours sincerely,

Christer Hedelin

Annexes
