

***Case No COMP/M.2416 -
TETRA LAVAL / SIDEL***

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89
MERGER PROCEDURE**

Article 6(2) NON-OPPOSITION
Date: 13/01/2003

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 13/01/2003

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In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EEC) No 4064/89 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(2) DECISION

To the notifying party

Dear Sir/Madam,

**Subject: Case No COMP/M.2416 – Tetra Laval/Sidel
Re-commencement of an Article 10(1) procedure pursuant to Article 10(5) of Council Regulation No 4064/89¹**

1. On 18 May 2001, the Commission received a notification (the “Original Notification”) pursuant to Article 4 of Regulation (EEC) No 4064/89 (the “Merger Regulation”) of a proposed concentration by which Tetra Laval S.A., France, belonging to the group Tetra Laval B.V. (“Tetra”), The Netherlands, acquired within the meaning of Article 3(1)(b) of the Merger Regulation control of the French company Sidel S.A. (“Sidel”) by way of a public bid announced on 27 March 2001.
2. After examination of the Original Notification, the Commission concluded that the notified operation fell within the scope of the Merger Regulation and that it raised serious doubts as to its compatibility with the common market and the EEA Agreement. On 5 July 2001, the Commission decided in accordance with Article 6(1)(c) of the Merger Regulation to initiate proceedings in this case.
3. On 30 October 2001, the Commission declared the operation incompatible with the common market, following an in-depth investigation (the “Decision”). By judgement (the “Judgment”) delivered on 25 October 2002, the Court of First Instance of the European Communities (“CFI”) annulled the Commission’s Decision in its entirety. Pursuant to Article 10(5) of the Merger Regulation, the time periods referred to in Article 10 of the Merger Regulation start again from the date of the Judgment. The

¹ OJ L 395, 30.12.1989 p. 1; corrigendum OJ L 257 of 21.9.1990, p. 13; Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9. 7. 1997, p. 1, corrigendum OJ L 40, 13.2.1998, p. 17).

analysis in the present decision is based, in several respects, on rulings in the Judgment. The Commission notes that it has appealed against the Judgment on a number of related points of law. The compatibility of the operation with the common market may depend on the outcome of that appeal and of an eventual re-examination by the Community Courts of the validity of the Article 8(3) Decision of 30 October 2001.

4. Pursuant to Article 10(1) of the Merger Regulation the decisions referred to in Article 6(1) must be adopted within one month. Under Article 10(1) that period begins, on the day following the receipt of a notification or if the information to be supplied with the notification is incomplete, the day following that of the receipt of the complete information.
5. In accordance with Article 4(2) of Commission Regulation (EC) No 447/98 (“Implementing Regulation”), the Commission declared Tetra’s notification of 18 May 2001 incomplete in a material respect and requested Tetra to provide the complete information by 18 November 2002. On 18 November 2002 Tetra submitted the complete information. The said information contained material changes. Pursuant to Article 6(4) of the Implementing Regulation the periods referred to in Article 10(1) began with effect from 19 November 2002.

I. THE PARTIES

6. Tetra, the notifying party, is a privately held group of companies, which is active in the design and manufacture of equipment, consumables and ancillary services for the processing, packaging and distribution of liquid food (known as the Tetra Pak packaging business). Tetra’s business mainly comprises traditional carton packaging, where it is the world-wide market leader. Tetra also has more limited activities in the high density polyethylene (“HDPE”) plastic bottles, where it acts as a converter (which consists of manufacturing and supplying empty packaging to producers who then fill the packaging themselves) and in HDPE packaging equipment.
7. Sidel is a company involved in the design and production of packaging equipment and systems, in particular, stretch blow moulding machinery, barrier technology and filling machines for polyethylene terephthalate plastic bottles (“PET”). Sidel is the world-wide leader for the production and supply of stretch blow moulding machines (“SBM”). The company also has activities in engineering, conveying, overwrapping and palletising, health and beauty.

II. THE OPERATION

8. On 27 March 2001, Tetra Laval S.A. announced a public bid for all outstanding shares in Sidel. Tetra Laval S.A. is a privately-held company established under French law for the purpose of holding Sidel’s shares acquired through the public bid. It is a wholly owned subsidiary of Tetra. On the same day, Tetra Laval S.A. acquired roughly 9.75% of the shares of Sidel from Azeo (5.56%) and Sidel’s directors (4.19%).
9. Tetra Laval S.A.’s bid for Sidel was for cash at a price of EUR 50 per share and, in accordance with French law, was unconditional. The acceptance of the bid was unanimously recommended by the Board of Directors of Sidel and was also approved by Sidel’s major shareholders.

10. This offer price presented a substantial premium on the share price on 21 March 2001. The bid valued Sidel at approximately EUR 1.9 billion and was financed through [...].

III. CONCENTRATION

11. Pursuant to the bid, approximately 27.1 million shares, approximately 81.3% of the outstanding shares in Sidel were tendered to Tetra Laval S.A. After the closing of the bid, Tetra Laval S.A. acquired certain additional shares making its holdings roughly 95.2%. As of 01 February 2002, this was reduced to 94%.²
12. The public bid, whereby Tetra acquires sole control over Sidel, constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

IV COMMUNITY DIMENSION

13. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion³ (Tetra EUR [...] and Sidel EUR [...] in 2000 and in 2001 Tetra EUR [...] and Sidel EUR [...]). Both Tetra and Sidel have a Community-wide turnover in excess of EUR 250 million (Tetra EUR [...] and Sidel EUR [...] in 2000 and in 2001 Tetra EUR [...] and Sidel EUR [...]), and they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State.
14. The notified operation therefore has a Community dimension within the meaning of Article 1(2) of the Merger Regulation.

V RELEVANT MARKET

1. *End-use product segments*

15. In the Decision, the Commission concluded that “*end-use segmentation*” constitutes a meaningful analytical tool for assessing the market for “*liquid food packaging systems and packaging material*” (recital 44). Moreover, the Commission focused its competitive assessment on the impact of the concentration in the sectors in which Tetra and Sidel are primarily active, namely PET and carton packaging, by reference to the interplay between these two packaging systems, in particular by reference to four end-use segments comprising liquid dairy products (“LDPs”), juice and nectar (“juice”), fruit flavoured still drinks (“FFDs”) and tea/coffee drinks including isotonic drinks (the so called “*sensitive products*”).
16. With the exception of end-use segmentation of the SBM machine market, which is discussed below, the above analysis remains unaffected by the Judgment and was confirmed by the current market investigation.

² Source: Sidel website on 13 November 2002.

³ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25). To the extent that figures include turnover for the period before 1 January 1999, they are calculated on the basis of average ECU exchange rates and translated into EUR on a one-for-one basis.

2. *Aseptic and non-aseptic packaging*

17. In the Decision, the Commission also distinguishes between aseptic (i.e. sterile) and non-aseptic packaging which is not contested by Tetra (recital 51). Although aseptic packaging can be done in all materials, carton is the main material used. Moreover, aseptic packaging is mainly used for LDPs and juices to increase shelf-life, and avoid refrigerated distribution. Taste is affected which means that aseptically and non-aseptically packaged end products are not perfect substitutes from the consumer's perspective. In addition, there is no supply-side substitutability, since aseptic and non-aseptic machines use very different technology with aseptic machines being much more complicated and not all suppliers are capable of producing both machines (recital 50).⁴
18. The above analysis is also unaffected by the Judgment, save as indicated below with regard to SBM machines. The analysis was confirmed by the current market investigation.

3. *Packaging systems using PET and packaging systems using other materials*

19. Furthermore, in the Decision, the Commission agreed with Tetra in its assessment that packaging systems using different materials form distinct relevant product markets for competition law analysis, but disagreed with Tetra in its contention that there could be no interaction between PET and carton (recital 53). Tetra's contention was based on two main arguments: (i) "*minimal overlap*" between the end products used for PET and carton and no prospect of future growth; (ii) "*no pricing constraints*" in that the pricing of PET and carton do not constrain one another since customer choice is driven by marketing considerations (recital 52). Instead, the Commission contended that PET will "*grow rapidly*" in the same end-use segments as carton (recital 53).
20. The Commission concluded that PET and carton belonged to distinct but closely neighbouring relevant product markets because they were technical substitutes and "*weak economic substitutes*", but that one could not rule out that in the future the markets could converge so as to belong to the same product market (recital 163).
21. The Commission's analysis of the interaction between PET and carton, is accepted by the CFI in its Judgment when it says that "*analysis of the close links between the markets for carton packaging and PET packaging is based on a series of factors which, taken together, support the findings of the Commission to the requisite legal standard*" (paragraph 192). This analysis was confirmed by the current market investigation.

4. *PET packaging markets*

22. The Decision identifies four main stages of a typical PET packaging line, necessitating specific machinery: (i) production of plastic pre-forms ("injection machines"); (ii) blowing of the empty bottles (stretch blow moulding or "SBM machines") (iii) filling (aseptic or non-aseptic "filling machines"), (iv) end-of-the-line stages or in-between stages (e.g. cap applicators, conveyors, flow equipment, wrapping machines, and palletisers) (recital 21). This analysis is unaffected by the Judgment of the CFI.

⁴ This is notwithstanding the existence of so called "ultra-clean" filling solutions which to some extent represent an approximation to aseptic filling.

Regarding (iv) it is not necessary to define specific markets for the purposes of this decision. This analysis was confirmed by the current market investigation.

4.1. PET Pre-forms

23. On PET pre-forms, the Decision finds that, as Tetra submitted, PET pre-forms (pre-production tubes made from PET resin that are used in an SBM machine to produce the final bottle) are a distinct product market as there appears to be no substitute from a demand or a supply side perspective (recital 206). Users of SBM machines can only use PET pre-forms to produce PET bottles. Producers of other kinds of plastic cannot switch their supply to production of PET pre-forms (recital 205).
24. In addition, the Commission finds that standard resin and barrier-enhanced PET pre-forms form two distinct sub-markets (recital 206). PET pre-forms are usually produced by converters and are sold to beverage companies for the production of bottles or are used by converters themselves for the production of bottles. Barrier-enhanced pre-forms are used for oxygen and light-sensitive products. Standard and barrier enhanced PET pre-forms are not substitutable either from a demand side perspective (for example, a standard pre-form cannot be used for the filling of an oxygen sensitive product) and from a supply side perspective (standard pre-forms are commodities whereas barrier-enhanced pre-forms need specific technologies which not all suppliers of standard pre-forms have) (recital 205).
25. The above analysis is unaffected by the Judgment. On the basis of the market investigation, the Commission does not take a different view.

4.2. PET SBM Machines

4.2.1. Compressed-air SBM machines

26. As for the market for “*SBM machines*”, the Decision found that:
 - 26.1. high (more than 8 000 bph) and low (less than 8 000 bph) capacity SBM machines form distinct product markets, which is not contested by Tetra – high capacity machines use only the more complex rotary technology whilst low capacity machines use both rotary and the less complex linear technology (recitals 166 to 168);
 - 26.2. both high and low capacity machines are used for the “*sensitive products*” depending on the volume of the product that a beverage company intends to fill - the decision to invest in a PET filling line will be demand driven when a beverage producer foresees a consumer need for PET packaging, which was not contested by Tetra (recitals 184 to 186);
 - 26.3. separate relevant markets exist for distinct customer groups based on end-use segmentations particularly for the “*sensitive products*” comprising LDPs, juice, FFDs and tea/coffee drinks since the requirements of such “*sensitive products*” dictate very specific characteristics of a PET line which make a standard PET line, of which an SBM machine is an essential component, an insufficient substitute for the needs of “*sensitive*” beverage producers. This is partly evidenced by the fact that: (a) there are a number of end-use-specific SBM machines such as hot-fill machines and Combi machines (i.e. combined stretch-

blowing, filling and capping machines) that are specifically designed for *sensitive products*; (b) standard SBM machines need to be customised when included in a line used for sensitive products; (c) customers filling *sensitive products* have specific, distinct needs such as the need for aseptic guarantees; (d) in addition, customers purchasing SBM machines for these products can be easily identified and targeted with specific practices by the supplier such as price discrimination which cannot be defeated by arbitrage - the Commission obtained evidence showing past price discrimination by end-use practised by Sidel, which was strongly contested by Tetra (recitals 176 to 183);

- 26.4. given that the Combi machine is a relatively recent innovation, it is difficult to assess whether customers find it substitutable to standard PET lines to the extent that the Combi should be treated as part of the SBM machine market and/or the PET filling machine market. In any event, it was not necessary to define a separate market for Combi machines which combine blowing, filling and capping in a single machine.⁵
27. The Judgment finds that the Decision:
- 27.1. bases its “*emphasis ... on sensitive products belonging to 'common product segments' on an objective criterion*” (paragraph 260); and
- 27.2. “*correctly stresses the importance of the individual needs of customers who require an aseptic PET filling line in particular, namely a basic guarantee of aseptic conditions, ...*” (paragraph 265).
28. Moreover, the Commission’s finding regarding the identification of specific groups of customers and past price discrimination is not dismissed in the Judgment. Nevertheless, the Judgment finds that the Commission’s finding of price discrimination practised by Sidel, although not vitiated by a manifest error of assessment, “*cannot constitute sufficiently convincing evidence that the merged entity will continue to behave in a similar way*” because “*unlike Sidel prior to the merger the merged entity would be bound not only by the commitments but also by the various obligations limiting Tetra's conduct*”. (paragraph 223)
29. Having excluded price discrimination as evidence of the existence of a separate market for sensitive products, the Judgment finds that the Decision “*fails to provide sufficiently convincing evidence to demonstrate the allegedly specific characteristics of SBM machines used for packaging sensitive products*”; (paragraph 261) and “*does not provide sufficient evidence to justify the definition of distinct sub-markets among SBM machines with reference to their end-use*” (paragraph 269). In particular, the Commission failed to justify its market definition by:
- 29.1. failing to rebut “*Tetra’s assertion regarding the relatively low cost, when compared to the cost of a so-called ‘standard’ SBM machine, ..., of making any*

⁵ There are some indications that the Combi may form a distinct product market: they require less space, fewer personnel, and offer advantages particularly suited to “*sensitive products*” in terms of reduced risk of contamination, are less expensive than a combination of separate SBM, filling and capping machines, as against which they may carry greater risk of downtime for the whole system should a single component fail, and operate at a standard speed based on the SBM component as compared to a stand alone filler which can run faster (recitals 172 to 175).

necessary changes to render the machines more compatible for use with aseptic and non-aseptic PET filling machines, or possibly with aseptic filling machines capable of conversion from PET to HDPE” (paragraph 266), which Tetra asserted at the hearing “*represented a mere 5% of the cost of an SBM machine*” (paragraph 264); and

- 29.2. not establishing the relevance to the definition of end-use specific markets of (a) the possibility of determining exactly which group a given customer belongs to (i.e. sensitive or non-sensitive products producer) when he purchases an SBM machine and (b) of whether or not arbitrage of SBM machines is possible in the EEA (paragraph 268).
30. Consequently, the CFI examines the SBM market by reference to only two sub-markets, namely low and high capacity machines (paragraph 269), without any further end-use segmentation.
31. Given the CFI's finding that price discrimination could not constitute sufficient evidence to define a separate market for SBM machines for sensitive products, the Commission's market investigation focused on the other elements identified by the CFI. The investigation confirmed the Commission's previous findings that: (a) SBM machines are tailor-made to meet specific customer needs depending on the type of bottle to be blown, the type of liquid to be filled into that bottle (e.g. sensitive-non-sensitive liquids), and the type of filling process to be used thereafter; (b) specific customers and hence customer groups can be identified at the time of sale in particular due to the fact that SBM machines need to be customised to meet specific customer requirements; (c) arbitrage allowing customers to defeat price discrimination is not a regular feature of the EEA market; in addition, (d) there are commercial and strategic barriers, as customer purchasing choices are not influenced by the price of the SBM machine alone – instead the level of performance guarantees (e.g. aseptic guarantee) and increasingly the ability to offer one-stop-shop full line capabilities (particularly for aseptic lines), including related after sales services (in time and in situ) constitute particularly important factors; (e) SBM machines used in a specific PET line (e.g. non-aseptic) need retooling, adaptation and additional components to be tailored for use with other products (e.g. aseptic); According to new data from Sidel, the cost of retooling an SBM machine used in a non-sensitive line for use in a sensitive line (or *vice versa*) would be around [0-10%] or less of the total cost of a basic SBM machine;⁶ in addition, according to new Tetra data it appears that the cost of customisation specific to a new “aseptic version” SBM machine would be around [0-10%] or less of the total cost of a standard SBM machine.⁷ The market investigation does not reveal any new facts regarding SBM machines save for the development of the Tetra Fast technology for SBM machines. The above factors were not deemed sufficient by the CFI to define a distinct market for SBM machines by end use.
32. In the light of this, and subject to its findings on the impact of the Tetra Fast technology as outlined in paragraphs 33 - 37 below, the Commission's competitive assessment of the proposed operation is based on the wider market (comprising all beverages) for, respectively, low and high capacity SBM machines without distinctions by end-use, as found by the CFI in its Judgment.

⁶ Sidel submission dated 5 December 2002, response to question 35.

⁷ Tetra submission dated 4 December 2002, Annex 2.

4.2.2. Tetra Fast-enhanced SBM machines

33. The existence of SBM machines and SBM machine technology enhanced by the Tetra Fast technology is a new element which was not disclosed by Tetra during the previous procedure and has surfaced since the annulled Decision.⁸
34. Conventional (compressed air) stretch blow moulding, as discussed above, involves using a compressor generating approximately 40 bar of pressure for blowing the bottle from the heated pre-form. The Tetra Fast technology, however, is based on the concept of using a hydrogen oxygen (explosive) chemical reaction to form PET bottles, instead of using compressed air, whereby the explosive process has a sterilising effect. It does not require the use of an expensive compressor⁹ and performs the high-pressure stage of the blow moulding by igniting an oxygen/hydrogen mixture causing an explosion inside the pre-form.
35. [...] According to Tetra the process uses the same pre-form and mould as conventional stretch blow moulding. The new technology, rather than constituting one or more new SBM markets, can be expected to be sufficiently substitutable, at least in the first years of its commercialisation, and in any rate up to 2005, with existing SBM technologies.
36. In spite of its aseptic capabilities the new technology, at this stage, does not seem to lead to the creation of a distinct ‘aseptic SBM’ market, as the technology could be used equally to form bottles for aseptic and non-aseptic liquids. The CFI has not accepted the Commission’s arguments on price discrimination with conventional compressed air SBMs. The same applies by analogy to Tetra Fast SBMs.
37. In the light of this, the Commission’s competitive assessment of the proposed operation is based on the wider market (comprising all beverages) for, respectively, low and high capacity SBM machines without distinctions by end-use, as found by the CFI in its Judgment, and without distinction by bottle forming technology.

4.3. PET filling machines (aseptic – non-aseptic)

38. The Decision finds that as advanced by Tetra, aseptic and non-aseptic filling machines belong to different product markets, since they are not substitutable either from the demand or supply side. Aseptic filling machines fill a product under sterilised conditions ensuring a longer shelf-life. They employ much more complex technology than non-aseptic filling machines and are usually used for “*sensitive products*” (recital 201).
39. Tetra argued that aseptic PET filling machines are not interchangeable with other aseptic filling machines and, in particular HDPE aseptic filling machines and hot-fill PET machines (recital 202). HDPE filling machines are used almost exclusively for packaging UHT milk. HDPE filling machines have significant technical differences distinguishing them from aseptic PET filling machines. Not all suppliers can offer both types of machines. However, the Commission found these distinctions may blur in the

⁸ The Tetra Fast technology had not been mentioned in the first administrative procedure (although Tetra obtained patents in 1997 [...]). The Commission only learned of this technology when the hold-separate trustee appointed under the Commission’s Article 8(4) decision of 30 January 2002, reported [...]

⁹ A smaller and less expensive compressor of 15 bar is required.

future as some market participants, including Tetra are developing machines that can switch between HDPE and PET aseptic filling (recital 202).

40. As for hot-filling, this is a non-aseptic method for high acid drinks (mainly juices) in which sterilisation is achieved by heating the drink to approximately 80 degrees Celsius and filling into the PET bottle at that temperature. Hot-filling achieves similar shelf life to aseptic PET filling, but affects the taste of the product even more than cold aseptic filling. Hot-fill machines also use different technology, which is closer to the simpler non-aseptic filling technology. The bottles must be thicker than standard PET bottles to withstand the heat (recital 203).
41. The Judgment upholds the Commission's market definition distinguishing between aseptic and non-aseptic PET filling machines (paragraphs 236 and 237), as well as its finding that existing technical distinctions which currently separate PET and HDPE filling machines may blur in the future with the development of machines such as Tetra's LFA-20 ON that can switch between PET and HDPE aseptic filling (paragraph 244).
42. The results of the Commission's market investigation tend to confirm this.

4.4 Barrier Technology

43. Since PET enables the manufacture of permeable transparent bottles, for products that are sensitive to oxygen and light such as juices and LDPs, PET must be enhanced for long shelf life using a barrier technology.
44. Barrier technologies can be divided into four principal categories: 1) *multilayer technology* (applied by combining a standard PET plastic material with a barrier material sometimes in combination with oxygen scavengers); 2) *spray coatings* (barriers sprayed on the outside of the PET bottle in a separate step after blowing); 3) *plasma coatings* (application of internal as well as external plasma coatings on the PET bottle in a separate step after blowing using dedicated proprietary machines); and 4) *mono-layer enhanced PET* (enhanced PET resin which contain the requisite barrier properties) (recital 191). Tetra and Sidel are active in *plasma coatings* through their Actis (Sidel) and Glaskin (Tetra) barrier technologies (recital 196).
45. The Decision finds that for the time being, all barrier technologies are substitutable from the demand side as they produce identical or at least similar results so that the end product is indistinguishable to consumers (recital 197). However, barrier technology is an emerging market in which no single barrier technology has emerged as the clear winner even though there are indications that Tetra and Sidel's plasma technologies, which are well developed, have some cost advantages. Nevertheless, some independent third parties are actively researching the barrier technology field and are close to the stage of commercialisation of new mono-layer technologies that may offer greater cost advantages than plasma coatings whilst also having the advantage that the material could be used as standard PET on standard SBM machines (that is the technology is not machine specific) without additional capital costs (recital 198).
46. Thus, the Commission concludes that barrier technologies for PET form part of the same product market, which includes multi-layer, plasma, barrier coatings and mono-layer solutions, without excluding the possibility that any one of the technologies (most

likely mono-layer or plasma) might, in the future, acquire such technical features and cost advantages that it should be placed in a distinct product market.

47. The above analysis remains unaffected by the Judgment and is confirmed by the results of the Commission's market investigation. This analysis is also unaffected by the coating technology described in paragraph 70 below.

5 *HDPE packaging systems and HDPE bottles*

48. HDPE bottles are produced by extrusion blow moulding machines (EBM machines) and are filled by dedicated aseptic and non-aseptic HDPE filling machines. The Decision dismissed potential concerns raised with regard to dominance in a potential market for machines producing aseptic HDPE bottles with handles (recital 297, footnote 125).
49. The Decision refers to the fact that the existing technical distinctions which currently separate the PET and HDPE filling machines markets "*may blur in the future*" with the development of machines such as Tetra's LFA-20 ON "*that can switch between HDPE and PET aseptic filling*" (recital 202).
50. The above analysis was unaffected by the Judgment. On the basis of the market investigation, the Commission does not take a different view.
51. Regarding the supply of HDPE bottles (which Tetra produces in its capacity as a converter) it is apparent from the Decision (recitals 33, 292 and 297) that the Commission regards these as a separate market. On the basis of the present market investigation, the Commission does not take a different view.

6 *Carton packaging systems*

52. The Decision concluded that there are four distinct product markets: aseptic carton packaging machines, aseptic cartons, non-aseptic carton packaging machines and non-aseptic cartons, as defined in previous Commission decisions, which is accepted by Tetra (recitals 207 to 209).
53. The Judgment accepts, as common ground, these relevant product markets.

7 *Relevant geographic market*

54. The Decision concluded that the relevant geographic market for all the above relevant liquid packaging equipment product markets is the EEA, which is accepted by Tetra (recitals 210 to 212). On the basis of the present market investigation the Commission does not take a different view. Consequently, for the purposes of the present decision the relevant market for liquid packaging equipment is the EEA. As regards the supply of bottles (be it PET or HDPE) the relevant market is narrower than the EEA by reason, *inter alia*, of high transport costs relative to the value of the product. For the purposes of the present decision it is, however, not necessary to define its exact scope.

VI. COMPETITIVE ASSESSMENT

A. Market Overview: Sidel's and Tetra's positions on the relevant markets and prospects for PET growth

1. *Tetra's current dominant position in aseptic carton and leading position in non-aseptic carton.*

55. The Decision concluded that Tetra continues to hold a dominant position on the market for aseptic carton packaging machines and cartons (with [70-80%] market share)¹⁰ and a leading position (with [50-60%] market share)¹¹ in the market for non-aseptic carton packaging machines and cartons (recitals 215 to 231). In addition, Tetra is a vertically integrated packaging company with a business model of offering integrated “*one-stop-shop*” solutions of machines and packaging material to its customers (recitals 295 and 296). The Decision found that since in the overall market for packaging in both aseptic and non-aseptic cartons Tetra holds some [60-70%] of the overall market and there are particularly close associative links between the two markets, Tetra also has a dominant position in the carton packaging market as a whole.

56. This was accepted by the Judgment (paragraphs 217, 218 and 323).

57. Tetra has accepted its carton dominance in its submissions to the Commission in the course of the present investigation.¹² On the basis that Tetra's 2001 share of the market for aseptic carton packaging machines and cartons was [70-80%] and [50-60%] on the market for non-aseptic carton packaging machines and cartons there has therefore been no material change that should lead the Commission to change its conclusion that Tetra is dominant in the market for aseptic packaging machines and retains a leading position in the market for non-aseptic packaging machines.

2. *Sidel's leading position in SBM machines and Tetra's leading position in Tetra Fast SBM technology and equipment*

58. The Decision concludes that Sidel has a leading, but not dominant, position in SBM machines of high and low capacity. Sidel is the only company capable of providing the full range of SBM machines from very low capacity to the highest capacity always using leading rotary technology (recitals 232 to 248).

59. The Decision finds that post-merger, in both the low¹³ and high¹⁴ capacity segments, Tetra/Sidel would have market shares of [50-60%] or more. Tetra/Sidel would be by far the leading company throughout the entire spectrum of SBM machinery from the simplest low-capacity machines (i.e. Tetra's Dynaplast) to the highest-capacity and most technologically advanced machines (i.e. Sidel's). In 2000, market shares by volume (capacity bph) for low capacity SBM machines were: Sidel ([30-40%]); Tetra ([20-30%]); ADS ([10-20%]); Urola ([0-10%]); Sipa ([0-10%]); and SIG ([10-20%]).

¹⁰ SIG ([5-15%]); Elopak, International Paper and VarioPak ([5-15%]) – based on 2000 figures. International Paper has since exited the EEA market.

¹¹ SIG, International Paper and VarioPak ([40-50%]) - based on 2000 figures. International Paper has since exited the EEA market.

¹² Tetra's submission of 04 December 2002.

¹³ Low Capacity SBM Machines < 8 000 bph – linear and rotary technology.

¹⁴ High Capacity SBM Machines > 8 000 bph – only rotary technology.

For high capacity SBM machines they were: Sidel ([60-70%]); Krones ([10-20%]); SIG ([10-20%]); Sipa ([0-10%]).

60. The Judgment criticises the Commission's analysis of the low-capacity SBM market (paragraphs 271-283). As regards the high-capacity SBM market the Judgment acknowledges "*that the Commission was correct in highlighting Sidel's leading position on this market*" and that Sidel is "*by far the market leader*". (paragraph 284)
61. In 2001, Tetra's and Sidel's market share in low capacity SBM has fallen, largely due to Tetra's decision to close down its Dynaplast business. There is therefore no reason to assume that the parties' position on the low-capacity SBM market is stronger than it was at the time of adoption of the Decision. The market investigation has not revealed any fundamental changes to market conditions as discussed in the Decision and reviewed in the Judgment, except as related to the Tetra Fast technology, the impact of which is discussed in paragraph 101 below.
62. In high capacity SBM machines, there is no indication that Sidel's position has materially changed since the adoption of the Decision.
63. The Tetra Fast technology (see paragraphs 33 - 37 above) is owned by Tetra and has been described and evaluated in detail in Tetra's internal documents.¹⁵ These documents indicate that [...].¹⁶ On the basis of these documents the technology appears to offer a range of economic, operational and environmental advantages over conventional stretch blow moulding. Tetra considered that the application of the technology would achieve:
 - 63.1. [*statement concerning electricity consumption and total machine investment costs*]¹⁷
 - 63.2. [*statement concerning floor space*]
 - 63.3. [*statement concerning water and sterilising agents; statement concerning aseptic performance*]
64. As regards the stage of development and length of time it would take to commercialise the Tetra Fast technology, it appears that [*statement on the stage of development*] In field tests approximately [...0-10 million bottles] were produced and sold. The prototype has [...]¹⁸
65. On the basis of this information it appears that commercialisation can be achieved [...], if necessary, subsequent to further testing and technological improvements. There is no doubt on the combined entity's enhanced ability to achieve further progress due to the combined technological capabilities of both parties.

¹⁵ [...]The patent family comprises approximately [...] patents. Tetra [...]have been granted CH 691218 A5 & EP 0.923446 B1[...]

¹⁶ Tetra was granted a patent for the initial idea of using a hydrogen-oxygen chemical reaction to form PET bottles, instead of using compressed air in 1997 and estimates that it has invested [several, EUR <10mn] in the development of the Tetra Fast technology during the period 1996-2002. [...]

¹⁷ [*contains cost comparisons*]

¹⁸ [*internal competitor statement relating to assessment of technology by competitor*]

66. The Tetra Fast technology thus has a strong potential for proving to be a break-through technology for SBM machines by: (a) [...]; (b) leading to substantial cost savings and process and performance improvements.
67. The Commission's market investigation has furthermore confirmed that Tetra's and Sidel's main competitors do not have an equivalent technology in the pipeline and therefore could not challenge the merged entity's position regarding enhanced SBM machines.

3. *Tetra & Sidel's combined positions in barrier technology*

68. The Decision finds that:

- 68.1. Tetra & Sidel are both active in "*plasma technology*"; which is applied onto PET bottles using dedicated proprietary machines in a separate step after the bottles have been blown (recital 272);
 - 68.2. Sidel is active through its recently commercialised *Actis* range - a carbon-based technology, which uses a layer with a brownish tint on the inside of the bottle (making it more suitable for beer bottles). *Actis* uses rotary technology and can reach speeds up to 10 000 bph. Contrary to Sidel's optimistic expectations for sales of hundreds of *Actis* machines, Sidel had only sold [...] machines by 2001. Sidel has also developed a Lite version of its *Actis* technology – exhibiting a lighter, almost invisible, yellow tint, which is thus more suitable for juices (recital 273);
 - 68.3. Tetra is active through its *Glaskin* technology - a clear SiOX compound coated onto the inside of the bottle. The machines may reach speeds of up to 12 000 bph; at the time of the Decision Tetra had also licensed another barrier technology, *Sealica*, but informed the Commission that it had taken the commercial decision to abandon this license (recital 274);
 - 68.4. the economics of plasma make it an attractive option for customers in the "*sensitive products*" such as LDPs and juices, nevertheless, it requires the buying of special equipment, as against which any enhanced monolayer PET pre-forms likely to be commercialised in the near future, could be blown in standard SBM machines (recitals 277 to 281);
 - 68.5. although in plasma Tetra and Sidel are the two main players they face competition from Kronos/Coca Cola's Bestpet and there are other potential new entrants in the overall barrier technology market; the Tetra/Sidel combination would have a market share of [10-20%] of the overall barrier technology market on the basis of barrier-enhanced bottles produced in 2000 (recital 275).
69. During the course of the present investigation, Tetra informed the Commission that it had indeed ceased its development activity concerning its *Sealica* barrier technology (based on multilayer technology). As regards *Glaskin*, according to Tetra, the technology is still in the early stages of commercialisation (as found in the Decision, recital 274). The first coating line started operations in [...] The production line, located in Oudenaarde, Belgium has a capacity of [...] bottles/year. According to the estimates of Tetra and Sidel, the combined market share of the parties' based on sales of bottles in 2001 was clearly [0-10%].

70. A coating technology is currently being developed by Tetra in the context of its Tetra Fast technology. In this coating technology a precursor gas is exploded with the explosive gas and forms a coating on the inner wall of the container. It is apparently still at an early stage of development. On the basis of the information available it appears that this technology does not constitute a separate market being sufficiently substitutable with other barrier technologies (although this may change in the future). Nor is there on the basis of this information sufficient ground to assume that this technology will be the “winning technology” as regards PET barrier technologies. (It appears, however that the technology is of high importance in the context of the further development of the Tetra Fast technology, affecting its commercial viability, as many liquids need, at least for prolonged shelf life, the application of coating technologies.)

71. The operation therefore does not raise serious doubts on the market for PET barrier technologies.

4. *Sidel’s strong experience in aseptic and non-aseptic PET filling and the innovative Combi-machines*

72. The Decision emphasised:

72.1. the importance of effectively managing filling operations in combination with blow moulding particularly with regard to “*sensitive products*” such as LDPs and juices to ensure clean or ultra-clean packaging processes. Sidel manufactures both aseptic (through its subsidiary Rémy) and non-aseptic (through its subsidiaries Alsim and Girondine) PET filling machines (recitals 249 and 250);

72.2. the growth in aseptic PET filling - total market volume of installed aseptic PET filling machines has increased by [70-80%] (from [...] machines to [...] machines) during 1998-2000 with a more than [20-30%] increase of the installed base in the year 2000 alone. For the next few years the market is expected to continue to grow by at least [10-20%] annually with the countries currently having a low installed base of aseptic filling machines experiencing a particularly strong growth (recital 250). Sidel is active in aseptic PET filling machines through its subsidiary Rémy, a leader in PET aseptic technology with an established market position and benefits from excellent reputation and aseptic “brand” recognition. Its aseptic filling machine business is located in France (Octeville-sur-Mer);

72.3. the average filling speed of PET filling machines varies from supplier to supplier - KHS-Kloeckner, Stork and GEA, and recently Sidel, are in the same range of 12 000-13 000 bph, although Sidel’s ultra-clean and aseptic PET filling machines using flowmeter feeding technology¹⁹ allows for speeds up to [...] (fermented milk, 100 ml), [...] (pasteurised whole milk, 1 l) and [...] (orange juice with pulp, 1 l) (recital 253); Tetra’s RFA-40, can be used for bottles of 0.2-1.5 litres and has a capacity of [...] and is more suitable for high/low-acid drinks than LDPs (recital 284); Procomac (12 000-20 000 bph) and Kronos (20 000 bph) are faster; only SIG is believed to be slower (6 000 bph) (recital 253);

¹⁹ In particular, Sidel’s 8100 series, 8200 series and 8300 series. See The World of PET, p. 21. Flow-meter feeding includes filling with no nozzle/package contact which reduces the contamination risk.

- 72.4. the breakthrough in aseptic PET filling through Sidel’s innovative Combi technology, which allows the integration of blowing, filling and capping of a PET bottle in a single machine. This innovative technology represents a similar approach to the manufacture of PET bottles to that achieved by Tetra’s aseptic carton packaging machines. The Combi SRU, a Combi machine operating in an ultra-clean but not aseptic environment, has a capacity of [...] ([...] moulds), [...] ([...] moulds) to [...] ([...] moulds). For “*sensitive products*”, such as juices and LDPs, the Combi SRU (non-aseptic ultra-clean) and SRA (aseptic) enables beverage companies to blow and fill PET bottles in an integrated machine reducing the risk of contamination (recital 254).
73. For aseptic PET filling machines, market shares by value (new sales capacity) 1998-2000 were: Sidel + Tetra ([10-20%]); Procomac ([30-40%]); Serac ([0-10%]); Kronos ([30-40%]). On the basis of estimates of EEA 2000-2002 sales of aseptic PET filling machines they were: Sidel + Tetra ([20-30%]), Procomac ([20-30%]), Serac ([0-10%]), Kronos ([10-20%]), SIG ([10-20%]), KHS Kloeckner ([20-30%]); Stork ([0-10%]) and GEA ([0-10%]). The merged entity’s market share of approximately 30% of the installed base of aseptic PET filling machines has changed little. With that share the merged entity is still behind the market leader, Procomac with a share [30-40%].
74. There has been little change in Sidel’s position in non-aseptic PET filling machines and Sidel continues to be the leading company in Combis.

5. *Tetra/Sidel’s other activities in PET & HDPE*

75. The Decision refers to Sidel’s activities in addition to SBM machines, barrier technology and filling machines such as the supply of secondary line equipment (mainly conveyor belts) etc ... without distinguishing between such downstream or neighbouring activities related to its upstream activities linked to the liquid food industry as opposed to such activities linked to other industries such as non-liquid food industry and health & beauty industry (recitals 256 and 257). However, the Decision does emphasise Sidel’s strong capabilities in offering tailor-made solutions for product lines; where it faces competition mainly from Kronos and several smaller more local competitors (recital 258).

5.1. *HDPE packaging markets*

76. Tetra acts as a converter supplying finished HDPE bottles, through “Hole-through-the-wall” arrangements, mainly to dairies in the United Kingdom that are used for non-aseptic filling of pasteurised and ESL²⁰ milk. Tetra produces the HDPE bottles using EBM machinery from Graham Engineering under an [...] alliance.²¹ Tetra’s market share in this downstream market for the supply of non-aseptic HDPE bottles in the United Kingdom is [20-30%] (the leader being Nampack, a converter, with [60-70%]). Tetra also started supplying HDPE bottles in Belgium. Sidel is not active as a supplier of HDPE bottles.

²⁰ Extended shelf life (ESL) milk is fresh pasteurised milk which has a shelf life of approximately 90 days. This places it between UHT (aseptic) milk and short-life fresh milk.

²¹ [...]

77. The Commission's market investigation has revealed no firm new evidence that Tetra's market position has been significantly strengthened in the supply of non-aseptic HDPE bottles since the adoption of the annulled Decision.
78. Sidel is active as a supplier of EBM machines but has no significant market share. An attempt to produce a combined blowing and filling HDPE filling machine (the EOLE) has aborted since the adoption of the annulled Decision. Consequently, the merged entity's combined position does not lead to serious doubts as regards the EBM machines market.
79. At the time of the adoption of the Decision the parties claimed that only Sidel was active in aseptic HDPE filling. However, Tetra at that time informed the Commission that it was developing an aseptic HDPE filling machine, called LFA.
80. Since the annulled Decision Tetra's market position has evolved in aseptic HDPE filling through further development and successful field testing of this LFA filling machine, which exists in both an open neck (the LFA-ON) and a closed neck aseptic version. [...] Tetra has already obtained FDA authorisation for one of the LFA's field tests. Given that Sidel already held some [10-20%] of the aseptic HDPE filling market at the adoption of the Decision (this share has remained unchanged), Tetra's progress will undoubtedly enhance the parties' combined position on this market. The enhancement of this position was raised by the Commission during the judicial proceedings and reference was made to internal documents of Tetra Laval showing very high expectations for sales of the LFA machine. The CFI dismissed the importance of such evidence by holding that *"the emphasis placed by the Commission, in its written answers and at the hearing, on the commercial potential of LFA-20 machines, referred to in the contested decision (recital 82, footnote 32, and recital 202), which will be capable of filling aseptically both HDPE and PET bottles, cannot support [its argument]. Those machines, at least according to Tetra, which the Commission did not contradict on this point at the hearing, are still being tested by it and by three competitors which are also developing them"*.
81. Given that the Commission, in its annulled Decision had not found any specific creation of dominance on the market for aseptic HDPE filling, given that Serac and Stork have established market positions and higher EEA market shares than Sidel (Serac being the clear market leader), and in view of the CFI's comments regarding aseptic PET filling (in which the parties' combined market share was higher and their market share distance to the market leader was smaller), the additional facts regarding the LFA machine are in themselves insufficient for the Commission to revert on its position as expressed in the annulled Decision.
82. As regards non-aseptic HDPE filling, Sidel's market share, by installed base, has increased from [10-20%] in 2001 (at the time of the notification) to [15-25%] in 2002 (at the time of Sidel's update to the notification). Tetra is not active on this market. Sidel has improved its position since adoption of the Decision by [...] sales of non-aseptic HDPE filling machines. Given that the Commission, in its annulled Decision had not found any specific creation of dominance on the market for aseptic HDPE filling, given that Serac and Stork have established market positions (Serac being the clear market leader with [40-50%] market share in 2002), and in view of the CFI's comments regarding aseptic PET filling (in which the parties' combined market share was higher and their market share distance to the market leader was smaller), the

enhancement of Sidel’s position is in itself insufficient for the Commission to revert on its position as expressed in the annulled Decision.

5.3. *PET equipment and PET lines*

83. At the time of the Decision, the merged entity’s full line PET capability would have been as follows (recital 299):

Market	Tetra	Sidel	Tetra + Sidel
Pre-forms	[0-10%]	Not active	[0-10%]
SBM (low-capacity)	[20-30%]	[30-40%]	[50-60%]
SBM (high-capacity)	Not active	[60-70%]	[60-70%]
Barrier technologies	Active	Active	[10-20%]
Aseptic PET fillers	[0-10%] ²²	[10-20%]	[20-30%]
Non-aseptic PET fillers	Not active	Active	[0-10%]
Secondary line and distribution packaging equipment ²³	Not active	Active	[20-30%]
Plastic bottle closures	[10-20%]	Not active	[10-20%]

84. Today that position has not changed significantly with the exception of Tetra’s exit from the PET pre-forms market, Tetra’s closing down of its low-capacity SBM business Dynaplast and the discovery of Tetra’s position with regard to its Tetra Fast technology, the impact of which on the SBM markets is discussed in paragraph 99- 101
85. As regards the market for blow moulds, Sidel produced approximately [...] blow moulds in 2000. Sidel estimates that it supplies about [50-60%] of the replacement moulds for Sidel machines. The notifying parties do not have information on the total size of the mould market or on the size of competitors’ mould production, therefore a market share estimate is not possible. There appear to be a number of suppliers of replacement molds in the EEA and world-wide. No concerns on this market were raised during the Commission’s market investigation.

6. *Growth prospects of PET and other packaging materials*

86. The growth prospects of PET versus other packaging material was one of the main elements of the two theories of harm advanced by the Commission in its Decision and is still a relevant aspect of the market overview in the context of this case. It should be noted that, given the CFI’s market definition of a wider SBM machine market including both “sensitive” and “non-sensitive” products, growth levels either similar to or higher than those estimated in the Decision would be necessary for the Commission to show likely foreclosure in this wider market and hence conclude that the concentration raises serious doubts as to its compatibility with the common market. Such growth figures would have to be based on evidence that would be “particularly plausible” in the sense required by the CFI in the Judgment (paragraph 162).

²² This percentage refers to Tetra’s aseptic RFA machine. On the issue of potential suitability of the LFA machine for switching between aseptic HDPE filling and aseptic PET filling see the CFI’s remark quoted in paragraph 78.

²³ Secondary line equipment comprises principally conveyor belts and distribution packaging equipment (i.e. various machines that package single product units together for distribution).

87. In the Decision, the Commission considered Tetra's contention that the use of PET packaging would exhibit very limited growth in both (1) the liquid dairy product segment, consisting primarily of UHT and fresh milk, and (2) the juice segment, two segments which represent the main bulk of sensitive liquids. Tetra continues to maintain that use of PET bottles in fresh liquid dairy products will grow from 1.2% of liquid volume in 2000 to 2.6% in 2005. Tetra further maintains that the use of PET bottles for packaging juices will increase from 0.3% of liquid volume in 2000 to 1.0% in 2005.
88. In the Decision, the Commission disagreed with Tetra and concluded that PET use in the sensitive product segments would grow significantly in the next 5 years. The Commission based its conclusion on its assessment of various sources of evidence including: research studies commissioned by Tetra (Canadean); independent studies (PCI - PET packaging, resin and recycling, "The potential for PET in the packaging of liquid dairy products", (2001); "Warrick Research Report Packaging Markets" (2000); and Pictet "European Packaging Machinery" (September 2000)); the parties' own projections and internal documents; the results of the Commission's own market investigation, and technological, cost and marketing considerations.
89. The Commission concluded that there was already significant overlap between PET and carton in FFDs and tea/coffee drinks where PET represents 20% and 25% respectively, and that PET will continue to make inroads into these segments at the expense of carton reaching 30% by 2005 (recital 144). As for LDPs, the Commission concluded that despite the current overall limited presence of PET in these segments, the improvements in barrier technology and aseptic PET filling would lead to significant growth in the next 5 years reaching between 10% and 15% in fresh milk and 25% in flavoured and other dairy beverages by 2005. PET's use in UHT milk (50% of the total milk market) was deemed more uncertain – only 1% by 2005 - even though the relevant light barrier technology exists, since growth would depend on developments in low-acid aseptic filling and possibly on cost reductions. Overall, PET would account for 9% of the total European market for LDPs by 2005 (recital 147). As for juices, the Commission predicted substantial switching from glass to PET and more limited switching from carton to PET to occur, reaching at least 20% of the overall juice market in the EEA by 2005 (recital 148).
90. The CFI upheld the Commission's findings in the Decision that PET and carton were technical substitutes, that PET is being used as a packaging material for the *sensitive products* traditionally packaged in carton and that there is significant customer overlap with beverage companies using both carton and PET as part of their packaging mix.
91. As regards anticipated future growth of PET, the CFI found that the Commission had established to the requisite legal standard that "*growth in the PET market is foreseeable*" thereby rendering leveraging possible, but questioned "*the extent of the growth for the various sensitive products*" (paragraph 195).
92. The CFI did not call into question the Commission's growth estimates for PET growth by 2005 for tea/coffee drinks including isotonic drinks and FFDs (recital 215).
93. However, as regards LDPs and juices, the CFI determined that, although a certain amount of growth in LDPs and juices was likely, especially for premium products, "*convincing*" evidence of the extent of the growth was lacking. According to the CFI the growth estimates adopted by the Commission in respect to those segments were

"not really very convincing" (paragraph 212 of the Judgment) as the independent studies reviewed did not, in the CFI's view, prove the Commission's forecasts to the "requisite legal standard". The Commission's market investigation, internal documents of the parties and other sources of evidence were not addressed by the CFI.

94. The Commission conducted a new analysis of the market taking into account the current market conditions and the findings of the CFI's Judgment. The Commission's new investigation did not reveal any new studies of material significance nor any other new evidence of a materially different probative value to that available at the time of the adoption of the previous Decision which could allow the Commission to forecast levels of growth similar to or higher than those in the previous Decision, which were rejected by the CFI, in accordance with the standard of "*convincing evidence*", as applied by the CFI.

B. Substantive Test

95. In essence, the Decision considered that the take-over of Sidel by Tetra would create a market structure which would lead to the:

95.1. creation of a dominant position for Sidel in the market for SBM machines (and other PET equipment) used for "*sensitive products*" through leveraging of the merged entity's dominant position in the relevant carton markets (termed in the CFI's Judgment "**first pillar**");

95.2. strengthening of Tetra's dominant position in the relevant carton markets (aseptic and overall) through the loss of the threat posed by the competitive constraint emanating from Sidel's SBM machine business, given Sidel's leading market position in the SBM machine market taken together with the anticipated growth in PET at the expense of carton (termed in the CFI's Judgment "**second pillar**") and

95.3. reinforcement of both those positions as a result of the merged entity's enhanced position in the end-use sectors of "*sensitive products*" in three packaging materials, carton, PET and HDPE (the so called "**third pillar**")²⁴.

96. Whilst the Judgment upheld the Commission with regard to the underlying theories of harm, it nonetheless annulled it, *inter alia* on the basis that a number of factors advanced by the Commission in support of its case were not proven to the "*requisite legal standard*" as applied by the CFI in its Judgment. In essence, these were as discussed below.

1. *Regarding the first pillar of the Decision: creation of a dominant position for Sidel in PET equipment and in particular on the SBM machines markets*

1.1. *Regarding horizontal and vertical effects*

97. The Decision identified a number of horizontal and vertical effects which were dismissed by the CFI. Given the findings of the CFI in its Judgment, the Commission's

²⁴ The third pillar was dismissed by the Court on the basis that none of the other two pillars, on which it was essentially dependent, were proven (see paragraph 335 of the Judgment). It will therefore not be examined separately in the present decision.

market investigation did not focus on the alleged horizontal and vertical effects save insofar as necessary to assess the impact of Tetra's Tetra Fast technology which is patented and is being developed for use on SBM machines and which has been retained by Tetra.

98. On such markets the operation leads to a (continued) horizontal overlap between Tetra and Sidel in SBM machines, which was not disclosed at the time of the annulled Decision.
99. As outlined in paragraphs 63 - 67 above the Tetra Fast technology can be expected to have a strong impact on both the low-capacity and the high-capacity SBM markets due to its potential for significant cost-savings and its fairly advanced stage of development. Sidel has long been by far the strongest company in high capacity SBM machines, holding [50-60%] market share by installed capacity and has a reputation for technological leadership in SBM machines and tailor-made SBM solutions. Both Tetra and Sidel have advanced R&D capabilities and the combined entity will have sufficient financial means to conduct research and development. The market investigation has not led to any indication that any competitor has comparably promising technology in the pipeline. While few competitors have managed to surmount the high barriers to entry and expansion in the high-capacity SBM market, the likely further development and introduction by Tetra/Sidel of their proprietary Tetra Fast technology in the short to mid-term is liable to: (a) raise barriers to entry; and/or (b) foreclose competitors.²⁵ The merged entity would have a reduced incentive to licence the technology. It could either decide not to make it available to competitors at all or to make it available at a higher, possibly prohibitive, price or to make it available only partly while retaining key patents exclusively. The operation therefore raises serious doubts as to the creation of a dominant position for the merged entity in high-capacity SBM machines.
100. However, with regard to high-capacity SBM machines, the commitment offered by Tetra regarding the Tetra Fast technology (and the related patents on coating technology – see paragraph 70 above) which are assessed further below (under “*Commitments*”) ensure open access for third parties other than Tetra/Sidel to the Tetra Fast technology, reduce barriers to entry and eliminate the risk of foreclosure. Competition on the further development of the Tetra Fast technology will ensure that competitors have an equal chance to make decisive progress on this technology.
101. Sidel's position is clearly weaker in the low-capacity SBM market and entry into this market has been possible more easily (although Tetra's commercial failure with Dynaplast may indicate that barriers to entry and expansion are not low). On the other hand, the state of development of the Tetra Fast technology is currently more advanced in low-capacity SBM machines than in high-capacity machines (a fact that is, at least partly, to be seen in connection with Tetra's previous business activity in low-capacity SBMs related to Dynaplast). In any event, in view of the commitment given by Tetra in regard to the Tetra Fast technology, which has an impact on the low-capacity SBM market and would remove concerns, it is not necessary to decide upon this question.²⁶

²⁵ See footnote 16 indicating the [...] investment cost and [...] development time of the Tetra Fast technology.

²⁶ In this context, the Commission also points to the commitment given by Tetra regarding Dynaplast (see under *Commitments* below), of which it takes note.

102. As for the horizontal overlap on PET and HDPE filling machines, divided into aseptic and non-aseptic fillers, HDPE and PET fillers, the CFI ruled that no creation of a dominant position was possible due to Tetra/Sidel's current market position with market shares, at the time of the Decision of [20-30%] or below. The new market investigation does not lead to higher market shares on any HDPE and PET filling market than [20-30%] in 2001 which in the CFI's view was insufficient for the finding of dominance, e.g. in aseptic PET filling, as against the market share of [30-40%] of Procomac, the market leader.
103. As for the vertical concern existent at the time of adoption of the Decision with regard to Tetra's activities as a pre-forms producer, the CFI has held in its Judgment that subsequent to Tetra's exit of the pre-forms business there could be no more vertical concerns arising from the operation. The Commission's market investigation does not lead to vertical concerns relating to PET pre-forms. The Commission, however, takes note as a factual basis for its decision, of Tetra's commitment which is a corollary to its exit of the pre-forms business, to refrain from EEA re-entry in the next [...] years.
104. As regards the horizontal overlap in PET barrier technologies, reference is made to paragraphs 68- 71.

1.2. Regarding leveraging

1.2.1. PET equipment other than SBM machines

105. As regards PET equipment markets other than SBM machines, such as aseptic PET filling machines, barrier technology and other PET equipment, the CFI held that leveraging would be unlikely to lead to foreclosure and dominance in those relevant markets, given the parties' "modest" positions within those markets and the presence of significant competitive constraints²⁷.
106. The Commission's market investigation has not revealed any new facts that would go beyond what was adduced in the Decision except as regards Tetra's further development of its LFA filling technology which also has an impact on aseptic PET filling as the LFA technology may be suitable for switching between aseptic HDPE and PET filling. However, in the light of the CFI's findings, and having regard to progress in the intervening period in the development of this technology, these are not considered sufficient to lead to serious doubts regarding the possible creation of a dominant position by the merged entity in those relevant markets.

1.2.2. SBM machines of low and high capacity

107. As explained above, the opportunity and incentives for leveraging of Tetra's dominant position in carton packaging to foreclose competitors and dominate the SBM machine markets must be assessed by reference to the overall (all beverages) markets for low and high capacity SBM machines.

²⁷ It should be recalled that the CFI in its Judgment finds that "(g)iven the power of Procomac and the intensity of competition on the market, especially with the arrival of new competitors, it is also unlikely, on the basis of the current market shares held by Tetra and Sidel, that the merged entity would be able to achieve a dominant position in the relatively near future through leveraging from the aseptic carton markets." (Judgment, paragraph 241).

108. Despite the high market shares of the merged entity, particularly in high capacity SBM machines, it is unlikely that post-merger Tetra could leverage its carton customers so as to lead to the creation of a dominant position for Sidel in the wider SBM machines market without distinguishing by specific end-product nor by aseptic or non-aseptic end product. This is because, given the CFI's market definition of a wider SBM machine market including both "*sensitive*" and "*non-sensitive*" products, growth levels either similar or higher to those estimated in the Decision would be necessary for the Commission to show likely foreclosure in this wider market and hence conclude that the concentration raises serious doubts as to its compatibility with the common market. However, as noted above, the Commission's new investigation did not reveal any new studies of material significance nor any other new evidence of a materially different probative value to that available at the time of the adoption of the previous Decision which could allow the Commission to forecast levels of growth similar to or higher than those in the previous Decision, which were rejected by the CFI, in accordance with the standard of "*convincing evidence*", as applied by the CFI.

109. As a result, the Commission cannot raise serious doubts regarding the creation of a dominant position for the merged entity in the wider SBM machine market.

2. *Regarding the strengthening of a dominant position for Tetra on the aseptic carton market*

110. According to the Judgment the Commission was right "*in examining the significance for the carton markets of a reduction of potential competition from the PET equipment markets*", but it was also necessary "*to show, ..., that such a reduction, if it exists, would tend to strengthen Tetra's dominant position in relation to its competitors on the aseptic carton markets*" (paragraph 323). In the CFI's view, the Commission failed to demonstrate such strengthening, for the following reasons:

110.1. the two factual elements regarding Tetra's conduct i.e. increase in price of carton and decrease in innovation were not established to the requisite legal standard;

110.1.1. on Tetra's ability post-merger to raise prices, the CFI remarks that the Commission does not explain "*why this would not enable Tetra's competitors on the carton markets who are also active on the PET market, such as SIG and Elopak, to benefit from this*" (paragraph 327).

110.1.2. On innovation, the CFI held inter alia, that "*the reference by the Commission at the hearing to the high costs of innovation on the relevant markets, although pertinent and probably correct, cannot by itself justify its finding that Tetra's competitors would not be able to benefit from a decision by the merged entity to innovate less.*" (paragraph 330)

110.2. the Commission's reliance on considerable foreseeable growth in PET especially for LDPs and juice which is much less marked than the Commission believes (paragraph 324); therefore, it is not possible to determine "*with the certainty required to justify the prohibition of a merger*" whether post-merger Tetra would be placed in a situation where it could be more independent than in the past "*in relation to its competitors on the aseptic carton market*" (paragraph 324).

111. Without seeking to respond to each and every point made by the CFI in its Judgment, the Commission's market investigation focused on:
- 111.1. the projected growth of PET which has been outlined above: the Commission's new investigation did not reveal any new studies of material significance nor any other new evidence of a materially different probative value to that available at the time of the adoption of the previous Decision which could allow the Commission to forecast levels of growth similar to or higher than those in the previous Decision, which were rejected by the CFI, in accordance with the standard of "*convincing evidence*", as applied by the CFI;
- 111.2. Tetra's incentives post-merger to raise prices or innovate less in carton: here again the results of the Commission's market investigation on this point do not reveal any new factors beyond those considered by the Commission in the annulled Decision. In particular, the market investigation does not reveal any new factors that would result in a conclusion showing that Tetra's carton competitors have been weakened even further to the extent that they would not be able to benefit, in the way that the CFI envisages in its Judgment, from any decisions by the merged entity to raise its carton prices or to innovate less.
112. Consequently, the Commission's case on the strengthening of Tetra's dominance, cannot be buttressed beyond what has already been rejected by the CFI in its Judgment.

C. Commitments

113. There were, *inter alia*, two structural commitments and two behavioural commitments which formed the basis of the "*modified concentration*" taken by the CFI as the basis for its Judgment. In view of this, on 15 November 2002, Tetra confirmed its offer of the said commitments made within the context of the Commission's previous in-depth investigation. The said commitments were modified by Tetra as set out in the Annex to this decision and finally submitted to the Commission on 10 January 2003. These commitments were offered on the understanding that the Commission can accept any or all of them.
114. The commitments are set out in the Annex. They consist of: (i) divestiture of Tetra's Dynaplast SBM business; (ii) divestiture of Tetra's PET pre-form business and a commitment not to resume pre-form activities in the EEA; (iii) licensing on a non-discriminatory basis to any third party of the Tetra Fast technology; and (iv) holding Sidel separate from Tetra Pak.

1. *Divestiture of Tetra's SBM business*

115. First, the CFI found that there was no horizontal overlap in low capacity SBMs following Tetra's offer to divest its subsidiary Dynaplast. Tetra submitted that it had approached numerous potential buyers for Dynaplast but was unable to find a buyer. Tetra therefore, closed Dynaplast at the beginning of 2002. According to Tetra, in closing Dynaplast, Tetra has exited from the market for SBM machines and Sidel's position on that market will therefore remain basically unchanged. All sales activities were stopped and the staff released under redundancy schemes. Only a small spare part and service team of seven people was kept to maintain support for SBM machines already sold and operating in the field. As to the SBM machines, they were either sent for scrap or sold. The few that were retained are kept for retrieving spare parts.

116. To complete Tetra's exit, Tetra has offered to divest the assets used for the technical service and maintenance of Dynaplast products and, as required by the purchaser, the technical personnel supporting its SBM machines still operating in the field.
117. Tetra undertakes to assign to an independent third party all its intellectual property rights which were used or would have been capable of being used by Dynaplast (including without limitation those set out in Annex 1).
118. The Commission considers that an assignment is necessary insofar as this commitment relates to any intellectual property rights of Tetra which were used in its SBM business by Dynaplast or may have been capable of being used to remove horizontal concerns raised by the proposed concentration. The Commission does not, however, require Tetra to dispose of the assets or the technical personnel used for the technical service and maintenance of Dynaplast products supporting its SBM machines still operating in the field. The Commission takes note of this commitment as a factual basis for its decision.

2. *Exiting Tetra's PET pre-forms business*

119. Second, Tetra undertook to divest its pre-forms business which it has in fact sold to Alpla. The only interest that Tetra Laval retains in the pre-form market is through a joint venture in Saudi Arabia which could not be included in the disposal. For a period of [...] years from the clearance date, Tetra Laval undertakes not to resume the commercial sale of PET pre-forms in the EEA, EFTA and in the territories of the countries listed in the conclusions of the European Council of 12 and 13 December 2002 as candidate countries for joining the EU on 1 May 2004. After five years from the clearance date, the Commission may extend this undertaking for a further period of maximum [...] years, should this be justified by Sidel's market power on the SBM machine market at that time. The Commission takes note of this commitment as a factual basis for its decision.

3. *Tetra Fast Licensing*

120. Third, Tetra undertakes to offer on a non-discriminatory basis to any third party, if so requested by that third party, a licence for the entire families of patents relating to the innovations described in patents and patent applications EP 0.923446, PCT/EP00/06604 and PCT/EP01/14743 PCT/EP02/02160 and/or DE 102 118 78.7 and relating to the explosion stretch blow moulding of plastic bottles and coating of the same. Pursuant to this commitment, consideration due to Tetra Laval for the granting of the licence will take the form of a fixed flat fee subject to a 'pendulum' arbitration procedure in the case of a dispute arising between Tetra and prospective licensees. Tetra undertakes to report annually until expiry of the families of patents on developments in its patent applications, negotiations with prospective licensees, any arbitration proceedings, and provide copies of all patents, requests for arbitration, arbitral awards and all license agreements entered into pursuant to this undertaking with third parties. The Commission considers that short of divesting its technology altogether the open licence is sufficient to remove competition concerns due to any horizontal overlap in that it provides all interested third parties the possibility to obtain a bare patent licence to the Tetra Fast technology for full scale commercial exploitation.

121. The Commission considers that a divestiture (e.g. in the form of an exclusive licence) of the Tetra Fast technology by Tetra/Sidel would be disproportionate to the competition problem created by it and that such divestment could have the effect of delaying the introduction of this new technology to market, which would be contrary to the aim of maintaining technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition set out in Article 2(2) of the Merger Regulation. The open licence commitment proposed by Tetra and accepted by the Commission achieves this. Moreover, the broad scope of the licence (not being limited to high capacity SBM machines for instance) ensures the commercial viability of the licensed technology by enabling the licensee to conduct similar development work as that carried out by Tetra (currently in low capacity SBM machines) and renders the technology accessible to both actual and potential competitors in the high capacity segment, throughout the life of the patents. It should be noted that the proposed commitment is accepted based on express confirmation by Tetra that the inventions listed therein embody all of Tetra's innovations to date related to the Tetra Fast technology; and that Tetra's remaining SBM intellectual property rights would not hinder prospective licensees from using the Tetra Fast technology.
122. By contrast, the Commission considers it appropriate for Tetra to include *all* technology related to Tetra Fast (in particular Tetra Fast related coating technology – see paragraph 70) as it is only this inclusion which puts licensees on an equal technological footing with Tetra/Sidel regarding the further development of the Tetra Fast technology and which increases their commercial incentives to invest in the technology.

4. Separation of Sidel from Tetra Pak

123. For a period of [...] years following the clearance date, Tetra undertakes to hold Sidel structurally separate from all Tetra Pak companies and not to jointly offer any of Tetra Pak's carton products together with any of Sidel's SBM machines. The Commission does not need to consider these hold separate and behavioural commitments, since they are no longer necessary given the Commission's finding in this decision that there are no serious doubts as to leveraging on the wider SBM machines market. In any event, such commitments would be virtually impossible to monitor effectively.

5. Conclusion on the Commitments

124. Subject to full compliance by Tetra with the commitment relating to Tetra Fast Licensing, the Commission concludes that there are no serious doubts remaining with regard to the horizontal overlap identified in this decision.

VII. CONCLUSION

125. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement, subject to full compliance with the commitment set out in Section C of the Annex, as well as meeting all of the obligations set out in Section F. This decision is adopted in application of Articles 6(1)(b) and 6(2) of the Merger Regulation.

For the Commission

Mario MONTI
Member of the Commission

CONFIRMATION OF UNDERTAKINGS

Pursuant to Article 6(2) of Council Regulation (EEC) No. 4064/89, as amended ("the Merger Regulation"), the Tetra Laval Group ("Tetra Laval") hereby offers to the European Commission ("the Commission") the present undertakings ("the Undertakings") as set forth below with respect to the notified acquisition of Sidel S.A. ("Sidel"), so as to remove any competition concerns that might be raised by the Commission.

The Undertakings are offered with the understanding that the Commission can accept any or all of them. Upon receipt by Tetra Laval of the Commission's decision declaring the notified concentration compatible with the Common Market pursuant to Article 6(1)(b) of the Merger Regulation (the "Clearance Date"), those Undertakings that are accepted by the Commission as conditions or obligations attached to its decision will become binding. Accordingly, from the day of the Clearance Date, Tetra Laval will comply and where applicable will procure that Sidel and Tetra Pak will comply with these accepted Undertakings in accordance with the provisions set forth herein.

A. Divestiture of Tetra Laval's SBM business

Both on 14 June 2001, and then again on 25 September 2001 and 9 October 2001, Tetra Laval has formally undertaken vis-à-vis the Commission - in order to obtain a merger clearance decision - to divest its SBM Business, Dynaplast, to an independent third party.

As the Commission is aware, Tetra Laval has approached numerous potential buyers for the business, but has unfortunately been unable to find any.¹ It has therefore closed the business. In closing Dynaplast, Tetra Laval has however exited from the market and Sidel's position will therefore remain basically unchanged.

All sales activities were stopped and the staff was released under redundancy schemes. Only a small spare part and service team of seven people was kept to maintain support for machines already sold and operating in the field. As to machines, they were either sent for scrap or sold. The few that were retained are kept for retrieving spare parts. Tetra Laval has therefore to all intents and purposes exited the market.

Should the Commission however have concerns about the completeness of such an exit, Tetra Laval herewith UNDERTAKES to :

- enter into a binding agreement to divest, within [...] following the decision under Article 6(1)(b), the assets used for the technical service and maintenance and, as required by the purchaser, the technical personnel supporting its SBM machines still operating in the field (hereafter "the SBM Business"); and

¹ At para. 128 of its judgment in Case T-5/02, the CFI indeed notes that the "*fact that Tetra was subsequently unable to find a purchaser for Dynaplast (...) confirms Tetra's unprofitable and, notwithstanding a large market share, relatively weak position in the market for low capacity SBM machines prior to the merger*".

- assign to an independent third party all its intellectual property rights which were used by the SBM Business (including without limitation those set out in Annex 1 hereto).

As regards the Commission's approval of the third party and Trustee, Tetra Laval refers to the provisions set out under point F.II below.

B. PET pre-form

Both on 25 September 2001 and on 9 October 2001, Tetra Laval had undertaken to divest to an independent third party its business relating to PET pre-forms.

Tetra Laval has exited from the pre-form business through a sale to Alpla, thereby eliminating the concerns raised by the Commission, as stressed by the CFI in its judgment in Case T-5/02.

The only interest that Tetra Laval retains in the pre-form market is through a joint venture in Saudi Arabia which could not be included in the disposal.

For a period of [...] from the Clearance Date, Tetra Laval UNDERTAKES not to resume the commercial sale of PET pre-forms in the EEA, EFTA and in the territories of the countries listed in the conclusions of the European Council of 12 and 13 December 2002 as candidate countries for joining the EU on 1 May 2004.

After [...] from the Clearance Date, the Commission may extend the Undertaking set out in the preceding paragraph for a further period of maximum [...], should this be justified by Sidel's market power on the SBM equipment market at that time.

C. Tetra Fast Licensing

Tetra Laval undertakes to grant on a non-discriminatory basis to any third party, if so requested by that third party, a licence for the entire families of patents relating to the innovations described in patents and patent applications EP 0.923446, PCT/EP00/06604, PCT/EP01/14743, PCT/EP02/02160 and/or [amended number DE 10231345.8] and relating to the explosion stretch-blow moulding and the use of that process for coating of plastic bottles, (including without limitation those listed in Annex 2 hereto) under the terms and conditions set out in the term sheet enclosed to the present document as Annex 3.

Tetra Laval will report to the Commission annually until the expiry of the Families of Patents on developments in its patent applications, negotiations with prospective licensees, any arbitration proceedings, and provide copies of all patents, requests for arbitration, arbitral awards and all licence agreements entered into under this Undertaking with the aforementioned third parties, Tetra Pak, Sidel or any other member of the Tetra Laval Group, to the Commission.

D. Separation of Sidel from Tetra Pak and behavioural commitments

Tetra Laval herewith confirms the hold-separate and behavioural commitments already made to the Commission on 9 October 2001. Tetra Laval thus confirms the following UNDERTAKING:

For a period of [...] following the Clearance Date, Tetra Laval undertakes to hold Sidel structurally separate from all Tetra Pak companies. This will be accomplished through the following steps:

- (a) Sidel will be maintained as a separate legal entity. However, Tetra Laval may change Sidel's current corporate form. Sidel's shares will not be owned by Tetra Pak or any Tetra Pak subsidiary, but by a separate company belonging to the Tetra Laval Group;
- (b) No member of the supervisory or executive board or officer or employee of Sidel may serve at the same time as a member of a supervisory or executive board or as officer or be an employee of any Tetra Pak company and vice versa. Sidel will be managed by its executive board subject to certain approval requirements by and reporting obligations to a Sidel supervisory board as well as the Tetra Laval Group board. The chairman of the Tetra Laval Group board will be the chairman of the Sidel supervisory board;
- (c) Sidel will perform all marketing, sales, training services, technical support and technical services by means of its own respective departments or outsourcing agents, which will be separated from the respective departments or outsourcing agents of Tetra Pak companies by effective and reasonable firewall measures which Tetra shall communicate to the Commission;
- (d) In particular, no joint offerings of any of Tetra Pak's carton products together with any of Sidel's SBM machines will be made;
- (e) Tetra Laval will cause that Sidel accepts that the Trustee appointed pursuant to section F.V. below participates without any voting rights in the meetings of its supervisory board, as further specified in section F.V.

After [...] from the Clearance Date, Tetra Laval shall have the right to request the Commission to review the present Undertaking (No. D) to determine if the continuation of this Undertaking is still necessary.

E. License of Sidel's sensitive products and converter SBM business

As to the license for Sidel SBM machines for sensitive product applications, it follows from the Court's judgment that this remedy is apparently not required for obtaining a clearance. The Court indeed makes no reference to it anywhere and finds that the merger is unproblematic even in the absence of it. Since the Commission requires commitments only where they are necessary and "*proportional to*" the need to eliminate the identified competition problem,² Tetra Laval does not maintain the proposed Undertaking.

F. Common provisions

I. Time Limits

1. Tetra Laval undertakes to "complete" (as defined in the following paragraph) the divestiture offered under section A (the "Divestiture") within [...] following the Clearance Date.

² See recital 8 of Council Regulation No. 1310/97.

2. The Divestiture shall be deemed "completed" as soon as Tetra Laval has executed a binding purchase and sale agreement for the business to be fully and finally divested in good faith to a Third Party that meets the requirements set out below in sections F.II and F.III below, provided that Tetra Laval implements the agreement and transfers the business concerned in accordance with the terms of such agreement within [...] of the approval of the Third Party by the Commission.

II. Third Party Requirements

3. The Third Party has to be independent of and unconnected to Tetra Laval and Sidel or any member of these groups, possessing the financial resources, proven expertise and having the incentive to maintain and develop the divested business.
4. The business to be divested in section A must be acquired by one and the same Third Party.

III. Commission Approvals

5. Tetra Laval can execute an agreement with a Third Party only contingent on the approval of the Third Party and the agreement by the Commission. Tetra Laval must also inform the Commission in writing of one or more prospective third parties (subject to the latter's consent) which indicate a serious desire to acquire the business to be divested.
6. The Commission will inform Tetra Laval in writing, as soon as reasonably practicable, as to the suitability of any proposed third party, upon receipt of a fully reasoned and substantiated proposal demonstrating that the third party requirements are met. Should there be more than one Third Party that the Commission approves, Tetra Laval shall be free to choose any of the Third Parties so approved.
7. In determining whether a proposed third party is suitable, Tetra Laval is required to demonstrate to the Commission that the prospective Third Party :
 - (a) possesses the status and resources necessary to operate the relevant business over the long term;
 - (b) meets the applicable third party requirements set out above in Section F.II;
 - (c) has, or reasonably can obtain, all necessary approvals for the respective sale from the relevant competition and other regulatory authorities in the European Community and elsewhere.

IV. Interim Obligations

8. For the period from the Clearance Date and until the full and final implementation of the commitment set out in section A, Tetra Laval covenants to do the following :
 - (a) use all reasonable efforts to ensure that:
 - i) the production capacity and selling activities are maintained, pursuant to good business practices, at their current level;
 - ii) all contracts necessary to preserve the business as a going concern are entered into or continued in accordance with their terms, consistent with good business practice and in the ordinary course of business; and

- iii) all services provided by Tetra Laval or any of its subsidiaries will continue to be provided efficiently and satisfactorily in accordance with existing contractual obligations;
- (b) maintain sufficient administrative and management functions; and
- (c) provide and maintain sufficient working capital.

V. Trustee

9. Tetra Laval will appoint a "Trustee" in accordance with the following provisions :

- (a) within seven working days of the Clearance Date, Tetra Laval will propose to the Commission the names of at least two institutions or individuals, independent from both Tetra Laval and Sidel;
- (b) if the Commission approves only one name, Tetra Laval shall appoint that institution or individual as Trustee. If more than one name is approved, Tetra Laval is free to appoint as Trustee any one of the approved names;
- (c) if all proposed names are rejected, Tetra Laval will propose at least two further names within seven working days after being informed in writing of the Commission's rejection. In case of an approval, the provisions of sub-clause (b) immediately above apply. In case of rejection, the Commission will propose one or more name(s) that Tetra Laval shall not unreasonably reject.

10. The appointment of the Trustee shall be made within seven working days following the Commission's approval, subject to any modifications deemed necessary by the Commission for the Trustee to fulfil its obligations, of the mandate proposed by Tetra Laval.

11. The mandate of the Trustee covers the following functions :

- (a) Monitor Tetra Laval's compliance with the Interim Obligations set forth in section F.IV above;
- (b) Monitor Tetra Laval's compliance with the Undertakings set forth in sections A to D. In that respect, the Trustee shall in particular :
 - (i) monitor and advise the Commission on the adequacy of the procedure for selecting the Third Party, the suitability of the Third Party under the third party requirements, and the conduct of negotiations;
 - (ii) monitor and advise the Commission as to whether the proposed agreement (sale and purchase agreement) with the Third Party will properly provide for the full and final divestiture of the business referred to in section A above;
 - (iii) provide written reports ("Trustee Reports") to the Commission on the progress of and the discharge of the Trustee's mandate, identifying any aspects with respect to which it has been unable to discharge its mandate.

12. The Trustee Reports shall be provided at regular monthly intervals commencing one month after the date of the Trustee's appointment, or at such other time(s) or time periods as the Commission may specify.

13. For the purpose of, and to the extent necessary to monitor compliance with Undertakings under sections A and C, the Trustee shall have full and complete access, reasonably

exercised, to the personnel, books, records, documents, facilities and technical information relating to Tetra Laval's SBM Business or to any other relevant information, as the Trustee may reasonably request. Subject to the provisions in the paragraph immediately below, the mandate of the Trustee is limited to the time until the relevant Undertakings under sections A and C have been fully discharged, subject to the Commission discharging the Trustee from its mandate, upon a reasoned request by the Trustee.

14. For the duration of Undertaking D, the Trustee will be invited as an observer to the meetings of Sidel's supervisory board in order to monitor compliance with that Undertaking. The Trustee's position shall be structured in a way that the privilege and confidentiality of proceedings at the board are not compromised.
15. If Tetra Laval fails to properly "complete" Divestiture A within the time period specified in section F.I., the Commission may request the Trustee to carry out the following additional functions, and The Trustee's mandate shall be deemed to be extended accordingly. In the event of a conflict with its initial functions, the Trustee shall give priority to the discharge of these additional functions :
 - (a) conduct negotiations on behalf of Tetra Laval or Sidel, as applicable;
 - (b) ensure proper "completion" of the outstanding Divestiture, in particular submit to the Commission no later than [...] after its request (or such other period specified by it), for approval agreements designed to "complete" the outstanding Divestiture. These agreements have to be unconditional and irrevocable except for the approvals of the Commission or any competent regulatory body and customary closing conditions;
 - (c) submit to the Commission as part of the Trustee Reports but in any event no later than [...] after the Commission's request, a proposal for the method and time-scale of how to "complete" the outstanding Divestiture. The Commission shall, as soon as reasonably practicable, approve the proposal or indicate any changes that may be required;
 - (d) provide to the Commission as part of the Trustee Reports but in any event as soon as negotiations with prospective third parties have started, sufficient information to enable the Commission to determine the suitability of the third parties in question; and
 - (e) cease negotiations with any prospective third parties if the Commission determines that the prospective third party is not a suitable third party.
16. Tetra Laval and Sidel will provide the Trustee with all such assistance and information, including copies of all relevant documents, as the Trustee may reasonably request for carrying out its mandate, and will pay reasonable remuneration for its services. The remuneration paid to the Trustee shall be sufficient enable it to discharge its mandate in full and to carry out the Commission's instructions in doing so, and shall not be structured in such a way as to compromise the Trustee's independence from Tetra Laval, Tetra Pak and Sidel.

VI. Abandonment of the Acquisition

17. If prior to "completing" Undertaking A Tetra Laval ceases ownership and control of Sidel, all Undertakings set out herein shall be null and void with immediate effect.

VII. Review Clause

18. The Commission may, where appropriate, in response to a request from Tetra Laval showing good cause, upon which the Commission may request the Trustee to submit a report:
- (a) Grant an extension of the divestiture period; or
 - (b) Allow the sale of the Divested Business at the request of the proposed third party showing good cause, without one or more of the assets relating thereto;
 - (c) Waive or modify, in exceptional circumstances, one or more of the conditions and obligations contained in these commitments.

For Tetra Laval,

Thomas ANDERSSON

Patents granted in the field of stretch blow molding

Patents Number	Patent Name	Priority ¹⁾ Granted ²⁾ Valid till ³⁾	technical function	commercial significance
CH 683.757 US 5.200.134	Method and apparatus for stretching and blowing up a heated preform	31 May 90 ¹⁾ 13.05.1994 (CH) ²⁾ 06.04.1993 (US) ²⁾ 2010 ³⁾	Same supply of pressurized fluid for blowing preform and stretch rod pneumatics used for general SBM	old machines only not sold last 5 years
CH 690.908	Presse hydraulique	15 Aug 95 ¹⁾ 28.02.2001 2015 ³⁾	Pneumatic manifold to be used in SBM machine to compress the molding tool	Not used
CH 690.543 US 5.876.768 EP 839085	Machines for production of receptacles of plastic material	19 Jul 95 ¹⁾ 13.10.00(CH) ²⁾ 02.03.99(US) ²⁾ 04.10.01(EP) ²⁾ 2015 ³⁾	SBM machine where preforms are heated in N parallel rows and then blown in line of N molds (LX-6 concept) used in all linear SBM	Used in LX models
CH, 690.002 EP 854.780 (DE, FR, IT)	Machine for the production of receptacles of plastic material	10 Oct 95 ¹⁾ 15.03.2000 (CH) ²⁾ 05.04.2000 (EP) ²⁾ 2015 ³⁾	SBM machine with guiding means for stretch rod used in general for SBM	Used in all our models
CH 690.003	Machine pour la fabrication de recipient en matiere plastique	10 Oct 95 ¹⁾ 15.03.2000 (CH) ²⁾ 2015 ³⁾	mold with moveable bottom for guiding the preform instead of using a stretch rod for general SBM process	Not used
CH 690.095, US 5.980.22, EP 868284 (DE, ES, FR, IT)	Heating device for machines for the transformation of plastic materials	7 Dec. 95 ¹⁾ 28.04.2000 (CH) ²⁾ 09.11.1999 (US) ²⁾ 05.04.2000 (EP) ²⁾	special geometry of preform heating oven used in all linear SBM machines	Used in all our models

		2015 ³⁾		
EP 1066149 (DE, ES, FR, GB, IT) TW 136836	Machine and process for moulding by stretching and blowing	25 Mar 98 12.06.2002 (EP) ²⁾ 2018	moving stretch rod with servo motor along a special calibration procedure for general SBM use	Used in all current models
- US 6358032	Machine for the production of receptacles of plastic material	9 Nov 99 19.03.2002 (US) ²⁾ 2019	heating oven which can be pulled out of machine for maintenance used in linear SBM	Used in current models

Country codes;	CH	Switzerland	JP	Japan
	US	United States	KR	Kroatia
	DE	Germany	MX	Mexico
	IT	Italy	BR	Brasil
	FR	France	GB	Great Britain
	CA	Canada		

Patent applications in the field of stretch blow molding

Patents Number	Patent Name	Priority ¹⁾	Patents granted	not technical function	commercial significance
CH 683.757 US 5.200.134	Method and apparatus for stretching and blowing up a heated preform	31 May 90	DE	Same supply of pressurized fluid for blowing preform and stretch rod pneumatics used for general SBM	old machines only not sold last 5 years
CH 690.543 US 5.876.768 EP 839085	Machines for production of receptacles of plastic material	19 Jul 95	CA, JP, KR, MX	SBM machine where preforms are heated in N parallel rows and then blown in line of N molds (LX-6 concept) used in all linear SBM	Used in LX models
CH, 690.002 EP 854.780 (DE, FR, IT)	Machine for the production of receptacles of plastic material	10 Oct 95	BR, JP	SBM machine with guiding means for stretch rod used in general for SBM	Used in all our models
CH 690.095, US 5.980.22, EP 868284 (DE, ES, FR, IT)	Heating device for machines for the transformation of plastic materials	7 Dec. 95	BR, CA, JP	special geometry of preform heating oven used in all linear SBM machines	Used in all our models
EP 1066149 (DE, ES, FR, GB, IT) TW 136836	Machine and process for moulding by stretching and blowing	25 Mar 98	AR, CH, JP, US (WO 99/48669)	moving stretch rod with servo motor along a special calibration procedure for general SBM use	Used in all current models
- US 6358032	Machine for the production of receptacles of plastic material	9 Nov 99 2019	CH, BR, JP,	heating oven which can be pulled out of machine for maintenance used in linear SBM	Used in current models
-Applied for patent	Machine pour la fabrication de recipient en matiere plastique	Feb 2001	CH	SBM machine with extended linear preform infeed / bottle outfeed and several linked heating / blowing modules	not used

-Applied for patent	Support de preforme pour machines destinees a la fabrication de recipients en matiere plastique par etirage soufflage	Aug 2001	CH	self-tighting wide-neck preform support for general use in SBM	not used
-Applied for patent	Machine pour la fabrication de recipient en matiere plastique	July 2001	CH	rotating and oscillating stretch rod for active cooling (heat setting)	not used
-Applied for patent	Support de preforme pour machines destinees a la fabrication de recipients en matiere plastique par etirage soufflage	Aug 2001	CH	preform support with IR reflecting disc for heat protection of neck	not used
-Applied for patent	Machine pour la fabrication de recipient en matiere plastique	Aug 2001	CH	“passive” bottle outfeed, actuated and driven by main conveyor	not used
-Applied for patent	Machine pour la fabrication de recipients en matiere plastique et procede de mise en action d’une telle machine	10 Nov 99	CH	For achieving uniform heating, preform heating oven is divided into several sections kept at different temperature	Not used

Country codes;	CH	Switzerland	JP	Japan
	US	United States	KR	Kroatia
	DE	Germany	MX	Mexico
	IT	Italy	BR	Brasil
	FR	France	GB	Great Britain
	CA	Canada		

TP patent cases in the field of FAST stretch blow molding

Patents Number	Patent Name	Priority/ Valid till	Patents Pending	Technical function	Commercial significance
CH 691218 A5	Process for producing stretch blow formed plastic containers	14. 08. 1996 2016		The preform is preheated to stretch blow temperature and preblown with an explosive gas mixture. The gas is ignited after stretching, generating the blowing pressure	Not commercially up to now
EP 0.923446 B1	Dito	13. 08. 1997 2017		dito	dito
WO 98/06559	Dito	19.02.1998 not granted	AU, JP, US	dito	dito
DE 19938724 A1 WO01/12416 A1 PCT EP00/06604	Device for the production of plastic containers by stretch blow forming using an explosive gas mixture	16.08.1999 not granted	US, CA, JP TW	Describes a device for producing bottles with above mentioned process, with emphasis on dosing, igniting, gas mixing,	dito
PCT/EP01/14743 DE100 65 652.8	Device for the production of plastic containers by stretch blow forming using an explosive blowing medium	29.12.2001 not granted		Describes a manifold for gas mixture and bottle support for linear SBM machines	For linear SBM only. not in use

PCT/EP02/02160	Method of stretch blow molding a plastic container and coating the inner side	23.03.2001 not granted		Patent describes a method of explosion blow molding of plastic container using a precursor gas mixture to coat the inner side of the bottle	Not used
[amended number DE 10231345.8]	Method of stretch blow molding a plastic container and coating the inner side on a rotary SBM platform.	18.03.2002 Not granted		Patent describes a method of explosion blow molding of plastic container on a rotary SBM platform using a precursor gas mixture to coat the inner side of the bottle	Not used

TERM SHEET LICENCE TETRA FAST

The present term sheet sets out below the terms of a licence to be granted by Tetra Laval on a non-discriminatory basis to certain patents as set forth in point (iv) below.

- (i) **Licensor:** the patent owner (a company within the Tetra Laval Group)
- (ii) **Licensee:** the party having requested a licence
- (iii) **Grant of the licence:** the licence can be obtained on simple request to the Licensor given payment of the requisite compensation pursuant to point xiii below and acceptance of the present terms
- (iv) **Subject matter:** the licence covers the entire families of patents relating to the innovations described in patents and patent applications EP 0.923446, PCT/EP00/06604, PCT/EP01/14743, PCT/EP02/02160 and/or [amended number DE 10231345.8] and relating to the explosion stretch-blow moulding and the use of that process for coating of plastic bottles (including without limitation those listed in Annex 2 to the Confirmation of Undertakings submitted to the Commission by Tetra Laval).
The licence shall cover all subsequent patents granted to the patent owner for these innovations.
- (v) **Scope of the licensed technology:** to develop, use, manufacture, have manufactured, sell and distribute equipment to produce through explosion the pressure needed to stretch-blow mould plastic bottles, without any restriction as to the exploitation of the benefits to be derived from that process in terms of coating and/or sterilisation of plastic bottles.
- (vi) **Geographic scope:** world-wide.
- (vii) **Duration:** perpetual and irrevocable from the date of the Licensee's formal acceptance of these terms, including the price.
- (viii) **Exclusivity:** none
- (ix) **Sublicensing rights:** none
- (x) **Transfer of rights:** no right except for intra group transfer
- (xi) **Field of use limitation:** none, including with regard to use in combination with filling technology
- (xii) **Improvements/grant-back:** improvements/grant-backs are not covered by this licence
- (xiii) **Price:** non-discriminatory fixed flat up-front fee to be agreed. The parameters for establishing the level of such fixed flat fee shall be the following: (i) costs incurred by the patent owner in the development of the patents and their maintenance; (ii) the potential of the patents licensed, taking into account the costs to be incurred by the Licensee in working and testing the patented technology with a view to its commercial exploitation; (iii) the level of comfort, at the time of the grant of the license, that such potential will materialise.
- (xiv) **Dispute resolution:** Should the Licensor and the Licensee be unable to agree on a flat fixed fee, the question shall be submitted to arbitration as follows.
The arbitration panel shall consist of three individuals, one arbitrator selected by each of the parties and the chair selected jointly by these two arbitrators. If for any reason a party fails to select an arbitrator within fifteen (15) days, the other party shall have the right to select this arbitrator also. Exclusive place of the arbitration shall be Stockholm and the arbitration shall be conducted in the English language.
Each party shall submit a single proposal for a flat fixed fee to the arbitration panel. The panel shall select either of the two submitted proposals in its entirety, taking into account the parameters set out in point xiii *supra*. This selection must be made by majority decision. The arbitral award shall be binding on both the Licensor and the Licensee. If a prospective licensee does not abide by the arbitral award within a period of one month following, its communication, Tetra Laval may request the Commission to re-consider whether it may be relieved of this Undertaking with regard to such prospective licensee.

- (xv) **Infringement:** The Licensee shall as soon as it becomes aware thereof give the Licensor in writing full particulars of any action by any other person, firm or company which amounts to or might amount to an infringement of a patent covered by this licence. Moreover, if the Licensee becomes aware that any other person, firm or company alleges that a patent covered by this licence is invalid or that their use infringes any rights of another party or that they are otherwise attacked or attackable the Licensee shall immediately give the Licensor full particulars in writing thereof and shall make no comment or admission to any third party in respect thereof.
- The Licensor shall conduct all proceedings relating to the patents covered by this licence and shall in its sole discretion decide what action (if any) to take in respect of any infringement or alleged infringement thereof. The Licensee shall at the request and expense of the Licensor co-operate with the Licensor in any action, claim or proceedings brought or threatened in respect of the patents covered by this licence.
- If within 30 days of a written demand for enforcement by the Licensee the Licensor has not stated that it is able and willing to enforce a patent covered by this licence against a third party, the Licensee may commence or defend an action, claim or proceedings against such third party, provided that the Licensee shall not take such action if it would have a material adverse effect on the Licensor. If proceedings are commenced by the Licensee, the Licensor shall if necessary and at the request of the Licensee assist in such action, claim or proceedings subject to its being indemnified by the Licensee in respect of all costs, expenses or other liabilities which it may reasonably incur as a result.
- (xvi) **Liability:** the Licensee shall indemnify the Licensor from and against all claims, demands, actions, liabilities and damages made by, or awarded to, any person against the Licensor (and any related costs and expenses thereof, including legal fees) which arise directly or indirectly from the licensed patents and the Licensee's use thereof.
- (xvii) **Payment terms and conditions:** to be agreed.
- (xviii) **Governing law:** this licence and any dispute, controversy, proceedings or claim of whatever nature arising out of or in any way relating to this licence or its formation shall be governed by and be interpreted in accordance with Swedish law. The parties submit irrevocably to the jurisdiction of the Stockholm District Court (*Stockholms Tingsrätt*).