Judgment of the Court of First Instance, Schneider Electric/Commission, case T-310/01 (22 October 2002)

Caption: By its judgement of 22 October 2002, in case T-310/01, Schneider Electric/Commission, the Court of First Instance annuls a Commission Decision declaring a concentration to be incompatible with the common market and the EEA Agreement for the reason that it is vitiated by an infringement of the rights of defence. The statement of objections addressed by the Commission to the undertaking has not explained with sufficient clarity the competition problems raised by the proposed merger, in order to give the notifying parties the chance to suggest properly and in good time corrective measures.

Source: CVRIA. Case-law: Numerical access to the case-law. [ON-LINE]. [Luxembourg]: Court of Justice of the European Communities, [22.05.2006]. T-310/01. Available on http://curia.eu.int/en/content/juris/index.htm.

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Judgment of the Court of First Instance (First Chamber) of 22 October 2002 (1) Schneider Electric SA v Commission of the European Communities

Case T-310/01

(Competition - Regulation (EEC) No 4064/89 - Decision declaring a concentration to be incompatible with the common market - Action for annulment)

In Case T-310/01,

Schneider Electric SA, established in Rueil-Malmaison (France), represented by F. Herbert, J. Steenbergen and M. Pittie, lawyers,

applicant,

supported by

French Republic, represented by G. de Bergues and F. Million, acting as Agents, with an address for service in Luxembourg,

intervener,

v

Commission of the European Communities, represented by P. Oliver, P. Hellström and F. Lelièvre, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

Comité central d'entreprise de la SA Legrand,

Comité européen du groupe Legrand,

established in Limoges (France), represented by H. Masse-Dessen, lawyer,

interveners,

APPLICATION for annulment of Commission Decision C(2001)3014 final declaring a concentration to be incompatible with the common market and the EEA Agreement (Case COMP/M.2283 - Schneider-Legrand),

THE COURT OF FIRST INSTANCE

OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of: B. Vesterdorf, President, N.J. Forwood and H. Legal, Judges,

Registrar: B. Pastor, Deputy Registrar,

having regard to the written procedure and further to the hearing on 10 July 2002,

gives the following

Judgment

Legal framework

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

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

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

(a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;

(b) the market position of the undertakings concerned and their economic and financial power, the opportunities available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

2. A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market.

3. A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.

...

2. Under Article 6(1)(c) of Regulation No 4064/89, where the Commission finds that the concentration notified falls within the scope of the regulation and raises serious doubts as to its compatibility with the common market, it is to decide to initiate proceedings.

3. Article 7 of Regulation No 4064/89 provides:

1. A concentration as defined in Article 1 shall not be put into effect either before its notification or until it has been declared compatible with the common market ...

...

3. Paragraph 1 shall not prevent the implementation of a public bid which has been notified to the Commission in accordance with Article 4(1), provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of those investments and on the basis of a derogation granted by the Commission pursuant to paragraph 4.

...

4. Article 8 of Regulation No 4064/89 provides in particular:

2. Where the Commission finds that, following modification by the undertakings concerned if necessary, a notified concentration fulfils the criterion laid down in Article 2(2) ... , it shall issue a decision declaring the concentration compatible with the common market.

...

3. Where the Commission finds that a concentration fulfils the criterion defined in Article 2(3) ... , it shall issue a decision declaring that the concentration is incompatible with the common market.

4. Where a concentration has already been implemented, the Commission may, in a decision pursuant to paragraph 3 or by separate decision, require the undertakings or assets brought together to be separated or the cessation of joint control or any other action that may be appropriate in order to restore conditions of effective competition.

5. Under Article 10(3) of Regulation No 4064/89, a decision declaring that a concentration is incompatible with the common market must be taken within not more than four months of the date on which proceedings are initiated.

6. Under Article 10(4), that period is exceptionally to be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision pursuant to Article 11(5) of Regulation No 4064/89.

7. Under Article 10(5) of Regulation No 4064/89, where the Court of Justice gives a judgment which annuls the whole or part of a Commission decision taken under the regulation, the periods laid down therein are to start again from the date of the judgment.

8. Article 10(6) of Regulation No 4064/89 provides that where the Commission has not taken a decision in accordance with Article 8(3) within the four-month time-limit referred to above, the concentration is to be deemed to have been declared compatible with the common market.

9. Article 11(1) of Regulation No 4064/89 enables the Commission, in carrying out the duties assigned to it by the regulation, to obtain all necessary information from, among others, the parties to the concentration which has been notified.

10. Article 11(5) provides that where an undertaking does not provide the information so requested by the Commission within the period fixed or provides incomplete information, the Commission is, by decision, to require the information to be provided. The decision must specify what information is required, fix an appropriate period within which it is to be supplied and state that the person concerned has the right to have the decision reviewed by the Community Courts.

11. Article 18(3) of Regulation No 4064/89 provides that the Commission is to base its decision only on objections on which the parties have been able to submit their observations and that the rights of the defence are to be fully respected in the proceedings.

12. Finally, under Article 9(1)(a) of Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time-limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ 1998 L 61, p. 1), the period of four months is to be suspended where the Commission, under Article 11(5) of Regulation No 4064/89, has to take a decision because the information requested from one of the notifying parties has not been provided or has not been provided in full within the time-limit fixed by the Commission.

Facts

13. Schneider Electric SA (Schneider), a company incorporated under French law, is the parent company of a group engaged in the manufacture and sale of products and systems in the electrical distribution, industrial

control and automation sectors. In the 2000 financial year Schneider's turnover was EUR 8 750 million worldwide and EUR 4 095 million within the Community.

14. Legrand SA is a company incorporated under French law which specialises in the manufacture and sale of electrical equipment for low-voltage installations. In 2000 its turnover amounted to EUR 2 791 million worldwide and EUR 1 684 million within the Community.

15. On 16 February 2001 Schneider and Legrand, in accordance with the requirements in Regulation No 4064/89, notified the Commission of Schneider's proposal to make a public exchange offer (the offer) in respect of all the shares in Legrand held by the public.

16. That step was taken after informal notifications had been submitted on 12 December 2000 and 5 January 2001.

17. The notifying parties sent the Commission a further draft notification on 29 January 2001.

18. Schneider and Legrand then replied to 71 questions sent by the Commission on 7 February 2001 and intended to finalise the third draft notification.

19. The Commission concluded that the concentration notified fell within the scope of Regulation No 4064/89 and that there were serious doubts as to its compatibility with the common market and the European Economic Area (EEA).

20. As a result, the Commission adopted, on 30 March 2001, a decision under Article 6(1)(c) of Regulation No 4064/89, by which it opened the second stage of the procedure for examining the transaction notified.

21. By letter of 6 April 2001, the Commission sent Schneider and Legrand a request for information under Article 11(1) of Regulation No 4064/89.

22. Since by the end of the period for responding, which expired on 18 April 2001, neither company had provided all the information requested on the various markets affected by the concentration, the Commission sent each of them a decision pursuant to Article 11(5) of Regulation No 4064/89 dated 27 April 2001.

23. By 25 June 2001 the Commission had received all the information requested.

24. On 7 June 2001, Schneider submitted the terms of its offer to the French Financial Markets Council (Conseil Français des Marchés Financiers), which at its meeting of 14 June 2001 stated that it had no objections. The offer was approved by the Commission des Opérations de Bourse (Stock Exchange Commission) on 19 June 2001.

25. Since Article 7(3) of Regulation No 4064/89 allows the implementation of public bids which have been notified to the Commission, provided that the purchaser does not exercise the voting rights attached to the securities concerned, Schneider launched its offer on 21 June 2001 and closed it on 25 July 2001.

26. On 3 August 2001, the Commission, acting in accordance with Article 13(2) of Regulation No 447/98, sent Schneider a statement of objections in which it concluded that the transaction would create or strengthen a dominant position in a number of national sectoral markets.

27. On 6 August 2001 the Commission des Opérations de Bourse announced the final outcome of Schneider's offer for Legrand shares. Schneider thus acquired 98.7% of the shares in Legrand.

28. Schneider submitted to the Commission a report dated 14 August 2001 which had been drawn up by Professor L. Waverman and the consultancy, National Economic Research Associates, on behalf of the notifying parties (the first NERA report). That report examines the definition of the sectoral market in switchboards and panel-boards, the integrated sales of panel-board components of two of Schneider's

competitors, ABB and Siemens, and also competition on the market for panel-boards in Italy, Spain, Portugal and Denmark.

29. The notifying parties replied to the Statement of Objections by a document lodged on 16 August 2001.

30. A hearing was held on 21 August 2001.

31. On 29 August 2001, a meeting took place between Schneider and Commission officials with a view to drawing up modifications, for the purposes of Article 8(1) of Regulation No 4064/89, intended to solve the competition problems identified by the Commission.

32. To that end, Schneider submitted its proposed commitments (remedies or corrective measures) on 14 September 2001, the final day of the period prescribed for that purpose.

33. On 18 September 2001, the Commission sent the other parties concerned a questionnaire concerning the proposals.

34. The Advisory Committee on Concentrations met on 19 September 2001 to examine the draft of the final decision.

35. On 24 September 2001 Schneider sent the Commission a new version of its commitments of 14 September in response to the specific requests made by the Commission on 21 September.

36. On the same date, the Commission convened a meeting with the parties.

37. In a note enclosed with their letter of 25 September 2001 to the Member of the Commission responsible for competition matters, Schneider and Legrand expressed their utter surprise at the Commission's further negative reaction to their new proposed commitments, since they envisaged that Legrand would withdraw from the markets for panel-board components throughout the entire EEA.

38. The Advisory Committee on Concentrations met again on 28 September 2001 to examine the proposed corrective measures and to express its view on the draft decision.

39. On 10 October 2001 the Commission adopted a decision on the basis of Article 8(3) of Regulation No 4064/89 (C (2001) 3014 final (Case COMP/M.2282 - Schneider/Legrand)) (the Decision).

40. Article 1 of the Decision states:

The concentration notified to the Commission by Schneider on 16 February 2001, which would allow it to acquire sole control of Legrand, is declared incompatible with the common market and the EEA Agreement.

41. The Decision includes a description of the sector for low voltage electrical equipment (Section V.A Compatibility with the Common Market), a definition of the national sectoral markets affected by the merger (Section V.B), an analysis of the transaction (Section V.C) and an assessment of the remedies proposed by Schneider to resolve the competition problems identified by the Commission (Section VI, Corrective Measures).

42. The industrial sector affected by the concentration consists of equipment used in industrial, tertiary or residential buildings, downstream from the connection to the medium voltage distribution grid. That equipment can be arranged in three categories, which are described in recital 12 to the Decision.

43. First, low-voltage distribution switchboards are used essentially for supplying electricity to the various levels of the installation and protecting the installation and the user against power surges and short-circuits.

44. Those switchboards, mainly composed of a cabinet and safety components such as circuit breakers, fuses

or differential switches, may be subdivided into three groups of products corresponding to the different levels of electrical distribution:

- main switchboards, used to connect large tertiary or industrial buildings to the medium-voltage grid;

- distribution panel-boards, used on the individual floors of a building;

- final panel-boards, used by end-users with low current requirements, such as the occupant of an apartment.

45. Second, cableways/ladders and busbar trunking are used to carry electric cables in the basement, service shafts or false ceilings of a building.

46. Third, the electrical equipment situated downstream from the final distribution panel-board is composed of six categories of product (see, in particular, recital 302 to the Decision):

- ultraterminal equipment making up the final part of the electrical installation (sockets, switches, etc.);

- control systems running a specific application, such as heating, in an individual area of a building;

- safety systems, protecting property and people (alarm systems, fire detectors, safety lighting, etc.);

- computer connectors for communication systems (computer connectors, interconnection boxes, etc.);

- fixing and shunting equipment, used for shunting, fixing and wiring equipment downstream from final panel-boards;

- trunking components (concealed trunking, floor boxes or conduits).

47. The concentration also impacts on other types of products for industrial use, in particular accessories for control and signalling, also known as industrial pushbuttons, and equipment for supplying and transforming electricity.

48. The parties agreed to divide the relevant industrial sector into segments as shown in the table below, which is set out at recital 14 to the Decision:

[…]

49. Six categories of operators are involved in the supply of, and demand for, the equipment concerned.

50. Manufacturers, such as Schneider and Legrand, are the industrial groups producing the electrical equipment concerned.

51. Wholesalers are the local distributors who buy from the manufacturers and offer the range of materials which installation engineers and switchboard assemblers need in order to carry out an electrical installation.

52. Switchboard assemblers are professionals who put together the various components of a switchboard in a building. In practice, they carry out four functions, namely:

- designing and adapting the board to the particular needs of each installation;

- supplying and assembling the parts of the board (cabinet components, circuit breakers, fuses, etc.);

- wiring the board;

- checking that the assembly works properly.

53. The switchboard assemblers then deliver the cabinets ready for use to the installation engineer, who will fit them at the end-user's premises. In practice, switchboard assemblers are mainly involved with main switchboards and distribution panel-boards. Final panel-boards are generally adapted and assembled directly by installation engineers.

54. Installation engineers are professionals responsible for fitting low-voltage electrical equipment at the end-user's premises.

55. Project managers are architects, research consultancies, construction companies or property developers responsible for projects involving the installation of electrical equipment.

56. End-users are the persons or undertakings which own the building in which the electrical equipment is installed. Typically, end-users can be divided into two broad categories: (i) industrial and (ii) construction undertakings. The construction sector is itself sometimes subdivided into companies in the tertiary sector and residential customers.

57. The Commission concluded, at recital 782 to the Decision, that the transaction would create a dominant position as a result of which effective competition would be significantly impeded on the following markets:

- the markets for moulded case circuit breakers, miniature circuit breakers and cabinets intended for distribution panel-boards in Italy;

- the markets for miniature circuit breakers, differential circuit breakers and cabinets intended for final panel-boards in Denmark, Spain, Italy and Portugal;

- the markets for connector circuit breakers in France and Portugal;

- the market for cableways in the United Kingdom;

- the market for sockets and switches in Greece;

- the market for watertight equipment in Spain;

- the market for fixing and shunting equipment in France;

- the market for electrical transformation products in France;

- the market for control and signalling accessories in France.

58. The Commission also took the view, at recital 783 to the Decision, that the projected transaction would strengthen a dominant position as a result of which effective competition would be significantly impeded on the following markets:

- the markets for moulded case circuit breakers, miniature circuit breakers and cabinets intended for distribution panel boards in France;

- the markets for miniature circuit breakers, differential switches and boxes intended for final panel boards in France;

- the market for sockets and switches in France;

- the market for watertight equipment in France;

- the market for security lighting systems or independent emergency lighting units in France.

59. The Commission finally concluded that the commitments proposed by Schneider would not resolve the competition problems identified in the Decision.

60. Schneider submitted a second report to the Commission. This was prepared by NERA in December 2001 (the second NERA report) and dealt with demand elasticity as regards panel-board components, the brand loyalty of installation engineers, distribution structure in Italy, Spain, Portugal and Denmark, the features of ABB's and Siemen's integrated sales of panel-board components and, finally, definition of the sectoral market for electrical switchboards and panel-boards to be taken into consideration.

Procedure before the Court

61. Schneider brought an action for annulment of the Decision by application lodged at the Court Registry on 13 December 2001.

62. By separate document, Schneider requested the Court to adjudicate on its case under an expedited procedure, in accordance with Article 76a of the Rules of Procedure.

63. On 23 January 2002, the Court dismissed that application having taken account of the nature of the case and, in particular, the volume of the application and the documents annexed to it.

64. On 5 April 2002, an informal meeting was organised between the President of the First Chamber and the Judge-Rapporteur and the parties' representatives.

65. On 3 May 2002 the Court (First Chamber) decided, after hearing the Commission's views, to grant Schneider's application for the case to be adjudicated under the expedited procedure, since Schneider had confirmed that it would adhere to the abridged version of its application, submitted on 12 April 2002.

66. By order of 6 May 2002, the French Republic was granted leave to intervene in support of the form of order sought by Schneider.

67. On 16 May 2002, the Commission lodged a new version of the defence that it had previously lodged, adapted to the abridged version of the application.

68. By order of 7 June 2002, the Works Council of SA Legrand and the European Works Council of the Legrand group were granted leave to intervene in the proceedings in support of the form of order sought by the Commission.

69. Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure and put a number of questions to the parties, by way of measures of organisation of procedure, as provided for in Article 64 of the Rules of Procedure of the Court of First Instance. The parties complied with the requests.

70. The parties presented oral argument and replied to the Court's questions at the hearing on 10 July 2002.

Forms of order sought by the parties

71. Schneider, supported by the French Republic, claims that the Court should:

- primarily, allowing the first plea in law, annul the Decision and declare that Article 10(5) of Regulation No 4064/89 is not applicable to the present case;

- in the alternative, annul the Decision;

- in so far as may be necessary, reserve the applicant's right to request the adoption of any measure of organisation of procedure or measure of inquiry necessary for establishment of the facts and for analysis of

the disputed concentration;

- order the Commission to pay all the costs.

72. The Commission, supported by the Works Council of SA Legrand and by the European Works Council of the Legrand group, contends that the Court should:

- dismiss the application;

- order Schneider to pay the costs.

Law

73. The arguments developed by Schneider in support of its action are set out in various pleas, which, for ease of presentation, are to be regarded as alleging (i) procedural irregularity as regards Article 10(3) of Regulation No 4064/89, (ii) manifest errors on the part of the Commission in its appraisal, first, of the impact of the concentration and, second, of the commitments submitted by Schneider in order to render the transaction compatible with the common market and (iii) infringement of the rights of the defence.

Procedural irregularity

First plea, alleging infringement of Article 10(3) of Regulation No 4064/89

- Arguments of the parties

74. In the context of this plea, raised by way of principal claim, Schneider observes that, under Article 10(3) of Regulation No 4064/89, the Commission had a period of four months starting on 30 March 2001, the date on which the second stage of the procedure began, to make a finding as to whether the concentration was incompatible with the common market.

75. That mandatory period expired on 10 August 2001, as a result of the application of the provisions of Regulation No 447/98 relating to the calculation of time-limits, i.e. before the Commission adopted the Decision on 10 October 2001.

76. In those circumstances, the disputed concentration must be deemed to have been declared compatible with the common market, in accordance with Article 10(6) of Regulation No 4064/89.

77. The Commission, however, relied on the exceptional suspension of the four-month period prescribed by Article 10(4) of Regulation No 4064/89 where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has been obliged to request information by decision pursuant to Article 11(5) of Regulation No 4064/89.

78. The decision of 27 April 2001 sent to Schneider (see paragraph 22 above) in effect required it to provide the Commission with information which the Commission, by letter of 6 April 2001, had already asked it to provide by 18 April 2001. However, the very strict conditions to which Article 10(4) of Regulation No 4064/89 subjects suspension of the four-month period had not been met.

79. Suspension of that period is exceptional and does not necessarily follow from every request for information. In the present case, the Commission was obliged to adopt the decision not because of circumstances for which the parties to the concentration were responsible but because of the fact that, in the letter of 6 April 2001, the parties were given five working days within which to respond to 322 questions. Those questions involved gathering more than 300 000 pieces of information, whose later use in the appraisal of the transaction remains to be shown.

80. The Commission thus itself created a situation which it later used to justify adopting a decision requesting information and having a suspensive effect.

81. Schneider points out that the Decision, at recital 8, takes Article 10(4) of Regulation No 4064/89 as the basis for suspending the period for adopting a decision, whilst the decision of 27 April 2001 requesting information is founded, in that regard, on Article 9 of Regulation No 447/98.

82. The Commission cannot attempt to justify suspending the four-month period by contending that Article 9 of Regulation No 447/98, unlike Article 10(4) of Regulation No 4064/89, does not refer to the exceptional nature of the suspension and the need to establish that there were circumstances for which the parties to the concentration were responsible. Regulation No 447/98 cannot provide an exception to the provisions of the basic Regulation, No 4064/89, which it implements.

83. The fact that Schneider did not directly bring an action for annulment of the decision of 27 April 2001 does not affect the admissibility of the present plea. Suspension of the maximum four-month period is not a substantive measure affecting the rights of the undertakings. That interpretation is not affected by the fact that it was stated in the body of the decision of 27 April 2001 that an action for annulment could be brought against it. The operative part did not mention suspension of the four-month time-limit and Schneider could not in any event have shown sufficient legal interest to apply for annulment of the decision.

84. In so far as the first plea is upheld, Schneider also asks the Court to find, on the basis of Article 241 EC, that Article 10(5) of Regulation No 4064/89 is inapplicable. Article 10(5) provides that the periods laid down in the regulation are to start again from the date of a judgment annulling a Commission decision. To cause time to run again in a case in which a decision on compatibility is deemed to have been given would be tantamount not to condemning but to endorsing the unlawful act, since the Commission would thereby be granted a fresh period within which to determine the matter.

85. The Commission claims that the plea alleging that the decision of 27 April 2001 is illegal is manifestly inadmissible, since the decision was not challenged within the period prescribed for bringing an action for annulment (Case C-178/95 Wiljo [1997] ECR I-585, paragraph 19).

86. The decision of 27 April 2001 requesting information, which was adopted under Article 11(5) of Regulation No 4064/89, is a measure against which an action for annulment may be brought. In addition, Schneider had a vested and present interest in applying directly for annulment of that decision.

87. In any event, the plea is unfounded: the decision complies with Regulation No 4064/89 and Regulation No 447/98. In particular, the information requested was necessary for the investigation and the Commission was actually obliged to adopt the decision because of a delay for which the notifying parties were responsible.

88. Whether a time-limit is reasonable must be determined in relation to the particular circumstances of each case (Joined Cases T-213/95 and T-18/96 SCK and FNK v Commission [1997] ECR II-1739) and the Commission is obliged to observe mandatory time-limits.
89. The letter of 6 April 2001 amounted to no more than the logical follow-up to the various questions which the Commission had been asking since the start of the procedure, to which an undertaking such as Schneider was required to reply with all the diligence expected of a reasonably well-informed operator.

90. There is no difference, as regards the effects of decisions requesting information under Article 11(5) of Regulation No 4064/89, between Article 10(4) of Regulation No 4064/89 and Article 9 of Regulation No 447/98. It is possible to refer to either of those provisions.

91. In those circumstances, it is of no consequence that, in stating reasons for suspending the four-month period, the decision of 27 April 2001 takes as its legal basis, at its tenth recital, Article 9 of Regulation No 447/98, and that the Decision, at its eighth recital, takes Article 10(4) of Regulation No 4064/89 as such.

92. Furthermore, the Commission regards as premature, and therefore inadmissible, the plea of illegality raised in respect of Article 10(5) of Regulation No 4064/89, which provides that the periods laid down in that regulation are to start again from the date on which a judgment annulling a decision is given.

93. In any event, it is logical, indeed essential, that Regulation No 4064/89 should contain a provision setting out the effects which annulment of a decision based on that regulation is to have on the periods prescribed therein.

- Findings of the Court

94. The contested suspension of the four-month period within which the Commission was to take a decision covers the period between 19 April 2001, the day following the deadline set in the Commission's request for information of 6 April 2001, and 25 June 2001, the date on which the Commission considers that it received all the information requested.

95. It is not disputed that, if the suspension of the period were to be regarded as lawful, the Decision, adopted on 10 October 2001, would have been given, account being taken of the calculation of working days, within the four-month period commencing on 30 March 2001, the date on which the procedure was initiated. By contrast, if the suspension were found to be unlawful, the Commission would have to be regarded as not having taken a decision under Article 8(3) within the statutory period.

96. Suspension of this kind, which Regulation No 4064/89 describes as exceptional, presupposes that the Commission has been obliged to request information by decision because of circumstances for which one of the parties to the concentration is responsible.

97. In that regard, the Commission noted, in the seventh recital to its decision of 27 April 2001, that the information requested in its letter of 6 April 2001 was necessary, for the purposes of Article 11(1) of Regulation No 4064/89, to enable it to examine the compatibility of the proposed transaction with the common market and, in particular, to determine the position of the notifying parties on the various sectoral markets concerned.

98. Schneider does not fundamentally dispute that the information was necessary, since it merely submits that the later use of the information in the appraisal of the transaction remains to be shown.

99. Nor is it disputed that the parties to the notification did not comply with the deadline for replying, set for 18 April 2001 by the letter of 6 April 2001. As stated in the fourth recital to the decision of 27 April 2001, the notifying parties informed the Commission by letter of 23 April 2001 that they were not in a position to meet the deadline for responding.

100. Given the circumstances of the present case (see, in particular, paragraphs 15 to 18 above), and the requirement for speed which characterises the overall scheme of Regulation No 4064/89, the Court regards the time-limit for responding set by the letter of 6 April 2001, which expired on 18 April 2001, as reasonable.

101. The letter of 6 April 2001 followed a series of contacts and conversations between the notifying parties and the Commission which had begun on 8 December 2000. In the course of that period, the notifying parties had already had occasion to reply to numerous informal requests for information.

102. In view of its nature, the information requested in the letter of 6 April 2001, which was of a similar kind to much of the information already supplied during the informal stage of the enquiry, should, therefore, in the normal course of events have been available at short notice within a company of Schneider's size.

103. Furthermore, the notifying parties did not immediately challenge the extent of the information requested in the letter of 6 April 2001, since they did not react until they wrote to the Commission on 23 April 2001 (see above).

104. It does not therefore appear that the Commission acted incorrectly when, on 27 April 2001, it adopted a decision pursuant to Article 11(5) of Regulation No 4064/89 requiring the parties to provide it with the information requested.

105. That finding is not affected by the fact that on 23 April 2001, i.e. five days after expiry of the deadline for responding set by the letter of 6 April 2001, the parties suggested that the deadline should be postponed until 29 April 2001.

106. In such a situation, the four-month period referred to in Article 10(3) of Regulation No 4064/89 is exceptionally ... suspended, under the mandatory terms of Article 10(4). Where a decision requiring information has been properly sent by the Commission to a notifying undertaking, the fact that the term exceptionally is used does not preclude that decision from automatically suspending the four-month period from the date on which it is found that the necessary information has not been provided until the date on which it is provided.

107. In that regard, there is no contradiction between the wording of Article 10(4) of Regulation No 4064/89 and that of Article 9 of Regulation No 447/98.

108. Also, the Commission was entitled to state, at the tenth recital to the decision of 27 April 2001:

Under Article 9 of Regulation No 447/98, the periods set by Article 10(1) and (3) of Regulation No 4064/89 are to be suspended, where the Commission adopts a decision pursuant to Article 11(5) of that regulation, throughout the period between the end of the time-limit set in the request for information and receipt of the complete and correct information required by that decision.

109. The Court is not convinced by the argument that the application of the basic rule in Regulation No 4064/89 was exceptional and unlawful. What is exceptional about suspension of the relevant period is the occurrence of the conditions which allow a decision requesting information to be adopted and not the consequences to be inferred from such a decision. As is clear from the above arguments, Schneider has failed to show that that decision was unlawful.

110. Since the Commission was entitled to adopt the decision of 27 April 2001, the effect of which was to suspend the four-month period within which the Commission was to take a decision on the compatibility of the transaction notified, the Decision is not unlawful in that respect.

111. In those circumstances, the first plea in law must be rejected and there is no need to rule on its admissibility in so far as it indirectly alleges that the decision of 27 April 2001 is unlawful.

112. The plea alleging that Article 10(5) of Regulation No 4064/89 is illegal in so far as it has the effect that the relevant periods are to start again where a decision on incompatibility is annulled, was raised only if and in so far as the Court should uphold the plea alleging that suspension of the four-month period was unlawful. Accordingly, there is no need to adjudicate on the former plea.

113. Moreover, even if the plea had been upheld, the objection of illegality would have had to be rejected as inadmissible, since the Commission has not at this stage adopted vis-à-vis Schneider any decision based on the provision whose illegality is raised indirectly (see, to that effect, Joined Cases C-432/98 P and C-433/98 P Council v Chvatal and Others [2000] ECR I-8535, paragraph 33).

Pleas criticising the Commission's assessment of the impact of the concentration

114. In the alternative, Schneider argues that the objections relating to the creation of a dominant position are not properly reasoned. In addition, the Decision is vitiated by manifest errors of methodology and assessment and fails correctly to apply the conditions necessary under Article 2(3) of Regulation No 4064/89 for a finding that a concentration is incompatible with the common market. The Decision thus

contains substantive defects such as to justify its annulment.

115. Before undertaking an examination of the various pleas falling under this heading, the Court will set out the substance of the economic reasoning on which the Commission based its analysis of the impact of the concentration.

116. According to recital 488 of the Decision, the examination in the introduction to the Commission's analysis of the effects of the concentration (Section V.C.1.1. of the Decision) of the main features of competition so far as switchboards and panel-boards are concerned applies mutatis mutandis to the other product markets affected by the transaction, subject to particular considerations ... mentioned in the sections relating to the products concerned.

117. In the general analysis set out between recitals 489 and 520, the Commission emphasises the low price sensitivity of demand for low-voltage electrical equipment. First, the decision to undertake building or renovation projects is not influenced by the price of electrical equipment, which often accounts for only a small part of the total cost of the work. Second, electrical equipment often represents only 20% of the overall value of the electrical installation, the other 80% being essentially labour costs. Consequently, an overall rise in the price of electrical equipment would have little, or indeed no, effect on demand.

118. The Commission also considers that installation engineers and switchboard assemblers show significant loyalty to their manufacturer's brand and do not readily desert that manufacturer even if they are offered lower prices by competing producers.

119. The Commission makes clear, however, that such brand loyalty is not absolute. As long as one brand guarantees that low-voltage electrical equipment is of good quality and is immediately available, it is not easy for other manufacturers to win over the customers, even if they offer better products and/or lower prices. By contrast, if a brand ceases to satisfy the basic requirements of installation engineers and switchboard assemblers, it will quickly lose their confidence and will find it difficult to regain it.

120. Where, because the brand is one of the main factors which determine electricians' choices, a particular brand represents a significant barrier to market entry or diversification by manufacturers on other sectoral markets, the extent of the product range is, in the Commission's view, a further factor in the manufacturer's success. Manufacturers' readiness to extend their product ranges corresponds to wholesalers' inclination to prefer manufacturers with very extensive product ranges in order to optimise their costs.

121. As indicated at recital 71, although wholesalers are not involved in sales of components for main switchboards, they account for between 80 and 90% of sales of the other types of electrical equipment affected by the transaction.

122. Furthermore, manufacturers with extensive product ranges have an advantage at distributor level because of the various discounts which they offer to wholesalers and which represent a significant part of wholesalers' turnover (see recital 589). In particular, the basis for calculating volume discounts is the value of sales of all low-voltage electrical equipment (recital 587).

123. As a result, although the criteria which influence their choices must clearly reflect those of their customers (switchboard assemblers and installation engineers), wholesalers nevertheless look for suppliers with the most extensive possible product range (recital 81).

124. In the Commission's view, the merged entity will become an irresistible force in the distribution of the products concerned owing to its ability to reinforce its current market positions, at the expense of its competitors, owing to its unrivalled geographic coverage, its privileged relations with wholesalers, its unequalled product range and its incomparable variety of brands.

125. Given the atomised nature of demand from switchboard assemblers and installation engineers and their loyalty to the best-known brands, the new group will be in a position to impose price rises, without their

effect being negated by corresponding losses in market share (recitals 592 and 688).

126. The Commission concludes that the transaction is likely to have a particularly acute effect on the price of panel-boards (recital 612), cableways (recital 641) and ultraterminal electrical equipment (recital 688).

Second plea, alleging errors in the economic reasoning underpinning the analysis of the impact of the concentration

- Arguments of the parties

127. First, Schneider claims that the Commission's conclusion that the merged entity would be able to act independently of other players and, consequently, to raise prices is predicated on the low price sensitivity of overall demand for low-voltage electrical equipment. However, that factor is not relevant to an assessment of the competitive structures on each of the various sectoral markets.

128. Instead, the analysis should be based on the elasticity inherent in an undertaking's tariff offer. In that regard, the second NERA report established that where manufacturers ran advertising campaigns for a particular item, sales increased to the detriment of competitors.

129. The Commission observes that it pointed out, at recitals 517 to 519, that overall demand for low-voltage electrical equipment is not very price sensitive, or inelastic, since it is largely determined by exogenous factors.

130. The point on which the Commission and Schneider disagree is therefore the price sensitivity of demand vis-à-vis each manufacturer. That issue is actually one and the same as the issue of purchasers' loyalty to manufacturers' brands.

131. The Commission contends that the two NERA reports do not establish that sales promotions enabled manufacturers to win over their competitors' customers. Despite the low level of demand elasticity, however, those promotions could provide the opportunity to launch new products and could provide the necessary means of ensuring continuing consumer brand loyalty.

132. Second, Schneider submits that the Commission cannot, without being inconsistent, find that the high degree of brand loyalty of switchboard assemblers and installation engineers puts competitors in a better position to withstand the concentration and at the same time find that such brand loyalty none the less represents a significant barrier to market entry which should be taken into account for the purposes of analysing the anti-competitive effects of the transaction.

133. The Commission observes that, according to recital 499, the degree of brand loyalty has no consequences for the assessment of a dominant position and that such loyalty is not absolute but significant. It does not place existing players in an impregnable position (recital 494). However, that reasoning is not undermined by - nor is it inconsistent with - the fact that, for potential competitors, brand loyalty is a barrier to market entry.

- Findings of the Court

134. The Court finds, first, that, as is apparent from the second NERA report, Schneider does not call into question the relative inelasticity of overall demand for low-voltage electrical equipment. The dispute between the parties relates only to the need, perceived by Schneider, to take account of any cross elasticity between manufacturers when assessing the competitive structures of the various markets for low-voltage electrical equipment.

135. Schneider's arguments suggest that that question is closely linked to that of the brand loyalty of switchboard assemblers and installation engineers. Thus, the second NERA report, at point 2.1.2, concludes

from the increased sales of promotion items that customers, such as switchboard assemblers and installation engineers, change brands quickly when the prices of electrical equipment change.

136. Schneider has not challenged recital 22, which states that direct purchases from manufacturers are the province of wholesalers, whose low price sensitivity to which the Commission refers (in particular at recital 650), is not discussed.

137. Nor does it appear that Schneider has criticised recital 70, according to which only large industrial customers or large-scale switchboard assemblers operating in the main switchboard segment, which does not involve wholesalers, may find it advantageous to buy products directly from the manufacturers.

138. In those circumstances, the increase in certain manufacturers' sales of promotion items - on the assumption that it was to the detriment of competitors - does not seem, in itself, to be capable of affecting what the Commission found to be the significant brand loyalty of switchboard assemblers and installation engineers.

139. In fact, it is not inconceivable that the increase in sales of products promoted by the manufacturers can be accounted for by wholesalers.

140. Therefore, it cannot necessarily be inferred from the increased sales of promotion items either that switchboard assemblers and installation engineers have a tendency to change brands quickly or, as a consequence, that there is high cross elasticity of demand on the part of those operators.

141. As a result, the Court accepts the Commission's finding that switchboard assemblers and installation engineers have significant loyalty to the brands of manufacturers of low-voltage electrical equipment.

142. In those circumstances, Schneider has not shown that the Commission, for the purposes of assessing the impact of the transaction, was wrong to use the test of price sensitivity of overall demand for low-voltage electrical equipment instead of relying on cross elasticity of demand (which has not been proved) on the part of switchboard assemblers and installation engineers.

143. The Court finds, second, that, owing to what must be recognised as the significant loyalty of switchboard assemblers and installation engineers, it cannot be precluded that penetration of a national sectoral market may prove difficult for a new competitor.

144. None the less, it cannot be precluded that such loyalty may also be a factor which, in this instance, puts a manufacturer already present on the relevant market in a better position to withstand the impact of the concentration.

145. Therefore, the Commission's assessment of electricians' brand loyalty does not appear to be inconsistent.

146. In those circumstances, the plea must be rejected.

Third plea, alleging overestimation of the strength of the merged entity

- Arguments of the parties

147. Schneider observes that the Commission's approach was to define country by country the various product markets affected by the transaction, whilst the notifying parties had, on the contrary, contended during the administrative procedure that certain sectoral markets were European in scale.

148. Without taking issue with that definition, Schneider complains that the Commission carried out, in Section V.C of the Decision, an overall analysis at European level of the impact of the transaction, instead of

proceeding country by country on the basis of the definition of the product markets set out in Section V.B of the Decision.

149. That overall analysis prompted the Commission to describe the new entity as the European leader and to conclude that it would enjoy certain substantial advantages in comparison with its competitors, in particular, the extent of its geographic coverage, its relations with wholesalers, the extent of its product range and the wide variety of its brands.

150. However, the Commission cannot complain that the future entity would become the unchallenged European leader, whilst the strict national definition of the markets which it had undertaken shows, on the contrary, the narrow geographic limits of the competition problems identified.

151. The Commission contends that it concluded that the transaction would lead to the creation or strengthening of a dominant position, relying solely on an analysis of the impact of the transaction in each country affected, irrespective of whether those effects were common to the national markets as a whole or specific to one or some of them.

152. The Commission denies that it tried to establish that the merged entity would have a dominant position on any sectoral market of European scale or that it was the European leader. The Commission draws attention to the fact that the merged entity enjoyed, in particular, unrivalled geographic cover, and a product range and variety of brands which are appreciably more extensive than those of its competitors.

- Findings of the Court

153. It follows from point 8 of the Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5, point 7) that the geographic market to be taken into account comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

154. The Court has confirmed that the geographic market is a defined area in which the product concerned is marketed and where the conditions of competition are sufficiently homogeneous for all economic operators, so that the effect on competition of the concentration notified can be evaluated rationally (Joined Cases C-68/94 and C-30/95 France and Others v Commission [1998] ECR I-1375, paragraph 143).

155. At Section V.B of the Decision, Definition of the relevant markets, the Commission described the national dimension of the various markets and market segments for low-voltage electrical equipment identified beforehand and set out in the table reproduced at paragraph 48 of this judgment.

156. The Commission's conclusion that there were national markets for distribution and final panel-board components was founded on four factors (see recital 194).

157. First, there are significant differences between the products sold in the various countries.

158. Second, prices are set at national level and the price of certain reference products varies considerably (by up to twice as much) from one country to another.

159. Third, the key factors in competition, both on the supply side (positioning of brands, access to wholesalers) and on the demand side (customer structure and expectations), are dependent upon essentially national factors, such as the concentration, size and sphere of activity of wholesalers, or installation engineers' perception of brands and product ranges. In addition, those factors vary significantly from one country to another. In particular, the extent to which wholesalers are concentrated varies markedly between countries and wholesalers' purchasing is organised on a national basis (recital 220). Negotiations between manufacturers and wholesalers, in particular as regards choice of suppliers and selection of the product

ranges to be bought and sold, take place almost entirely at national or regional level (recital 223).

160. Fourth, there are significant barriers to entry and expansion between countries. Those barriers can be attributed in particular to the conservatism of installation engineers (see recital 240), to national practices (see recitals 194 and 203) and to the absence of full harmonisation of technical standards at Community level (see recital 201) and can require a new entrant to invest significant sunk costs.

161. At recital 268 the Commission points out that those key factors apply by analogy to cableways and busbar trunking.

162. Similarly, the Commission takes the view that the various market segments in ultraterminal electrical equipment are national in scale (recitals 380, 381 to 384, 394 and 424).

163. On concluding of its analysis of the transaction, the Commission finds that there are a certain number of objections relating to the creation or strengthening of a dominant position on the various national sectoral markets affected by the transaction and, as such, listed at recitals 782 and 783 (see paragraphs 57 and 58 of this judgment).

164. The Commission's analysis of the effect of the disputed concentration on each of the national sectoral markets affected by the transaction is none the less also founded on the positions held by the merged entity outside those markets, inasmuch as the Commission took into account its unrivalled geographic coverage, i.e. the fact that its activities extend to the whole of the EEA.

165. As regards, first, national markets for switchboard and panel-board components, the Commission, in order to illustrate that the new entity would acquire an unrivalled position, refers to the strength of the combined entity on the markets for low-voltage electrical equipment as a whole (recital 551) and sets out in Table 30, which is reproduced below, the range of low-voltage electrical equipment which the Schneider-Legrand group would be able to offer in each of the 15 countries listed:

Table 30
Markets for low-voltage electrical equipment affected by the transaction

[…]

166. In that regard, the Commission explains at recital 550 that prior to the proposed transaction, the parties each had a very wide range of products in the low-voltage electrical-equipment sector. They most frequently held very significant positions for some of those products and in certain geographic areas. Thus the transaction [will] enable the parties to combine Schneider's strong positions in the Nordic countries in electrical equipment used downstream from final panel-boards with Legrand's strong positions in Southern Europe. Likewise, Schneider brings its strength in all categories of switchboards and panel-boards and reinforces Legrand's strong position in downstream products as a whole.

167. The Commission continues as follows at recital 551:

Following the transaction, there [will] be only two countries in the EEA (Germany and Finland) in which the combined entity will not have a leading position. More generally, it should also be pointed out that Schneider states that for low-voltage electrical equipment it is ranked second globally whilst Legrand portrays itself as world leader in ultraterminal electrical distribution ....

168. The Commission goes on to observe, at recital 552, that none of Schneider-Legrand's competitors [will] have such a wide range of products and such geographic coverage with strong positions on the relevant markets.

169. As regards, second, national markets for ultraterminal electrical equipment, the Commission draws attention to the fact that the merged entity will offer a full range of products and that its coverage of the EEA

as a whole will be comprehensive and unmatched (recitals 654 and 658). The proposed transaction will therefore result, in the Commission's opinion, in the combination of Schneider's large market shares in Northern Europe and those of Legrand in Southern Europe (recital 659).

170. Thus, although the Commission used the national dimension of the sectoral markets for low-voltage electrical equipment to demonstrate that a dominant position would be created or strengthened in those markets, it nevertheless had recourse to evidence of economic power drawn from all the national sectoral markets, irrespective of whether the concentration would give rise to competition problems on those markets.

171. However, the Court observes that the creation or strengthening of a dominant position on national sectoral markets could, in this instance, be apprehended only on the basis of evidence of economic power relating to those markets, possibly supplemented by a consideration of transnational effects, assuming such effects should be shown to exist in the present case. However, that is not the position.

172. In that regard, the Commission itself points out, at recitals 534 and 537, that, although the transaction creates, for example, a cumulation of market shares on all the national markets for panel-boards, it none the less gives rise to competition problems in only five countries, as may be seen from Tables 27 to 29, reproduced below.

Table 27
Market shares in distribution panel-board components

[…]

Table 28
Market shares in final panel-board components

[…]

Table 29
Market shares in connector circuit breakers

[…]

173. Likewise, the purpose of Table 35 in the Decision, reproduced below, is to illustrate the presence of the merged entity and of its main competitors on the various segments of the market for ultraterminal electrical equipment throughout the EEA.

Table 35
Presence of the major manufacturers on the markets for equipment used downstream from the final panel-board

[…]

174. Of the segments of national markets referred to in Table 35 only the following segments were referred to in the objections relating to the creation or strengthening of a dominant position, set out at recitals 782 and 783:

[...]

175. It follows that, of all the national sectoral markets referred to in Table 30 reproduced at paragraph 165 above, the factual evidence in the Decision indicates that only the markets and segments shown below entail competition problems relating to the creation or strengthening of a dominant position:

176. The Court thus finds that the Commission incorporated, not only in its presentation, but also in its analysis, of the facts, the unmatched geographic coverage of the merged entity throughout the whole of the EEA, in order to show that a dominant position would be created or strengthened on the national sectoral markets for switchboard components and for ultraterminal equipment as referred to in the objections set out at recitals 782 and 783.

177. The Court points out in that respect that the transaction, as the documentary material in the Decision itself shows, in reality poses competition problems only in France and on six other national markets.

178. Admittedly, as pointed out at paragraph 171 above, it is in principle open to the Commission to take account of transnational effects which may increase the impact which a concentration has on each of the national sectoral markets deemed relevant.

179. Those effects may not be presumed to exist, however: on the contrary, the Commission must provide sufficient evidence that they do.

180. It must be pointed out that, in order to provide evidence of the competition problems which would arise on the sectoral markets affected by the concentration and referred to at recitals 782 and 783, the Commission focused exclusively on the power which the merged entity would have on all the other national sectoral markets in Table 30, without weighing that power against the competitive strength of its competitors on those markets.

181. None of those competitors features in Table 30. The table gives no indication of the impact of the transaction on each of the various national sectoral markets in which no competition problems will arise as a result of the concentration.

182. In particular, Table 30 does not make clear that Legrand was present on the markets for distribution panel-board components in only three of the 15 countries referred to in Table 30, namely France, Italy and Norway (see recital 530). Nor, as a consequence, does it make clear that the proposed merger is likely to pose competition problems only in those three countries.

183. Nor does Table 30 indicate whether the strength attributed to the merged entity on each of the national sectoral markets listed would result from the transaction or from the presence on those markets, prior to the transaction, of one or other of the notifying parties (see paragraphs 327 and 392 below). In particular, the table fails to indicate that before the transaction Legrand was not present on any of the national markets for main switchboard components and that, as a consequence, the transaction cannot give rise to competition problems in those markets (recital 245).

184. Furthermore, ABB, Siemens and GE have a huge range of low-voltage products (recital 17), whilst ABB and Siemens are generally present in a large number of Member States (recital 20). In particular, ABB is represented on all the national markets for ultraterminal electrical equipment, or most of them, whilst Siemens and Hager are present on several of those markets (recitals 644 and 645).

185. Nor, in light of the general scheme of the Decision, can the Court accept the assertion that the assessment of the role to be played by Schneider-Legrand at European level, far from casting doubt on the geographic definition of the relevant markets as being of national dimension, is an integral part of the analysis of the impact of the concentration on each of the national markets and product markets affected (recital 654).

186. At the hearing, the Commission stated that a company present on all markets and holding a dominant position on all the geographic markets of the EEA as a whole is capable of retaliation.

187. It was, however, by reference to each of the territories concerned that the Commission pointed out, at recital 605, that the combined entity's ability to offer a very wide range of products would enable it to direct targeted retaliatory measures against its competitors.

188. Likewise, according to the Commission's own interpretation of Table 30 in its reply to the seventh plea (see paragraph 304 of this judgment), it is within the same geographic market that the new entity is supposed to gain a significant competitive advantage as a result of its strong position on other product markets on which the same wholesalers are active.

189. Thus, only the Spanish market would appear to be affected by what the Commission claims at recitals 678 and 685 to be Schneider's ability to capitalise on the substantial presence it is known to enjoy on the markets for panel-board components in Spain and force wholesalers to stock its ultraterminal electrical equipment.

190. Similarly, according to recital 604, it is only in Portugal that Schneider, which is deemed to be in a very strong position on the market for miniature circuit breakers, especially for industrial and tertiary applications, is accused of regularly fuelling the price war in the residential segment, in such a way as to confine Hager and ABB to that less profitable market and thereby protect its market shares in the segments for tertiary and industrial applications.

191. It follows from the foregoing that the Commission, in its analysis of the merged entity's geographic coverage, incorrectly applied Article 2(3) of Regulation No 4064/89.

192. The plea must therefore be accepted.

Fourth plea, alleging inconsistency in the analysis of the structure of competition at wholesaler level

- Arguments of the parties

193. Schneider claims, first, that there are manifest errors of reasoning in the Commission's overall assessment of the relative strength of manufacturers and wholesalers and, second, that there are inconsistencies in the consequences which in the Commission's contention follow from, in particular, the greater or lesser degree of concentration in distribution for the competitive pressure which the wholesalers are capable of exercising on the merged entity.

194. The Commission replies that the degree of concentration among wholesalers, and thus the extent of buyer power, varies significantly from one country to another. However, irrespective of the degree of concentration among wholesalers, rivalry between them does not have an impact on the manufacturers, at least not on the largest manufacturers, amongst whose leaders the merged entity is to be found.

195. The competition between wholesalers consequent upon a low (Italy and Spain) or average (Portugal) degree of concentration of distribution does not mean that the resulting competition between wholesalers leads to significant pressure being brought to bear on the leading manufacturers. On the contrary, the wholesalers' room for manoeuvre vis-à-vis the manufacturers is particularly limited and does not enable them to constrain prices in any appreciable way.

196. In countries in which distribution is highly concentrated (France and Denmark), wholesalers are dependent for a very large number of products on the major manufacturers with the best-known brands. The leading manufacturers grant even larger discounts to wholesalers when they concentrate on selling the manufacturers' products, so that there is even less incentive for wholesalers to exert their buyer power on manufacturers.

- Findings of the Court

197. It is appropriate to point out that the Commission confined itself, at recitals 579 to 583, to a very general examination of the relative strengths of manufacturers and wholesalers at a transnational level, whilst the national dimension of the geographic markets stated to be relevant would have called for a

detailed country-by-country analysis.

198. In addition, the examination carried out by the Commission does not prove that the new entity would be an unavoidable trading partner for wholesalers nor that they would be incapable of exercising any competitive restraints on it.

199. First, it does not appear that the Commission's method of gauging the wide variations which it found in the extent to which distribution was concentrated on the various national markets provided a sufficiently reliable basis for the conclusions it reached about the relative strengths of manufacturers and wholesalers.

200. At recitals 26 and 221, the Commission classed Portugal, together with Spain, among the countries in which wholesalers were most atomised. The Commission also notes, at recital 594, First, installation engineers and switchboard assemblers are too atomised to exercise significant buyer power over the merged entity. The same is true of Spanish, Danish and Portuguese wholesalers.

201. However, it does not follow from Table 6 in the Decision, set out below, that the structure of distribution is atomised in Portugal, since two wholesalers between them have 40% of the market for switchboards and panel-boards.

Table 6
Schneider's estimate of the market shares of the five groups of international wholesalers on the markets for switchboards/panel-boards

[…]

202. In any event, the structure of distribution obtaining in Portugal can be distinguished from that in Spain, where three wholesalers together have 19% of the market for switchboards and panel-boards, and that in Denmark, where two wholesalers together control 13%. In its defence, the Commission also classifies Portugal as a country in which there is an average degree of concentration, as is clear from the Commission's answer to the plea set out above.

203. Second, several passages of the Decision (see recitals 26 and 221) are at variance with the Commission's conclusion that in countries in which distribution is not highly concentrated wholesalers' room for manoeuvre vis-à-vis manufacturers is particularly limited and does not enable them to constrain prices in any appreciable way.

204. At recital 26, the Commission observes, with reference to Legrand's medium-term plans, that according to the parties' internal documents, those structural differences [in distribution] are not without consequences for the conduct of wholesalers in the countries concerned and that it thus appears that in the countries in which wholesalers are the most fragmented, such as Portugal, competition between wholesalers leads to a price war which has repercussions at manufacturing level. Nevertheless, the Commission regards Legrand as having a strong position in Southern Europe.

205. At recital 221, the Commission states:

As an internal document from Legrand shows, there are several classes of distributor in Portugal, chiefly independent speculative family-run businesses, without a structured commercial policy, and operating in the very short term. Consequence: strong anarchic competition between them, which entails (i) a fall in prices generally and in their profit margin in particular, resulting in constant pressure on manufacturers to give better purchasing terms...

206. The example of Portugal cited by the Commission does not therefore lend weight to the proposition that in countries where distribution is not highly concentrated, wholesalers are not in a position to restrain prices in any appreciable way.

207. Similarly, according to Legrand's medium-term (2001-2005) plan for Spain, [distributors'] margins and their profitability continue to fall year on year because of the strong pressure on prices caused by the large number of distributors on the market, the fall in those prices then rebounding on manufacturers.

208. Thus, those data undermine the Commission's argument at recital 579 that it is highly unlikely that Spanish wholesalers each have sufficient buyer power to restrain the merged entity's competitive conduct in any appreciable way and, contrary to the Commission's contention at recital 581, it cannot be taken as proved that the merged entity would be an unavoidable trading partner for the wholesalers (see paragraph 216 et seq. below).

209. Third, the Court does not consider that there is sufficient evidence to support the Commission's finding that where wholesalers are highly concentrated, there is still no strong downward pressure on prices.

210. In support of that finding, the Commission points out, at recital 582, that in a number of countries, including Italy, wholesalers favour Legrand's products particularly because of their relatively high prices, which give them increased profit margins.

211. On the one hand, it follows from the foregoing that the Commission places Italy among the countries where distribution is not highly concentrated, as is evident from Table 6 in the Decision, reproduced at paragraph 201 above.

212. The reference to Italy therefore does not demonstrate that there is no strong downward pressure on prices where distribution is highly concentrated.

213. The reference at recital 582 to the structure of distribution in Austria is irrelevant: according to the Decision itself, no relevant sectoral market in that country is affected by the concentration (see recitals 782 and 783).

214. Further, the characteristics of overall demand for electrical equipment, including customer-side demand, must also be taken into consideration.

215. In that regard, it is apparent from recital 213 that the high cost of Legrand's products may actually be a significant impediment in that it sometimes makes the products ill-suited to the customers' purchasing power.

216. Fourth, Table 31 of the Decision, reproduced below, does not effectively support either the description of the merged entity at recital 567 as an unavoidable trading partner for most wholesalers, which is based on the fact that it has sway over a very substantial proportion - in some cases more than 40% - of national sales or the contention that it has significant market positions in each country.

217. Table 31, reproduced below, provides percentage brackets for sales of all low-voltage electrical equipment by the leading manufacturers to wholesaler [A] (2).

Table 31
Wholesaler [A's] (3) percentage sales of low-voltage electrical equipment

[…]

218. Since, as regards low-voltage electrical equipment as a whole, there is no indication of how distribution is concentrated nationally (as there was in Table 6 in the case of the markets for switchboards and panel-boards), it is impossible to decide from Table 31 whether national wholesalers of low-voltage electrical equipment as a whole will find the merged entity an irresistible force.

219. Nor does a comparison of Tables 31 and 6 (on the assumption that any such comparison is possible, since Table 6 deals only with switchboard and panel-board components) make it possible in any event to

regard the new entity's share of sales to wholesalers as substantial.

220. The 30 to 40% bracket sales of low-voltage electrical equipment by wholesaler [A] (4) in Italy attributed to the Schneider-Legrand group in Table 31 is not an adequate basis for an accurate assessment of the economic power which that group will have vis-à-vis distributors in that country.

221. First, that wholesaler accounts for only 4% of the Italian market for panel-board components. According to the Commission itself, account should be taken of how well established wholesalers are when ascertaining to what extent the manufacturers' competitive position is essentially determined by their access to distribution.

222. At recital 73, the Commission thus points out that the competitive position of the various manufacturers will to a large extent be determined by ... their access to wholesalers, at least in the Member States in which the latter are sufficiently well established.

223. Second, Table 6 is not exhaustive. As the Commission states, at recital 72, manufacturers do not necessarily have access to the same wholesalers. Whilst the larger manufacturers tend to work with large international groups, the smaller competitors are more inclined to operate at regional level and work with smaller wholesalers.

224. The first NERA report indicates, and is not disputed in that regard by the Commission, that, according to Legrand's estimates, there are about 800 wholesalers on the Italian market for ultraterminal electrical equipment.

225. Furthermore, recital 63 makes clear that local wholesalers supplying installation engineers are not necessarily subsidiaries of international wholesalers.

226. For the same reasons, the Court is also unable to accept the Commission's assertion, at recital 676, that the new group will account for a significant proportion of the wholesalers' turnover and, as a result, a significant proportion of their purchasing in most of the EEA Member States (see further above, Table 31).

227. The Court cannot accept the Commission's contention at recital 637 that the merged entity will have privileged access to distribution on the United Kingdom markets for products for electrical distribution on the ground that it will account for between 10 and 20% of the sales of electrical-distribution products by one of the largest wholesalers in the United Kingdom, whilst that wholesaler's second supplier accounts for less than 10% of its sales.

228. Owing to its imprecise nature, since it could be anywhere between less than 1% and more than 19%, the difference between Schneider-Legrand and the supplier in second place cannot be regarded as a reliable indication of privileged access to distribution.

229. For the same reason, the Court cannot accept the finding at recital 573 that the Schneider-Legrand group in Spain will be relatively larger than its competitors, having regard to the brackets of shares of sales by [A] (5) accounted for by each of the leading operators on the market for low-voltage electrical equipment and set out in Table 31, which includes equally imprecise percentage brackets of market shares.

230. In those circumstances, neither the fact that the merged entity will be an unavoidable trading partner for wholesalers nor their inability to exercise competitive constraints on it have been properly demonstrated.

231. The plea must therefore be declared founded.

Fifth plea, alleging errors in the analysis of the impact of the concentration on the various national sectoral markets referred to in the Commission's objections

- Arguments of the parties

232. Schneider submits that the Commission's Europe-wide analysis of the impact of the transaction led it to substitute general considerations for an analysis of the merged entity's position on each of the national markets affected. Instead of carrying out such an analysis, the Commission confined itself to general arguments relating to the product range and to the new entity's incomparable variety of brands. In reality, the Commission has drawn inferences about the other national product markets from the situation regarding competition on the French sectoral markets.

233. The Commission contends that it structured its analysis of the transaction by presenting, category by category, arguments which applied to each of the markets concerned, although to varying degrees and using different methods, which are duly explained. The general presentation did not distort the subsequent analysis of each of the markets affected by the transaction: in fact it was helpful in shedding light on the analysis of competition on each of those markets.

- Findings of the Court

234. In its reply to the seventh plea (see paragraph 304 below), the Commission contends that Table 30 (see paragraph 165 above) is intended to show that, on each of the markets affected by the transaction, the new entity will derive a substantial competitive advantage from the fact that it will be in a strong position, in the same geographic market, in other product markets in which the same wholesalers are active (recitals 567 to 578).

235. In taking the range of low-voltage electrical equipment which the merged entity will offer to wholesalers as evidence of economic power, the Commission relied, as is apparent from the answers it gave at the hearing, on Article 2(1)(b) of Regulation No 4064/89.

236. That provision indeed states that the Commission is to take into account the access of the undertakings concerned to markets and, therefore, their access to distribution in order to establish whether a concentration is compatible with the common market.

237. The Court takes the view, however, that the Commission did not properly incorporate that criterion into its assessment of the new entity's economic power on each of the national sectoral markets affected by the transaction and listed at recitals 782 and 783 of the Decision, owing to the lacunae and inconsistencies in the analysis of the structure of distribution which the Court found to exist when considering the fourth plea.

238. As a result of those shortcomings, the Court finds that the Commission has failed to establish the ability of the merged entity to compel wholesalers on each of the national sectoral markets affected by the transaction to distribute other products from its range which they did not thus far distribute.

239. In addition, the Commission qualifies the Schneider-Legrand group's product range as unrivalled on the basis of an abstract combination of the various kinds of low-voltage electrical equipment which the group will supply throughout the EEA as a whole and not of an assessment of the product range which the group will actually offer on each of the national sectoral markets affected by the proposed transaction and referred to in the objections set out at recitals 782 and 783 of the Decision.

240. As was made clear above, the Commission contends that the transaction would enable the parties to combine Schneider's strong positions in the Nordic countries in electrical equipment used downstream from final panel-boards with Legrand's strong positions in Southern Europe and to associate Schneider's strength in all categories of panel-boards with Legrand's strong position in downstream products as a whole (recital 550). Thus, the merged entity will, in the Commission's contention, have a full range of products covering all markets for electrical equipment downstream from the final panel-board (recital 654).

241. However, contrary to what recital 654 might suggest, it does not follow from the Decision that the combined entity will necessarily offer the whole range of low-voltage electrical equipment on each of the

national markets referred to in the objections listed at recitals 782 and 783 of the Decision.

242. Thus, Table 35, reproduced at paragraph 173 above, shows that the Schneider-Legrand group will not be present on certain segments of the market for ultraterminal electrical equipment, even in France, Italy and Spain. In particular, the Schneider-Legrand group will not be present in the control systems segment, even in France.

243. It is apparent that the Commission took a transnational approach in putting together the merged entity's product range. That notional range cannot, however, give a valid indication of the entity's economic power on each of the national sectoral markets affected by the transaction.

244. It is common ground that decisions about the product ranges to be bought and sold as between the manufacturers and the wholesalers are made almost entirely at national or regional level (recital 223, cited above).

245. Furthermore, apart from the fact that it does not mention, for example, either the extent or the distribution of the market shares held by the new entity's competitors on the national sectoral markets affected, Table 30 gives only broad market share brackets, instead of sufficiently precise market positions, which alone would allow the entity's economic power to be accurately evaluated. The same is true of Table 35.

246. It is clear that its hypothetical approach led the Commission to overestimate the new group's power on certain of the national sectoral markets affected by the transaction. The statement, at recital 550, that Schneider brings its strength in all categories of panel-boards is thus at variance with Table 28, reproduced at paragraph 172 above, which indicates that the Commission accepted that Schneider's market shares on the Italian markets for final panel-board components fluctuate between [...] * and [...] (6).

247. It is also necessary to put into perspective the importance attached by the Commission to the actual extent of the range of low-voltage electrical equipment. At recital 507, the Commission observes that, according to the notifying parties, in order to be viable in distribution panel-boards and final panel-boards, it is necessary to supply the full range of components (cabinets, fuses, circuit breakers, differential protection devices and control systems etc) corresponding to those panel-boards, and ... for the purposes of distribution installation, manufacturers must offer the full range of products.

248. Although the extent of the product range supplied by a manufacturer may be a factor in its success, it none the less does not follow from recital 507 that a manufacturer must necessarily supply wholesalers with the entire range of low-voltage electrical equipment or that wholesalers must try to reduce the number of their suppliers indiscriminately throughout all the sectoral markets for low-voltage electrical equipment.

249. In any event, recital 141 itself states that all the parties' large competitors (such as ABB, Siemens or Hager) have the full range of panel-board components, which should enable them to meet the need, referred to at recital 82, to offer the fullest possible product ranges in that sector.

250. The Commission also observes, at recital 507, that each of the large manufacturers, including not only Schneider and Legrand but also ABB, Siemens and GE, offers more than 2000 items for distribution panel-board components and more than 5 000 items for final panel-board components.

251. Likewise, the Commission notes, at recital 17, that ABB, Siemens and GE have a huge range of low-voltage products. It also appears from recital 507 that the large manufacturers' product catalogues of equipment used downstream from final panel-boards and related equipment also include several thousand items.

252. Furthermore, brand mixing exists even in the case of certain switchboard and panel-board components (recitals 136 and 163). In that regard, the Commission points out, at recital 168, that single branding is not absolute for either final panel-boards or distribution panel-boards.

253. In addition, it seems from the Decision that brand mixing may well exist between switchboard and panel-board components and other types of low-voltage electrical equipment.

254. Finally, account must also be taken of the important role which, as the Commission acknowledges, is played by end-users and project managers in the choice of visible equipment (plugs, switches, trunking, etc.). Their main selection criteria are appearance and practicality (recitals 66 and 79) and not whether a wide range of products is available.

255. The Commission was not therefore lawfully entitled, for the purposes of assessing the merged entity's economic power on the national sectoral markets affected and defined at recitals 782 and 783, to rely on a product range whose alleged superiority to those of its competitors resulted from its being a notional whole based on a combination of the various kinds of low-voltage electrical equipment that will be supplied by the merged entity throughout the EEA.

256. It follows that the Commission has again overestimated the economic power of the new entity on the national sectoral markets referred to at recitals 782 and 783 by including in its analysis of the impact of the transaction on those markets the total effect of a product range which does not reflect the true competitive situation which will obtain in those markets following the concentration.

257. The same reasoning must apply as regards the merged entity's wide variety of brands, which is also deemed to be unrivalled because the brands owned by the notifying parties in the EEA as a whole have been taken together in the abstract.

258. Since it does not necessarily supply the whole range of low-voltage products on each of the various national sectoral markets concerned, the Schneider-Legrand group will not necessarily offer in those markets all the brands which it owns throughout the EEA.

259. It is also appropriate to take into account the number and reputation of the other competitors on each national sectoral market. It is thus clear from the Commission's answer at the hearing to a question asked by the Court that, in comparison with the four competitors in Tables 27 and 28, which are reproduced at paragraph 172 above, the Schneider-Legrand group will, for example, own only two brands on the market for final panel-board components in Denmark, Spain and Portugal.

260. The Court also observes that, even if the importance to competition of the range of components and brands is accepted, it is none the less the case, as the Commission itself points out at recital 176, that the strength of a brand is principally based on the competitiveness of its various constituent parts.

261. That finding puts into perspective the importance which the Commission attaches in its arguments to the merged entity's wide variety of brands.

262. It follows that the Commission was wrong to take as its reference point the entire range of products and brands which the merged entity will have throughout the EEA for the purpose of assessing the entity's economic power on each of the various national sectoral markets affected by the transaction.

263. To that extent the Commission has misapplied Article 2(3) of Regulation No 4064/89.

264. The plea must therefore be accepted.

Sixth plea, alleging manifest errors of assessment in the analysis of the impact of the concentration on certain national markets for panel-board components

- Arguments of the parties

265. Schneider challenges the Commission's refusal to include within the market shares of ABB and Siemens (two of the merged entity's leading competitors) the not insignificant proportion of the sales of panel-board components made by those companies to installation engineers and switchboard assemblers which are vertically integrated within those groups.

266. Since they are all capable of winning tenders for large construction projects, the manufacturers of panel-boards are to be viewed as direct competitors, irrespective of whether they have integrated switchboard assembly and installation businesses.

267. The notifying parties provided the Commission with specific examples of tenders in which they competed directly with the bids submitted by ABB and Siemens through their integrated subsidiaries.

268. That competition testifies to the existence of an independent market in distribution channels selected by each manufacturer. To that extent, the market for panel-board components is radically different from the situation in which products are manufactured in-house for purely internal consumption.

269. By refusing to take ABB's and Siemens' integrated sales into account, the Commission underestimated those companies' market shares and, consequently, overestimated the new entity's economic power on the French and Italian markets for distribution panel-board components and on the Danish, Spanish, French, Italian and Portuguese markets for final panel-board components.

270. Schneider goes on to complain that the Commission made a manifest error of assessment in its quantification of ABB's and Siemens' integrated sales. Schneider indicates that it put the proportion represented by integrated sales at [...] of the turnover to be taken into account for the sale of panel-boards in Europe. That percentage is far higher than the figure of 5% stated by Siemens at the hearing on 21 August 2001 and reproduced, unexamined, by the Commission at recital 527.

271. The Schroder Salomon Smith Barney study confirmed Schneider's assessment in the following terms:

Around [... (7)] of [Automation] & [Drives] 2000 sales that includes Low Voltage Activities were made to other Siemens divisions.

272. The Commission replies that it did not take integrated sales of components made by ABB and Siemens into account, since those products cannot immediately be rechannelled into the open market. As such they do not exert any direct competitive pressure and should not be included in the calculation of the market shares of the undertakings concerned, in particular where added value is conferred on the products in question (Commission Decision 2000/174/EC of 3 May 2000 declaring a concentration to be compatible with the common market and the EEA Agreement (Case No COMP/M.1693 - Alcoa/Reynolds, OJ 2002 L 58, p. 25)). That practice in taking decisions was approved by the Court of First Instance in Case T-221/95 Endemol v Commission [1999] ECR II-1299, paragraph 109.

273. Each category of operators on the three levels of the vertical chain of distribution and final panel-board production adds value to the component (wholesalers (around 20%), switchboard assemblers (between 15 and 20%) and installation engineers (around 80%)) before they are installed at the end-user's premises (recital 523 and paragraph 179 of the defence).

274. Schneider cannot therefore criticise the Commission for differentiating between alleged modes of distribution, since the components used for the purposes of ABB's and Siemens' integrated business are not sold but are directly incorporated into mounted and wired panel-boards (by switchboard assemblers) or installed (by installation engineers).

275. In order for those internal sales to be available at short notice and at minimal cost, the manufacturers concerned would have to have an economic interest in making available on the free market the components which they use in their integrated businesses.

276. In that regard, Schneider cannot, without being inconsistent, maintain that ABB and Siemens were prepared to forgo sales as switchboard assemblers or installation engineers in favour of additional sales of components as manufacturers and, at the same time, claim that their integrated activities gave them a competitive advantage. Furthermore, if they abandoned those sales they would then provide an advantage to third-party switchboard assemblers and installation engineers who would not necessarily use ABB's and Siemens' components.

277. Even on the assumption that it was in ABB's and Siemens' interest to do so, they would still have to have a means of disposing of their former internal sales, for which they would need, in particular, greater access to distribution and a recognised brand.

278. It is not immediately apparent that supply on the open market is substitutable for internal supply, which means that ABB's and Siemens' internal sales cannot be included in the calculation of their market shares.

279. The Commission states that it was purely as an ancillary exercise that it undertook a quantitative assessment of ABB's and Siemens' internal sales of components, on the basis of data provided by the operators, in order to show the low impact of such sales.

280. The different methods of assessing market share proposed by Schneider are not convincing. In any event, the inclusion of integrated sales, when they are accurately assessed, has only a marginal impact on the relative strengths on the markets in question (recital 528).

- Findings of the Court

281. First, it is apparent from the first NERA report, which the Commission does not challenge on this point, that large construction projects are normally carried out following an invitation to tender and that the manufacturers submit bids directly.

282. It cannot be denied that, in the context of such competitive procedures, ABB and Siemens, as integrated producers, compete with their non-integrated counterparts such as Schneider, either directly where the non-integrated manufacturers agree with switchboard assemblers or installation engineers to submit their bids or indirectly where those manufacturers sell panel-board components to a switchboard assembler whose bid has been accepted. In both cases, the prices of the non-integrated manufacturers are subject directly to competitive pressure from the parallel bids made by ABB and Siemens in response to the same invitation to tender.

283. In those circumstances, the Commission's reasons for refusing to take into account ABB's and Siemens' integrated sales of panel-board components, the basis for which is that there are three levels in the vertical chain of panel-board production, do not address the fact that there is direct competition between producers submitting bids in response to invitations to tender for large construction projects.

284. This direct competition between manufacturers, which, significantly, does not involve wholesalers, is also indirectly apparent from Section V.A of the Decision, which describes the entire low-voltage electrical equipment sector.

285. The Commission draws attention to the fact that larger customers and switchboard assemblers, who work on complex projects, most often obtain supplies directly from the manufacturers (recitals 25 and 29).

286. The Commission affirms, at recital 41, that in most industrial contracts and large building contracts manufacturers sell the electrical equipment concerned either directly to the end-customer, in the case of large industrial sites, or to the large switchboard assemblers.

287. At recital 71, the Commission also observes that there is a disparity between large projects and other installations in which wholesalers will be a necessary intermediary between manufacturers and installation engineers (or switchboard assemblers). It then concludes, at recital 79, that, in the case of industrial contracts

and large building contracts, the equipment is, as a general rule, selected by a project manager or a large switchboard assembler and obtained directly from the manufacturers.

288. Second, the Court cannot accept the assertion that if ABB's and Siemens' integrated sales were taken into account in calculating their market shares, that would in any event have only a slight effect on the assessment of relative strength on the relevant markets.

289. The quantitative significance of ABB's and Siemens' integrated sales in their respective market shares is increased if it is acknowledged that those undertakings traditionally deal with industrial customers, as the Commission appears to accept at recital 42.

290. Conversely, it should be noted that, because of Legrand's absence from the sector for main switchboard components, the concentration concerned will not significantly impede competition there (recital 245).

291. Finally, the Court notes that, according to recital 17, Schneider's third major competitor, GE, is also to some extent vertically integrated.

292. The Commission was therefore wrong to refuse to take ABB's and Siemens' integrated sales of panel-board components into account when calculating market shares.

293. When it took the view that the inclusion of those integrated sales would have only a marginal impact, the Commission relied on ABB's and Siemens' estimate that those sales represented 5% of their turnover from production of panel-board components.

294. That percentage is, however, only a general estimate, provided without further explanation, of integrated sales of panel-board components, which, furthermore, is not related to a specific national market. The Commission made clear, at recital 28, that ABB and Siemens have their own switchboard assembly facilities only in certain countries.

295. In those circumstances, no probative value can be attributed to the figure of 5% adopted by the Commission, which is not reliable and which, additionally, concerns only Siemens' Europe-wide business. Contrary to the Commission's suggestion at recital 528, the extent to which the market shares need to be adjusted as a result of the inclusion of Schneider's competitors' integrated sales of panel-board components cannot be measured from that figure. Nor, consequently, can it be established from that figure that taking the competitors' integrated sales into account would only marginally affect the merged entity's position on the national markets affected and referred to in the objections listed at recitals 782 and 783.

296. It follows from the foregoing that, in refusing to include in ABB's and Siemens' market shares their integrated sales of panel-board components, the Commission underestimated the economic power of the merged entity's two main competitors and correspondingly overestimated that entity's strength on the French and Italian markets for distribution panel-board components and on the Danish, Spanish, French, Italian and Portuguese markets for final panel-board components.

297. The plea must therefore be accepted.

Seventh plea, alleging incorrect analysis of the impact of the concentration on the Danish markets for final panel-board components

- Arguments of the parties

298. First, Schneider disputes that the new entity will have a dominant position in Denmark or unrivalled power on the markets for miniature circuit-breakers, differential switches and cabinets intended for final panel-boards.

299. The Commission complains that the new entity would have had a market share pointing to dominance (recitals 534 to 536), since it is significantly higher than the market shares of its competitors (recital 542). The combined share of its three main competitors does not undermine that finding.

300. Second, Schneider claims that the Commission had no grounds for stating, at recital 546, that the transaction would also eliminate competition between Schneider and Legrand. There never was any competition between those two companies on the Danish market.

301. The Commission complains that Legrand was an active competitor on the Danish market for final panel-boards (or their components) and was strong there (recital 545). There was competition between Schneider and Legrand and the proposed merger would have enabled the merged entity to become the undisputed leader on that market.

302. Third, Schneider submits that Table 30 of the Decision (reproduced at paragraph 165 above) does not show that the new entity had the wide variety of products attributed to it by the Commission. That table cannot replace the analysis of competition which the Commission should have carried out in relation to the Danish markets.

303. Furthermore, neither the overlaps nor the real market shares of the new entity are shown there, since the Commission merely gave percentage brackets. Nor are competitors found there. Finally, the Commission used only the French market in its commentary on Table 30, at recital 552, which is also wholly contradictory.

304. The Commission contends that Table 30 is intended to show the significant competitive advantage which the Schneider-Legrand group will enjoy on each of the markets concerned by the merger, owing to its strong position within the same geographic market on other product markets in which the same wholesalers are active (recitals 567 to 578).

305. Fourth, Schneider submits that the arguments drawn by the Commission from its incomparable variety of brands do not go to show that the dominant position alleged would be created on the market in question. Installation engineers in Denmark are not familiar with the Legrand brand.

306. The Commission asserts that it explained, at recitals 554 to 565, that the wide variety of brands which the merged entity could offer would give it a significant competitive advantage over each of its competitors. Panel-boards and their components marketed under the Legrand brand would have accounted for [... (8)] of sales in Denmark in 2000. In addition, the Legrand brand would be used to market other categories of low-voltage electrical equipment in Denmark and would thus have a certain reputation there.

307. In addition, as recital 565 explains, the fact that the merged entity would own several brands would enable it to consolidate its market power by means of targeted retaliation against competitors or by concentrating the entity's commercial efforts on one of the two brands.

308. Fifth, Schneider submits that there is no proof that there are no significant restrictions on demand in Denmark. The Commission has not established that wholesalers will be forced to have recourse to the new entity, that a high level of concentration does not necessarily entail downward pressure and that the complex relations between the Schneider-Legrand group and wholesalers will be conducive to upholding the merged entity's position. The Decision does not describe demand on the Danish market, which is not even mentioned in Table 31, reproduced at paragraph 217 above.

309. The fact that wholesalers in Denmark are highly concentrated means that considerable pressure may be exerted on the manufacturers. There is no indication that the emergence of the new entity would have promoted the conclusion between Schneider and certain distributors of convergence agreements which did not exist before. Direct sales to switchboard assemblers and installation engineers represent 50% of total sales. Demand is determined by installation engineers and not by wholesalers, who are actually responsible for the logistics of supplying the products required by the installation engineers.

310. The Commission replies that neither wholesalers, nor switchboard assemblers nor installation engineers would have been in a position to challenge a rise in the merged entity's prices. In Denmark, distributors are less important to manufacturers as a means of distributing their products owing to the fact that 50% of sales are made directly to switchboard assemblers and installation engineers. There are very large numbers of such engineers and assemblers and individually they do not account for a significant proportion of the manufacturers' total sales. Nor do they appear to have any incentive to exert any pressure on the manufacturers.

311. Finally, sixth, Schneider submits that the Commission's contention that there are no significant restraints on competition is unsupported, in the absence of any analysis of competition on the Danish market for final panel-boards. Three important competitors, ABB, Siemens and Hagar, share [... (9)] or [... *] of that market.

312. Schneider accuses the Commission of serious inconsistencies. At recital 610, the Commission states that, in Hager's submission, the development of a product range comparable to that of the new entity in all the countries concerned is almost inconceivable. The Commission none the less points out, at recital 141, that all the parties' large competitors, such as ABB, Siemens or Hager, are able to offer the full range of components.

313. The Commission observes that, at recital 609, it stated that it was unlikely that a new competitor could enter the Danish market for final panel-boards (or their components), precisely because of the competitive advantages which the merged entity would have amassed (recitals 595 to 608).

- Findings of the Court

314. As is clear from the presentation of the plea, Schneider cites, as regards the Danish markets for final panel-board components, the errors (already noted above) made by the Commission in its assessment of the merged entity's economic power on each of the various national sectoral markets affected by the transaction and listed at recitals 782 and 783.

315. It follows that the conclusions drawn by the Commission in finding, at recitals 611 and 613, that the concentration would be incompatible with the common market as regards the Danish markets for components are vitiated by the defects found to exist by the Court in the course of its examination of the third, fourth, fifth and sixth pleas.

316. Schneider's arguments about the Danish market for final panel-board components, in addition to providing an illustration of the preceding pleas, also supplement those pleas.

317. It is apparent that the Commission's analysis of the impact of the concentration on the Danish markets for the products in question suffers from particular defects, which affect more specifically the legality of the finding of incompatibility as regards those markets.

318. Thus, in failing to include ABB's and Siemens' integrated sales of panel-board components in their shares of the Danish markets for final panel-board components, the Commission overestimated the Schneider-Legrand group's economic power on those markets.

319. In that regard, it can actually be seen from the table below, taken from point 461 of the application, that the shares of the Schneider-Legrand group on those markets vary markedly according to whether or not the integrated sales of components attributed to ABB and Siemens by Schneider are taken into account.

Danish markets for final panel-board components

[…]

320. In those circumstances, it cannot be taken as proven that the addition of Legrand's market shares to those of Schneider in the wake of the transaction is in itself sufficient to create a dominant position on each of those various markets, notwithstanding the quantitative significance to which such addition none the less gives rise.

321. In addition, even if it were established that the new entity had a dominant position, that position could not be regarded, on the basis of the Decision, as significantly impeding effective competition in Denmark within the meaning of Article 2(3) of Regulation No 4064/89.

322. First, it has not been proved, contrary to the Commission's statement at recital 544, that the transaction would have the effect of eliminating a direct competitor on the Danish markets for final panel-board components.

323. It is clear from a comparison of the market shares of the main players set out in Table 28 and in the table at paragraph 319 above that Legrand is in fifth position on each of the product markets concerned and cannot therefore be regarded as Schneider's direct competitor.

324. Nor, contrary to the Commission's observations at recitals 544 and 545, does it appear that the proposed merger can be interpreted, vis-à-vis the Danish markets for final panel-board components, as substantially strengthening the leader via the acquisition of additional business on other sectoral markets for low-voltage electrical equipment.

325. Legrand is not present in any of the segments of the Danish market for ultraterminal electrical equipment listed in Table 35, reproduced at paragraph 173 above, or, as is clear from Tables 14 and 15 below taken from recitals 286 and 288 of the Decision, on the Danish markets for busbar trunking and cableways.

Table 14
Market shares of the leading operators on the market for busbar trunking in the larger EEA Member States

[…]

Table 15
Market shares of the leading operators on the market for cableways in various EEA Member States

[…]

326. Contrary to the Commission's interpretation of Table 30 in its argument set out above, the data in the Decision do not establish that the merged entity will enjoy a substantial competitive advantage in the form of strong market positions on sectoral markets other than those for final panel-board components.

327. In short, it is not clear from Tables 14, 15 and 35 that it is because of the concentration that the Schneider-Legrand group is present in Denmark on those other sectoral markets. An examination of the abovementioned tables suggests, rather, that its presence can be accounted for by Schneider's position there even before the transaction took place.

328. Accordingly, the Court does not regard as adequately made out the Commission's argument at recital 546 that the merger between Schneider and Legrand will eliminate competition between those two undertakings, whose rivalry would appear to constitute a key aspect of competition in the relevant countries.

329. In addition to the fact that the contention that it is important lacks assurance, the rivalry between the two undertakings cannot be regarded as established in the case of Denmark. The examples cited by the Commission at paragraph 547 in support of its proposition concern only France and Portugal. As to recital 540, it merely makes a general reference to no further rivalry between Schneider and Legrand in certain markets, without further details.

330. Furthermore, such rivalry could scarcely be expected in Denmark from two undertakings whose centre of gravity is, according to the Decision, in Northern Europe for one of them and in Southern Europe for the other (recitals 550 and 659).

331. Second, owing to the fact that Legrand is not present in the segments of the Danish market for ultraterminal equipment set out in Table 35, the contribution and reputation of the Legrand brands are necessarily limited, as is clear from the lists of the notifying parties' brands in Table 36 and in Annex 2 to the Decision. Those lists suggest that, all in all, Legrand owns only two brands in Denmark in the whole of the low-voltage electrical equipment sector.

332. The Court observes, in that regard, that Denmark is never cited, per se, in the Commission's arguments, at recitals 554 to 565, about the wide variety of brands attributed to the merged entity.

333. In fact, given that Legrand is not present in any of the segments of the Danish market for ultraterminal equipment listed in Table 35, it does not appear that the last sentence of recital 555 is relevant to Denmark: it states that the parties' reputation and brand image are obviously further enhanced by their presence in a key part of the sector for low-voltage electrical equipment, as shown by Table 30 above.

334. Consequently, it is impossible to accept the Commission's argument, set out above, that the Legrand brand is well-known because it markets low-voltage electrical equipment other than panel-board components in Denmark.

335. Third, it also follows that it cannot be taken as proved that Legrand, the weaker of the notifying parties in Denmark (see recital 545), had privileged access to the major international wholesalers.

336. That lack of proof is all the more striking in that Denmark does not feature in Table 31, reproduced at paragraph 217 above, from which the Commission draws the specific conclusion, at recital 573, that each of the parties accounts for a very considerable proportion of the turnover of the main wholesalers, if all low-voltage electrical equipment is taken together.

337. Nor, given that Legrand is not present in the segments of the Danish market for ultraterminal equipment set out in Table 35, is it possible to accept that the new group would be an unavoidable trading partner for wholesalers, as the Commission alleges at recital 567, on account of its unrivalled range of electrical equipment.

338. The Commission confines itself, at recital 567, to stating that the unavoidable nature of the merged entity vis-à-vis wholesalers will be most pronounced in France and to a lesser extent in Spain, Italy and Portugal, and therefore Denmark is not mentioned at all.

339. In addition, in the Commission's own view, prior to the merger, competition from third party undertakings vis-à-vis the notifying parties on the markets for panel-board components was, in terms of market share, not inconsiderable (recital 548).

340. In fact, the relative size and concentration of the market shares of the merged entity's three immediate competitors are worthy of note.

341. Fourth, the Commission's assertion, at recital 595, that the merged entity's existing competitors will find it difficult to exert any significant constraints on its conduct is not borne out in the Decision so far as Denmark is concerned.

342. In that regard, Section V.C.1.4. of the Decision does not include an analysis of the structure of competition as regards other manufacturers present on the Danish markets examined. However, the relative size and concentration of the main competitors' market shares, which may be seen from the table reproduced at paragraph 319 above, should have merited much more detailed treatment because, according to recital

548, the notifying parties faced not inconsiderable competition, in terms of market share, from those third-party undertakings.

343. The Commission adds nothing to the brief statements at recitals 536 and 548, where it says that the transaction, first, will result in the creation of very strong market positions and, second, will allow the merged entity to become the undisputed market leader on the relevant Danish markets.

344. Such findings do not in themselves establish that any dominant position resulting from the transaction would significantly impede effective competition on those markets.

345. Furthermore, Denmark is not cited, as such, by the Commission in its description, at Section V.C.1.4. of the Decision, of the difficulties that the merged entity's existing competitors would encounter in exerting significant constraints on its conduct.

346. Thus, the arguments on this subject in the Decision, at recital 596 et seq., emphasise the preeminence of the leading brands of the parties to the transaction, backed up by references drawn, once again, from national markets other than the Danish markets.

347. The difficulty referred to at recital 601 which the merged entity's competitors could encounter among installation engineers and switchboard assemblers owing to the allegedly inferior reputation of their products is wholly unsupported by any factual evidence relating directly to Denmark.

348. Finally, since Legrand does not have a significant presence on the Danish markets for low-voltage electrical equipment and, in particular, since it is not present on the Danish markets for ultraterminal equipment depicted in Table 35, the Court cannot accept the Commission's finding at recital 606 that the merger would give each of the notifying parties a stronger position in their traditional areas of excellence and would allow the formation of a group with reference brands in each of the three relevant segments (residential, tertiary and industrial).

349. It follows that there is not sufficient evidence either that the merger would result in a dominant position on the Danish markets for final panel-board components or, even if that were the case, that effective competition on those markets would be significantly impeded, for the purposes of Article 2(3) of Regulation No 4064/89, as a result of the dominant position.

350. It is therefore appropriate to uphold the plea as founded.

Eighth plea, alleging errors in the analysis of the impact of the concentration on the Italian markets for distribution and final panel-board components

- Arguments of the parties

351. Schneider claims, first, that the market shares of the leading players on the Italian markets for distribution and final panel-board components, where there is keen competition, are such that a dominant position could not be created there. In Schneider's submission, the merger will not substantially strengthen the existing leader there.

352. It is not possible to conclude from the fact that in one year Gewiss acquired [... (10)] only of the market for miniature circuit breakers for distribution or final panel-boards that there are significant barriers to entry to the Italian market. Keen competition in a market, a feature of which is the presence of eight brands, cannot be taken as indicative of the existence of such barriers. On the contrary, Gewiss's penetration of the markets for distribution and final panel-boards and its meteoric acquisition of [... (11)] of cabinets for final panel-boards show that those barriers do not exist.

353. The Commission replies that the merged entity's market shares, in comparison with those of its

competitors, are clearly a genuine indication of dominance. Gewiss is an exceptional case, since, as is apparent from recital 516, it was able to surmount barriers to entry, with very relative success, by obtaining supplies from ABB and by gaining access to wholesalers and installation engineers as a result of its activities on the market for ultraterminal equipment.

354. Second, Schneider complains that the Commission largely founded its analysis on the elimination of the competition between Schneider and Legrand, which was not a key factor in competition. ABB, Siemens and GE, on the market for distribution panel-boards, and ABB, Siemens, Hager and GE, on the market for final panel-boards, were Legrand's equal in terms of size.

355. The Commission replies that recital 545 shows that Legrand is the yardstick for competition in Italy. Schneider has a substantial position there, is well-known and enjoys privileged access to the major international wholesalers. The wholesalers class Schneider and Legrand as market leaders.

356. Schneider observes, third, that the Italian markets for panel-board components are not focused solely on three brands (Bticino, ABB and Merlin-Gerin), as the Commission contends, but incorporate new products (Gewiss) and renewals (GE, Siemens).

357. The Commission's finding of strong brand loyalty would render redundant any decision by the new entity to intensify specialisation in each of Schneider's and Legrand's reference brands in industrial and tertiary applications, on the one hand, and in residential applications, on the other.

358. The Commission replies that, as is made clear at recital 565, there is not a full overlap between Schneider's and Legrand's customers, so that the Schneider-Legrand group can reinforce specialisation of its brands with certain categories of customers.

359. Fourth, Schneider denies that the new entity is an irresistible force, since ABB and GE both offer alternatives. It is difficult to see how Legrand's good relations with its wholesalers in Italy, assuming they can be proved, could restrict competition. The major wholesalers control a very small proportion of distribution as is shown by Table 6 in the Decision (see paragraph 201 above).

360. In addition, the greater part of the distributors' sales are not accounted for by the notifying parties, since each of the distributors sells several different brands. Schneider and Legrand do not enjoy privileged relations with wholesalers. The proposed transaction would not marginalise the other manufacturers, since wholesalers would restore equilibrium among the products they offer by buying from other manufacturers.

361. Furthermore, it is hard to see how the concentration would weaken competitors, since the combined sales of the notifying parties account for only [... (12)] of their main wholesaler's total sales. Finally, if it is the case that there is a high degree of brand loyalty, it will be in the wholesalers' interest to continue to meet demand with products from the smaller manufacturers.

362. In order to show that where distribution is heavily concentrated there is not necessarily an intense downward pressure on prices, the Commission maintains that wholesalers hold Legrand's products in high regard, since the products' relatively high prices provide them with good profit margins. Schneider objects on the ground that distribution is very atomised on the Italian markets for distribution and final panel-boards, as the Commission itself states in Table 6 of the Decision.

363. The Commission points to three factors which ensure that demand in Italy will find the merged entity an irresistible force: it accounts for a very substantial proportion of the wholesalers' overall turnover, it has an unequalled range of electrical equipment and it has strong competitive positions in each country (see Table 30). In addition, Schneider does not challenge the explanation, at recitals 584 to 591, of the means which will be available to the Schneider-Legrand group to establish its dominance. Thus, wholesalers are not in a position to exert any significant constraints on the merged entity.

364. Finally, fifth, Schneider regards as inaccurate, given the plethora of brands on the Italian market, the

Commission's conclusion that the merger will lead to brand concentration and weaken competitors.

365. It is an exaggeration to say that other competitors will be marginalised. The power of competitors like ABB, Siemens and GE on the markets for panel-boards is comparable to that of the new entity. Competitors like Hager, Gewiss and Moeller also have a good reputation.

366. To claim that there are no competitor-driven constraints is also fundamentally inconsistent with the structure of the markets and distribution in Italy, given their great enthusiasm for any promotion arranged by a plausible competitor, the presence of such competitors among the wholesalers and the lack of any privileged access (see the first NERA report, points 4.3, 4.4, and 4.5).

367. The Commission observes, first, that Schneider acknowledges that the merged entity's only genuine competitor is ABB and, second, that the NERA report related only to conditions of competition prior to the transaction and not to its effects.

368. The Commission merely concluded that competitors will experience greater difficulties in enticing customers away from the Schneider-Legrand group and could be satisfied with being followers on the relevant markets (recital 602). At recital 608, the Commission further observes: The parties' existing competitors are not in a position to exert sufficiently strong pressure to constrain the merged entity's conduct.

- Findings of the Court

369. Like the preceding plea, the eighth plea invokes, as regards the Italian markets for distribution and final panel-board components, the errors, already noted above, which the Commission made in its assessment of the economic power of the merged entity on each of the various national sectoral markets affected by the transaction and set out at recitals 782 and 783.

370. It follows that the conclusions on which the Commission based its finding, at recitals 611 and 613, that the disputed concentration was incompatible with the common market on the relevant Italian markets for components, are vitiated by the same defects as those found to exist by the Court in the course of its examination of the third, fourth, fifth and sixth pleas.

371. Schneider's arguments concerning the Italian market in final panel-board components, in addition to providing an illustration of the preceding pleas, also supplement those pleas.

372. In that regard, it is clear that the Commission's analysis of the impact of the concentration on the Italian markets under consideration is vitiated by specific defects, which more particularly concern the legality of the finding of incompatibility as regards those markets.

373. Thus, in failing to include ABB's and Siemens' integrated sales of panel-board components in their shares of the Italian markets for distribution and final panel-board components, the Commission overestimated the Schneider-Legrand group's economic power on those markets.

374. In that regard, it can actually be seen from the table below, taken from point 461 of the application, that the shares of the Schneider-Legrand group on those markets vary markedly according to whether or not the integrated sales of components attributed to ABB and Siemens by Schneider are taken into account.

Italian markets for distribution panel-board components

[…]

Italian markets for final panel-board components

[…]

375. Furthermore, at recital 195, in the part of the Decision relating to the geographic definition of the market for panel-boards, the Commission classes Gewiss among Legrand's main competitors in Italy. Gewiss does not feature in Tables 27 and 28 of the Decision, reproduced at paragraph 172 above.

376. In addition, Schneider submitted at the hearing, without being challenged on that point by the Commission, that Gewiss controls [... *] of the Italian market for cabinets for final panel-boards as against the merged entity, which controls [... (13)].

377. In that regard, the Court notes that the total of the shares of the components market held by the manufacturers with a presence in Italy and shown in Table 28 comes to only 66%. The table thus gives no indication of the division or distribution of the market shares of the producer(s) controlling the remaining 34% market share.

378. Since the analysis of the structure of the relevant markets is thus incomplete, the Court cannot regard as sufficiently reliable either the various producers' shares or those which the merged entity will control once the notifying parties' market shares are added together.

379. Consequently, it has not been proved that the concentration will result in a dominant position on the Italian markets for distribution and final panel-boards.

380. In addition, even supposing it were established, any dominant position that the merged entity might have is not shown by the Decision to constitute a significant impediment to effective competition on those markets for the purposes of Article 2(3) of Regulation No 4064/89.

381. Since account must be taken of ABB's and Siemens' integrated sales of components, it is doubtful that Schneider can be regarded as ranked first, in terms of its shares of the markets for distribution panel-board components, given that there is not much distance between it and ABB, according to the Commission's figures in Table 27.

382. In those circumstances, there is no support for the conclusion, at recital 549, that the merger will increase the already substantial size of one of the notifying parties, in this case Schneider, on the Italian markets for distribution panel-boards.

383. On the Italian markets for final panel-board components set out in Table 28, Schneider, prior to the proposed transaction, was only in third place, a considerable way behind ABB. If ABB's and Siemens' integrated sales of components, as estimated by Schneider, are taken into account, then Schneider drops to second-to- last position (see the second table reproduced at paragraph 374 above).

384. Thus, there is no proof to support the Commission's assertion at recital 544 that the transaction will eliminate a direct competitor of the leader, Legrand, on the Italian markets for final panel-board components.

385. Furthermore, the rivalry which, as the Commission states at recital 546, existed between Schneider and Legrand, is not adequately demonstrated as regards Italy, the examples cited by the Commission, at recital 547, in support of that assertion being drawn solely from the French and Portuguese markets. Recital 540 merely makes a general reference to elimination of the rivalry between Schneider and Legrand on certain markets, without giving further details.

386. Likewise, the Commission, at recital 612, describes the rivalry between Schneider and Legrand as the fundamental source of competition on certain of the relevant markets, particularly in France, again without any specific reference to Italy.

387. It should also be observed that, as Schneider itself admits, its performance in logistical matters is mediocre and it must considerably improve performance if it is to attain its objectives both in Italy and

centrally (recital 214).

388. Furthermore, as the Commission points out at recital 158, a feature of Schneider's position is its relative lack of competitiveness as regards residential customers.

389. Contrary to the Commission's statement at recital 545, it cannot be concluded from the Decision that Schneider, the weaker of the parties to the merger on the Italian markets for final panel-board components, had privileged access to the main international wholesalers in Italy.

390. In fact, recital 545 refers specifically only to France and to the case of Legrand, whose very significant positions on other markets for low-voltage electrical equipment are pointed out by the Commission.

391. Unlike the case of Legrand in France, Schneider cannot be described as having very significant positions in Italy on the markets for low-voltage electrical equipment other than on the markets for panel-board components.

392. Out of all the segments of the market for ultraterminal electrical equipment shown in Table 35, shown at paragraph 173 above, Schneider is in fact present in Italy only on the segment for fixing and shunting equipment. In addition, as is clear from Table 15, shown at paragraph 325 above, Schneider has no presence at all on the Italian market for cableways. Finally, Italy is not among the countries shown in Table 14 of the Decision showing shares of the market for busbar trunking (see paragraph 325 above). Consequently, Schneider's position in Italy on that sectoral market is not even dealt with by the Decision.

393. The Commission has thus failed to prove that, owing to the acquisition of additional businesses, the merger will substantially reinforce Legrand's position on the Italian markets for final panel-board components (see recital 544).

394. As regards the unrivalled collection of brands attributed to the merged entity, the Commission observes, at recital 556, but without much conviction, that the entity appears to have a significant competitive advantage in Italy, because the market is concentrated on the three leading brands (Bticino, ABB and Merlin Gerin).

395. That putative finding must in any event be viewed in perspective, given the absence of Gewiss, which is none the less regarded by the Commission as one of Legrand's main competitors.

396. The Court also observes that the Commission classes ABB's brand among the three leading brands. ABB is the merged entity's main competitor on the markets dealt with by the present plea. ABB also owns the Vimar brand, as Table 36 of the Decision shows. Moreover, it is apparent from recital 195 that that brand is of not inconsiderable significance.

397. As regards the new entity's relations with wholesalers, the Court observes that the Commission, having stated at recital 567 that the merged entity will be a particularly unavoidable trading partner for wholesalers in France and, to a lesser extent, in ... Italy, notes, at recital 569, that Legrand has very good relations with distributors there.

398. Owing to their lack of precision, those two findings do not assist in proving to the requisite legal standard that the merged entity will be an unavoidable trading partner for Italian wholesalers.

399. In addition, the Decision does not prove, with regard to Italy, that, as the Commission states at recital 595, the new entity's existing competitors will have difficulty in exerting any significant constraints on its conduct.

400. In the Commission's view, that circumstance arises because the new entity will be an unavoidable trading partner for wholesalers. The foregoing arguments show that it is not possible to accept that that is the case in Italy, given the facts put forward by the Commission in support of its assertion.

401. Finally, the difficulty that the merged entity's competitors will encounter, according to recital 601, at installation-engineer and switchboard-assembler level owing to the allegedly poorer reputation of their products is not substantiated by factual material relating directly to Italy.

402. Thus, it has not been proved to the requisite legal standard that the merger results in the creation of a dominant position on the Italian markets for distribution and final panel-board components or, even if there should prove to be a dominant position, that it significantly impedes effective competition on those markets for the purposes of Article 2(3) of Regulation No 4064/89.

403. In those circumstances, the plea must be accepted.

The consequences of the findings of errors of analysis and assessment

404. The Court considers the errors, omissions and inconsistencies which it has found in the Commission's analysis of the impact of the merger to be of undoubted gravity.

405. In taking as its basis the fact that the merged entity's activities extend throughout the EEA, the Commission has included indicators of economic power outside the scope of the national sectoral markets affected by the merger and having the effect of unduly magnifying the impact of the transaction on those markets.

406. In that regard, it is appropriate to bear in mind that none of the findings of fact in the Decision suggest that the proposed transaction could give rise to competition problems on markets other than the sectoral markets in France and in six other countries, which the Decision identifies, at recitals 782 and 783, as affected by the transaction.

407. In particular, the Decision does not contain any analysis of the structure of competition in the national sectoral markets not affected by the concentration at issue (see Table 30, reproduced at paragraph 165 above).

408. Owing to the incompleteness of, and inconsistencies in, the analysis of distribution structures, the Commission could not qualify as substantial competitive advantages for the merged entity either its alleged privileged access to distributors consequent upon its positions on all the markets for low-voltage electrical equipment at distributor level or the inability of wholesalers to exert competitive constraints on the new entity.

409. The abstract nature of the indicators of economic power based on the Schneider-Legrand group's unrivalled range of products and incomparable variety of brands and the fact that those indicators bore no relation to the relevant national sectoral markets, led the Commission to overestimate even further the merger's impact on the national sectoral markets affected.

410. The same is true, first, of the Commission's refusal to take account of the integrated sales made by ABB and Siemens on the national markets for panel-board components affected by the merger and, second, of the incomplete nature, in particular, of the analysis of the impact of the transaction on the Danish markets for final panel-board components and on the Italian markets for components for distribution panel-boards and final panel-boards.

411. The errors of analysis and assessment found above are thus such as to deprive of probative value the economic assessment of the impact of the concentration which forms the basis for the contested declaration of incompatibility.

412. None the less, however incomplete a Commission decision finding a concentration incompatible with the common market may be, that cannot entail annulment of the decision if, and to the extent to which, all

the other elements of the decision permit the Court to conclude that in any event implementation of the transaction will create or strengthen a dominant position as a result of which effective competition will be significantly impeded for the purposes of Article 2(3) of Regulation No 4064/89.

413. In that regard, the errors found do not in themselves suffice to call in question the objections which the Commission raised in respect of each of the French sectoral markets listed at recitals 782 and 783.

414. The Court notes in that regard that Schneider did not fundamentally dispute the analysis of the impact of the transaction on those markets. On the contrary, it applied itself to criticising the Commission for having used the competitive situation obtaining on the French markets in the aftermath of the transaction to draw conclusions about the other national sectoral markets affected.

415. In the light of the factual findings in the Decision, it is impossible not to subscribe to the Commission's conclusion that the proposed transaction will create or strengthen on the French markets, where each of the notifying parties was already very strong, a dominant position as a result of which, for the purposes of Article 2(3) of Regulation No 4064/89, effective competition will be significantly impeded in the common market or in a substantial part of it (see, as to the concept of a substantial part of the common market, Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 Suiker Unie and Others v Commission [1975] ECR 1663, paragraphs 375 and 448).

416. It is clear from the Decision that the Schneider-Legrand group has, on each of the French markets affected, market shares which are indicative of dominance or of a strengthened dominant position, given the weak market presence and thinly spread market shares of its main competitors (see in particular Tables 27 to 29, reproduced at paragraph 172 above).

417. In addition, as the Commission found at recital 582, without challenge from Schneider, and as is also clear from Tables 7 to 10 at recitals 228 and 234, the prices paid by wholesalers for low-voltage electrical equipment prior to the merger were on average appreciably higher in France than on the other national markets affected.

418. Finally, there is no doubt that the rivalry between the notifying parties was extremely significant on the French sectoral markets to which the objections relate and that one effect of the merger will be to eliminate a key factor in competition there.

419. The economic analysis underpinning the Decision can therefore be held inadequate only as regards all the national sectoral markets affected apart from the French markets; and the latter markets indisputably constitute a substantial part of the common market within the meaning of Article 2(3) of Regulation No 4064/89.

420. It is thus appropriate to examine, as regards solely the French markets affected by the transaction, the other pleas raised in the application and, in particular, Schneider's plea alleging infringement of the rights of the defence in connection with the proposed corrective measures which it submitted during the procedure before the Commission to render the concentration compatible with the common market.

Infringement of the rights of defence

Ninth plea, alleging inconsistency between the statement of objections and the Decision

- Arguments of the parties

421. Schneider, supported by the French Republic, argues in substance that the Commission, at recital 811, based a key objection on the strengthening, in France, of Schneider's dominant position on the markets for distribution panel-boards and final panel-boards owing to Legrand's leading position in the sector for ultraterminal equipment, which was distinct from any overlap between the businesses of the two notifying

parties.

422. That complaint was not formulated in the statement of objections with sufficient precision to allow Schneider to identify it as such, to submit practical comments and to take appropriate action, including by proposing appropriate remedies for the competition problems identified by the Commission.

423. The analysis in the statement of objections of the impact of the concentration on competition covered the various geographic markets in general but did not focus on the particular case of France. Furthermore, when the statement of objections deals with Legrand's dominance on certain markets in France, it never mentions Schneider's position on the markets for switchboards and panel-boards.

424. In the supplementary report of 8 October 2001, the Hearing Officer recognised that there was indeed an objection based on the combined market strength of the notifying parties vis-à-vis wholesalers distinct from any overlap in their activities. The Hearing Officer none the less took the view that that objection was already found in the statement of objections where it refers to one of the key factors in the creation or strengthening of a dominant position.

425. However, none of the points which the Hearing Officer derived from the analysis of competition in the statement of objections refers to an objection based on the combination of the parties' dominant positions on the two French sectoral markets concerned which would in itself justify a decision prohibiting the concentration.

426. That objection was presented to the notifying parties as a decisive obstacle to the alternative proposals for corrective measures submitted by Schneider on 24 September 2001. The objection in question is reproduced in the Decision in the section dealing with corrective measures, as obvious grounds for rejecting the solutions put forward by Schneider.

427. The Commission contends that the plea is inadmissible on formal grounds in that it is imprecise and does not allow the Commission to formulate a defence.

428. As to substance, the Commission observes that Schneider is doubtless seeking to show that the Commission relied on a concept foreign to Regulation No 4064/89, i.e. the mere combination of dominant positions on discrete sectoral markets, without any overlap in businesses. The Commission finds that argument perplexing, since Schneider acknowledges, at paragraph 177 of the application, that the concept does not feature in the Decision either.

429. Since that wholly spurious objection is not mentioned in the Decision, Schneider attempts to show that the Commission made various tacit or veiled references to such an objection in the Decision.

430. However, its attempt lacks conviction. The passages of the decision which Schneider cites do not reveal any substantial changes to the objections set out in the statement notified to the parties on 3 August 2001. The extracts cited by Schneider are confined, on the basis of the comments and information provided by the parties and third parties in the course of the administrative procedure, either to drawing the logical conclusion from the statement of objections, a practice found to be acceptable by the Court in Endemol v Commission (at paragraph 81), or to illustrating a proposition by examples.

431. Schneider is confusing the concept, which does not apply here, of combination of dominant positions and the objection that the merged entity will have the ability to have privileged access to wholesalers, owing to its range of activities.

432. On that last point, both the statement of objections and the Decision stated that the new entity would have a range of activities on the various relevant markets and that its unequalled range of products would ensure that it was an unavoidable trading partner for wholesalers. In each of those documents, the Commission took the view that the fact of having that range of activities would, when combined with a series of other factors, such as the creation of a new player with very large market shares, the elimination of

rivalry between Schneider and Legrand and the combination of the brands owned by them into one incomparable line of brands, constitute one of the main factors in the creation and strengthening of a dominant position, in view of the characteristics of the markets affected by the transaction.

433. Schneider had ample opportunity to express its opinion on this point during the administrative procedure; and the Hearing Officer rejected its complaint on the point in the first paragraph of his supplementary report of 8 October 2001.

434. In so far as the plea concerns remedies, it would have been physically impossible to deal with them in the statement of objections since they had not yet been put forward by Schneider.

435. On the assumption that the new objection is quite clear from recital 811, as Schneider submits at paragraph 179 of the application, the Commission wonders why Schneider does not take the trouble to analyse that issue and explain what the new objection consists of.

436. In so far as the new objection refers to the combination of dominant positions in France, it is clear from the foregoing arguments that by this branch of the plea Schneider is merely criticising the Commission for having used that expression during a meeting held on 24 September 2001. Even on the assumption that the criticism is a valid one, it is nevertheless difficult to understand how Schneider's rights of defence have been infringed, since the alleged objection does not appear in either the statement of objections or the Decision.

- Findings of the Court

437. The Court considers that the claim that Schneider's rights of defence have been infringed in that the Commission included in the Decision a specific objection which was not clearly expressed in the statement of objections is stated sufficiently precisely and coherently for the Commission to respond properly to the plea and for the Court to assess its merits.

438. According to well-established case-law, the Decision need not necessarily replicate the statement of objections. Thus, it is permissible to supplement the statement of objections in the light of the parties' response, whose arguments show that they have actually been able to exercise their rights of defence. The Commission may also, in the light of the administrative procedure, revise or supplement its arguments of fact or law in support of its objections (see, to that effect, Case T-86/95 Compagnie Générale Maritime and Others v Commission [2002] ECR II-1011, paragraph 448).

439. As the Commission contended at the hearing, it is clearly open to it to finalise its assessment of the compatibility of a concentration with the common market in the light of the corrective measures proposed by the notifying parties, since, by definition, those measures could not be envisaged before the statement of objections was drawn up.

440. None the less the statement of objections must contain an account of the objections cast in sufficiently clear terms to achieve the objective ascribed to it by the Community regulations, namely to provide all the information the undertakings need to defend themselves properly before the Commission adopts a final decision.

441. That is particularly so in this case, where what the Commission did was not to take proceedings under Articles 81 EC and 82 EC in respect of anti-competitive practices which had already taken place and of which the undertakings concerned could not have failed to be aware: what it found to be incompatible with the common market was a concentration affecting the structure of competition in the national sectoral markets listed at recitals 782 and 783.

442. In addition, in the procedures for reviewing concentrations, the statement of objections is not solely intended to spell out the complaints and give the undertaking to which it is addressed the opportunity to submit comments in response. It is also intended to give the notifying parties the chance to suggest corrective measures and, in particular, proposals for divestiture and sufficient time, given the requirement

for speed which characterises the general scheme of Regulation No 4064/89, to ascertain the extent to which divestiture is necessary with a view to rendering the transaction compatible with the common market in good time.

443. Furthermore, it is evident from Section VI of the Decision that the Commission, as required under Regulation No 4064/89 (France and Others v Commission, cited above, paragraph 221), adopted a prospective approach to the state of competition to which the concentration was likely to give rise in the future, in order to come to a decision on the proposals Schneider put forward for divestiture.

444. The Commission was consequently required to explain all the more clearly the competition problems raised by the proposed merger, in order to allow the notifying parties to put forward, properly and in good time, proposals for divestiture capable, if need be, of rendering the concentration compatible with the common market.

445. It is not apparent on reading the statement of objections that it dealt with sufficient clarity or precision with the strengthening of Schneider's position vis-à-vis French distributors of low-voltage electrical equipment as a result not only of the addition of Legrand's sales on the markets for switchboard components and panel-board components but also of Legrand's leading position in the segments for ultraterminal electrical equipment. The Court observes in particular that the general conclusion in the statement of objections lists the various national sectoral markets affected by the concentration, without demonstrating that the position of one of the notifying parties on a given product market would in any way buttress the position of the other party on another sectoral market.

446. As the Commission affirmed in the course of its oral argument relating to the Decision's examination of the remedies, two factors were instrumental in strengthening that position, as stated at recital 811, which refers to the analysis of competition on the relevant markets: first, the mere fact of the overlap between the shares of the market for distribution and final panel-board components and, second, the strengthening of Schneider's position vis-à-vis wholesalers resulting from the addition of Legrand's sales and from Legrand's leading position in the sector for ultraterminal electrical equipment.

447. The Commission also reiterated at the hearing that the proposed commitments given on 24 September 2001 in respect of the French markets for switchboards and panel-boards would have eliminated only the additional shares of the market for the components thereof.

448. On the other hand, the increased strength consequent upon the addition of Legrand's power vis-à-vis wholesalers to that of Schneider would have remained unchanged. The merged entity would have retained most of Legrand's ultraterminal business, which put Legrand in a strong position vis-à-vis wholesalers, so that the problem of the new entity's privileged access to distribution would not have been remedied.

449. The Commission draws attention, at recital 545, to the fact that Legrand has very substantial positions on markets for low-voltage products other than switchboards and panel-boards and that Legrand already has dominant positions on the markets for sockets and switches, watertight equipment, fixing and shunting equipment and independent emergency lighting units. However, that information does not feature in the corresponding passage of the statement of objections (point 460).

450. Point 501 of the statement of objections states that the proposed transaction brings into existence a group which, on many markets for low-voltage electrical products, will be the main supplier to wholesalers, substantially ahead of the second supplier. The Commission nevertheless felt it necessary to make clear, at recital 590 of the Decision, that [a]s explained above, that will be particularly the case in France.

451. Furthermore, it is clear from point 4 of its note of 18 September 2001 to the members of the Advisory Committee on Concentrations concerning the proposed commitments put forward by the notifying parties, that the Commission made its approval of the remedies suggested in the economic sector concerned conditional on the divestiture being sufficiently extensive to eliminate the instances of all competitive overlap identified in the statement of objections.

452. Competitive overlap is conceivable only within a single national sectoral market and is thus different in nature from the mutual support provided at distribution level where two undertakings hold leading positions in one country in two distinct but complementary sectoral markets.

453. It follows that the statement of objections did not permit Schneider to assess the full extent of the competition problems to which the Commission claimed the concentration would give rise at distributor level on the French market for low-voltage electrical equipment.

454. It follows that Schneider's rights of defence have been infringed in various respects.

455. Schneider, first, was not afforded the opportunity of properly challenging the substance of the Commission's argument that, at distributor level, Schneider's dominant position would be strengthened in France in the sector for distribution and final panel-board components by Legrand's leading position in ultraterminal equipment.

456. It follows that Schneider was not given a proper opportunity to submit its observations in that regard either in its response to the statement of objections or at the hearing on 21 August 2001.

457. If it had been given such an opportunity, the Commission could have reconsidered its position or, on the contrary, have provided further evidence in support of its proposition, so that the Decision might have been different in any event.

458. Schneider must therefore be regarded as not having been afforded the opportunity to submit, properly and in good time, proposals for divestiture sufficiently extensive to provide a solution to the competition problems identified by the Commission on the relevant French sectoral markets.

459. The Court notes, in that connection, that Schneider stated at the hearing that it had not in fact been able to propose in good time any remedies for the competition problems in respect of which it did not challenge the Decision.

460. Thus Schneider was indirectly deprived of the chance of obtaining the approval which the Commission might have given to the remedies proposed, had the notifying parties been put in a position to submit in good time proposals for divestiture sufficiently extensive to resolve all the competition problems identified by the Commission at distribution level in France.

461. The effect of those irregularities is all the more serious, because, as the Commission stated several times at the hearing, remedies are the only means of preventing a concentration falling under Article 2(3) of Regulation No 4064/89 from being declared incompatible.

462. Consequently, the Decision is vitiated by an infringement of the rights of defence and the plea must be accepted.

463. In those circumstances the Decision must be annulled, without there being any need to adjudicate on the other pleas and arguments put forward by Schneider in support of its action and directed, in particular, against the Commission's assessment of the proposals for divestiture which Schneider submitted with a view to rendering the transaction compatible with the common market.

464. Under Article 233 EC, it is incumbent upon the Commission to take the necessary measures to comply with this judgment.

465. Such measures to comply with the judgment must have regard to the grounds constituting the essential basis for the operative part of the judgment (see Joined Cases 97/86, 99/86, 193/86 and 215/86 Asteris and Others v Commission [1988] ECR 2181, paragraph 27). The relevant grounds of this judgment require, in particular, that, if the Commission should resume its examination of the compatibility of the transaction,

Schneider should be placed in a position, as regards the relevant national sectoral markets in respect of which the economic analysis in the Decision has not been rejected, i.e. the French sectoral markets, to put forward a proper defence and, where appropriate, to propose corrective measures addressing the objections made and previously indicated by the Commission.

Costs

466. Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been essentially unsuccessful, it must be ordered to bear its own costs and to pay those incurred by Schneider, since Schneider applied for costs.

467. Under the third paragraph of Article 87(4) of the Rules of Procedure, the Comité central d'entreprise de Legrand SA and the Comité européen du groupe Legrand, interveners, are to bear their own costs.

468. Under the first paragraph of Article 87(4) of the Rules of Procedure, Member States which intervene in the proceedings before the Court of First Instance are to bear their own costs. It follows that the French Republic must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Annuls Commission Decision C(2001)3014 final of 10 October 2001 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case COMP/M.2283 - Schneider-Legrand);

2. Orders the Commission to bear its own costs and, in addition, to pay those incurred by Schneider Electric SA;

3. Orders the Comité central d'entreprise de SA Legrand and the Comité européen du groupe Legrand to bear their own costs;

4. Orders the French Republic to bear its own costs.

Vesterdorf
Forwood
Legal

Delivered in open court in Luxembourg on 22 October 2002.

Registrar
H. Jung

President
B. Vesterdorf

(1) Language of the case: French.
(2) Confidential information.

(3) Confidential information.
(4) Confidential information.
(5) Confidential information.
(6) Confidential information.
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(13) Confidential information.