JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
25 October 2002 *

In Case T-80/02,

Tetra Laval BV, established in Amsterdam (Netherlands), represented by A. Vandencasteele, D. Waelbroeck, A. Weitbrecht and S. Völcker, lawyers,

applicant,

v

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

defendant,

APPLICATION for annulment of the Commission Decision of 30 January 2002 setting out measures in order to restore conditions of effective competition pursuant to Article 8(4) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (Case No COMP/M.2416 — Tetra Laval/Sidel),

* Language of the case: English.

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

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

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 4 July 2002,

gives the following

Judgment

Legal context

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

2 Article 2 of the Regulation states:

'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.

...

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.

...'

3 Article 4 of the Regulation requires the party acquiring control, or the parties acquiring joint control, of another undertaking to notify the concentration to the Commission within a week of completing it.

4 Although Article 7(1) of the Regulation provides that a concentration is not to be put into effect either before its notification or until it has been declared compatible with the common market, the implementation of a public bid that has been notified to the Commission may, in accordance with Article 7(3) of the

Regulation, proceed '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 under paragraph 4'.

5 Once proceedings have been initiated in respect of a notification, the decision-making powers of the Commission are fixed by Article 8 of the Regulation. That article provides *inter alia*:

'3. Where the Commission finds that a concentration fulfils the criterion laid down 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.'

Background to the case

6 On 27 March 2001, Tetra Laval SA, a privately held company incorporated under French law and a wholly owned subsidiary of Tetra Laval BV, a holding company belonging to the Tetra Laval group (hereinafter 'Tetra' or 'the applicant'), announced a public bid for all outstanding shares in Sidel SA (hereinafter 'Sidel'), a French publicly quoted company. On the same day, Tetra Laval SA acquired roughly 9.75% of the shares in Sidel from Azeo (5.56%) and Sidel's directors (4.19%).

7 Pursuant to the bid, Tetra acquired approximately 81.3% of the outstanding shares in Sidel. After the closing of the bid, the applicant acquired certain additional shares, making its current holdings roughly 95.20% of the shares and 95.93% of the voting rights in Sidel.

8 On 18 May 2001, the operations by which Tetra acquired its shareholding in Sidel were notified to the Commission. In accordance with Article 7(3) of the Regulation, the applicant undertook not to exercise the voting rights attached to those shares without express authorisation from the Commission.

9 It is agreed by the parties that those operations constitute an acquisition within the meaning of Article 3(1)(b) of the Regulation and have a Community dimension within the meaning of Article 1(2) thereof.

10 On 30 October 2001, the Commission adopted a decision pursuant to Article 8(3) of the Regulation (Decision C (2001) 3345 final, Case No COMP/M.2416 — Tetra Laval/Sidel, hereinafter 'the prohibition decision').

11 Under Article 1 of that decision:

'The concentration notified to the Commission by Tetra Laval BV... on 18 May 2000, whereby Tetra would acquire sole control of the undertaking Sidel SA is declared incompatible with the common market and the functioning of the EEA Agreement.'

12 On 19 November 2001, following the prohibition decision, the Commission notified to the applicant a statement of objections, pursuant to Article 13(1) of Commission Regulation (EC) No 447/98 of 1 March 1988 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), setting out the specific measures which it considered appropriate in order to restore conditions of effective competition.

13 The applicant replied to that statement of objections on 3 December 2001.

14 On 14 December 2001, a hearing was held before the hearing officer, in accordance with Articles 14, 15 and 16 of Regulation No 447/98.

15 On 30 January 2002, the Commission adopted a decision setting out measures in order to restore conditions of effective competition pursuant to Article 8(4) of Council Regulation (EEC) No 4064/89 (Case No COMP/M.2416 — Tetra Laval/Sidel), hereinafter 'the divestiture decision'). The divestiture decision, which was notified to the applicant on 4 February 2002, orders Tetra to divest itself of its shares in Sidel and lays down the principles governing that divestiture.

16 Article 1 of the divestiture decision orders the applicant 'to separate itself from Sidel... in accordance with the provisions of the Annex to this Decision'.

17 Point 1(5) of the Annex to the divestiture decision requires Tetra to divest itself of its entire shareholding in Sidel 'so that... neither Tetra nor any directly or indirectly affiliated member of its group hold any equity interest, either directly or indirectly, in Sidel'. According to point 2(1) of the Annex, Tetra is not to 'take

any measure to implement the concentration without the Commission's prior written approval' in the transitional period pending divestiture, whilst point 2(2) prohibits it from exercising the voting rights attached to the shares or from acquiring shares without such approval. Point 2(8) requires the applicant *inter alia* to keep the Commission informed in writing on a monthly basis during the transitional period of the developments in negotiations with potential purchasers of Sidel. Point 3(1) deals with the appointment of an 'independent trustee', whose mandate and appointment are to be subject to the approval of the Commission, and who must have 'sufficient expertise and powers to monitor the divestiture process and Sidel's viability and effective functioning'. Lastly, point 4 of the Annex covers the 'timing for divestiture', which, under the terms of paragraph 1, includes a specific deadline for its completion.

Procedure

18 By application lodged with the Registry of the Court of First Instance on 15 January 2002, the applicant brought an action against the prohibition decision, registered under case number T-5/02. By a separate document lodged the same day, the applicant also applied for an expedited procedure, pursuant to Article 76a of the Rules of Procedure of the Court of First Instance.

19 On 6 February 2002, the First Chamber of the Court of First Instance, to which the case had been assigned, decided to grant the application for the procedure to be expedited in Case T-5/02.

20 By application lodged at the Registry of the Court of First Instance on 19 March 2002, the applicant brought the present action against the divestiture decision and applied for the joinder of the present case with Case T-5/02. By a separate

document lodged on the same day, it also requested an expedited procedure, which the Commission, in its observations on that application, lodged on 3 April 2002, agreed was justified. That case was also assigned to the First Chamber of the Court of First Instance.

21 By a separate document also lodged on 19 March 2002 at the Registry of the Court of First Instance, the applicant made an application for interim measures, registered under number T-80/02 R, seeking suspension of the operation of the time-limit for Tetra's divestiture of its holdings in Sidel, as laid down in point 4 of the Annex to the divestiture decision.

22 By way of measures of organisation of procedure, on 19 March 2002 the parties were requested, pursuant to Article 64(3)(e) of the Rules of Procedure, to attend an informal meeting on 4 April 2002 with the Judge-Rapporteur.

23 On 18 April 2002, the First Chamber of the Court of First Instance granted the application for an expedited procedure in the present case and set 26 and 27 June 2002 as the dates for the hearings in Cases T-5/02 and T-80/02. In accordance with the statements by the applicant at the informal meeting, the application to have the present case and Case T-5/02 joined was deemed withdrawn.

24 The Commission lodged its defence on 30 April 2002.

25 Pursuant to the agreement reached between the parties at the hearing on 24 April 2002 in Case T-80/02 R, concerning the postponement of the time-limit fixed for Tetra's divestiture of its shares in Sidel, the applicant withdrew its application for interim measures by letter of 3 May 2002. Case T-80/02 R was, as a result, removed from the register by order of 15 May 2002 of the President of the Court of First Instance, and a decision on costs was reserved.

26 Upon hearing the report of the Judge-Rapporteur, the First Chamber of the Court of First Instance decided, at its meeting on 10 June 2002, to open the oral procedure and, by way of measures of organisation of the procedure, invited the parties to answer a number of written questions notified by letter of 11 June 2002.

27 On 19 June 2002, the parties lodged at the Registry of the Court the speaking notes they had been asked to lodge during the informal meeting and answered the written questions.

28 As one of the Judges of the First Chamber of the Court of First Instance was prevented from attending, the President of the Court designated Judge Pirrung on 24 June 2002, pursuant to Article 32(3) of the Rules of Procedure, in order to attain the quorum necessary to give judgment and rescheduled the two hearings for 3 and 4 July 2002.

29 The parties presented oral argument and answered questions put to them by the Court at the hearing on 3 and 4 July 2002.

Forms of order sought

30 Since the conditions stated during the informal meeting for the amendment of the form of order sought have been met, the applicant claims that the Court should:

— annul the divestiture decision;

— order the Commission to pay the costs.

31 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

32 The applicant puts forward four pleas in support of its action: first, infringement of its procedural rights; second, lack of legal basis for the divestiture decision as a

result of the illegality of the prohibition decision; third, non-applicability of Article 8(4) of the Regulation; and fourth, infringement of the principle of proportionality. The applicant partially abandoned the fourth plea in its speaking notes.

33 By judgment delivered today in Case T-5/02, the Court of First Instance annulled the prohibition decision. Accordingly, it is appropriate to begin by examining the second plea, alleging that there is an inevitable link between the illegality of the prohibition decision and that of the divestiture decision.

34 The applicant claims that the link between the divestiture decision and the prohibition decision arises from both the wording of the divestiture decision, essentially the 10th recital in it, and the fact that the divestiture decision is merely a measure for implementing the prohibition decision, with a view to restoring conditions of effective competition. Since the divestiture decision is dependent upon the prohibition decision, the annulment of the prohibition decision completely deprives the divestiture decision of any legal basis.

35 The Commission contends that the divestiture decision is based on the prohibition decision before its annulment. Accordingly, any subsequent annulment of the prohibition decision has no effect on the validity of the divestiture decision. Thus, if all of the other pleas in the present action were to be dismissed, the illegality of the prohibition decision would not justify annulment of the divestiture decision. The Commission would have to give due effect to the annulment of the prohibition decision, pursuant to Article 233 EC, as interpreted by the Court of Justice (Joined Cases 97/86, 193/86, 99/86 and 215/86 *Asteris and Others* v *Commission* [1988] ECR 2181, paragraphs 30 and 32, hereinafter 'the judgment in *Asteris*').

36 The Court finds, first of all, that the scheme of the Regulation, and particularly the 16th recital, show that the objective of Article 8(4) is to allow the Commission to adopt all the decisions necessary for the restoration of conditions of effective competition. When, as in the present case, the concentration has been implemented pursuant to Article 7(3) of the Regulation, the separation of the undertakings involved in the concentration is the logical consequence of the decision declaring the concentration incompatible with the common market.

37 However, the adoption of a divestiture decision subsequent to the adoption of a decision declaring a concentration incompatible with the common market presupposes that the latter decision is valid. Since the object of a divestiture decision adopted pursuant to Article 8(4) of the Regulation is to restore conditions of effective competition which have been impeded by the prohibited concentration, it is obvious that its validity is contingent on that of the decision prohibiting the concentration and that, accordingly, annulment of the latter decision completely deprives the divestiture decision of any legal basis.

38 This conclusion is confirmed by the fact that, under Article 8(4) of the Regulation, the divestiture of shareholdings acquired in a concentration transaction can be ordered even in the prohibition decision that has been adopted pursuant to Article 8(3).

39 Moreover, this conclusion is not called into question by the Commission's reference to the judgment in *Asteris*, cited above. First of all, it should be noted that in that case the Court of Justice confirmed 'the retroactive effects of judgments by which measures are annulled' (paragraph 30). Secondly, the judgment in *Asteris* concerned in particular the effects which the annulment of a regulation with a clearly defined temporal scope have on provisions of subsequent regulations with the same content as the one found to be illegal. That case thus concerns the scope of the obligation under Article 233 EC on the institution responsible for the adoption of the subsequent regulations to take the necessary measures to comply with the judgment annulling the first regulation.

40 The present case, however, unlike the situation which gave rise to the judgment in *Asteris*, does not concern regulations containing identical provisions, but rather a divestiture decision which merely gives effect to an earlier prohibition decision. The mere fact that the prohibition decision had not yet been annulled when the divestiture decision was adopted cannot cause the subsequent declaration of annulment of the earlier decision to be deprived of retroactive effect.

41 As stated in paragraph 33 above, the Court has annulled the prohibition decision by its judgment today in Case T-5/02.

42 Since the illegality of the prohibition decision thus leads to the illegality of the divestiture decision, the present action for annulment of the divestiture decision must be upheld and it is not necessary to examine the other pleas raised by the applicant.

43 Accordingly, the divestiture decision is annulled.

Costs

44 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 defendant has been unsuccessful and the applicant has asked for the defendant to pay the costs, the latter must be ordered to bear its own costs and to pay those of the applicant, including those relating to the interim proceedings.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber),

hereby:

1. **Annuls the Commission Decision of 30 January 2002 setting out measures in order to restore conditions of effective competition pursuant to Article 8(4) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (Case No COMP/M.2416 — Tetra Laval/Sidel);**

2. **Orders the Commission to bear its own costs and to pay those of the applicant, including those relating to the interim proceedings.**

Vesterdorf Pirrung Forwood

Delivered in open court in Luxembourg on 25 October 2002.

H. Jung

Registrar

B. Vesterdorf

President