OPINION OF ADVOCATE GENERAL TIZZANO
delivered on 25 May 2004 [1]

1. The subject-matter of this case is an appeal brought by the European Commission against the judgment of the Court of First Instance of 25 October 2002 in Case T-80/02 which annulled the 'Commission's decision of 30 January 2002, adopted pursuant to Article 8(4) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, setting out measures in order to restore conditions of effective competition (Case No COMP/M.2416 — Tetra Laval/Sidel)'.

I — The relevant provisions

2. As everyone knows, in order to contribute to the creation of 'a system ensuring that competition in the internal market is not distorted' (Article 3(f) of the EEC Treaty, then, after amendment, Article 3(g) of the EC Treaty, now Article 3(g) EC), Council Regulation No 4064/89 [2] ('the merger Regulation' or just 'the Regulation') introduced control of concentrations with a Community dimension. [3] For that purpose, it provided in particular that prior notification of those operations should be made to the Commission, which is called upon to appraise their compatibility with the common market on the basis of the criteria laid down in Article 2 of the Regulation.

3. For our purposes now it must be borne in mind that, in accordance with Article 7(1) of the Regulation, a concentration with a Community dimension is not to be put into effect until it has been notified to the Commission and been authorised by the latter, explicitly or by implication. Article 7(3), however, provides that that does 'not prevent the implementation of a public bid which has been notified to the Commission ... , provided that the acquirer does not

1 — Original language: Italian.

2 — OJ 1989 L 395, p. 1 (corrigendum published in OJ 1990 L 257, p. 13). Regulation No 4064/89 was amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1).

3 — What is meant by 'concentrations' is explained in Article 3 of the Regulation, while Article 1(2) and (3) makes clear in what circumstances a concentration may have a 'Community dimension'.

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 ...'.

4. With regard to the decisions that may be adopted by the Commission, Article 8(3) must be noted here, according to which provision, when the criteria are fulfilled, the Commission 'shall issue a decision declaring that the concentration is incompatible with the common market'. Article 8(4) then provides that '[w]here 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'.

II — Facts and procedure

The concentration notified and the decisions adopted by the Commission

5. The relevant parts of the reconstruction of the facts in the judgment under appeal reveal the following:

'(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."

...

(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 orders Tetra to divest itself of its shares in Sidel and lays down the principles governing that divestiture.

...'

The judgment of the Court of First Instance and the appeals brought before the Court of Justice by the Commission

6. By applications lodged at the Registry of the Court of First Instance on 15 January 2002 and 19 March 2002, Tetra challenged both those decisions.

7. The Court of First Instance adjudicated on those applications by two judgments of 25 October 2002 in which: (i) in Case T-5/02 it annulled the 'prohibition decision'; (ii) in Case T-80/02 it annulled the 'divestiture decision'.

8. In that second judgment — under challenge in this case — the Court of First Instance stated in particular that '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'.[4] After noting that the prohibition decision had been annulled by the judgment given in Case T-5/02,[5] the Court of First Instance confined itself therefore to the observation that: '[s]ince the illegality of the prohibition decision ... leads to the illegality of the divestiture decision, the ... action for annulment of the divestiture decision must be upheld'.[6]

9. By application lodged at the Registry of the Court of Justice on 8 January 2003, the Commission brought an appeal against both those judgments of the Court of First Instance, seeking to have them set aside.

III — Legal analysis

10. In support of its appeal in this case the Commission does in substance no more than maintain that, if in Case C-12/03 P the Court of Justice should set aside the Court of First Instance's judgment concerning the 'prohibition decision', it must also set aside the judgment concerning the 'divestiture decision' which is based on the former.

11. However, in view of the fact that in Case C-12/03 P I have suggested that the Commission's appeal should be dismissed, I cannot but consider that this appeal too must be rejected, and that it is not necessary to examine the pleas of inadmissibility raised in this regard by Tetra.[7]

Costs

12. Under Article 69(2) of the Rules of Procedure, and having regard to the conclusions I have reached concerning the dismissal of the appeal, I consider that the Commission must be ordered to bear the costs.

4 — Paragraph 37.

5 — Paragraph 41.

6 — Paragraph 42.

7 — In this connection, see Case C-23/00 P *Council* v *Boehringer* [2002] ECR I-1873, paragraphs 51 and 52, from which it is clear that, for reasons of economy of procedure, the Community judicature may reject an appeal on its merits without having to rule on the objections of inadmissibility raised by the respondent.

IV — Conclusion

13. In the light of the foregoing conclusions, I propose that the Court should declare that:

— the appeal is dismissed;

— the Commission shall bear the costs.