MERGERS (PACKAGING): THE TETRA LAVAL CASE

Subject: Mergers
Prohibition
Annulment (of Commission Decision)

Industry: Packaging; carton packaging; plastic bottles; eqipment
(Some implications for other industries)

Parties: Tetra Laval BV Group
Sidel

Source: Court Press Release 87/02, dated 25 October 2002, referring to Judgments of the Court of First Instance in Case T-5/02 and Case T-80/02, *Tetra Laval BV v Commission*

(Note. In this case, the Court of First Instance annulled a Commission decision prohibiting the merger of Tetra Laval and Sidel, as well as the related divestiture decision. The Court took the view that the economic analysis of the immediate anti-competitive effects, of conglomerate effects and of the foreseeable conduct of the companies in question was based on insufficient evidence and some errors of assessment. However, Tetra Laval's argument concerning infringement of the right of access to the file was rejected.)

Nine months after the cases were lodged by the Tetra Laval BV group, the world leader in carton packaging, the Court of First Instance, ruling in an expedited procedure, delivered two judgments. The cases concern, first, the Commission's decision to prohibit a merger between the Tetra Laval group, the world leader in the field of carton packaging, and the French company Sidel, which is active in the design and manufacture of equipment and of polyethylene terephthalate (PET) plastic bottles and, second, a related decision of the Commission ordering the separation of the two companies. The merger at issue concerns the liquid food packaging sector and, according to the Commission, could have negative repercussions on competition in several overall markets in that sector: the PET packaging machines market, on which Sidel holds a leading position, the market for aseptic production machines and aseptic carton packaging, on which Tetra Laval holds a dominant position and the one for high-density polyethylene (HDPE) plastic and the machines which produce HDPE packaging.

In the judgment annulling the first decision, the Court finds, notwithstanding Tetra Laval's claims, that the Commission did not infringe its right of access to the file. However, Tetra Laval's arguments regarding the substance of the case are upheld. The Court holds, first, that the anti-competitive effects of the merger were overestimated on the markets identified by the Commission, in so far as the Commission justifies its prohibition, at least in part, by the likely immediate horizontal (control of the PET equipment market) and vertical (risk of creation of a vertically-integrated structure) effects resulting from the merger. The Court then

examines the Commission's analysis of the merger's conglomerate effects, that is, the effects of the merger of undertakings which are basically active on different markets (carton and PET) and which do not compete directly with each other. The Commission argued, in support of the core justification for its prohibition, that it could not be ruled out that the merger would give rise to anti-competitive repercussions in future. Its reasoning is based on leveraging, elimination of potential competition and strengthening of the merged entity's overall position. The Court, however, although confirming that it is permissible for the Commission to examine future conglomerate effects created by a new structure when assessing whether competition would be seriously impeded by a merger, disagrees with the conclusions reached by the Commission in this particular case.

As regards leveraging, the Commission starts from the premise that the current overlaps in the markets in question will, in the medium- to long-term, have a tendency to grow, so that Tetra Laval, from its strong dominant position on the carton market, will probably put pressure on its current carton packaging and packaging equipment customers wishing to switch over to PET packaging to use equipment produced by Sidel when they make that switch. The Court agrees, in principle, that putting the merger into effect could allow such leveraging to occur, but finds that the Commission has not proved that the merged entity would have an incentive to use that possibility. In this regard, the Court rejects inter alia the Commission's forecast of strong growth in the PET market, because analysis of the liquid dairy products (LDP) segment does not support it and because the Commission's analyses in regard to fruit juices were inadequate to support a finding that the glass containers currently used would be replaced by other packaging materials in PET rather than in carton or HDPE. The Court also finds that the Commission does not provide sufficiently convincing evidence in its examination of the potential leveraging methods which, according to the Commission, if exercised between now and 2005 from the aseptic carton markets, would enable the merged entity to acquire a dominant position on the various markets for PET packaging equipment. As for the market for high-capacity Stretch Blow Moulding (SBM) machines, where Sidel is by far the market leader, the Commission's prohibition is undermined by certain defects in its analysis.

As regards the elimination of potential competition on the aseptic carton markets represented by indirect competition from undertakings active on the PET equipment markets, the Court finds that the evidence provided is insufficient to support the Commission's conclusion that Tetra Laval's dominant position will be strengthened. As regards the strengthening of the merged entity's overall position, the Court finds that this basis for the prohibition cannot be separated from the Commission's reasoning relating to leveraging and the elimination of potential competition, and, therefore, rejects it without going into a detailed examination.

Case T-80/02 concerns the Commission's second decision ordering the separation of Tetra Laval and Sidel, which has as its legal basis the earlier decision prohibiting the merger. The annulment of the prohibition decision leads in consequence to the annulment of the second decision, since it deprives it of any legal basis. ■