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

In Case T-5/02,

**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,

* Language of the case: English.

APPLICATION for annulment of Commission Decision C (2001) 3345 final of 30 October 2001 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case No COMP/M.2416 — Tetra Laval/Sidel),

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 3 and 4 July 2002,

hereby gives the following

## Judgment

### Legal background

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.

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 alternatives 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.

...'

3 Article 4 of the Regulation requires the party acquiring control, or the parties acquiring joint control, of another undertaking to notify the concentration within a week to the Commission, which is required by Article 6(1) to examine that notification 'as soon as it is received'. Article 6(1)(c), read in conjunction with Article 10(1), provides that the Commission is to initiate proceedings in respect of a notified concentration within one month, and at most six weeks, where it finds that the concentration falls within the scope of the Regulation 'and raises serious doubts as to its compatibility with the common market'.

4 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. Under Article 8(3), '[w]here 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'. Under Article 10(3), such decisions 'must be taken within not more than four months of the date on which the proceedings are initiated'.

5 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), 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'.

6 Article 18 of the Regulation, which concerns the hearing of the parties and of third parties, provides:

'1. Before taking any decision provided for in Article 7(4), Article 8(2), second subparagraph, and (3) to (5), and Articles 14 and 15, the Commission shall give the persons, undertakings and associations of undertakings concerned the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them.

...

3. The Commission shall base its decision only on objections on which the parties have been able to submit their observations. The rights of the defence shall be

fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets.

...'

7 Article 13(3) 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) provides:

'After having addressed its objections to the notifying parties, the Commission shall, upon request, give them access to the file for the purpose of enabling them to exercise their rights of defence.

The Commission shall, upon request, also give the other involved parties who have been informed of the objections access to the file in so far as this is necessary for the purposes of preparing their observations.'

8 Article 17 of Regulation 447/98, entitled 'Confidential information', provides:

'1. Information, including documents, shall not be communicated or made accessible in so far as it contains business secrets of any person or undertaking, including the notifying parties, other involved parties or of third parties, or other

confidential information the disclosure of which is not considered necessary by the Commission for the purpose of the procedure, or where internal documents of the authorities are concerned.

2. Any party which makes known its views under the provisions of this Chapter shall clearly identify any material which it considers to be confidential, giving reasons, and provide a separate non-confidential version within the time limit fixed by the Commission.'

## Factual background

9 On 27 March 2001, Tetra Laval SA, a privately held company incorporated under French law and a wholly owned subsidiary of Tetra Laval BV (hereinafter 'Tetra' or 'the applicant'), a holding company belonging to the Tetra Laval group, 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%).

10 The bid was in cash at EUR 50 per share and, in accordance with French law, was unconditional. Acceptance of the bid was unanimously recommended by the Board of Directors of Sidel and was also approved by Sidel's major shareholders. The joint offer document from Tetra Laval SA and Sidel was approved on 11 April 2001 by the stock exchange committee. Following publication on 14 April 2001, the bid was officially opened for the period 17 April to 22 May

2001. It provided that, in the event of the bid being successful, the shares of Tetra SA would be quoted again in the week beginning 11 June 2001, subject to the restrictions in Article 7(3) of the Regulation.

11 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.

12 Tetra comprises, *inter alia*, the Tetra Pak company, which is mainly active in the area of liquid food carton packaging, where Tetra Pak is the world-wide market leader. Tetra also has more limited activities in the plastic packaging sector, mainly as a converter (which consists of manufacturing and supplying empty packaging to producers who then fill the packaging themselves), particularly of high density polyethylene (hereinafter 'HDPE') bottles.

13 Sidel is involved in the design and production of packaging equipment and systems, particularly stretch blow moulding machines (hereinafter 'SBM machines'), which are used in the production of polyethylene terephthalate (hereinafter 'PET') plastic bottles. It is the world-wide leader for the production and supply of SBM machines. It is also active in barrier technology, used to make PET compatible with products which are sensitive to gas and light, as well as in the manufacture of filling machines for PET and, to a lesser extent, HDPE bottles.

14 On 18 May 2001, the operations by which Tetra acquired its shareholding in Sidel were notified to the Commission.

15 It is agreed by the parties that those operations (hereinafter 'the merger' or 'the notified transaction') constitute an acquisition within the meaning of Article 3(1)(b) of the Regulation and that the merger has a Community dimension within the meaning of Article 1(2) thereof.

16 By decision of 5 July 2001, the Commission, having concluded that the merger raised serious doubts as to its compatibility with the common market and the Agreement on the European Economic Area ('the EEA Agreement'), initiated proceedings in accordance with Article 6(1)(c) of the Regulation.

17 On 7 September 2001, the Commission sent to Tetra and Sidel a statement of objections, in accordance with Article 18 of the Regulation, explaining why its initial conclusion was that the transaction should be prohibited. The applicant replied to the statement on 21 September 2001.

18 On 24 September 2001, an additional statement of objections, which focused in particular on the activities of Tetra in the HDPE sector, was sent to Tetra and Sidel, and was replied to by the applicant on 1 October 2001.

19 On 25 September 2001, the applicant proposed a number of commitments, in accordance with Article 8(2) of the Regulation, with a view to remedying the competition concerns expressed in the first statement of objections.

20 On 26 September 2001, a hearing took place before the hearing officer, in accordance with Articles 14, 15 and 16 of Regulation No 447/98.

21 On 9 October 2001, the applicant offered the Commission a new set of firm commitments (hereinafter 'the commitments'), replacing those dated 25 September 2001.

22 The Commission carried out a specific market investigation regarding the commitments by sending 51 questionnaires to different operators in the economic sector in question (customers, converters and competitors); the questionnaires were sent out on 11 October 2001, with the deadline for reply set at 17 October. It received 34 responses (hereinafter 'the responses to the market investigation') and, judging them to be entirely confidential, drew up two non-confidential summaries concerning, first, customers and converters and, second, competitors. It sent those summaries to the applicant.

23 The draft of the Commission's final decision, which also dealt with the commitments, was discussed and approved by the Advisory Committee on concentrations at its meeting on 19 October 2001.

24 By decision of 30 October 2001 (Case No COMP/M.2416 — Tetra Laval/Sidel C (2001) 3345 final) (hereinafter 'the contested decision'), the Commission declared the notified transaction incompatible with the common market and the functioning of the EEA Agreement, pursuant to Article 8(3) of the Regulation.

25 The contested decision was notified to Tetra on 6 November 2001.

26 In the light of the findings in the contested decision and following a separate administrative procedure initiated by the sending of a statement of objections to Tetra on 19 November 2001, the Commission adopted, on 30 January 2002, a

decision setting out measures in order to restore conditions of effective competition pursuant to Article 8(4) of the Regulation (Case No COMP/M.2416 — Tetra Laval/Sidel).

## The contested decision

27 In the contested decision, the Commission, in analysing the compatibility of the transaction with the common market, first describes the liquid food packaging industry and examines the relevant product and geographic markets, and then assesses the notified transaction from a competition standpoint. After that analysis, the Commission assesses the scope of the commitments in the light of that prior assessment of competition.

### *The liquid food packaging sector*

28 The Commission considers that the 'competitive impact of [the notified transaction] will be primarily in the liquid food packaging industry', ('liquid food' meaning essentially liquid dairy products ('LDPs')), fruit juices and nectars ('juices'), fruit flavoured still drinks ('FFDs') and tea/coffee drinks, these four products together being referred to hereinafter as 'the sensitive products') and, in particular an impact on the sectoral segments in which the parties are primarily active, namely 'plastic, in particular PET packaging, and carton packaging' (recital 12). The Commission states that PET enables the manufacture of transparent bottles. For products which are sensitive to oxygen and light, PET must be enhanced using a 'barrier technology'. There are three stages in the PET packaging process: (i) production of plastic preforms, which are the pre-production tubes used to make the bottles; (ii) production of the empty bottles themselves using SBM machines (see paragraph 13 above); and (iii) filling of the

bottles (recital 20). It describes HDPE packaging as having a rather 'cloudy' appearance. HDPE is produced in a similar way to PET but using extrusion blow moulding machines (hereinafter 'EBM machines') (recital 26). Unlike plastic packaging, pack construction, filling and sealing are integrated operations in the carton packaging process (recital 28).

29 The Commission draws several distinctions, in particular between aseptic and non-aseptic packaging, in line with its earlier decisions in this area, between the packaging itself and the packaging machines, and between packaging performed in-house by the producers of liquid foods and packaging by converters (see paragraph 12 above). However, according to the Commission, that distinction is lessened by the existence of 'hole-through-the-wall' arrangements (hereinafter 'HTW arrangements') whereby a converter produces the bottles at a site next to the premises of the beverage producer and conveys them directly to the producer for filling.

*The relevant product markets*

30 Since the 'competitive impact of [the notified transaction] will be primarily in the liquid food packaging industry', the Commission concentrated its analysis on the segments of that industry in which Tetra and Sidel are primarily active: 'plastic, in particular PET packaging, and carton packaging' (recital 12). The Commission considers that 'end-use segmentation constitutes a meaningful analytical tool for assessing the liquid food packaging equipment market' (recital 44). It acknowledges that 'packaging systems using different materials, for example glass and cans, form distinct relevant product markets for competition law analysis and that, therefore, PET packaging systems belong to a distinct product market'. The Commission categorically rejects the idea that 'carton and PET do not share

common product segments and that there can be no interaction between the two' and, accordingly, decides to look at 'the interplay between carton and PET and the future growth of PET in the traditional carton end-use segments' (recital 53).

31 Turning to carton packaging, which is non-transparent, the Commission considers that it is 'suitable for oxygen and light-sensitive products but cannot withstand carbonation'. PET packaging, on the other hand, 'is transparent and can withstand carbonation but has been traditionally less suitable for oxygen- and light-sensitive products' (recital 55). The Commission emphasises that 'PET is a suitable material for the packaging of *all* the products that have been traditionally packaged in carton', that is, sensitive products, and concludes that 'PET may potentially provide an alternative competing material for the entire spectrum of carton-packaged products' (recital 57, emphasis in the original). These products can none the less be distinguished from one another, because 'the specific characteristics of the product dictate slightly different packaging solutions (juices are high acid whereas LDPs are low acid, FFDs and ice tea do not require the same extent of oxygen barrier as juices)' (recital 58).

32 Regarding the expected growth of PET use for sensitive products, the Commission dismisses the assertion of Tetra that 'PET's use is very limited and will not grow significantly in the future' (recitals 59 to 148). It states in that regard that '[t]he fastest growing PET segment has been water and [carbonated soft drinks] mainly due to a switch from glass packaging' and that 'PET is popular with consumers and producers' (recital 55, footnote 22). The Commission finds 'that already today it is possible to package and sell commercially fresh milk, flavoured milk, ice tea, fresh juice, long-life (hot-fill) juices, fruit flavoured drinks and sports drinks in PET' and that there are only two segments for which PET use presents technical problems: 'aseptic juices and aseptic white (UHT) milk' (recital

61). Referring to the figures provided on behalf of Tetra by the consulting company Canadean, it observes that, even though PET use is not currently very significant for LDPs and juices (0.5% in both segments in 2000), 'the picture [...] is already today very different for the segments of FFDs and tea/coffee drinks which do not require the same barrier properties as LDPs and juices', segments where PET 'has already made more significant inroads' (recital 69) (reaching 20% for FFDs and 25% for tea/coffee drinks in 2000).

33 For the years 2000 to 2005, the Commission, in the light of its own market investigation, that of Canadean and 'independent studies' by PCI, Warrick and Pictet (recital 104), concludes that 'there is already significant overlap between PET and carton in the FFDs and tea/coffee drinks segments' and that 'PET will continue to make inroads into these segments at the expense of carton', so much so that '[u]nder a conservative estimate, with PET reaching 30% in each of these segments by 2005, PET would pack 800 million litres of tea/coffee drinks (including sports drinks) and 1 billion litres of FFDs' (recital 144). It adds that 'improvements in barrier technology and aseptic PET filling are expected to enhance PET's position in all four [sensitive] product segments' and that 'in the LDP and juice segment, PET will grow significantly in the next five years' (recital 146). According to the Commission, 'it is realistic to expect that PET will reach at least 10-15% in fresh milk and 25% in flavoured and other dairy beverages by 2005', but that 'PET's use for UHT milk (which represents approximately 50% of the total milk market in the EEA) is uncertain' (recital 147). Emphasising the 'significant potential' of PET, 'at least in smaller, premium segments of aseptic milk such as single serve packages', the Commission considers that '[w]ith PET reaching at least 15% of fresh milk, 25% other dairy beverages and only 1% UHT milk by 2005, PET will package approximately 3 billion litres per annum (this represents approximately 9% of the total European market for [LDPs]' (recital 147). Regarding juices, the Commission believes that 'it is realistic to expect PET to reach at least 20% of the overall juice market in the EEA by 2005',

even if this growth will mainly result from 'substantial switching from glass to PET' (recital 148).

34 Turning to the competition between PET and carton in overlap products, the Commission concludes that 'carton packaging systems and PET packaging systems (and hence carton packaging equipment and PET packaging equipment) form distinct relevant product markets'. It finds that 'although substitution between the two systems does not currently have the necessary effectiveness and immediacy required for the purposes of market definition (i.e. they are weak substitutes), this may change in the future as PET's barrier technology improves and PET/carton costs converge'. The convergence could even be such that the two systems might in future, 'belong to the same relevant product market for competition law purposes' (recital 163).

35 The Commission then examines the segments of 'specific equipment within each packaging system' in order to determine 'whether there are distinct relevant product markets' for each of them (recital 164).

36 Regarding the PET packaging systems, the Commission considers that, for SBM machines, in the light of the specific characteristics of the sensitive products and the ability for price discrimination, 'separate relevant markets exist for each distinct group of customers on the basis of end-use in particular in the four "sensitive" beverage segments, LDPs, juice, FFDs and tea/coffee drinks' (recital 188). The Commission considers that the different barrier technologies form part of the same product market, although some of them might, in future, be placed in a distinct product market (recitals 198 et 199). There are also two distinct markets for aseptic and non-aseptic PET filling machines (recital 204), whilst PET preforms constitute yet another distinct market (recital 206).

37 With respect to carton packaging systems, the Commission notes that there is consensus that 'there are four distinct product markets: aseptic carton packaging machines, aseptic cartons, non-aseptic carton packaging machines and non-aseptic cartons' (recital 209).

*The relevant geographic market*

38 The relevant geographic market is defined as the EEA because 'all suppliers [of PET packaging equipment] are active throughout the EEA, [and] are capable of providing and provide their equipment on a cross-border basis' (recitals 210 and 211)

*Competition law analysis of the notified transaction*

39 The assessment of the merger under competition law is contained in a detailed analysis (recitals 213 to 408) and is essentially as follows:

'213 The Commission's market investigation and analysis has shown that the operation could strengthen Tetra's dominant position in the market for aseptic carton packaging machines and aseptic cartons and create a dominant position in the market for PET packaging equipment and, in particular SBM machines (low and high capacity) in the "sensitive" product and end-use segments, LDPs, juices, FFDs and tea/coffee drinks.

214 The merged entity's future dominant position in two closely neighbouring markets as well as a notable position in a third market (EBM machines and HDPE filling machines) are likely to reinforce its position in both markets, raise barriers to entry, minimise the importance of existing competitors and lead to a monopolistic structure of the whole market for aseptic and non-aseptic packaging of "sensitive" products in the EEA.'

40 In support of its findings, the Commission notes, first, that, as regards the carton packaging market, very little has changed since the '*Tetra Pak II*' judgments (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, confirmed on appeal in Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-5951). Thus it finds that, in the year 2000 in the EEA, Tetra had a dominant position on the market for aseptic packaging machines and cartons, with a market share of 80% (recitals 219 and 223) and a 'leading' position in the market for non-aseptic packaging machines and cartons, with a market share of [50-60%] [1] (recitals 229 and 231). Second, whilst acknowledging that Sidel does not have a dominant position on the market for SBM machines, the Commission concludes that it has a 'leading' position, since it is 'the only company capable of providing the full range of SBM machines from very low capacity to the highest capacity always using leading rotary technology' (recital 248). Noting that '[t]he importance of effectively managing filling operations in combination with blow moulding is particularly apparent with regard to "sensitive" products such as milk and fruit juice to ensure clean or ultra-clean packaging processes' (recital 249), the Commission observes that Sidel manufactures aseptic and non-aseptic filling machines (recital 250) and that it has an innovative Combi technology which allows it to integrate blowing, filling and capping in a single machine (recital 254). The Commission concludes that Sidel has a 'leading position in the [...] SBM market' and a 'strong position' in other PET packaging equipment, in particular 'aseptic filling machines, secondary equipment and associated services' (recital 259).

1 — Confidential information omitted.

41 With respect to the creation of a dominant position on the market for PET and the reinforcement of Tetra's position on the carton markets, the contested decision deals, firstly, with the horizontal and vertical effects of the merger; secondly, the 'leveraging' effect from the carton markets into the PET market; thirdly, the effects on the carton markets following from the elimination of competitive pressure from the PET market; and, lastly, the overall effects on the carton and PET markets.

42 First of all, as regards horizontal effects, the Commission considers that, since both Tetra and Sidel are active on three distinct product markets: 'SBM machines (low capacity); barrier technology and aseptic PET filling machines' (recital 263), the transaction would strengthen the position of the merged entity on those three markets. Whilst acknowledging that that position does not constitute a dominant position, the Commission finds that it would reach 'the level of dominance through the leveraging of the merged entity's dominant position in aseptic carton packaging equipment and aseptic cartons' (recital 263).

43 Secondly, the Commission states that the 'significant vertical effects' which would result from 'the vertical integration of the merged entity in the three packaging systems (carton, PET and HDPE)' could 'lead to vertical foreclosure of independent converters' (recital 291). The market structure created by the merger would foreclose independent converters in the following way (recital 292):

'(i) the merged entity would be the only vertically integrated liquid food packaging company in carton (carton packaging machines and carton reels), HDPE (EBM machines and HDPE bottles) and PET packaging (SBM machines, barrier technology, aseptic fillers, preforms and bottles); (ii) the merged entity's dual position as supplier and competitor of converters would be likely to create a channel conflict in the market. Using its strong market position as supplier of

SBM machines to converters which are to a certain extent dependent on Sidel, the merged entity may be able to raise converters' costs and marginalise their market position as suppliers of preforms and turnkey installations. Tetra/Sidel may be able to offer combined packages of SBM machines and preforms for instance by using Tetra's successful business strategy in carton, offering the SBM machines at a low price and recouping the cost by tying the customer with a long-term contract for the supply of standard and barrier enhanced preforms. The merged entity may also have the ability to offer turnkey installations to its customers without the use of converters'.

44 Next, the extent of Tetra's vertical integration on the markets for carton is highlighted, markets in which it has a 'business model of offering integrated solutions of machines and cartons (reels or blanks) to its customers' (recital 296) on the market for HDPE, where it produces HDPE bottles on EBM machines through an alliance with Graham Engineering Corporation and supplies them to customers as a converter through HTW agreements, and also on the PET market. Regarding the PET market, the Commission observes that Tetra is 'the third largest independent preform supplier in the world with a market share of 10%', that it 'has plans to produce a limited number of finished PET bottles enhanced with its proprietary barrier technology Glaskin' and that, since 1999, it 'is active in plastic beverage bottle closures through its subsidiary Novembal' with a '[10-20%] market share in 2000 in the EEA' (recital 298). This integration distinguishes it from Sidel, which 'is not a vertically integrated company' (recital 293). None the less, the entity resulting from the merger 'is likely to create a channel conflict in the market as the merged entity would be a supplier and competitor of converters' (recital 301) and 'may have the ability to marginalise converters by offering customers combined packages of SBM machines and preforms as well as turnkey installations' (recital 312). It is also possible that it might be able to 'marginalise converters from these activities by refusing the supply of SBM machines or raising their costs and favouring its own integrated business' (recital 318). As for Tetra's decision to leave the preforms market, the Commission states that it 'does not conclude that these vertical concerns would, by themselves, result in the creation of a dominant position for PET or preforms' (recital 324).

45 The Commission then sets out in detail (recitals 325 to 389) the reasons for its concern that the merged entity would exploit its dominant position on the carton markets by 'leveraging' into the market for PET packaging equipment in order to 'dominate the PET market for "sensitive" end-products' (recital 328). It takes the view that it is sufficient that Tetra/Sidel have that possibility for the transaction to be incompatible with the common market. Thus the concerns of the Commission arise not from the position currently held by Sidel on the SBM machine market, but rather from '*Tetra's* dominance in the *carton* market' (recital 328, emphasis in the original). Referring *inter alia* to the close links between the two markets for carton packaging and PET packaging equipment, the Commission finds that the merger 'would create a market structure providing considerable scope for anti-competitive effects arising from the merged entity's simultaneous dominant and leading position in carton and PET equipment respectively' (recital 330).

46 Its analysis '[is] explained in four stages' (recital 331). First, the markets for carton and PET packaging systems 'belong to closely neighbouring product markets with a common pool of customers'. Second, given the future growth of PET in the new sensitive product segments, the merger would enable the merged entity to acquire a dominant position on the PET market by leveraging Tetra's current dominant position on the carton markets. Third, the merger would strengthen Tetra's dominant position in the carton markets. Fourth, the combination of the two dominant positions would consolidate the merged entity's position in the sector for packaging for 'sensitive' products, especially aseptic packaging, thus reinforcing the two dominant positions.

47 In support of its analysis, the Commission cites the fact that the notified transaction is of strategic importance to Tetra, that Tetra has the ability and would have an incentive to engage in leveraging, that the competitors of the merged entity would not be able to rival it at various levels, and, lastly, that Tetra could practise price discrimination.

48 With respect to the ability and the incentive to engage in leveraging, the Commission concludes that 'the market structure resulting from the merger would be particularly conducive to leveraging effects' (recital 359):

'(a) There would be a common pool of customers requiring both carton and PET packaging systems to package "sensitive" liquids.

(b) Tetra has a particularly strong dominant position in aseptic carton packaging with more than [80-90%] of the market and a dependent customer base.

(c) Tetra/Sidel would start from a strong, leading, position in PET packaging systems and in particular SBM machines with a market share in the region of [60-70%].

(d) Tetra/Sidel would have the ability to target selectively specific customers or specific customer groups as the structure of the market enables price discrimination.

(e) Tetra/Sidel would have a strong economic incentive to engage in leveraging practices. As carton and PET are technical substitutes, when a customer switches to PET he/she is a lost customer on the carton side of the business either because he/she partially switched *from* carton or because he/she did not switch some of the production *to* carton from other packaging materials. This creates an added incentive to capture the customer on the PET side of

the business to recover the loss. Therefore, by leveraging its current market position in carton, Tetra/Sidel would not only enhance its market share on the PET side but defend or compensate its possible loss on the carton side.

(f) Competitors of Tetra/Sidel in both the carton and the PET equipment markets would be much smaller, with the largest competitor having no more than [10-20%] share in the market for carton packaging machines or SBM machines.'

49 The leveraging practices would be based on Tetra's current dominant position on the aseptic carton markets (recital 364):

'Leveraging [this position] [...] in a number of ways [...] Tetra/Sidel would have the ability to tie carton packaging equipment and consumables with PET packaging equipment and, possibly, preforms (in particular barrier-enhanced preforms). Tetra/Sidel would also have the ability to use pressure or incentives (such as predatory pricing or price wars and loyalty rebates) so that its carton customers buy PET equipment and, possibly, preforms from... Tetra/Sidel and not from its competitors or converters'.

50 The Commission also states that '[m]any customers who will continue to need carton packaging for part of their production needs could be forced or provided with incentives to source both their carton and PET equipment from a single supplier of carton and PET packaging equipment' and that '[c]ustomers having long-term agreements with Tetra for their carton packaging needs will be particularly vulnerable to such pressures' (recital 365).

51 The leveraging could cause competitors of Tetra/Sidel to be foreclosed from the SBM machine market for sensitive products for the following reasons (recital 369):

'(a) whether competitors can continue to sell in the untied product segments (e.g. water or CSDs) is not relevant. This is due to the ability to price discriminate and target specific customer groups which results in a segmentation of the relevant markets by end-use; b) the "sensitive" product segments consist of very complex liquids which require very specific PET lines including barrier technologies and aseptic filling machines or aseptic Combi SBM machines [which combine blowing, filling and capping]. Competitors would not have sufficient incentive to invest and compete in these high technology areas of PET equipment [...] [and] would thus be foreclosed from the so-called "second era" markets of PET'.

52 They could also be foreclosed 'from the rest of the SBM machine market' (recital 370).

53 According to the Commission, this outcome is all the more likely given the weak position of the merged entity's competitors and its customers' lack of purchasing power. The Commission notes, in relation to the competitors' position, that a 'crucial' point for it is that, even if Sidel's three competitors in the market for high capacity SBM machines can match Sidel's offerings, the fact remains that they will 'lack the merged entity's dominant position in carton packaging' (recital 372). It states that:

'The SIG group, the only one of the three competitors which will have both carton and PET activities, will have market shares of no more than [10-20%] in

carton packaging machines and SBM machines. SIG lacks the full range of the merged entity in PET equipment as it currently lacks an essential element, barrier technology, for any future penetration in PET's new product segments. No other supplier of packaging equipment will be able to offer both carton and PET packaging equipment.'

54 It concludes that 'by combining the dominant company in carton packaging, Tetra, and the leading company in PET packaging equipment, Sidel, the proposed transaction would create a market structure which would provide the merged entity with the incentives and tools to turn its leading position in PET packaging equipment, in particular SBM machines (low and high capacity) used for the "sensitive" product segments, into a dominant position. This is also likely to enhance the merged entity's position and have anti-competitive effects on the overall SBM machine market' (recital 389).

55 Regarding the alleged effects on the carton markets, the Commission takes the view that the merger 'would create a market structure which would enable Tetra to strengthen its current dominant position in carton packaging by eliminating a source of significant competitive constraint', which could have 'serious negative consequences in the carton packaging sector' (recitals 390 and 391). The Commission refers to the need to be particularly vigilant when faced with the strengthening of such a high degree of dominance, as in the present case.

56 According to the Commission, without the merger, companies active in PET packaging, especially Sidel and converters, would engage in business strategies aimed at increasing the use of PET in order to take market share from carton. It dismisses the relevance of Tetra's argument that Sidel is able to influence only the

price of SBM machines, which forms a very small proportion of the total packaging cost, on the ground that it is the ability of Tetra to influence the price of both carton machines and cartons which is important.

57 Without the merger, 'PET companies would be expected to compete vigorously to gain market share from carton' (recital 398), and 'Tetra would also be expected to defend its position fiercely by seeking to improve its carton packaging solutions by innovating, bringing better carton technology, new carton shapes and closures and, in some cases, lowering carton prices to defend its position. Indeed, Tetra has been active in this field and has produced new carton packages with more user-friendly features such as the carton gable top package with screw top closure' (recital 398). The merger would not only eliminate the need for Tetra to compete as vigorously, but would also enable it to 'control significantly the shift from carton to PET' (recital 399). Thus, it could keep 'its carton package prices at the current high levels for those customers or that part of customers' production unable or unlikely to switch totally or partially to PET due to consumer preferences, switching costs and long-term contracts', whilst continuing, for customers wishing to switch to PET, to 'be in a position to influence its customers' choice of packaging machines, for example, through the timing of the shift, and to offer its timely and tailor-made solutions, thus increasing its PET equipment market share' (recital 399). Thus, Tetra could pre-empt 'the major advantage of its main competitor, the SIG group which is the only other company in the world that manufactures and sells both carton and PET packaging equipment' (recital 400).

58 The Commission also finds that '[t]he fact that the merged entity [holds] dominant positions in two closely related neighbouring markets (carton and PET packaging equipment) and a notable presence in a third market (HDPE) would enable the merged entity to have a particularly strong presence in the sectors for the packaging of the relevant end-use products (LDPs, juice, FFDs, tea/coffee

drinks)' (recital 404). This would also strengthen the already 'strong' position (recital 407) of Tetra in the sector of packaging of the 'sensitive' products and would increase the barriers to entry for the competitors of Tetra/Sidel, which would allow the merged entity to 'marginalise competitors and [...] reinforc[e] dominance in the relevant markets for carton packaging equipment and PET packaging equipment, in particular SBM machines used for "sensitive" products' (recital 408).

*The commitments*

59 The commitments, set out in the Annex to the contested decision, are summarised by the Commission as consisting of: '(i) divestiture of Tetra's SBM business; (ii) divestiture of Tetra's PET preform business; (iii) holding Sidel separate from Tetra Pak companies and pre-existing behavioural remedies under Article 82 of the Treaty; and (iv) granting a licence for Sidel's SBM machines for sale to customers filling "sensitive" products and for sales to converters' (recital 410). The Commission finds them to be 'insufficient to eliminate the major competition concerns identified on the PET packaging equipment and carton packaging markets' (recital 424). The proposed divestiture of Tetra's SBM business and PET preform business would only have 'a minimal impact on the position of the merged entity', whilst the licence, in particular for Sidel's SBM machine business for sensitive products, would not only be insufficient to eliminate the problems but would not appear to be 'a viable option' (recital 424). The licence 'may actually introduce complex mechanisms in the market resulting in artificial regulation' (recital 424). Lastly, the two behavioural commitments concerning the separation of Sidel's and Tetra's business and compliance with Article 82 EC 'are considered insufficient as such to resolve the concerns arising from the structure of the market following the merger' (recital 424).

60 Given their 'overall insufficiency to address the competition concerns raised by the transaction', the Commission finds that the commitments 'thus cannot form the basis for an authorisation decision' (recital 451).

61 Accordingly, Article 1 of the contested decision states:

'The concentration, notified to the Commission by Tetra Laval BV [...], 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.'

## Procedure

62 By application lodged with the Registry of the Court of First Instance on 15 January 2002, the applicant brought the present action against the contested decision.

63 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. The Commission, in its observations on that application, lodged on 5 February 2002, agreed that the procedure was justified.

64 On 6 February 2002, the First Chamber of the Court of First Instance, to which the case has been assigned, decided to grant the application for an expedited procedure.

65 The Commission lodged its defence on 12 March 2002.

66 By application lodged at the Registry of the Court of First Instance on 19 March 2002, the applicant brought an action, registered under Case T-80/02, seeking the annulment of the decision of 30 January 2002 (see paragraph 26 above) and the joinder of the present case with Case T-80/02. By a separate document lodged on the same day, Tetra also requested an expedited procedure in Case T-80/02, which was supported by the Commission in its observations in respect of that application, lodged on 3 April 2002. That case was also assigned to the First Chamber of the Court of First Instance.

67 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.

68 The applicant accepted at the informal meeting that its application for joinder of the present case and Case T-80/02 could be regarded as withdrawn if the oral hearings in both cases could be held consecutively and if the judgments were to be delivered, pursuant to the expedited procedure, on the same date. At the meeting the parties were given leave to lodge speaking notes no later than one week prior to the oral hearings for the two cases.

69 On 18 April 2002, the First Chamber of the Court of First Instance granted the application for the procedure to be expedited in Case T-80/02 and set 26 and 27 June 2002 as the dates for the hearings in the two cases.