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***Tetra Laval/Sidel* Approved on Remand**

On 13 January 2003, the European Commission approved the proposed acquisition by the Swiss-Swedish Tetra Laval Group of French packaging equipment maker Sidel. This marks the first time that companies using the new "fast-track" procedure before the Court of First Instance (CFI) have managed to obtain a merger clearance decision on remand after an initial Commission prohibition. The Commission issued its clearance decision after an intensive first-phase investigation.

The approval demonstrates that the new "fast-track" appeal procedure of the CFI is an important step towards effective judicial review of merger decisions. It also shows that the Commission is willing to reverse itself in response to the CFI's judgment.

Despite Tetra Laval's successful recourse to the CFI in this case, the fact remains that companies will normally find it very difficult to save their deals with the help of the Community Courts. The ultimate approval by the Commission comes almost 20 months after the deal was first notified, and was heavily influenced by the CFI's detailed substantive review of the case. The Commission has now appealed the CFI's judgment to the European Court of Justice (ECJ) with the very aim of curbing such searching judicial review in future cases.

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I. The Proceedings

In May 2001, Tetra Laval BV (part of the Tetra Laval Group, "Tetra Laval") notified to the Commission its proposed acquisition of French company Sidel S.A. Tetra Laval, through its Tetra Pak business, is the leading manufacturer of aseptic and non-aseptic carton packaging systems, which are used for many consumer goods. Sidel is the leader in PET packaging equipment, in particular "stretch-blow molding" (SBM) machines for making empty PET bottles. In October 2001, the Commission prohibited the transaction based on conglomerate concerns *(i.e.*, the possibility of leveraging market power into a neighboring market and the elimination of potential competition across packaging systems).

Tetra Laval appealed the prohibition decision to the CFI. The appeal was only the second merger appeal to benefit from the CFI's new "fast-track" appeal procedure,[1] which is designed to eliminate several time-consuming procedural steps in the appeal process and enable the CFI to render judgment much more quickly. In the European Union, courts have traditionally played a

[1] The Tetra Laval appeal and the appeal by Schneider Electric of the *Schneider/Legrand* prohibition decision were heard and decided within days of each other.

relatively insubstantial role in the merger review process, largely because the CFI takes up to three years to review Commission decisions under the standard appeal procedure. Given business exigencies and risks, parties are rarely able to keep alive a transaction the Commission has prohibited in hopes of obtaining relief from the CFI.

The CFI's judgment in *Tetra Laval* comprehensively rejected the Commission's substantive determination. Since the CFI has no power to make its own substantive determination and, thus, grant approval itself, it can only declare the Commission's prohibition annulled. The Commission is then obliged under the Merger Regulation to reassess the transaction, taking into account the CFI's ruling. Thus, Tetra Laval had to go back to the Commission and submit the transaction for a second review.

The second review commenced in November 2002, once Tetra Laval had updated its notification to include any market developments since its original notification in May 2001. On 13 January 2003, the Commission granted approval in the first phase of the merger review process in light of the CFI's holding, without opening a detailed second phase investigation. Tetra Laval may now complete its transaction and integrate Sidel into its business, some 20 months after its original notification.

On 8 January 2003, the Commission appealed the CFI's Judgment to the ECJ. In its clearance decision, the Commission stated that, because the decision takes into account the CFI's judgment, the outcome of its appeal to the ECJ could permit it to reconsider its clearance.

II. Implications of Tetra Leval for Future Merger Reviews

The CFI's judgment in *Tetra Laval*, in conjunction with the Commission's approval on remand, is significant for several reasons.

First, *Tetra Laval* demonstrates that it is possible to obtain effective judicial review in EC merger cases, in the sense of actually saving the deal through recourse to the fast-track procedure before the Community Courts. However, companies must keep in mind that Tetra Laval benefited from some special circumstances in this case. Since a quirk of French law had required Tetra Laval to acquire the shares in Sidel before making its original notification to the Commission, Tetra Laval continued to own Sidel at the end of the appeal process and was, therefore, very well positioned to seek clearance again. It will be the rare case in which an unconsummated public bid or even a private transaction can be held in limbo for the 20 months or so that it took Tetra Laval to gain approval via the expedited procedure. Moreover, given the CFI's institutional constraints, it is not clear that it will grant all fast-track applications in merger cases, or that it will review each case as quickly and as effectively as in *Tetra Laval*.

Second, *Tetra Laval* is one of a clutch of judgments overturning Commission prohibition decisions. It came only three days after the CFI annulled the Commission's prohibition decision in *Schneider/Legrand*,[2] and only months after the landmark *Airtours* decision.[3] It is now clear that the Court engages in a detailed review of the case file, rather than limiting itself to identifying particularly obvious errors in the Commission's analysis. However, as the *Schneider* case demonstrates, even such a searching review will not necessarily predetermine the final outcome of the Commission's proceedings on remand. In *Tetra Leval*, the CFI's wholesale rejection of the Commission's substantive analysis left the Commission no room to prohibit the

[2] Cases T-310/01 and T-77/02, *Schneider Electric v. Commission*, Judgments of the Court of First Instance of 22 October 2002.
[3] Case T-342/99, *Airtours plc. v. Commission*, Judgment of the Court of First Instance of 6 June 2002.

transaction on other grounds, but that will not always be the case. Indeed, in *Schneider/Legrand*, the Commission prohibited the merger after a second review on grounds that the CFI had not addressed (dominant position on the French market).

Third, *Tetra Laval* is the first judgment where the CFI has addressed theories of competitive harm based on conglomerate concerns, in particular leveraging theories. Although such concerns have been generally abandoned in the United States since the 1970s, the Commission has relied heavily on them in the past two years (most notably in its controversial *GE/Honeywell* prohibition[4]). Although the CFI did not rule out the possibility that conglomerate theories might provide a valid basis for prohibiting a merger in some contexts, it imposed a high standard of proof on the Commission. In particular, it made clear that these theories must be grounded in objective and cogent factual evidence: "Since the effects of a conglomerate-type merger are generally considered to be neutral, or even beneficial […], *the proof of anti-competitive conglomerate effects of such a merger calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects*." (emphasis added)

Accordingly, the CFI closely examined the Commission's findings concerning conglomerate effects. It held that the Commission could not merely assume that merging parties will engage in behavior that violates Article 82 EC (prohibiting monopolization); instead, it must analyze the actual likelihood of such behavior (given the possibility of detection and fines). The CFI then conducted its own highly detailed analysis of the Commission's reasoning, looking not only at the arguments and factual evidence presented during the appeal, but also more broadly at documentation from the original proceeding before the Commission.

Fourth, the CFI's judgment implicitly recognized the validity of behavioral commitments to remedy conglomerate concerns in appropriate cases. Although the Commission clearly prefers structural remedies (such as divestitures) to behavioral remedies, as evidenced in its Remedies Notice,[5] the CFI judgment may cause it to consider more seriously whether proposed behavioral remedies will adequately address competitive concerns in particular cases.

Finally, the CFI's rejection of Tetra Laval's procedural arguments (relating to insufficient access to the Commission's file), together with its dismissal of an important procedural plea in *Schneider/Legrand,* may indicate that the court is taking a relatively "hands-off" approach towards reviewing the Commission's procedure. It may be that the CFI will allow the Commission a certain amount of procedural leeway, provided that substantive issues are addressed with sufficient care.

III. Implications of the Commission's Appeal

The Commission's decision to appeal the CFI's judgment and its declaration that it "could re-assess its clearance in light of future court proceedings" may well undermine the newly increased confidence of industry in the effectiveness of judicial review under the CFI's "fast-track" appeal process following the *Tetra Laval* clearance decision. The Commission's approval of the transaction without a second-phase investigation on remand was in large part driven by the fact that the CFI had so thoroughly reviewed the Commission's findings that the Commission had little choice but to approve the transaction on remand absent any substantial

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4 Case No. COMP/M.2220, *General Electric/Honeywell*, Commission decision of 3 July 2001.

5 O.J. C 68/3 of 2 March 2001.

new developments. The Commission's appeal to the ECJ aims at curbing such searching review.

The Commission's appeal also leaves open whether the CFI's judgment will bring permanent changes to Commission merger reviews generally. While its appeal is pending, the Commission will have to abide by the stringent standard of proof the CFI has imposed. Until the appeal is resolved, however, we will not know for certain if the Commission will remain subject to these standards in its future merger review proceedings.

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