

# BEHIND

## EUROPEAN COURT OF JUSTICE DELIVERS LANDMARK DECISION IN TETRA LAVAL/SIDEL CASE

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On 15 February 2005, the European Court of Justice (ECJ) delivered two judgments in Cases C-12/03 P and C-13/03 P *Commission of the European Communities v. Tetra Laval BV* confirming an October 2002 judgment of the Court of First Instance (CFI) that annulled the European Commission's decision to block the Tetra Laval/Sidel merger.

The ECJ judgment will compel the Commission to adopt a more rigorous approach when reviewing mergers by raising the standard of proof that the Commission may rely on. This will be particularly relevant in the case of conglomerate mergers. The analysis of these types of mergers is necessarily prospective since the Commission cannot rely on existing overlaps or vertical relationships.

As a result of the ECJ judgment, the Commission will be required to produce particularly convincing evidence in order to establish the anti-competitive effects of such mergers. In this respect, the judgment may be of particular interest to private equity investors, many of whom value diversification. Consequently, their acquisitions are often more prone to give rise to conglomerate effect concerns, rather than traditional horizontal or vertical concerns.

The case is also important as it sends a direct message to buyers who are willing to offer commitments on their future behaviour in order to further alleviate competition law concerns for the deal, as the judgment also confirmed that the Commission cannot dismiss behavioural commitments as a matter of principle without having made a *bona fide* attempt to analyze whether or not such commitments are adequate to address competition concerns.

In 2001, Tetra Laval BV's French subsidiary Tetra Laval SA (Tetra Laval) acquired Sidel SA (Sidel), a French company, as a result of a successful public bid. Tetra Laval is active on the market for equipment and consumables used in the production of carton packaging for liquid food. Sidel is a leading producer of stretch blow moulding (SBM) machines that are used to produce another type of liquid food packaging made of plastic material PET (polyethylene terephthalate).

The Commission prohibited the merger on the grounds that Tetra Laval could leverage its dominant position on the market for carton packaging equipment/consumables into the neighbouring market for SBM machines, by persuading its customers who were switching to PET to choose Sidel's SBM machines. The Commission also considered that the elimination of Sidel as a significant potential competitor in the packaging market would deprive Tetra Laval of any incentive to lower prices and innovate in that market. Tetra Laval successfully appealed the Commission's decision to the CFI. The Commission in turn appealed the CFI judgment to the ECJ but was unsuccessful on virtually every ground of appeal.

The Commission's first ground of appeal was that the CFI wrongfully ignored the Commission's margin of discretion in the appraisal of complex economic matters in merger cases. For the Commission, the CFI unduly raised the Commission's standard of proof by requiring the adduction of "convincing evidence" of the anti-competitive effects of the merger. The ECJ considered that, although the Commission had some discretion in its economic appraisal of mergers, it was appropriate for the Community Courts

# the merger

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to determine whether the evidence relied on contained all the information necessary to substantiate the Commission's conclusions. The ECJ confirmed that this requirement was particularly important for conglomerate mergers since, in these cases, the Commission could not rely on existing overlaps or vertical relationships to establish anti-competitive effects. The ECJ pointed out that these mergers could be challenged only if the Commission produced high-quality and convincing evidence that such effects would occur.

The Commission's second ground of appeal was that the CFI wrongly concluded that the Commission should have considered whether the illegality of the conduct resulting in leveraging could have acted as a disincentive on Tetra Laval to adopt such a conduct. The ECJ only endorsed part of the CFI's findings. It agreed with the CFI that the Commission had to assess the likelihood that Tetra Laval would engage in such leveraging. However, the ECJ found that the Commission was not required under this analysis to undertake an exhaustive examination of the legal orders and enforcement rules applicable in the various Member

States since this would be too complex a task and run counter to the purpose of the Merger Control Regulation.

Nonetheless, Tetra Laval had offered commitments not to engage in illegal conduct that would result in leveraging. The ECJ accepted the CFI's findings that the Commission had wrongfully dismissed these commitments as inadequate as a matter of principle. The Commission ought to have made an assessment of whether or not these remedies could have effectively removed the competition concerns.

Lastly, the Commission argued that the elimination of Sidel as Tetra Laval's potential competitor on the market for carton packaging, equipment and consumables was detrimental to competition because Tetra Laval would lose an essential incentive to lower prices and innovate. The ECJ rejected the Commission's findings, considering that the Commission had failed to take into account the reaction of Tetra Laval's competitors in that case and, in particular whether they could have cancelled out the elimination of Sidel as a potential competitor by taking advantage of Tetra's failure to price competitively and lack of innovation.

All attention will now focus on the Court's anticipated judgment in the *GE/Honeywell* case where conglomerate effects were also at issue. [ACQ](#)

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