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Opinion of the Advocate General in appeal Cases C-12/03 P and C-13/03 P

Commission of the European Communities v Tetra Laval

ADVOCATE GENERAL TIZZANO CONSIDERS THAT, ALTHOUGH THE COURT OF FIRST INSTANCE DID COMMIT VARIOUS ERRORS OF LAW (IN PARTICULAR WITH REGARD TO THE SCOPE OF JUDICIAL REVIEW), THE JUDGMENTS UNDER APPEAL OUGHT NOT TO BE SET ASIDE

In October 2001 the Commission prohibited a merger of Tetra Laval SA (“Tetra”), which belongs to a group dominant in carton packaging for drinks, with Sidel SA, the market leader in the production of machines for packaging drinks in polyethylene terephthalate (“PET”) containers. According to the Commission, such a merger would have led to the creation of a dominant position on the PET packaging markets and subsequently to the strengthening of Tetra’s dominant position in carton packaging. By a decision of 30 January 2002, the Commission then ordered the separation of the two companies in order to restore conditions of effective competition.

On Tetra’s application both decisions were annulled by the Court of First Instance in judgments given on 25 October 2002¹. The Commission brought appeals against those judgments before the Court of Justice.

Advocate General Tizzano has today delivered his Opinions.

In respect of the judgment concerning the decision prohibiting the merger, the Advocate General considers well-founded the Commission’s objections to the assessments made by the Court of First Instance so far as the foreseeable growth in the use of PET for the packaging of liquid dairy products and the difference in the costs of PET and carton are concerned. Those assessments, to the Advocate General’s mind, are invalidated by excessive extension of judicial review, by incomplete or

¹ See Press Release No 87/2002 of 25 October 2002
(<http://curia.eu.int/fr/actu/communiqués/cp02/aff/cp0287fr.htm>)

inaccurate assessment of the relevant factors or by inadequate reasoning, as the case may be.

On the other hand, the Court of First Instance committed no error of law when it found that the Commission had not taken into consideration, as a possible disincentive to engaging in certain leveraging practices, the unlawfulness of the conduct which would have reflected those practices (conduct which would have led to the abuse of a dominant position) and the commitments in that regard offered by Tetra.

Nor, according to the Advocate General, are the Commission's objections well founded with regard to: (i) possible segmentation of the markets for particular machines depending on end use and (ii) strengthening of Tetra's dominant position on account of the reduction in indirect competition by PET.

Last, the Advocate General considers that the Commission's objections are well founded only in part in relation to the possible creation of a dominant position on the markets for machines for the production of plastic containers. In his view, the Court of First Instance committed errors of law only in relation to the "first-mover's" advantage with regard to the packaging of liquid dairy products and the opportunity for converters to resist leveraging.

In conclusion, while acknowledging that the Court of First Instance committed various errors (particularly as regards the scope of judicial review), the Advocate General proposes that the Court of Justice should not set aside the judgment under appeal, inasmuch as its operative part is in any case based on other legal grounds.

Having reached that conclusion concerning judgment on the decision prohibiting the merger, the Advocate General suggests that the appeal against the judgment on the divestiture decision should also be dismissed.

Important: The Opinion of the Advocate General is not binding on the Court. His role is to suggest to the Court, in complete independence, a legal solution to the case pending before it. The Court of Justice will now deliberate upon this case. Judgment will be delivered at a later date.

Unofficial document for media use which does not bind the Court of Justice.

Languages available:, English, French, German, Italian, Polish and Spanish

The full text of these Opinions may be found on our internet page

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In principle it will be available after midday (CET) on the day of delivery.

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