

JUDGMENT OF THE COURT (Grand Chamber)

15 February 2005<sup>\*</sup>

In Case C-13/03 P,

APPEAL under Article 49 of the EC Statute of the Court of Justice lodged on 8 January 2003,

**Commission of the European Communities**, represented by M. Petite, A. Whelan and P. Hellström, acting as Agents, with an address for service in Luxembourg,

appellant,

the other party to the proceedings being:

**Tetra Laval BV**, established in Amsterdam (Netherlands), represented by A. Vandencastele and D. Waelbroeck of the Brussels Bar, M. Johnsson of the Swedish Bar, and A. Weitbrecht and S. Völcker, Rechtsanwälte,

applicant at first instance,

<sup>\*</sup> Language of the case: English.

THE COURT (Grand Chamber),

composed of P. Jann, President of the First Chamber, acting for the President, C.W.A. Timmermans and A. Rosas (Rapporteur), Presidents of Chambers, C. Gulmann, J.-P. Puissochet, R. Schintgen, N. Colneric, S. von Bahr and J.N. Cunha Rodrigues, Judges,

Advocate General: A. Tizzano,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 27 January 2004,

after hearing the Opinion of the Advocate General at the sitting on 25 May 2004,

gives the following

### **Judgment**

- 1 By its appeal, the Commission of the European Communities asks the Court to set aside the judgment of the Court of First Instance of the European Communities in Case T-80/02 *Tetra Laval v Commission* [2002] ECR II-4519 ('the judgment under appeal'), by which the Court of First Instance annulled Commission Decision

2004/103/EC of 30 January 2002 setting out measures in order to restore conditions of effective competition pursuant to Article 8(4) of Council Regulation (EEC) No 4064/89 (Case COMP/M. 2416 — Tetra Laval/Sidel) (OJ 2004 L 38, p. 1, ‘the divestiture decision’).

### **Regulation (EEC) No 4064/89**

- 2 Article 8(3) and (4) of 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), (‘the Regulation’) provides:

‘3. Where 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.

4. Where a concentration has already been implemented, the Commission may, in a decision pursuant to paragraph 3 or by separate decision, require the undertakings or assets brought together to be separated or the cessation of joint control or any other action that may be appropriate in order to restore conditions of effective competition.’

## **The Commission decisions**

- 3 On 30 October 2001, the Commission adopted Commission Decision 2004/124/EC declaring a concentration to be incompatible with the common market and the EEA Agreement (Case No COMP/M. 2416 — Tetra Laval/Sidel) (OJ 2004 L 43, p. 13, ‘the prohibition decision’).
- 4 On 30 January 2002, the Commission adopted the divestiture decision, ordering measures designed to restore conditions of effective competition, pursuant to Article 8(4) of the Regulation. In Article 1 of that decision, of which Tetra Laval BV (‘Tetra’) was notified on 4 February 2002, the Commission ordered Tetra to divest itself of its shares in Sidel SA and set out the procedure for that divestiture.
- 5 By application lodged at the Registry of the Court of First Instance on 15 January 2002, Tetra brought an action for annulment of the prohibition decision, which was registered as Case T-5/02.
- 6 By application lodged at the Registry of the Court of First Instance on 19 March 2002, Tetra brought a second action, by which it sought annulment of the divestiture decision.

- 7 By its judgment in Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381 ('the judgment in Case T-5/02'), the Court of First Instance annulled the prohibition decision.
- 8 By the judgment under appeal, the Court of First Instance annulled the divestiture decision.

### **The judgment under appeal**

- 9 In paragraphs 36 to 43 of the judgment under appeal, the Court of First Instance ruled as follows:

'36 The Court finds, first of all, that the scheme of the Regulation, and particularly the 16th recital, show that the objective of Article 8(4) is to allow the Commission to adopt all the decisions necessary for the restoration of conditions of effective competition. When, as in the present case, the concentration has been implemented pursuant to Article 7(3) of the Regulation, the separation of the undertakings involved in the concentration is the logical consequence of the decision declaring the concentration incompatible with the common market.

37 However, the adoption of a divestiture decision subsequent to the adoption of a decision declaring a concentration incompatible with the common market presupposes that the latter decision is valid. Since the object of a divestiture decision adopted pursuant to Article 8(4) of the Regulation is to restore conditions of effective competition which have been impeded by the prohibited concentration, it is obvious that its validity is contingent on that of the decision prohibiting the concentration and that, accordingly, annulment of the latter decision completely deprives the divestiture decision of any legal basis.

38 This conclusion is confirmed by the fact that, under Article 8(4) of the Regulation, the divestiture of shareholdings acquired in a concentration transaction can be ordered even in the prohibition decision that has been adopted pursuant to Article 8(3).

39 Moreover, this conclusion is not called into question by the Commission's reference to the judgment in [Joined Cases 97/86, 193/86, 99/86 and 215/86 *Asteris and Others v Commission* [1988] ECR 2181, paragraphs 30 and 32, "the judgment in *Asteris*"]. First of all, it should be noted that in that case the Court of Justice confirmed "the retroactive effects of judgments by which measures are annulled" (paragraph 30). Secondly, the judgment in *Asteris* concerned in particular the effects which the annulment of a regulation with a clearly defined temporal scope have on provisions of subsequent regulations with the same content as the one found to be illegal. That case thus concerns the scope of the obligation under Article 233 EC on the institution responsible for the adoption of the subsequent regulations to take the necessary measures to comply with the judgment annulling the first regulation.

40 The present case, however, unlike the situation which gave rise to the judgment in *Asteris*, does not concern regulations containing identical provisions, but

rather a divestiture decision which merely gives effect to an earlier prohibition decision. The mere fact that the prohibition decision had not yet been annulled when the divestiture decision was adopted cannot cause the subsequent declaration of annulment of the earlier decision to be deprived of retroactive effect.

41 ... the Court has annulled the prohibition decision by its judgment today in Case T-5/02.

42 Since the illegality of the prohibition decision thus leads to the illegality of the divestiture decision, the present action for annulment of the divestiture decision must be upheld and it is not necessary to examine the other pleas raised by the applicant.

43 Accordingly, the divestiture decision is annulled.'

## **The appeal**

<sup>10</sup> By application lodged at the Court Registry on 8 January 2003, the Commission brought an appeal under Article 225 EC and the first paragraph of Article 49 of the EC Statute of the Court of Justice against the judgment in Case T-5/02.

## Arguments of the parties

- 11 In support of its appeal in the present case, the Commission submits that, should the appeal brought against the judgment in Case T-5/02 lead to that judgment's being set aside, the judgment under appeal will be based on a premiss vitiated by an error in law, namely the annulment of the prohibition decision. The annulment of the prohibition decision by the Court of First Instance having been the sole ground for its annulling the divestiture decision, the setting aside of the judgment in T-5/02, by which the former decision was annulled, will invalidate the judgment under appeal, by which the latter decision was annulled.
- 12 The Commission therefore takes the view that, if the appeal brought against the judgment in Case T-5/02 is upheld in the light of the detailed legal submissions set out in that appeal, the judgment under appeal will have to be set aside.
- 13 Tetra contends that the appeal is inadmissible. Contrary to the requirements of Article 112(1)(c) of the Rules of Procedure, the appeal does not contain the pleas in law and legal arguments relied on against the judgment under appeal.
- 14 Tetra claims that the Commission fails to argue that the judgment under appeal infringes Community law or that the reasoning followed by the Court of First Instance or the operative part of that judgement is vitiated by errors in law. On the



contrary, the Commission submits that it is not the judgment under appeal but rather that delivered in Case T-5/02 which is vitiated by an error in law.

15 In the alternative, Tetra contends that the appeal is unfounded and that, even if the appeal against the judgment in Case T-5/02 is upheld, that cannot result in the setting aside of the judgment under appeal.

16 Tetra argues, first, that the Commission has no interest in the setting aside of the judgment under appeal. It lacks such an interest because the divestiture decision is in itself academic since the measures ordered by it, including the time-limits prescribed, have been overtaken by events occurring after its adoption. Moreover, should the need arise, it will be for the Commission to adopt a new decision pursuant to Article 8(4) of the Regulation which is adapted to the situation.

17 Secondly, the present appeal is based on the premiss that, if the appeal brought in Case C-12/03 P is upheld, the Court will also set aside the judgment under appeal in the present case. However, in that event:

- either the Court will refer the first case back to the Court of First Instance for a fresh ruling; if it concludes that the final decision in the present case depends on the Court of First Instance's determination of the first case, it cannot give a ruling without knowing the final judgment of the Court of First Instance on the first case; therefore, the Court will also have to refer the present case back to the Court of First Instance;

— or the Court will decide to give judgment on the dispute in the first case; however, Tetra takes the view that, in that event, the present case will have to be referred back to the Court of First Instance for a fresh ruling. Indeed it raised several pleas before the Court of First Instance in support of its claim for annulment of the divestiture decision but the Court of First Instance ruled on only one of them.

18 In its reply, the Commission submits that, in support of its claim that the judgment under appeal should be set aside, it relies not on the arguments raised in its appeal against the judgment in Case T-5/02 but rather on the fact that, if that judgment is set aside, this will invalidate the legal basis for the judgment under appeal. As it would be based on a measure which is manifestly invalid, the judgment under appeal would be vitiated by an error in law as to the validity and applicability of that measure. This would be the case irrespective of the reasons for that invalidity, which may be established in separate proceedings. Since that ground was clearly set out in the present appeal, the appeal is admissible.

19 In response to the argument that the divestiture decision is no longer operational, the Commission argues that the possible need to amend a measure which imposes, inter alia, certain time-limits and the application of which has been delayed by legal proceedings cannot constitute a ground for a refusal to hear the action or the rejection of well-founded arguments capable of resulting, in appeal proceedings, in the setting aside of a judgment annulling that measure. The validity of the divestiture decision must be assessed in the light of the circumstances given at the time of its adoption by the Commission and, should the Community Courts ultimately find that its adoption was valid, the Commission will take all the measures necessary to ensure that it is applied lawfully.

20 With respect to the relationship between the present appeal and that brought against the judgment in Case T-5/02, the Commission submits that the setting aside of that judgment is sufficient for the judgment under appeal to be set aside. The setting aside of the judgment will have that effect even if the present case is referred back to the Court of First Instance for further examination.

## Findings of the Court

- 21 It is apparent from the arguments put forward by the Commission in its appeal that the appeal in this case has a purpose only if the judgment in Case T-5/02, which the Commission contested by its appeal in Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, is set aside by the Court in the judgment delivered today in that case.
- 22 However, by its judgment in Case C-12/03 P, the Court dismisses the appeal brought by the Commission against the Court of First Instance's judgment annulling the prohibition decision.
- 23 The present appeal must therefore be declared devoid of purpose and there is no need to examine the arguments alleging its inadmissibility put forward by Tetra.

## Costs

- 24 Under Article 69(6) of the Rules of Procedure, which is applicable to the procedure on appeal by virtue of Article 118, where a case does not proceed to judgment, the costs are at the discretion of the Court. Since the redundancy of the present appeal is the result of the dismissal by the Court of the Commission's appeal in Case C-12/03 P by a judgment delivered today in which the Commission was ordered to pay the costs, it must likewise be ordered to pay the costs of the present appeal.

On those grounds, the Court (Grand Chamber) hereby:

- 1. Declares that there is no need to give a ruling on the appeal;**
- 2. Orders the Commission of the European Communities to pay the costs.**

[Signatures]