

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE  
6 July 1993

In Case T-12/93 R,

**Comité Central d'Entreprise de la Société Anonyme Vittel**, an employees' representative body governed by Book IV of the French Code du Travail, and

**Comité d'Établissement de Pierval**, an employees' representative body governed by Book IV of the French Code du Travail,

each having its principal office in Vittel (France), represented by François Nativi, Hélène Rousseau and François Bienayme-Galaz, of the Paris Bar, assisted by Aloyse May, of the Luxembourg Bar, with an address for service in Luxembourg at the latter's Chambers, 31 Grand-Rue,

applicants,

v

**Commission of the European Communities**, represented by Francisco Enrique González Díaz, of its Legal Service, and Géraud de Bergues, a national expert seconded to the Commission's Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Nicola Anecchino, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for suspension of operation of the Commission decision of 22 July 1992 relating to a proceeding under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (IV/M.190 — Nestlé/Perrier)(OJ 1992 L 356, p. 1),

THE PRESIDENT OF THE COURT OF FIRST INSTANCE  
OF THE EUROPEAN COMMUNITIES

makes the following

**Order**

**Facts**

- 1 The essential facts of the case before the Court of First Instance, as put forward in the parties' pleadings and their oral arguments, may be summarized as follows.
- 2 On 25 February 1992 Nestlé SA (hereinafter 'Nestlé') notified to the Commission pursuant to Article 4(1) of Council Regulation No 4064/89 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1) a takeover bid for Source Perrier SA (hereinafter 'Perrier'). Having examined the notification, the Commission decided on 25 March 1992, pursuant to Article 6(1)(c) of Regulation No 4064/89, to initiate proceedings on the ground that the notified concentration raised serious doubts as to its compatibility with the common market.
- 3 On 22 July 1992, having regard in particular to the commitments given to it by Nestlé, the Commission adopted a decision declaring the concentration to be compatible with the common market (hereinafter 'the decision'). Conditions and obligations were attached to the decision to ensure that Nestlé complied with its commitments. One of the conditions imposed by the decision is that Nestlé must sell to a competitor to be approved by the Commission, within a period set in the decision itself, the brand names and sources Vichy, Thonon, Pierval, Saint-Yorre and certain other local sources and the bottling capacities relating to those sources.

- 4 On 26 January 1993, Nestlé indicated to the Commission a purchaser, the Castel group, already operating in the beverages sector. That purchaser declared itself interested in taking over three of the major sources which Nestlé had undertaken to resell (Vichy, Thonon and Saint-Yorre), and a number of less important sources. As the Commission did not consider that that transfer met all the terms of the decision, the Nestlé and Castel groups concluded a new agreement on 18 February 1993 which included transfer of the Pierval source as well as those mentioned above.
- 5 On 3 March 1993, the Commission published a press release to the effect that the purchase proposal from the Castel group contributed decisively to meeting all the requisite conditions and announced that it would proceed to bring the matter to a close once the obstacles to the actual transfer of the sources were removed, particularly regarding transfer to the Castel group of the rights to exploit the Vichy and Thonon sources, which were vested in the French State and the town of Thonon-les-Bains respectively.

## Procedure

- 6 By application lodged at the Registry of the Court of First Instance on 3 February 1993, the Comité Centrale d'Entreprise of Vittel SA, the Comité d'Établissement of Pierval and the Fédération Générale Agroalimentaire — CFDT brought an action under the second paragraph of Article 173 of the of the EEC Treaty for the annulment of the decision.
- 7 By a separate document lodged at the Registry of the Court of First Instance on 2 March 1993 the Comité Centrale d'Entreprise of Vittel SA and the Comité d'Établissement of Pierval (hereinafter 'the applicants') also applied, under Articles 185 and 186 of the EEC Treaty, for suspension of the operation of the contested decision and, in the alternative, sought an order from the Court that the decision be suspended to the extent to which it requires the transfer of Pierval, until the proceedings on the substance are determined.

- 8 The Commission lodged its written observations on the present application for interim measures on 17 March 1993. The parties presented oral argument on 23 March 1993.
- 9 By order of 2 April 1993 in Case T-12/93 R *CCE Vittel and CE Pierval v Commission* [1993] ECR II-449, the President ordered the Commission to inform the Court of First Instance, as soon as it was in possession of the relevant information, that all the conditions relating to the transfer of assets laid down in the decision had been fulfilled and, in particular, that the obstacles to transfer of the rights to exploit Vichy and Thonon had been removed. By the same order, the President of the Court of First Instance suspended the operation of the decision, in so far as it made any declaration as to the compatibility of the notified concentration subject to compliance with the condition concerning the transfer of Pierval, pending his decision, in the light of the information to be supplied to him by the Commission, on the claims before him.
- 10 By letter lodged at the Registry of the Court of First Instance on 11 June 1993 the Commission informed the Court of First Instance that on 27 May 1993 there had been produced to it the agreement between Nestlé and Castel for the transfer of the assets in question and the approvals given both by the French State for the acquisition by Castel of *Compagnie Fermière de Vichy*, the holder of the licence to exploit the Vichy-Célestins source, and by the town of Thonon-les-Bains regarding the grant of a new concession for exploitation of the Thonon source. At that time, the Commission forwarded to the Court of First Instance a press release from the French Ministry for the Budget dated 5 May 1993 showing that the Minister for the Budget had approved the agreement reached between the Nestlé and Castel groups regarding the concession in respect of the Vichy thermal spring, and a fax dated 25 May 1993 from the town clerk of Thonon-les-Bains indicating that the municipal council had adopted an ‘addendum to the concession contract between SEMT and the Municipality’.
- 11 By letter received at the Registry of the Court of First Instance on 30 June 1993, the Commission forwarded to the Court a copy of the minutes of the meeting of 24 May 1993 at which the Municipal Council of Thonon-les-Bains approved the addendum to the concession contract for the exploitation of mineral water at Thonon.

- 12 Having examined the information forwarded in compliance with the order of 2 April 1993, the judge hearing the application for interim measures finds that all the conditions for the transfer of assets laid down in the decision appear now to be satisfied and considers that he has sufficient information to enable him to give a decision on the substance of the application for interim measures.

## Law

- 13 Under the combined provisions of Articles 185 and 186 of the EEC Treaty and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities, the Court may, if it considers that circumstances so require, order that application of the contested act be suspended or prescribe any necessary interim measures.
- 14 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that applications for interim measures under Articles 185 and 186 of the EEC Treaty must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the measures applied for. Those measures must be provisional in the sense that they do not prejudge the decision on the substance of the case (see, most recently, the order of the President of the Court of 2 April 1993, cited above).
- 15 Reference is made to the order of 2 April 1993 for an account of the pleas in law and arguments of the parties which are discussed hereinafter only in so far as is necessary for the reasoning of the judge hearing the application.

### *The subject-matter of the application and the balance of interests*

- 16 The present application for interim measures is intended primarily to secure suspension of the operation of the decision by which the Commission authorized the takeover of Perrier by Nestlé and, in the alternative, an order from the Court that the operation of the decision be suspended, to the extent to which it requires the transfer of Pierval, until determination of the proceedings on the substance of the case.

17 With regard to the application for suspension of the operation of the decision, it must first be noted that the effect of granting that request would be to suspend throughout the course of the proceedings before the Court the authorization given by the Commission for the concentration notified to it and, therefore, the exercise by Nestlé of its voting rights within the Perrier group, a result which would be liable seriously to upset the functioning of the undertakings in the group.

18 Furthermore, as regards the application for an order suspending the operation of the decision, in so far as it requires the transfer of Pierval, until determination of the proceedings on the substance of the case, it must be noted that the effect of such a measure would be to suspend, albeit partially, fulfilment of Nestlé's commitments to the Commission referred to in paragraph 3 above and thereby prolong a situation described in the decision as a dominant position liable to have irreversible repercussions on competition in the sector concerned, a situation which the conditions and obligations imposed by the decision were specifically intended to bring to an end. Compliance with all those commitments, within the time-limit laid down in the decision, constitutes the condition on which the authorization given by the Commission for the notified concentration was based.

19 In view of that factual and legal situation, it is incumbent on the judge hearing the application for interim measures not only to balance the specific interest of the applicants in having the operation of the contested decision suspended against the Commission's general interest in restoring effective competition but also to have regard to the interests of third parties such as Nestlé and Castel in order to avoid both the creation of an irreversible situation and serious and irreparable damage to one of the parties to the proceedings or to a third party or else to the public interest (see the order of the President of the Court of First Instance in Case T-96/92 *CCE Grandes Sources and Others v Commission* [1992] ECR II-2579).

20 In that regard, it is appropriate to bear in mind that in circumstances such as those of this case where the interim measures applied for may seriously affect the rights and interests of third parties, which, not being parties to the proceedings, have not been able to make their views known, such measures can be justified only if it appears that, without them, the applicants would be exposed to a situation liable to endanger their very existence (see the order of the President of the Court of Justice

in Case 92/78 R *Simmenthal v Commission* [1978] ECR 1129; see most recently the order in Case T-96/92 R, cited above).

- 21 It is in the light of those considerations that it must be considered whether the legal conditions for granting the interim measures sought are met in the present case.

*The existence of serious and irreparable damage*

- 22 It has been consistently held by the Court of Justice that the urgency of an application for interim measures must be assessed in the light of the extent to which an interlocutory order is necessary to avoid serious and irreparable damage to the party seeking the interim measure. The party seeking suspension of the operation of a measure must furnish proof that he cannot await the conclusion of the main action without personally suffering damage which would have serious and irreparable consequences for him (see, most recently, the order of the President of the Court of Justice in Case C-280/93 *Germany v Council* [1993] ECR I-3667, paragraph 22).
- 23 The applicants claim that the transfer of Pierval will cause them serious and irreparable damage, which is imminent and certain to occur. In their view, the transfer of the assets of Pierval will be detrimental to the interests of its employees, in particular, and to those of Vittel, in general, in that the transfer would undermine their right to maintenance of the assets of the undertaking, particularly since, in the circumstances of this case, they regard the financial consideration for the transfer as derisory. Furthermore, as a result of the transfer, the employees of Pierval will no longer be able to enjoy the considerable social advantages conferred on them either by their individual contracts or by the collective agreement in force for Vittel. In the applicants' view, such damage would be irreparable since the transfer, if effected, would have irreversible legal repercussions, notwithstanding the existence of conditions precedent or subsequent. That damage, moreover, flows directly from the decision of the Commission which made its declaration that the concentration between Nestlé and Perrier was compatible with the common market conditional upon the transfer of various sources, including Pierval.

24 The Commission considers that the applicants have not demonstrated that the decision exposes them to certain and imminent damage. It contends in particular that the transfer of part of the assets of an undertaking cannot in itself be damaging to the employees unless it inevitably undermines an interest specific to them, for instance by causing them to lose their jobs, which is not the case here. As regards the damage that would allegedly be suffered by the employees of Pierval, in particular, as a result of the transfer, the Commission contends that there is no certainty that transfer of the undertaking would necessarily affect the collective agreement and that, in any event, such agreements continue to apply for a year or until the entry into force of a substitute agreement; if no agreement is concluded in the year following transfer of the undertaking, moreover, the employees retain the individual advantages acquired by them under the agreement concluded prior to the transfer. Furthermore, the Commission states that the collective agreements could in any event have been repudiated by the management of Vittel, even without the sale of Pierval. It follows, according to the Commission, that the repudiation of such agreements is not a concomitant of the Pierval transfer, with the result that damage to the employees of that undertaking is neither certain nor imminent.

25 It must be borne in mind, first, that, as the President of the Court of First Instance stated in his order in Case T-96/92 R, cited above, a decision authorizing a concentration cannot, in principle, have repercussions on the rights of the employees of an undertaking the ownership of which has been transferred following a concentration. However, it is appropriate to consider in this case, first, whether the serious and irreparable damage alleged by the applicants is sufficiently certain to justify adoption of the interim measures applied for and, secondly, whether there appears to be any direct causal link between such damage and the decision.

26 As regards the damage that would allegedly be suffered by the employees of Vittel in general as a result of the transfer of Pierval undermining their 'right to maintenance of the assets of the undertaking', it must be pointed out that the applicants have not shown how a decrease in the assets of Vittel, as a result of the transfer of Pierval, would be liable, at first sight, to entail a risk of serious and irreparable damage regarding the maintenance of employment within the company. In that connection, the applicants, which have not mentioned any particular circumstance such as to justify describing as certain and imminent the risk of damage to which the employees of Vittel would allegedly be exposed as a result of the transfer,

merely refer to the derisory nature of the financial consideration for the transfer. However, it is common ground that the price for the transfer of Pierval, even if it could be described as derisory, derives not from the decision but from the negotiations conducted by Nestlé with Castel concerning the transfer of all the assets which Nestlé has committed itself to selling.

27 As regards the damage that would allegedly be suffered by the employees of Pierval as a result of their ceasing to enjoy the considerable social advantages conferred on them either by their individual contracts or by the collective agreement in force for Vittel, it must be pointed out, in the first place, that, pursuant to Articles 3 and 4 of Council Directive 77/187/EEC of 14 February 1975 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1977 L 61, p. 26), a transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of the transfer are transferred to the transferee.

28 Secondly, it must be emphasized that pursuant to Article L-132-8 of the French Labour Code, referred to by the parties in the course of the proceedings, any collective labour agreement of indefinite duration may be repudiated by the parties to it under the conditions laid down therein. Where, in particular, an agreement in a given undertaking appears jeopardized by, *inter alia*, a merger, transfer or subdivision, that article provides that the agreement is to continue to take effect until the entry into force of a new one, failing which, it is to apply for a period of at least one year, with the result that the employees concerned retain the individual advantages acquired by them if the agreement which has been repudiated has not been replaced within the prescribed period.

29 It is apparent from the documents before the Court, in particular the submissions of the President of the Comité Centrale d'Entreprise of Vittel at the meeting held by the latter on 26 February 1993 (Annex 4 to the application for interim measures), that the overall collective agreement will continue to apply in the new

company. The company collective agreements will continue to apply on the terms laid down in Article L-132-8 of the Labour Code.

30 In view of all the foregoing, the first point is that the possibility of repudiating a collective agreement is open to any party to it and, secondly, that in the event of transfer of an undertaking, as in the present case, no legal or other provision requires the agreement in force to be repudiated or amended in any way. If, nevertheless, the application of such an agreement is challenged, the French legislation (the seventh subparagraph of Article L-132-8 of the Labour Code) lays down the same conditions as those which apply when one or more parties to the agreement repudiate it.

31 It follows that, even if the alleged damage, that is to say the loss by the employees of Pierval of the advantages conferred by the collective agreement in force for Vit-tel, appeared sufficiently certain, such damage could not be a direct result of the Commission decision. Just as the decision does not require the new employers to call in question the collective agreement applicable to the employees of Pierval, suspension of the transfer of Pierval would not provide any protection against the possibility of repudiation, under the conditions laid down by law, of the collective agreement in force.

32 Accordingly, without there being any need to analyse the applicants' pleas in law concerning the prima facie merits of their application in the main proceedings, it must be held that the legal conditions for the grant of the interim measures sought are not fulfilled and that the application must be dismissed.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **The application for interim measures is dismissed.**
2. **The costs are reserved.**

Luxembourg, 6 July 1993.

H. Jung

Registrar

J. L. Cruz Vilaça

President