Case T-5/02

Tetra Laval BV

v

Commission of the European Communities

(Competition — Regulation (EEC) No 4064/89 — Decision declaring a concentration incompatible with the common market — Rights of the defence — Horizontal and vertical effects — Foreseeable conglomerate effects — Leveraging — Potential competition — General effect of reinforcement)

Judgment of the Court of First Instance (First Chamber), 25 October 2002 II-4389

Summary of the Judgment

1. *Competition — Concentrations — Administrative procedure — Access to the file — Observance of the rights of the defence — Infringement — Condition (Council Regulation No 4064/89)*

2. *Competition — Concentrations — Administrative procedure — Access to the file — Detailed rules governing access — Commission's power to assess of its own volition the risk of disclosure of confidential information — Obligation to justify any restrictions on the right of access to the file — Scope*

(Art. 287 EC; Council Regulation No 4064/89; Commission Regulation No 447/98, Art. 17(1) and (2))

3. *Competition — Concentrations — Examination by the Commission — Assessments of an economic nature — Discretion as regards assessment — Review by the Court — Limits*

(Council Regulation No 4064/89, Art. 2)

4. *Competition — Concentrations — Assessment of compatibility with the common market — Concentrations which neither create nor reinforce a dominant position*

(Council Regulation No 4064/89, Art. 2(2) and (3))

5. *Competition — Concentrations — Assessment of compatibility with the common market — Conglomerate-type concentration — Definition — Assessment according to criteria applicable to other types of concentration — Taking into account of the likelihood that a dominant position will be created or reinforced through leveraging on the reference market for one of the undertakings party to the concentration — Whether permissible — Whether the Commission may rely on foreseeable conduct of the entity resulting from the concentration — Conditions — Presentation of a close examination supported by convincing evidence*

(Council Regulation No 4064/89, Art. 2(2) and (3))

6. *Competition — Concentrations — Assessment of compatibility with the common market — Conglomerate-type concentration — Taking into account of foreseeable conduct of the entity resulting from the concentration likely to constitute in itself abuse of an existing dominant position — Whether permissible — Obligation of the Commission to assess the likelihood of such conduct having regard to the risks inherent in the adoption of that conduct and the commitments offered by the notifying parties in relation thereto*

(Council Regulation No 4064/89, Art. 2(2) and (3))

7. *Competition — Concentrations — Assessment of compatibility with the common market — Taking into account of the likelihood that a dominant position will be created or reinforced through leveraging on the reference market for one of the undertakings party to the concentration — Taking into account of leveraging between the markets for two products which are technical substitutes — Whether permissible — Condition*

(Council Regulation No 4064/89, Art. 2(2) and (3))

8. *Competition — Concentrations — Assessment of compatibility with the common market — Taking into account of the elimination or significant reduction of potential but growing competition tending to reinforce a dominant position — Whether permissible — Obligation of the Commission to rely on convincing evidence of the alleged reinforcement*

   (Council Regulation No 4064/89, Art. 2(2) and (3))

9. *Competition — Concentrations — Assessment of compatibility with the common market — Taking into account of the likelihood that a dominant position will be created or reinforced on the reference market for one of the undertakings party to the concentration — Taking into account of the impact of a reduction of potential competition from neighbouring markets on the reference markets — Whether permissible*

   (Council Regulation No 4064/89, Art. 2(1), (2) and (3))

1. The general principles of Community law governing the right of access to the Commission's file are applicable to the procedures provided for by Regulation No 4064/89 on the control of concentrations between undertakings, even though their application may reasonably be adapted to the need for speed, which characterises the general scheme of that regulation. Those principles are designed to ensure effective exercise of the rights of the defence and breach thereof in the procedure prior to the adoption of the decision can, in principle, cause the decision to be annulled if the rights of defence of the undertaking concerned have been infringed.

   The rights of the defence have been infringed if the non-disclosure of the documents in the Commission's file might have influenced the course of the procedure and the content of the decision to the applicant's detriment.

   (see paras 89-91)

2. As regards the responses given by third parties to the Commission's requests for information, the mere fact that Article 17(2) of Regulation No 447/98 on the notifications, time limits and hearings provided for in Regulation No 4064/89 on the control of concentrations between undertakings imposes an obligation on each third party requesting confidentiality to indicate clearly which parts of its response are

to be considered confidential does not prevent the Commission, in the light of Article 17(1) and the objective of Article 287 EC, from examining of its own volition whether there is a risk that business secrets of some of the third parties involved in the procedure, or even other confidential information, may be divulged if unlimited access is allowed to the responses of other third parties who have not themselves requested confidentiality.

However, when faced with a request for access to the file from a notifying party, it is for the Commission, at least until the Advisory Committee has been consulted pursuant to Article 18(1) of Regulation No 4064/89, to justify any restrictions on that right of access, since any exception to that right must be interpreted narrowly, particularly when the Commission intends to prohibit the notified merger in question.

(see paras 101-102, 105)

The need for speed, which characterises the general scheme of Regulation No 4064/89, cannot by itself justify a refusal to allow access to the responses gathered as part of a market investigation carried out on the commitments offered by a notifying party. If the Commission does not have the time needed to ask the respondents to the market investigation for a non-confidential version of their responses, pursuant to Article 17(2) of Regulation No 447/98, it has at least to explain to the notifying party how the nature and scope of the fear of reprisals or other negative or undesired consequences expressed by those respondents who simply requested confidentiality without providing a non-confidential version of their responses justifies a refusal to allow access to those responses or to a non-confidential version thereof. Although the short deadlines in the second phase of a merger procedure may, for practical reasons and especially when many requests for confidentiality have been received, give grounds for drawing up non-confidential summaries, the Commission is still obliged to give valid reasons for a blanket refusal to allow access to those responses. That obligation applies even more strongly to the responses submitted to it without any — at least any formal — request for confidentiality.

(see paras 101-102, 105)

3. The substantive rules of Regulation No 4064/89 on the control of concentrations between undertakings, in particular Article 2, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature. Consequently, review by the Community judicature of the exercise of that discretion, which is

essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations.

(see para. 120)

(see para. 119)

4. Under Article 2(3) of the Regulation No 4064/89 on the control of concentrations between undertakings, a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it must be declared incompatible with the common market. Conversely, the Commission is bound declare a concentration falling within the scope of application of that regulation compatible with the common market where the two conditions laid down in that provision are not fulfilled. If, therefore, a dominant position is not created or strengthened, the transaction must be authorised and there is no need to examine the effects of the transaction on effective competition.

5. A merger which is conglomerate in type, that is, a merger of undertakings which, essentially, do not have a pre-existing competitive relationship, either as direct competitors or as suppliers and customers, do not give rise to true horizontal overlaps between the activities of the parties to the merger or to a vertical relationship between the parties in the strict sense of the term. Thus it cannot be presumed that such mergers produce anti-competitive effects and must therefore be prohibited. For them to be prohibited, it is necessary, as with any other concentration, that the two conditions laid down in Article 2(3) of Regulation No 4064/89 on the control of concentrations between undertakings are met.

Although it is true that, in principle, a merger between undertakings which are active on distinct markets is not usually of such a nature as immediately

to create or strengthen a dominant position due to the combination of the market shares held by the parties to the merger, since the factors which are of significance for the relative positions of competitors within a given market are generally to be found within the market itself, it is possible for the conditions of competition on a market to be affected by factors external to that market. This is the case where the markets in question are neighbouring markets and one of the parties to a merger transaction already holds a dominant position on one of them if the means and capacities brought together by the transaction may immediately create conditions allowing the merged entity to leverage its way so as to acquire, in the relatively near future, a dominant position on the other market.

If, in a prospective analysis of the effects of a conglomerate-type merger transaction, the Commission is able to conclude that a dominant position would, in all likelihood, be created or strengthened in the relatively near future and would lead to effective competition on the common market being significantly impeded, it must prohibit it.

Where, however, the creation or strengthening of a dominant position on the second market does not immediately result from the merger, but will occur only after a certain time and will result from conduct engaged in by the merged entity on the first market where it already holds a dominant position, that is, where it is not the structure resulting from the merger transaction itself but rather the future conduct in question which will create or strengthen a dominant position, it is for the Commission, if it intends to prohibit the concentration, to conduct a particularly close examination of the circumstances which are relevant for an assessment of the anti-competitive effect of the planned conglomerate in the reference market and to produce convincing evidence in support of its analysis.

(see paras 142-155)

6. Although Regulation No 4064/89 on the control of concentrations between undertakings provides for the prohibition of a merger creating or strengthening a dominant position which has significant anti-competitive effects, these conditions do not require it to be demonstrated that the merged entity will, as a result of the merger, engage in abusive, and consequently unlawful, conduct. Although it cannot therefore be presumed that Community law will not be complied with by the parties to a conglomerate-type merger transaction, such a possibility cannot be excluded by the Commission when

it carries out its control of mergers. Accordingly, when the Commission, in assessing the effects of such a merger, relies on foreseeable conduct which in itself is likely to constitute abuse of an existing dominant position, it is required to assess whether, despite the prohibition of such conduct, it is none the less likely that the entity resulting from the merger will act in such a manner or whether, on the contrary, the illegal nature of the conduct and/or the risk of detection will make such a strategy unlikely. While it is appropriate to take account, in its assessment, of incentives to engage in anti-competitive practices which might result from the situation created by the merger, the Commission must also consider the extent to which those incentives would be reduced, or even eliminated, owing to the illegality of the conduct in question, the likelihood of its detection, action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue. The fact that a notifying party offers commitments regarding its future conduct is also a factor which the Commission must take into account in assessing whether it is likely that the merged entity will act in a manner which might result in the creation of a dominant position on one or more of the relevant markets.

(see paras 159, 161)

7. The possibility cannot be excluded that leveraging from one market into another may take place when a product in one market and a product in another market are merely technical substitutes. Leveraging may be carried out when the products in question are ones which the customer finds suitable for the same end use.

(see para. 196)

8. When the Commission relies on the elimination or significant reduction of potential competition, even of competition which will tend to grow, in order to justify the prohibition of a notified merger, the factors which it identifies to show the strengthening of a dominant position must be based on convincing evidence. The mere fact that the acquiring undertaking already holds a clear dominant position on the relevant market may constitute an important factor but does not in itself suffice to justify a finding that a reduction in the potential competition which that undertaking must face constitutes a strengthening of its position.

(see para. 312)

9. Given the criteria laid down in Article 2(1) of Regulation No 4064/89 on the control of concentrations between undertakings, which the Commission is bound to apply in assessing notified merger transactions, it does not commit any error in examining the impact of a reduction of potential competition from neighbouring markets on the reference markets.

(see para. 323)