Case No COMP/M.3255 – TETRA LAVAL / SIDEL

Only the English text is authentic.

REGULATION (EEC) No 4064/89

MERGER PROCEDURE

Article 14(1)(b) and 14(1)(c)

Date: 07/07/2004

Commission decision

of 07.07.2004

imposing fines on an undertaking for supplying incorrect or misleading information in a notification in a merger control proceeding
(Case No COMP/M.3255 – Tetra Laval/Sidel – Art.14 procedure)

(Only the English text is authentic)

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings[1] and in particular, Article 26(2) thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings,[2] and in particular Article 14(1)(b) and Article 14(1)(c) thereof,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations,[3]

Having regard to the final report of the Hearing Officer in this case[4],

WHEREAS :

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1 OJ L 24, 29.1.2004, p.1.

2 OJ L 395, 30.12.1989, p. 1; corrected version in OJ L 257, 21.9.1990, p. 13. Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p. 1).

3 OJ C ..., ..., p. ...

4 OJ C ..., ..., p. ...

I. The Parties and the Transaction

1. On 18 May 2001, the Commission received a notification (the "Original Notification") pursuant to Article 4 of Regulation (EEC) No 4064/89 (the "Merger Regulation") of a concentration whereby Tetra Laval S.A., France, belonging to the group Tetra Laval B.V. ("Tetra"), the Netherlands, acquired within the meaning of Article 3(1)(b) of the Merger Regulation, control of the French company Sidel S.A. ("Sidel") by public bid announced on 27 March 2001.

2. Tetra, is a privately held group of companies, which is active in the design and manufacture of equipment, consumables and ancillary services for the processing, packaging and distribution of liquid food. Sidel is a company involved in the design and production of packaging equipment and systems, in particular, stretch blow moulding machinery, barrier technology and filling machines for polyethylene terephthalate plastic bottles ("PET bottles").

II. Procedure and chronology

3. After examination of the Original Notification, the Commission concluded that the notified operation fell within the scope of the Merger Regulation and that it raised serious doubts as to its compatibility with the common market and the EEA Agreement. On 5 July 2001, the Commission decided in accordance with Article 6(1)(c) of the Merger Regulation to initiate proceedings in this case.

4. On 30 October 2001, the Commission declared the operation incompatible with the common market, following an in-depth investigation (the "Tetra I Prohibition decision"). On 30 January 2002, the Commission adopted a divestiture decision pursuant to Article 8(4) (the "Tetra I Divestiture Decision"). By judgment (the "Judgment") delivered on 25 October 2002,[5] the Court of First Instance of the European Communities annulled the Commission's Decision in its entirety. Following the Judgment, the Commission re-commenced its examination of the notified concentration pursuant to Article 10(1) and 10(5) of the Merger Regulation. On 13 January 2003, the Commission decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement, pursuant to Article 6(1)(b) and 6(2) of the Merger Regulation, subject to full compliance with a commitment and obligations (the "Tetra II Conditional Clearance Decision").

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5 Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381.

5. Pursuant to the commitment Tetra undertook to grant on a non-discriminatory basis to any third party, if so requested by that third party, a licence for the entire families of patents relating to the innovations described in patents and patent applications EP 0.923446, PCT/EP00/06604, PCT/EP01/14743, PCT/EP02/02160 and/or DE 10211878.7 and relating to the explosion stretch-blow moulding and the use of that process for coating of plastic bottles. The innovations which were the subject of the commitment related to a new technology that allows stretch blow moulding ("SBM") machines to blow PET bottles using an innovative, explosive method rather than the more traditional compressed air blowing method (the "Tetra Fast" technology).

6. During the examination of the proposed concentration following the judgement of the of the Court of First Instance it became apparent that Tetra had failed to disclose pertinent information regarding the development of Tetra Fast which was being actively pursued, including its potential impact on the conditions of competition in the SBM market. Tetra had failed to disclose such information:

   (i) in the Original Notification of 18 May 2001; and

   (ii) in a reply dated 26 July 2001 to a request for information made pursuant to Article 11 of the Merger Regulation (the "Article 11 Reply of 26 July 2001").

7. On 1 August 2003, the Commission sent a Statement of Objections to Tetra communicating its preliminary view that such failures constituted an infringement within the meaning of Article 14(1)(b) of the Merger Regulation, in that the information which was provided regarding the markets for SBM machines was incorrect or misleading, and an infringement within the meaning of Article 14(1)(c) of the Merger Regulation, in that the information which was provided in response to the request made pursuant to Article 11 was incorrect, and that a fine should be imposed on Tetra in accordance with Article 14(1)(b) and (c) and Article 14(3) of the Merger Regulation. On 31 October 2003, Tetra responded to the Statement of Objections. On 5 March 2004, the Commission sent a letter containing supplementary factual elements to Tetra to which Tetra replied on 12 March 2004.

III. Relevant Facts

A. The development of the Tetra Fast technology

Patents

8. The Tetra Fast technology was first conceived in 1996. Between 1996 and 2002 Tetra spent approximately EUR [several, < 10 million]* on its development.[6]

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* Parts of this text have been edited to ensure that confidential information is not disclosed. Those parts are enclosed in square brackets and marked with an asterisk.

9. Between 1996 and 1998, Tetra filed for the following patents in relation to the basic process whereby the pre-form is preheated to stretch blow temperature and pre-blown with an explosive gas mixture which is ignited after stretching, generating the blowing pressure:

    (a) a Swiss patent with priority date of 14 August 1996 which is valid for 20 years until 2016;[7]

    (b) a European patent with priority date of 13 August 1997 which is valid for 20 years until 2017;[8] and

    (c) a world-wide patent with priority date of 19 February 1998 which has not yet been granted.[9]

10. In 1999, Tetra filed for the following patents in relation to a device for the production of bottles with the above-mentioned process with emphasis on dosing, igniting and gas mixing:

    (a) a German patent with priority date of 16 August 1999 which has not yet been granted;[10]

    (b) a world-wide patent with priority date of 16 August 1999 which has not yet been granted;[11]

    (c) a European patent with priority date of 16 August 1999 which has not yet been granted.[12]

11. In 2001, Tetra filed for the following patents in relation to a device for the production of plastic containers by stretch blow moulding using an explosive blowing medium describing a manifold for gas mixture and bottle support for linear SBM machines:

    (a) a European patent with priority date of 29 December 2001 which has not yet been granted;[13] and

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6 See Tetra's reply of 16 December 2002 to Question 10 of the Commission's Article 11 request for information of 13 December 2002.

7 Patent CH691218 A5. See Annex to the Commission's Decision of 13 January 2003 in Case No COMP/M.2416 – Tetra Laval/Sidel.

8 Patent No 0.923446 B1. See Annex to the Commission's Decision of 13 January 2003 in Case No COMP/M.2416 – Tetra Laval/Sidel.

9 Patent No WO 98/06559. See Annex to the Commission's Decision of 13 January 2003 in Case No COMP/M.2416 – Tetra Laval/Sidel.

10 Patent No DE 199938724 A1. See Annex to the Commission's Decision of 13 January 2003 in Case No COMP/M.2416 – Tetra Laval/Sidel.

11 Patent No WO 01/12416 A1. See Annex to the Commission's Decision of 13 January 2003 in Case No COMP/M.2416 – Tetra Laval/Sidel.

12 Patent No PCT EP 00/06604. See Annex to the Commission's Decision of 13 January 2003 in Case No COMP/M.2416 – Tetra Laval/Sidel.

(b) a German patent with priority date of 29 December 2001 which has not yet been granted.[14]

12. In 2001 and 2002, Tetra filed for the following patents in relation to a method of stretch blow moulding a plastic container and application of a coating to the inner side. The first of the patents describes a method of explosion blow moulding of plastic containers using a precursor gas mixture to apply a coating to the inner side of the bottle, and the second patent describes the same method for use on a rotary SBM platform:

(a) a European patent with priority date of 23 March 2001 which has not yet been granted;[15] and

(b) a German patent with priority date of 18 March 2002 which has not yet been granted.[16]

13. Also in 2002, Tetra filed for a German patent with priority date 5 December 2002 which has not yet been granted[17] in relation to the stretch rod component of the SBM machine in particular with regard to improved cooling of condensed steam at the inner surface of the bottle.

Field Tests

14. Between 2000 and 2002, field tests were carried out by Tetra both in its own research facilities in Darmstadt, Germany and in collaboration with a number of research and/or certification centres at various universities, institutes and/or governmental bodies with the object of developing the Tetra Fast technology for commercialisation.[18] These were as follows:

(a) Tetra requested universities to produce reports [..]* the Tetra Fast technology [..]*. In particular:

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[13] Patent No PCT EP 01/14743. See Annex to the Commission's Decision of 13 January 2003 in Case No COMP/M.2416 – Tetra Laval/Sidel.

[14] Patent No DE 100 65 652.8. See Annex to the Commission's Decision of 13 January 2003 in Case No COMP/M.2416 – Tetra Laval/Sidel.

[15] Patent No PCT EP 02/02160. See Annex to the Commission's Decision of 13 January 2003 in Case No COMP/M.2416 – Tetra Laval/Sidel.

[16] Patent No DE 10211878.7 which was modified as Patent No DE 10231345.8 on 11 July 2002 through the submission of new patent application with the same priority date. The new application contains new claims building on the concept contained in the earlier patent application. See Annex to the Commission's Decision of 13 January 2003 in Case No COMP/M.2416 – Tetra Laval/Sidel together with Tetra's letters of 11 February 2003 and 19 March 2003.

[17] Patent No DE 102357138.4. This patent was omitted by mistake from the Annex to the Commission's Decision of 13 January 2003 in Case No COMP/M.2416 – Tetra Laval/Sidel. Its existence was notified to the Commission by Tetra in its letter of 11 February 2003. This omission is not the subject of this Decision.

[18] Reports provided by the […]* as described in Annex 25 of Tetra's reply of 04 December 2002 to Question 29 of the Commission's Article 11 request for information of 27 November 2002.

– [..*statements concerning findings of universities*…]*[19] [..]*[20]

– [..*description of test results*..]*;[21]

(b) Tetra applied for safety certification for use of the Tetra Fast technology with its equipment. These are pre-marketing and commercialisation approval requirements. They include:

– [..*certification obtained*..]*;[22]

– [..*certification obtained*..]*;[23] and

– [..*certification obtained*..]*.[24]

(c) Tetra carried out a number of field tests in its own research facilities in Darmstadt, Germany […]*. The tests carried out with […]* were conducted on conventional SBM technology with which to compare the performance in terms of energy consumption of the Tetra Fast equipped machine at […]*. The aim of these tests was to refine the process and fine tune it for bottles of different sizes and shapes. These tests were conducted on […]* SBM machines: […]*. These included the following:

– [..*statement regarding field test results..]*;[25]

– [..*description of test results*…]*;[26] [..]*[27] [..]*[28]

– [..*description of test results and findings*..]*[29][..]*[30] [..]*[31] [..]*[32] […]* The presentation reports on the reduction in cost that will

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19 See page 42 of the "Test Report" of 31 January 2002 in Annex 4 to Tetra's reply of 16 December 2002 to the Commission's Article 11 request for information of 13 December 2002.

20 Annex 26 of Tetra's reply of 04 December 2002 to Question 29 of the Commission's Article 11 request for information of 27 November 2002.

21 Commission File Doc. 648 undated.

22 See Annex 1.A of Tetra's reply of 16 December 2002 to Question 9 of the Commission's Article 11 request for information of 13 December 2002.

23 See Annex 24 containing "Development Report" of 06 February 2002; Slide 5 of Powerpoint Presentation of 4 February 2002, of Tetra's reply of 4 December 2002 to the Commission's Article 11 request of information of 27 November 2002; and Tetra's reply of 16 December 2002 to Question 9 of the Commission's Article 11 request for information of 13 December 2002.

24 See Annex 1.A of Tetra's reply of 16 December 2002 to Question 9 of the Commission's Article 11 request for information of 13 December 2002.

25 See Annex 1A of Tetra's reply of 16 December 2002 to Question 9 of the Commission's Article 11 request for information of 13 December 2002.

26 See Annex 23 "*Tetra Fast History*" to Tetra's reply of 04 December 2002 to the Commission's Article 11 request for information of 27 November 2002.

27 See Annex 1.C - Management Meeting 27 August 2001, of Tetra's reply of 16 December 2002 to Question 1 of the Commission's Article 11 request for information of 13 December 2002.

28 See Annex 6 of Tetra's reply of 16 December 2002 to Question 14 of the Commission's Article 11 request for information of 13 December 2002.

take place as a result of the use of Tetra Fast in the […]* SBM machine as follows: […]* saving in capital spending; […]* reduction in floor space; and […]* reduction in electricity consumption.[33] […]*[34] A total of [0-10 million]* bottles of […]* different varieties of bottle shapes were produced with an average efficiency of […]*;[35]

– [..*further description of tests*..]*[36]

Results of Field Tests

15. The field tests carried out between 2000 and 2002 culminated in the production of at least one material "Test Report" on 31 January 2002 which showed that the results […]* were very satisfactory stating *inter alia,* that:

(a) [..*statement concerning operational aspects of the technology*..]*;[37]

(b) " *... the Fast technology is valid for SBM Linear machines up to* […]* *bottles/h. The next step should be to test the Fast technology* [..*statement concerning future plans in respect of the technology*..]*"[38]; and

(c) "[.*statement concerning future plans in respect of the technology*.]*";[39]

16. This was followed up by a "Technical Report" on 6 February 2002 drawing the following conclusions: [40]

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[29] See Tetra's reply of 16 December 2002 to Question 8 to the Commission's Article 11 request for information of 13 December 2002.

[30] See Annex 1.C - Management Meeting June 2001, of Tetra's reply of 16 December 2002 to Question 1 of the Commission's Article 11 request for information of 13 December 2002.

[31] See Annex 1.C - Management Meeting 16 July 2001, of Tetra's reply of 16 December 2002 to Question 1 of the Commission's Article 11 request for information of 13 December 2002.

[32] See Annex 1.C - Management Meeting 26 August 2001, of Tetra's reply of 16 December 2002 to Question 1 of the Commission's Article 11 request for information of 13 December 2002.

[33] See Annex 1.C - Management Meeting 17 September 2001, of Tetra's reply of 16 December 2002 to Question 1 of the Commission's Article 11 request for information of 13 December 2002.

[34] See Annex 1.C - Management Meeting 23 January 2002, of Tetra's reply of 16 December 2002 to Question 1 of the Commission's Article 11 request for information of 13 December 2002.

[35] Also see Annex 24 "Technical Report" and Slide 7 of attached Power-point Presentation "*Fast Overview*", of Tetra's reply of 04 December 2002 to the Commission's Article 11 request of information of 27 November 2002.

[36] See Tetra's reply of 16 December 2002 to Question 14 of the Commission's Article 11 request for information of 13 December 2002 and Annex 7 thereto.

[37] See "Results" in pages 2 and 3 of the Test Report dated 31 January 2002 at Annex 4 to Tetra's reply of 16 December 2002 to the Commission's Article 11 request for information of 13 December 2002.

[38] See page 46 of the Test Report dated 31 January 2002 at Annex 4 to Tetra's reply of 16 December 2002 to the Commission's Article 11 request for information of 13 December 2002.

[39] See page 1 of the Test Report dated 31 January 2002 at Annex 4 to Tetra's reply of 16 December 2002 to the Commission's Article 11 request for information of 13 December 2002.

(a) *"*[*..statement concerning flexibility..*]* *To check the process for 14 different bottle shapes* [100-200,000]* *bottles produced in-house tests. Further during Field –test approx.* [*0-10 million*]* *bottles produced and sold."*

(b) "*The measured savings of* [..]* *energy and the saving of* [..]* *investment costs give the Fast technology a* [..]* *opportunity*."

(c) "[*..statement regarding patent protection status..*]*"

(d) "[*..recommendations in respect of commercial potential..*]*:

- [..]*
- [..]*.

[..]*."

*Discussions with [..a competitor..]**

17. Following the production of the "Technical Report" on 6 February 2002 a [..]* meeting was held between [*..a competitor..*]* and Tetra about Tetra Fast [..]*;[41] in the course of which:[42]

(a) [*..description of discussions..*]*;

(b) [.. *description of contacts..*]*;

(c) Tetra disclosed the following information regarding the Tetra Fast technology:

"*1 A general overview of the FAST technology, its development and the field test.*

2 Potential savings ... technology provides in capital investments and operating cost.

3 Specific differences of the FAST technology to the conventional process mould design and machine components.

4 Encountered development problems and their solutions.

5 Examples of [..] different bottles produced.*

6 Tests performed and their results.

7 Safety features.

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40 See page 2 of Annex 24 Technical Report dated 06 February 2002, to Tetra's reply 04 December 2002 to the Commission's Article 11 request for information of 27 November 2002.

41 [..]*.

42 Minutes of Meeting in Annex 8 to Tetra's reply of 16 December 2002 to the Commission's Article 11 request for information of 13 December 2002.

*8 [..]**"

(d) [..]*.

18. [*..narrative in respect of contacts with a competitor..*]* [..]*[43] [..]*[44] [..]*[45] [..]*[46] [..]*.[47]

R&D spending on Tetra Fast

19. By 2001, Tetra had spent approximately EUR [0-10]* million on Tetra Fast research and development. For 2001, Tetra stated its expenditure was EUR [0-10]* million and estimated that its expenditure for 2002 would be EUR [0-10]* million.[48]

B. The failure to disclose the Tetra Fast in the Original Notification

20. At the time of the Original Notification, the development of the Tetra Fast technology had reached the stage where:

(a) Tetra had filed for a number of patents referred to in recitals 9, 10 and 12(a) above;

(b) Tetra had commissioned two comparative studies with academic institutions referred to in recital 14(a) above;

(c) Tetra had obtained safety approval requirements with a view to commercialising the Tetra Fast technology from a number of institutes referred to in recital 14(b) above;

(d) Tetra had conducted its own in-house field tests on [..]* SBM machines referred to in recital 14(c) above and [..]* referred to in recital 14(c) above.

Tetra had spent approximately EUR [0-10]* million on Tetra Fast R&D by the end of the year preceding the Original Notification, to which it committed a further EUR [0-10]* million in the year of the Original Notification (see recital 19 above).

Section 8.10. (Research and Development)

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43 Minutes of the […]* in Annex 8 to Tetra's reply of 16 December 2002 to the Commission's Article 11 request for information of 13 December 2002.

44 See Annex 8 to Tetra's reply of 16 December 2002 to the Commission's Article 11 request for information of 13 December 2002.

45 See […]* in Annex 1.D of Tetra's reply of 16 December 2002 to Question 1 of the Commission's Article 11 request for information of 13 December 2002.

46 See Tetra's reply of 16 December 2002 to Question 14 of the Commission's Article 11 request for information of 13 December 2002.

47 See Annex 23 "*Tetra Fast History*" of Tetra's reply of 04 December 2002 to the Commission's Article 11 request for information of 27 November 2002.

48 Commission File Doc. 896.

21. Section 8.10 of the Form CO requested Tetra to supply information about "*Research and development*" in the following terms:

"*8.10 Give an account of the importance of research and development in the ability of a firm operating on the relevant market(s) to compete in the long term. Explain the nature of the research and development in affected markets carried out by the parties to the concentration.*

In so doing, take account of the following, where appropriate:

(a) trends and intensities of research and development[49] *in these markets and for the parties to the concentration;*

(b) the course of technological development for these markets over an appropriate time period (including developments in products and/or services, production processes, distribution systems, etc.);

(c) the major innovations that have been made in these markets and the undertakings responsible for these innovations;

(d) the cycle of innovation in these markets and where the parties are in this cycle of innovation."

22. In replying to Section 8.10 of the Original Notification Tetra states: [50]

"*Importance of Research and Development: Research and development has been important in the early development of the SBM machine industry. Machine Output rates were initially too slow compared to glass and the bottles were too heavy and could not be shaped in different ways. However, these impediments were overcome by continuous improvements made to SBM machines on the basis of R&D and "learning-by-doing", often in co-operation with the customers.*

Today, SBM machines have become somewhat commoditized, a fact that is illustrated by wide-spread copying of technology pioneered by companies such as Corpoplast and Sidel"

23. There is no reference to Tetra Fast in section 8.10 of the Original Notification. Notwithstanding the advanced stage of its development as described in recital 20 above, the Original Notification does not contain any reference to the Tetra Fast technology at all.

C. The failure to disclose the Tetra Fast technology in the course of the administrative procedure following the Original Notification

C.1 The obligation to communicate to the Commission without delay any "*material changes in the facts contained in the notification*".[51]

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49 Form CO defines "research and development intensity" as research development expenditure as a proportion of turnover.

50 See page 36 of the Original Notification.

24. During the Commission's investigation of the Original Notification, which resulted decision pursuant to Article 8(3) of the Merger Regulation on 30 October 2001[52] ("Tetra I Prohibition Decision"), field tests were being carried out and a number of management meetings were already held reporting on the satisfactory progress being made in the field tests relating thereto as set out in recital 14(c) above. At the management meeting on 17 September 2001 it was reported that [0-10 million]* bottles had already been produced as part of that field test since […]* and that […]* saving in capital spending; […]* reduction in floor space; and […]* reduction in electricity consumption would take place as a result of the use of Tetra Fast in the […]* SBM machine.[53] In an internal Tetra paper dated 23 April 2001 a SWOT analysis was carried out which, under the heading "strengths" described the technology as a "[*..description of technical qualities and possible applications..*]*".[54]

25. Although Tetra was actively performing significant field tests with the Tetra Fast technology and receiving satisfactory and highly promising progress reports thereon, Tetra never disclosed the existence of the Tetra Fast technology to the Commission during the administrative procedure leading to the Tetra I Prohibition Decision. This failure occurred despite a general obligation on notifying parties to communicate to the Commission without delay any "*material changes in the facts contained in the notification*".[55]

C.2 Tetra's Article 11 Reply

26. Tetra also failed to disclose the relevant information in its responses to certain questions asked in a request for information addressed to it by the Commission pursuant to Article 11 of the Merger Regulation ("Article 11 request"), during the Tetra I investigation.

Article 11 Request of 13 July 2001

27. In Questions 4 and 5 of the Commission's Article 11 request of 13 July 2001, the Commission asked Tetra:

"*Q4. Please provide all available information on the future potential use of PET in the LDPs [liquid dairy products]* and juice segments. Provide all studies and internal documents discussing this possibility. Explain in detail what technologies would be needed to enable PET to be used successfully for the*

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51 Article 4(3) of Commission Regulation 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in the Merger Regulation (the "Implementing Regulation"), OJ L61, 02.03.1998, p.1.

52 Case COMP/M.2416- Tetra Laval/ Sidel.

53 See Annex 1.C - Management Meeting 17 September 2001, of Tetra's reply of 16 December 2002 to Question 1 of the Commission's Article 11 request for information of 13 December 2002.

54 Commission File Doc. 1156.

55 See Article 4(3) of Commission Regulation 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in the Merger Regulation, OJ L61, 02.03.1998, p.1.

packaging of LDPs and juice. Discuss your activities and others' activities in this area.

Q5. Please provide all documents in your possession relating to the development of a barrier technology. In particular, please provide all studies, internal documents, technical and economic analyses and scientific documents relating to PET barrier."

28. In the Reply of 26 July 2001, to Question 4, Tetra referred to the following technologies for successful PET packaging of LDPs and juices:

(a) light barrier technology;

(b) gas barrier technology;

(c) (low acid) aseptic PET filling technology.

In doing so it omitted any mention of the potential use of Tetra Fast technology, although it had filed the first of the two Tetra Fast related 2001-2002 coating technology patent applications on 23 March 2001.[56] This patent application describes a method of explosion blow moulding of plastic container using a precursor gas mixture to apply a coating to the inner side of the bottle.

29. The nexus between gas barrier technology and the packaging of juices (to a limited extent also for packaging certain LDP products) and the nexus between aseptic PET filling technology and both the packaging of juices and LDP is recognized by Tetra in its Article 11 Reply of 26 July 2001.[57] Tetra's first coating technology patent application explicitly mentions the packaging of juices[58] and describes the purpose of the invention as coating a bottle such as a PET bottle, at the moment of blowing or immediately after, with a barrier layer which is impermeable for gases and aromatic substances.[59] It also states that the new procedure is economical as on the basis of the invention (which combines the stages of bottle forming and coating) separate coating machines are no longer necessary[60] and that the new coating technology patent is able to

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56 See recital 12(a) above.

57 Gas barrier for juices: "Oxygen exposure to juice can lead to Vitamin C loss, color change, and flavour change…(T)he outlook for the development of a technologically and commercially successful gas barrier technology for juice is at least as uncertain as that for beer." (file Nr 182) . Gas barrier for LDP "some specific milk products require a slightly higher oxygen barrier" (file Nr. 181) Aseptic filling technology for LDP and juices : "(A)septic filling of low acid LDP in PET involves higher complexity and higher risks than any other aseptic products (such as iced tea, juices and other high acid products)." (file Nr. 181).

58 Commission File Doc. 1411.

59 Commission File Doc. 1412.

60 Commission File Doc. 1413.

create a aseptic packaging, the bottle being aseptic immediately after its forming. [61]

30. In response to Question 5, Tetra submitted 6 annexes, including many technical documents. Tetra omitted to provide any document that contained any reference to Tetra Fast itself or to Tetra Fast technology related to barrier or coating technology patent, which Tetra had developed for use with its Tetra Fast technology as set out in the patent referred to in recital 12(a) above.

D. When the Commission first learnt about Tetra Fast

31. During the investigation triggered by the submission of the Original Notification, Tetra made no reference to the Tetra Fast technology and its technical and commercial potential in the field of blowing PET bottles, notwithstanding that as described in part "A. The development of the Tetra Fast technology" above, significant steps were being taken by Tetra regarding the Tetra Fast technology such as field tests, management meetings and patent applications.

32. Furthermore, prior to the Commission's divestiture decision of 30 January 2002,[62] in which it ordered the separation of Tetra and Sidel through divestiture of Tetra's shareholding in Sidel, […]*.[63]

33. On 6 February 2002, (that is to say, one week after the adoption of the Tetra I Divestiture Decision), Tetra produced a "Technical Report" summarising the findings of its Tetra Fast field tests as set out in recital 16 above. This was followed up by […]* as described in recitals 17-18 above.

34. The Commission found out about the Tetra Fast technology through the monitoring work of the Commission's Trustee,[64] appointed under the Tetra I Divestiture Decision to monitor the hold-separate obligation imposed on Tetra.

35. In the Trustee's First Monthly Progress Report of 15 April 2002, the Trustee stated that it had discovered a link […]*, as follows:

"[...]*"[65].

36. Following the Commission's request that the matter be investigated further […]*, the Trustee stated in its Second Monthly Trustee Monitoring Report of 17 May 2002:

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61 "[Die Erfindung]* erlaubt nicht nur eine billige Beschichtung ohne grossen Maschinenaufwand, sondern erzeugt gewünschtenfalls auch eine aseptische Verpackung, wobei der Behälter unmittelbar nach seiner Herstellung aseptisch ist." (Original text in German Language.) Commission File Doc. 1413.

62 Commission Decision pursuant to Article 8(4) in Case COMP/M.2416- Tetra Laval/ Sidel.

63 See Annex 8 of Tetra's reply of 16 December 2002 to the Commission's Article 11 request for information of 13 December 2002.

64 Ms Karen Silcock of Deloitte and Touche was appointed as Trustee pursuant to a Trustee Mandate of 22 February 2002.

65 See page 4 of the First Monthly Progress Report of 15 April 2002.

"[…]*".[66]

37. The Trustee further reported on an […]*.[67]

38. No further information was provided in the Trustee's subsequent reports.

E. Tetra Fast before the Court of First Instance

39. The material significance of the Tetra Fast technology with regards to the Commission's assessment in the Tetra I Prohibition Decision emerged a few months later during the proceedings before the Court of First Instance resulting from Tetra's applications for annulment of the Tetra I Prohibition Decision and the Tetra I Divestiture Decision.[68]

40. In a written *question* dated 11 June 2002, the Court of First Instance asked:

"*Having regard to the low-capacity end of the SBM machines market, post-merger what additional element(s) could it be expected Tetra would bring, minus its Dynaplast business, to Sidel's existing market position within the context of the merged entity*"

41. On 19 June 2002 the Commission responded that:

"*In addition, whilst this was not clear during the administrative procedure, the Commission understands that Tetra is in possession of an exclusive technology, Tetra Fast, applicable to low-capacity SBM machines which it has not sold. […]**".[69]

42. In the commitments offered by Tetra on 9 October 2001, Tetra purported to divest its SBM business which Tetra contended removed any possible horizontal concerns in the low capacity SBM machines market. Tetra's failure to disclose the fact that it was developing the Tetra Fast technology and testing it on low capacity SBM machines, meant that the Commission was unable to ascertain that:

(a) the commitments offered in fact excluded Tetra Fast related intellectual property rights; and

(b) the commitments offered did not in fact remove any possible horizontal concerns in the low capacity SBM machines market as submitted by Tetra.

In its Judgement of 25 October 2002, the Court of First Instance stated that information in respect of Tetra Fast was irrelevant for the purposes of deciding

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66 See page 2 of the Second Monthly Trustee Monitoring Report of 17 May 2002

67 Ibid. page 3.

68 Cases T-5 and 80/02 Tetra Laval v Commission.

69 See the Commission's answer of 19 June 2002 to Question 3 from the Court of First Instance of 11 June 2002.

Tetra's action for annulment as it was not included in the Tetra I Prohibition Decision and was only provided after the adoption of that decision.[70]

F. The disclosure of Tetra Fast in the second administrative procedure leading to the Tetra II Conditional Clearance Decision

43. In its update to the Original Notification submitted on 18 November 2002, ("Update Notification") Tetra referred to the Tetra Fast technology in passing in its response to Section 3.2 of the Update Notification which requests information with regard to:

"*For each of the parties to the concentration provide a list of all undertakings belonging to the same group.*

This list must include:

3.1 all undertakings or persons controlling these parties, directly or indirectly;

3.2 all undertakings active on any affected market that are controlled, directly or indirectly:

(a) by these parties;

(b) by any other undertaking identified in 3.1."

44. Tetra did so in the following terms:

"*In the course of the appeals procedure, the Commission has moreover raised the issue of the "Tetra Fast" technology currently under developments by Tetra Laval, and the possible application of such technology in the context of the SBM machines.*

The Tetra Fast technology is based on the concept of using a hydrogen-oxygen (explosive) chemical reaction to form PET bottles, instead of using compressed air.[71] The concept was originally proposed in 1996, and despite internal opposition from Tetra Laval's own SBM personnel, who did not expect the project to work, testing has been conducted internally by Tetra Laval […]**. These tests showed that this technology worked under certain conditions but was not ready for commercial deployment and the field test was terminated. New tests are presently being pursued at Tetra Laval's testing facilities under laboratory conditions. No field tests are yet planned and it is not possible for Tetra Laval to say if and when the technology could be proved workable under commercial conditions.*" [72]

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70 See recital 129 of the Judgment.

71 At footnote 6 of the Update Notification, Tetra states; "*In theory at least, the process could also have a sterilisation effect, […]**.*"

72 See page 6 of Update Notification.

45. There are no further references to the Tetra Fast technology in the Update Notification.

Replies to Article 11 requests for information and Conditional Clearance Decision

46. The information enumerated in part "A. The development of the Tetra Fast technology" above was only supplied to the Commission as a result of Tetra's answer to two Article 11 requests for information made by the Commission during the Tetra II investigation, on 27 November 2002 and 13 December 2002, in which the Commission raised Tetra Fast specific questions.

47. Responding to the Commission's Tetra Fast specific questions, Tetra provided a significant volume of information concerning Tetra Fast, most notably the "Test Report" of 31 January 2002 and the "Technical Report" of 6 February 2002. Those reports formed the basis of the Tetra Fast information used by the Commission in its assessment of the concentration between Tetra and Sidel the Tetra II Conditional Clearance Decision.

48. In the Tetra II Conditional Clearance Decision the Commission stated that:

" *The existence of SBM machines and SBM machine technology enhanced by the Tetra Fast technology is a new element which was not disclosed by Tetra during the previous procedure and has surfaced since the annulled Decision.*" (recital 33)

49. Following a detailed analysis of the Tetra Fast specific information collected by the Commission during the Tetra II investigation, the Commission found that:

(a) *"*[…]*[73] According to Tetra the process uses the same pre-form and mould as conventional stretch blow moulding. The new technology, rather than constituting one or more new SBM markets, can be expected to be sufficiently substitutable, at least in the first years of its commercialisation, and in any rate up to 2005, with existing SBM technologies." (recital 35);*

(b) " *In spite of its aseptic capabilities the new technology, at this stage, does not seem to lead to the creation of a distinct 'aseptic SBM' market, as the technology could be used equally to form bottles for aseptic and non-aseptic liquids…*" (recital 36);

(c) " *... the Commission's competitive assessment of the proposed operation is based on the wider market (comprising all beverages) for, respectively, low and high capacity SBM machines without distinctions by end-use, as found by the CFI in its Judgement, and without distinction by bottle forming technology.*" (recital 37);

(d) " *... it appears that commercialisation can be achieved* […]**, if necessary, subsequent to further testing and technological improvements. There is no doubt on the combined entity's enhanced ability to achieve further progress due to the combined technological capabilities of both parties.*" (recital 65);

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73 "[*..narrative in respect of testing..*]*.

(e) " *The Tetra Fast technology thus has a strong potential for proving to be a break-through technology for SBM machines by: (a)* [..]* *; (b) leading to substantial cost savings and process and performance improvements. The Commission's market investigation has furthermore confirmed that Tetra's and Sidel's main competitors do not have an equivalent technology in the pipeline and therefore could not challenge the merged entity's position regarding enhanced SBM machines*" (recitals 66-67);

(f) " *A coating technology is currently being developed by Tetra in the context of its Tetra Fast technology… (It appears, however that the technology is of high importance in the context of the further development of the Tetra Fast technology, affecting its commercial viability, as many liquids need, at least for prolonged shelf life, the application of coating technologies.)*" (recital 70);

(g) " *… Given the findings of the CFI in its Judgement, the Commission's market investigation did not focus on the alleged horizontal and vertical effects save insofar as necessary to assess the impact of Tetra's Tetra Fast technology which is patented and is being developed for use on SBM machines and which has been retained by Tetra. On such markets the operation leads to a (continued) horizontal overlap between Tetra and Sidel in SBM machines, which was not disclosed at the time of the annulled Decision.*" (recital 97-98);

(h) " *... the Tetra Fast technology can be expected to have a strong impact on both the low-capacity and the high-capacity SBM markets due to its potential for significant cost-savings and its fairly advanced stage of development… Both Tetra and Sidel have advanced R&D capabilities and the combined entity will have sufficient financial means to conduct research and development. The market investigation has not led to any indication that any competitor has comparably promising technology in the pipeline. While few competitors have managed to surmount the high barriers to entry and expansion in the high-capacity SBM market, the likely further development and introduction by Tetra/Sidel of their proprietary Tetra Fast technology in the short to mid-term is liable to: (a) raise barriers to entry; and/or (b) foreclose competitors. The merged entity would have a reduced incentive to licence the technology. It could either decide not to make it available to competitors at all or to make it available at a higher, possibly prohibitive, price or to make it available only partly while retaining key patents exclusively. The operation therefore raises serious doubts as to the creation of a dominant position for the merged entity in high-capacity SBM machines.*" (recital 99);

(i) " *... with regard to high-capacity SBM machines, the commitment offered by Tetra regarding the Tetra Fast technology…ensure open access for third parties other than Tetra/Sidel to the Tetra Fast technology, reduce barriers to entry and eliminate the risk of foreclosure. Competition on the further development of the Tetra Fast technology will ensure that competitors have an equal chance to make decisive progress on this technology. Sidel's position is clearly weaker in the low-capacity SBM market and entry into this market has been possible more easily (although Tetra's commercial failure with Dynaplast may indicate that barriers to*

entry and expansion are not low). On the other hand, the state of development of the Tetra Fast technology is currently more advanced in low-capacity SBM machines than in high-capacity machines (a fact that is, at least partly, to be seen in connection with Tetra's previous business activity in low-capacity SBMs related to Dynaplast). In any event, in view of the commitment given by Tetra in regard to the Tetra Fast technology, which has an impact on the low-capacity SBM market and would remove concerns, it is not necessary to decide upon this question." (recitals 100-101);

(j) as a result of the commitment to offer a non-discriminatory license to any third party on the Tetra Fast technology the Commission stressed that *"... the broad scope of the licence (not being limited to high capacity SBM machines for instance) ensures the commercial viability of the licensed technology by enabling the licensee to conduct similar development work as that carried out by Tetra (currently in low capacity SBM machines) and renders the technology accessible to both actual and potential competitors in the high capacity segment, throughout the life of the patents. It should be noted that the proposed commitment is accepted based on express confirmation by Tetra that the inventions listed therein embody all of Tetra's innovations to date related to the Tetra Fast technology; and that Tetra's remaining SBM intellectual property rights would not hinder prospective licensees from using the Tetra Fast technology. By contrast, the Commission considers it appropriate for Tetra to include all technology related to Tetra Fast (in particular Tetra Fast related coating technology… as it is only this inclusion which puts licensees on an equal technological footing with Tetra/Sidel regarding the further development of the Tetra Fast technology and which increases their commercial incentives to invest in the technology.*" (recitals 121-122);

(k) " *Subject to full compliance by Tetra with the commitment relating to Tetra Fast Licensing, the Commission concludes that there are no serious doubts remaining with regard to the horizontal overlap identified in this decision*" (recital 124).

IV. Legal Assessment

A. The Statement of Objections addressed to Tetra

50. In the Statement of Objections it addressed to Tetra on 1 August 2003, the Commission took the preliminary view that Tetra had failed to disclose pertinent information regarding the development of Tetra Fast which was being actively pursued prior to and during the administrative procedure leading to the Tetra I Prohibition Decision including its potential impact on the conditions of competition in the SBM market, inter alia in the Original Notification and in its Article 11 Reply of 26 July 2001. The Commission regarded such failures as constituting infringements within the meaning of Article 14(1)(b) and (c) of the Merger Regulation in that, in the absence of Tetra Fast specific information, the information which was provided regarding the markets for SBM machines was incorrect and/or misleading in the case of the Original Notification and incorrect in the case of the Article 11 Reply of 26 July 2001.

B. Tetra's Reply to the Statement of Objections

51. In its reply to the Statement of Objections, Tetra submits there are no grounds for the imposition of fines pursuant to Article 14(1)(b) or (c) of the Merger Regulation. Tetra's principal argument is that Tetra Fast does not form part of any market affected by the operation and is not closely related to the affected market for SBM machines and it was therefore not necessary for Tetra Fast to be mentioned in Section 8.10 of Form CO. Tetra states that Tetra Fast is not a substitute for and does not replace an SBM machine. Tetra considers that the Tetra Fast technology replaces an external piece of equipment supplying the pressure necessary for blowing the bottle within the SBM machine. The traditional means of achieving this pressure relies on compressed air produced by a compressor (most often supplied by a party other than the SBM machine suppliers), whilst the Tetra Fast technology relies on the pressure generated by explosive combustion of a hydrogen/oxygen mixture.

52. Tetra accepts that in order to use the Tetra Fast technology, modification to the SBM machine itself, for example, […]*.[74] Tetra submits however, that the development of Tetra Fast modifies *"[n]either the manner of operation of the SBM machine nor its technical features, nor the intrinsic nature or function of the SBM machine*". Tetra submits that the technology merely replaces one source of pressure for another. Tetra submits that [..*statement as to intentions with respect to the technology*..]* and argues that the use of Tetra Fast may theoretically make the use of a quality SBM machine more cost effective, but it will not fundamentally affect the performance of the SBM machine itself.

53. Tetra draws a distinction between, on the one hand, information the absence of which will lead to information being incorrect or misleading in the sense of Article 14(1)(b) of the Merger Regulation and, on the other hand, such information which the Commission may receive over the course of its investigation which may be useful for the determination of the investigation but which is not specifically required in Form CO. Tetra emphasises what it considers to be the different characters of Form CO and an Article 11 request. In Tetra's opinion, Form CO sets out a series of pre-defined factual questions to allow for an assessment of the completeness of the notification, whereas the contents of Requests for Information are drawn up depending on the Commission's information requirements at a given moment in its decision-making process and must be construed taking into account this context and typically requires the addressees to express subjective views as to the issues raised. In addition, Tetra considers that Requests for Information are of a less formal character and provide a means of discussion and exchange of views, for the Commission and the parties. According to Tetra, this is recognised in Article 14(1)(c) of the Merger Regulation which sanctions the provision of incorrect information but not of misleading information whereas Article 14(1)(b) sanctions the provision of incorrect or misleading information. Tetra also suggests that the word "misleading" in Article 14(1)(b) applies a subjective

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[74] The Commission notes that in addition other modifications are required. In the case of adaptation of […]*, the machine requires […]* (see Tetra's response to the Article 11 request dated 27 November s Annex 23, (slide presentation) slides 4 and 10.

test. On this basis, Tetra considers that the scope for imposing sanctions under Article 14(1)(c) is significantly more limited than under Article 14(1)(b).

Original Notification

54. Tetra considers that the information contained in the Original Notification was not incorrect or misleading in the sense of Article 14 of the Merger Regulation. Tetra considers that it was not required to provide information on Tetra Fast in Form CO on the basis that Tetra Fast does not in itself form an affected market. At the time of the Original Notification (and the Article 11 Reply of 26 July 2001), […]*. Tetra considers therefore that the Tetra Fast technology itself does not belong to a "market" in the terms of Form CO.

55. Tetra notes that Section 8.10 requests notifying parties to *"[e]xplain the nature of the research and development in affected markets carried out by the parties to the concentration*". Tetra argues that, in the absence of a concrete link between the Tetra Fast technology and any specific SBM machine, Tetra Fast is not so closely related to the affected market for SBM machines such that R&D concerning Tetra Fast can be considered as taking place in that market. It follows according to Tetra, that it cannot be said that R&D relating to Tetra Fast is R&D carried out in the market for SBM machines. Tetra therefore submits that Tetra Fast falls outside the scope of any affected market and also outside the scope of the sections of Form CO relied upon by the Commission.

56. Therefore, in Tetra's view it was not required to mention Tetra Fast in response to Section 8.10 of Form CO.

Article 11 Request of 13 July 2001

57. Tetra submits in respect of Question 4 of the Article 11 request of 13 July 2001, that the use of Tetra Fast for blowing PET bottles is neutral in terms of the product filled. Tetra considers there was no need to mention it in a discussion relating specifically to the future potential use of PET for the filling of specific products such as LDPs and juice. Tetra also underlines that the question asks in the context of *"future potential use"* of PET for LDPs and juice, what technologies *"would be needed"* to enable PET to be used for the packaging of these products. Tetra contends that since Tetra Fast is merely an alternative means for producing the pressure required for the stretch blow moulding process, it is not needed for this purpose and therefore the failure to mention it does not mean the reply is incorrect.

58. With respect to Question 5 of the Article 11 request of 13 July 2001, Tetra maintains that Tetra Fast is not a barrier technology. It states that Tetra Fast relates to the use of the energy released during the explosive combustion of the gas mixture to apply the coating agent to the inside of the bottle. Tetra submits that Tetra Fast has nothing to do with the barrier as such. The identity of the coating agent may vary and is not covered by the patent application PCT/EP02/02160. Tetra submits that it was not required to mention the Tetra Fast technology in connection with barrier technology with the consequence that its reply was not incorrect.

59. In its reply dated 12 March 2004, Tetra asserts that it was quite reasonable for Tetra to assume it was not required to mention Tetra Fast in the Article 11 Reply of 26 July 2001.

C. The Commission's Evaluation of Tetra's Reply

Tetra's failure to disclose Tetra Fast in the Original Notification

60. The Commission refutes Tetra's suggestion that the word "misleading" in Article 14(1)(b) of the Merger Regulation is subjective. Misleading information is information which would tend to suggest to a normal or reasonable reader that the situation is other than it is.

Tetra Fast relates to the market for SBM machines

61. The Commission essentially agrees with Tetra's submission that research and development activity in respect of the Tetra Fast technology is aimed at finding different ways of supplying the pressure necessary to an SBM machine for the production of PET bottles. However, the Commission rejects Tetra's argument that such activities are not matters connected to the market for SBM machines.

62. Firstly, Tetra's reply is in itself unconvincing in that it argues that an essential part of SBM machines governing the essential "stretch-blow" phase of SBM machines is not part of SBM machines because it may also be marketed as a separate dissociable part. It is recalled that Tetra explains in its reply that [*..statement as to intentions with respect to the technology..*]*.

63. That Tetra itself saw Tetra Fast as part of SBM machines is shown by Tetra's internal overview of its Research and Development budget for 2000 which […]*.[75] The budget overview details expenditure on R&D projects and includes […]* Under each bold heading a breakdown of each R&D project/item is set out together with allocated costs. Under the final heading, […]* The financial breakdown set out in the budget overview document sets out the allocation of costs according to business area and thus, provides cogent evidence that Tetra indeed regarded expenditure on the Tetra Fast project R&D in relation to the market for SBM machines.[76] The Tetra Fast project was one of […]*[77] in respect of which Tetra had spent approximately EUR [0-10]* million before 2001 and to which it had committed a further EUR [0-10]* million in 2001.[78]

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75 Commission File Doc. 1060.

76 In its reply dated 12 March 2004, Tetra contests that the reference to […]* is not evidence that it considered such expenditure on R&D as relating to the SBM machine market on grounds that it is reasonable to […]*. Tetra notes that heading does not say […]*. The Commission considers that […]* expenditure evidently relates to SBM machines.

77 Commission File Doc. 1060.

78 […]* Commission File Doc. 896.

64. Tetra's internal documents go further, stating that the technology could be […]*[79] Tetra's Development report of 6 February 2002,[80] discussing the Tetra Fast technology, also states *(emphasis added)* :

"[..]*.

[*..statement as to strategy with respect to the technology..*]*[81]

[…]*

65. In addition, Tetra's submission that the Tetra Fast technology does not bring about any improvement to the operation of an SBM machine and does nothing more than provide an alternative means of producing pressure is also contrary to other documents on the Commission's File. The Commission notes that the Tetra Fast technology facilitates the blowing and sterilisation (and, in effect, aseptic blowing) of PET containers at one stage of production instead of requiring the separate production steps of blowing followed by sterilisation of the container before it enters an aseptic filling machine. Aseptic containers are required for the filling and packaging of long-life products such as juices and LDPs. Although aseptic blowing of the bottle using the Tetra Fast technology is not the only method of producing an aseptic container ready for aseptic filling, it is a technology which meets one of the clear needs of packaging long-life products. Therefore, Tetra's submission that Tetra Fast does nothing more than provide an alternative means of producing pressure is incorrect. The technology has the potential to modify conventional methods of stretch blow moulding, sterilisation and aseptic filling and could bring about substantial cost savings in the purchase and operation of SBM machines operating in the context of a PET production line.

66. Tetra's internal test reports indicated that measurement of a Tetra Fast equipped SBM machine compared to conventional SBM machines brought about […]* reductions in power consumption.[82] In addition, the Trustee's First Monthly Progress Report of 15 April 2002 summarised […]* views, on the basis of its discussions with Tetra regarding […]* the technology as follows: " […]* *"*[83]

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79 Commission File Doc. 569.

80 In its reply dated 12 March 2004, Tetra argues that the quotation from Tetra's Development report of 6 February 2002 has been taken out of context, on the basis that it is a general background introduction to a scientific report, and not a document relating to Tetra's commercial policy. The Commission does not allege that this document reflects Tetra's commercial policy. It is, however, an internal document setting out Tetra's internal findings and is of importance in regard to the relation between Tetra Fast and SBM machines.

81 Tetra's reply to the Article 11 request dated 27 November 2003, Annex 23.

82 Tetra Pak Development Report dated 10.08.2001, Tetra's reply to the Article 11 response dated 13 December 2003, Annex 1.A indicated power savings of […]*.

83 Commission File Doc 372, emphasis added.

67. The advantages of the Tetra Fast technology are highlighted in a Tetra internal document entitled "(Cost Analysis) Comparison of Tetra Fast with Conventional SBM Equipment" (undated). This document states:

> *"*[*..statement concerning cost analysis ..*]**"* [84]

68. Tetra's analysis of Tetra Fast equipped SBM machines compared with "conventional SBM equipment" and associated re-tooling also demonstrates that Tetra identified the connection between Tetra Fast and SBM machines. Tetra's own internal documents describing the Tetra Fast technology and its categorisation of its expenditure on Tetra Fast research and development demonstrate the clear link between the Tetra Fast technology and the markets for SBM machines. The Commission rejects Tetra's argument that a concrete link between Tetra Fast and *any specific* SBM machine would have been required in order to render provision of information relating to Tetra Fast necessary. The fact that the technology had the potential to make *all* SBM machines more efficient, including existing ones, subject to retooling rather than being tailored to specific models increased its importance as an SBM technology that Tetra was required to disclose in section 8.10 of Form CO.

69. In the context of the Tetra II Conditional Clearance Decision, Tetra itself *de facto* acknowledged the link between Tetra Fast and the markets for SBM machines by offering the commitment to grant a non-discriminatory licence for the Tetra Fast technology in response to the Commission's serious doubts regarding the creation of a dominant position on the high-capacity SBM market due to the impact of the Tetra Fast technology.

70. The proposed concentration gave rise to affected markets for SBM machines. Activities that are related to the modification of the design of SBM machines are in themselves likely to have an effect on the conditions of competition on these markets.[85] Furthermore, Tetra was aware of Sidel's strong position on the low capacity segment of the SBM machines market and its leading position in the high capacity SBM segment. This competitive strength made it even more evident that these modifications to SBM machines could impact on the conditions of competition on the affected market for SBM machines. Activities that are related to the modification of the design of SBM machines, such as Tetra Fast, should therefore have been mentioned in response to Section 8.10 of Form CO.

Tetra's awareness of the potential of Tetra Fast at the time of the Original Notification

71. Tetra had been researching Tetra Fast since 1996 and, at the time of the Original Notification:

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84 Commission File Doc 1028.

85 The modification to the physical characteristics of the SBM machine was even liable to have had an impact on the Commission's market definition(s) for SBM machines. (See Commission Notice on the definition of relevant market for the purposes of Community competition law 97C/ 372/03.)

(a) it had already acquired a number of basic patents described in recital 9(a) and (b) above, subsequently described by Tetra's R&D personnel as "[…]*" in this area[86];

(b) it had filed for a number of patents described in recitals 9(c) and recitals 10(a), (b) and (c) and 12(a) above;

(c) it had already incurred substantial R&D costs and had qualified Tetra Fast as […]*;[87]

(d) it had commissioned studies from university research facilities that had shown that […]* (see recital 14(a) above);

(e) it had obtained the necessary pre-marketing safety certifications (see recital 14(b) above);

(f) it had commenced field tests […]* (see recital 14(c) above).

Section 8.10 Form CO should have contained information on Tetra Fast

72. As illustrated at part C above, the Commission considers that R&D in respect of Tetra Fast is clearly related to the market for SBM machines. Despite this, Tetra did not mention the existence of Tetra Fast in Section 8.10 of Form CO. Instead, Tetra limited itself to general remarks about past innovation and the commoditised character of the market. In the light of the foregoing circumstances, Tetra's statement in section 8.10 was incorrect. It was at the very least misleading.

Tetra's failure to disclose Tetra Fast in the Article 11 Reply of 26 July 2001

73. The Commission rejects Tetra's view regarding the alleged distinction between the formal character of Form CO and an Article 11 request. Responses to requests for information made pursuant to Article 11 of the Merger Regulation must be correct in order to give the Commission a "true" picture of the state of the markets involved. Form CO and responses to requests for information are equally formal in character and the standard of correctness of the information provided is the same. The obligation of notifying parties to provide correct information applies equally to both replies to requests for information and Form CO. Article 14 (b) and Article 14(c) of the Merger Regulation differ insofar as Article 14(b) also sanctions the supply of "misleading information". However, both points (b) and (c) of Article 14 sanction the supply of "incorrect information" and in this respect *require observation of the same standard*. Even if Tetra's argument that the context and purpose of Article 11 letters is different from the context and purpose of submission of a Form CO were accepted, this could never mean that responding parties are exonerated from the obligation, where the reply does not cover all matters pertinent to the questions posed, to indicate the limitations of their reply clearly enough so as to put the

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86 See recital 16(1)(c) above.

87 More than EUR [0-10]* million by 2001. See Tetra's reply of 16 December 2002 to Question 10 of the Commission's Article 11 request for information of 13 December 2002.

Commission in a position to further enquire about certain facts not yet provided if the Commission deems those relevant for the purpose of its assessment. Tetra did not do so. The information supplied by Tetra in the Article 11 Reply was therefore incorrect, as is further demonstrated by the following:

74. At the time of the Article 11 Reply of 26 July 2001, in addition to what Tetra had already achieved as described at recital 71 above:

(a) […]* tests […]* were progressing well […]* as highlighted in recital 14(c) penultimate indent above; and

(b) management had received at least one presentation dated June 2001[88] and one presentation dated 16 July 2001[89] reporting on the promising development of the technology.

Tetra's reply did not give the Commission any indication of these facts, or any reason why Tetra was unable to provide them or why it considered them less relevant, all of which would have put the Commission in a position to ask further questions if it deemed the omitted information relevant.

75. Question 4 of the Article 11 request 13 July 2001 asked Tetra to provide all available information on the future potential use of PET in the LDPs and juice segments. It requested all studies and internal documents discussing this possibility and asked Tetra to explain in detail what technologies would be needed to enable PET to be used successfully for the packaging of LDPs and juice. The question therefore required Tetra to discuss what technologies would be needed in order to compete successfully on the markets for the packaging of these sensitive products. It requested Tetra to discuss its own and its competitors' activities in this area. This necessitated a discussion of the technologies that the parties and their competitors possessed or were developing in order to meet the needs identified and so compete effectively in future. Tetra was aware of, and indicated to the Commission, the need for aseptic packaging for long-life sensitive products. Tetra argues that the Tetra Fast technology is not necessary for the successful packaging of LDPs and juices. As noted above at recital 65, the Tetra Fast technology facilitates the blowing and sterilisation and, in effect, aseptic blowing of PET containers at one stage of production instead of requiring the separate production steps of blowing followed by sterilisation of the container before it enters an aseptic filling machine. Although aseptic blowing of the bottle using the Tetra Fast technology is not the only method of producing an aseptic container ready for aseptic filling, it is certainly a technology which meets one of the clear needs of packaging long-life products, and therefore should have been disclosed by Tetra.

76. As outlined in recital 12(a) above, Tetra had submitted a patent application for a new barrier application technology related to Tetra Fast. First, this patent application (which at one point mentioned juice explicitly) stated that the new

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88 Commission File Doc. 1038.

89 Commission File Doc. 1040.

technology was relevant to the gas barrier, which in Tetra's own view is relevant for commercially successful packaging of juice.[90] Second, this patent application mentioned the aseptic qualities of the technology for which patent protection was sought, the latter being undisputedly of high importance for commercially successful packaging of juice, and also of importance for LDPs.[91]

77. Regarding gas barrier technologies it can be observed that Tetra, as shown in recital 63 above, had over a number of years invested in R&D on Tetra Fast and listed it […]*. […]* projects had an impact on gas barrier technologies. Tetra mentioned one of them (Tetra's development of the Glaskin and Sealica barrier technologies) in its reply to this question but failed to provide any information on the Tetra Fast technology although it had submitted a patent application in this area. Tetra's response to the statement of objections, point 76, mentions that Tetra Fast was not included under the budget as […]*. However, this is irrelevant, as it was listed […]* and the fact that a technology with the potential to combine barrier application and bottle blowing in one process was listed in this way cannot take away from its status as a barrier technology project.

78. Regarding aseptic blowing and filling it can be observed that two of the three PET projects had a potential impact on aseptic PET blowing and filling technology. Tetra mentioned the other technology concerned, an aseptic filler, (by reference to the information it had submitted in form CO) but again failed to refer to the Tetra Fast technology although Tetra's coating patent application had contained unambiguous references to the aseptic qualities of the Tetra Fast technology and Tetra had to be aware of the influence of these qualities on aseptic PET packaging technologies in general.

79. […*statements as to aseptic qualities*..]*[92]

80. In light of the foregoing there was no reason for Tetra to consider that Tetra Fast was not relevant to the questions asked and to omit any reference to the Tetra Fast technology in its response. It is clear that a full discussion of the future competitive environment should have included a detailed explanation of this Tetra Fast derived technology. Tetra's response was incorrect at least in that it did not give the Commission any indication that the information given in the response was incomplete in a material respect.

81. Question 5 asked for documents relating to the development of a barrier technology. This obviously includes methods of applying barrier materials to the surface of the bottle. Further, Question 5 requested "*all studies, internal documents, technical and economic analyses and scientific documents relating to PET barrier."* Tetra argues that it was not required to mention Tetra Fast in response to Question 5 since the use of Tetra Fast for coating purposes relates

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90 Commission file Doc. 1411.

91 Commission file Docs. 1413, 141, 1423.

92 Tetra Pak Plastic Packaging R&D Darmstadt, SWOT-Analyse, 23 April 2001. The same document, also comments, […]*. This comment thereby acknowledges a direct connection between the Tetra Fast technology and PET filling technologies. Commission File Doc 1156.

to the use of energy released during the explosive combustion of the gas mixture to apply a coating agent to the inside of the bottle and thus Tetra Fast has nothing to do with the characteristics of the barrier as such. Tetra also points out that the subject matter of the patent application in question, referred to in recital 12(a) above, is the use of Tetra Fast as a means to apply a barrier coating on the inside of a PET container. According to Tetra it is not a "coating patent."[93] Tetra considers that since the use of Tetra Fast is only connected with the physical application of a barrier material to the inner surface of the container, it was not required to mention the technology since the Commission had requested information regarding barrier technologies only.[94]

82. The Commission accepts that there are different possibilities for applying a barrier coating to a PET container. Such methods may take the form of applying a barrier material onto the inside of the finished PET container (for example, in Tetra's Glaskin barrier technology or in Sidel's ACTIS technology). There are also other possibilities involving coating the PET preform before blowing (e.g., in Tetra's Sealica technology).[95] The contrasting methods of application of particular barrier technologies may be relevant to the likely success of one barrier relative to another if the application technology for one is cheaper than for a rival and this may be relevant to the cost, speed, reliability, effectiveness and therefore acceptability of barrier technologies as a whole, with consequential effects for the attractiveness of PET packaging for sensitive products. The Commission considers that the method of application of the barrier naturally falls under the heading "barrier technology", because it is impossible to consider one without reference to the other.

83. Tetra itself saw a need to discuss the method of application of the barrier technology as well as the barrier technology when it described barrier technologies in its Form CO dated 18 May 2001 under the heading "Section 6.1.B BARRIER TECHNOLOGY, (a) The Different Barrier Technologies", as follows:[96]

*"[122]** [...]* "

*"[138]** [...]*"

*"[142]** […]*".

"*[143]** […]*"

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93 Tetra's reply dated 12 March 2004, point 13.

94 Tetra suggested that a report submitted to the Commission "Barrier-enhancing Technologies for PET and Polypropylene Containers and Closures" provided to the Commission on 9 December 2002 focuses on technologies relating to the barrier itself and not the means of application. However, the Commission notes that the report discusses means of application in the context of process innovations, at Section I: Detailed Description of Recent Technical and Commercial Developments, p.8 ff.

95 See recitals 122-148 Form CO dated 18 May 2001.

96 Form CO dated 18 May 2001, recitals 116-148.

"[144] […]*".*[97]

84. Tetra's discussion of barrier materials together with barrier application technology under the heading "Barrier Technology" is a further indication that both logically fall under the same heading, barrier technology, and should be discussed together. Therefore, Question 5 which requested information on PET barrier technology also necessitated a discussion of methods of application of PET barrier materials to the inner surface of the bottle.

85. The patent application PCT/EP02/02160 (with a priority date of 23 March 2001) describes a method of blowing bottles using a precursor gas mixture to coat the inner side of the bottle at the same time as blowing the bottle. This is still a technology for applying a barrier to the inner surface of the bottle. The fact that it is not sprayed or applied on to the surface of the bottle in the same way as other barrier technologies does not make it any less related to PET barrier. At the time of filing the patent application, Tetra was aware of the potential of Tetra Fast to be used as a means of applying a coating to the inner side of the PET bottle. In light of the foregoing there was no reason for Tetra to consider that Tetra Fast was not relevant to the questions asked or to omit reference to the Tetra Fast technology in its response. Tetra's failure to mention Tetra Fast or to give any indication that its response was incomplete in this respect renders its reply incorrect.[98]

D Summary and conclusion on infringements

D.1 Transitional provisions

86. The Merger Regulation was repealed with effect from 1 May 2004 by Regulation (EC) No 139/2004. Article 26(2) of Regulation (EC) No 139/2004 provides that the provisions of the Merger Regulation shall continue to apply to any concentration which was the subject of an agreement or announcement or where control was acquired within the meaning of Article 4(1) of the Merger Regulation before 1 May 2004. Therefore, Article 14 of the Merger Regulation continues to apply to the infringements which are the subject of this Decision by virtue of Article 26(2) of Regulation (EC) No 139/2004.

87. The infringements at issue would also constitute infringements if committed in respect of a concentration which was subject to Regulation (EC) No 139/2004, pursuant to Article 14(1)(a) and Article 14(1)(b)of that Regulation, and would be liable to fines at least as high as those foreseen by Article 14 of the Merger Regulation.

D.2 Infringement of Article 14 (1) (b) of the Merger Regulation due to provision of incorrect or at least misleading information

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97 See also recitals 146 and 148 in which Tetra discusses barrier application technology together with barrier technology.

98 Tetra's submission […]* in support of its contention that it should not have been mentioned in connection with barrier technologies, is irrelevant to the issue whether information on Tetra Fast should have been included in Tetra's response. The important question is whether the technology showed promise at the time Tetra submitted its Article 11 Reply of 26 July 2001

88. Under Article 14(1) (b) of the Merger Regulation the Commission may by decision impose fines from EUR 1 000 to 50 000 where, intentionally or negligently, an undertaking supplies incorrect or misleading information in a notification pursuant to Article 4.

89. The above background demonstrates that, in the Original Notification, Tetra failed to disclose pertinent information regarding the development of Tetra Fast which was being actively pursued during this time, including its potential impact on the conditions of competition in the SBM market. Such failures constitute an infringement within the meaning of Article 14(1) (b) in that in the absence of Tetra Fast specific information and of any indication of its omission, the information which was provided regarding the markets for SBM machines was incorrect or at the least misleading.

90. The seriousness of the infringement is demonstrated by the fact that Section B of the introduction to the Form CO entitled "The need for correct and complete information" clearly states:

> "*All information required by this form must be correct and complete. The information required must be supplied in the appropriate section of this form.*"
>
> Notifying parties must take heed of the instructions in the Form CO, given the tight deadlines to which the Commission is subject. These constraints mean that firms must be particularly careful in submitting details of their merger. This makes the submission of complete and correct information regarding all matters relevant for the Commission's assessment of the compatibility of the concentration with the common market, all the more important.[99] Article 4(3) of the Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in the Merger Regulation.[100] provides that material changes in the facts contained in the notification which the notifying parties know or ought to have known must be communicated to the Commission without delay. Therefore, the responsibility to ensure that information is complete and correct is an ongoing obligation. Notifying parties must inform the Commission if information materially changes during the administrative proceedings that is responsive to the questions set forth in Form CO.

91. In particular, the absence of any mention of the Tetra Fast technology, in Tetra's Original Notification is incorrect or at least grossly misleading as it fails to disclose the potential impact of the innovative Tetra Fast technology on the future development of the SBM market that Tetra had been researching since 1996 and for which:

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[99] See recital 28 in Case No IV/M.1543 Sanofi/Synthelabo of 28 July 1999; recital 93 in Case No. IV/M.1610 – Deutsche Post/trans-o-flex of 14 December 1999 and recital 39 in Case No COMP/M.2624 BP/Erdolchemie of 19 June 2002.

[100] OJ L 61, 02.03.1998.

(a) it had already acquired a number of basic patents described in recital 9(a) and (b) above subsequently described by Tetra's R&D personnel as "[…]*";[101]

(b) it had already incurred substantial R&D costs[102];

(c) it had commissioned studies from university research facilities […]* (see recital 14(a) above).

(d) it had obtained the necessary pre-marketing safety certifications (see recital 14(b) above);

(e) it had commenced field tests including […]* (see recital 14(c) above).

92. These facts ought to have been included in Tetra's reply to Section 8.10 of the Original Notification set out in recitals 21-23 above.

D.3. Infringement of Article 14 (1) (c) due to provision of incorrect information

93. Under Article 14 (1) (c) of the Merger Regulation the Commission may by decision impose fines from EUR 1 000 to 50 000 where, intentionally or negligently, an undertaking supplies incorrect information in response to a request made pursuant to Article 11 of that Regulation.

94. Tetra's Article 11 Reply of 26 July 2001 was incorrect in that it omitted to make any mention of the Tetra Fast technology at all, which did not give the Commission a true picture as regards the specific aspects of the conditions of competition on the markets for PET packaging which were the subject of the Commission's questions. Such failures constitute an infringement of Article 14(1) (c) in that in the absence of Tetra Fast specific information or of any indication of its omission, the information which was provided regarding the markets for SBM machines was incorrect.

95. Undertakings responding to Article 11 requests must pay very careful attention to the instructions in such requests advising them of the requirement to provide correct information, where the Commission's letter requesting the information clearly states that:

(a) "The Merger Regulation, in the interest of the business community, requires the Commission to reach a decision within a strict, legal deadline";

(b) "This letter is a formal request for information in the context of the Commission's investigation into the markets in which the companies involved in the merger operate. ... This information is necessary to enable the Commission to make a full and proper assessment of the merger."; and

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[101] See recital 16 (1)(c) above.

[102] More than EUR [0-10]* million by 2001. See Tetra's reply of 16 December 2002 to Question 10 of the Commission's Article 11 request for information of 13 December 2002.

(c) *"The Merger Regulation empowers the Commission to obtain all necessary information from undertakings and associations of undertakings, and from persons controlling undertakings. In this connection, you should be aware of the powers of the Commission to impose fines and penalty payments for either the failure to supply information or the intentional or negligent submission of incorrect information."*

96. Tetra's Article 11 Reply of 26 July 2001 set out in recitals 27-30 above was incorrect in both its reply to question 4 and its reply to question 5 in that it failed to disclose the potential impact of the innovative Tetra Fast technology on the future development of the PET packaging and PET barrier technology. In particular, no mention was made of Tetra Fast and its implications for Tetra's carton and PET businesses although :

(a) Tetra was already field testing the Tetra Fast technology […]* on […]* SBM machines […]* as referred to in recital 14(c) above;

(b) [..]* tests […]* were progressing well […]* as highlighted in recital 14(c) penultimate indent above;

(c) Tetra had already applied for a patent describing a method of applying a coating to the inner surface of the bottle for use with the Tetra Fast technology as set out in recital 12(a) above.

97. All of the above steps were geared towards developing Tetra Fast […]*. Either option is likely to be of particular interest to juice and LDP customers who used Tetra's aseptic carton packaging model where Tetra was already dominant. Any development in respect of gas barrier technologies for PET bottles is likely to be of particular interest to Tetra's juice customers. This potential would therefore have had a significant impact on the Commission's assessment of:

(a) the SBM market;

(b) Tetra's ability and incentive to leverage its carton customers into PET;

(c) the future position of the merged entity on PET packaging markets.

98. In failing to disclose this information, Tetra's answers to Questions 4 and 5 of the Commission's Article 11 request of 13 July 2001 (see recitals 27-30 above) were incorrect in that they omitted to provide the following information or, at the very least, in that they did not disclose the factual limitations to Tetra's replies such as would have enabled the Commission to request further information if it deemed such information relevant to its assessment, regarding the following:

(a) all available information including internal documents existing at the time of relevance for the future potential use of PET in the LDPs and juice segments; (Question 4)

(b) a discussion of Tetra's activities in the research and development of technologies to enable PET to be used successfully for packaging LDPs and juice (Question 4); and

(c) all documents relating to the development of barrier technology or PET barrier (Question 5).

All of that information was expressly requested in the Commission's Article 11 request of 13 July 2001.

E. Negligence

99. In its Reply to the Statement of Objections Tetra makes no submission as to whether its conduct may be considered intentional or negligent. Tetra does not seek to explain the omissions in the notification or the Article 11 Reply of 26 July 2001, but instead argues there are no grounds for the application of Article 14(1) (b) or (c) in this case. Tetra's principal argument is that the Tetra Fast technology is not related to the markets for SBM machines and therefore it was not necessary to mention its existence in Section 8.10 of the Original Notification and in the Article 11 Reply of 26 July 2001. Therefore, according to Tetra's interpretation of Form CO and the Article 11 request of 13 July 2001.Tetra was not required to mention the Tetra Fast technology.

100. There are no indications that the failure to supply the information was committed intentionally. The Commission considers that Tetra's failure to mention the Tetra Fast technology in Section 8.10 of the Original Notification and the Article 11 Reply was a result of gross negligence.[103] As noted at recitals 61-70, there is a clear link between the Tetra Fast technology and the SBM markets. At the time of submission of the Original Notification, Tetra not only knew of the existence of Tetra Fast and its potential significance for the development of the market for SBM machines but:

(a) it had been actively researching the technology since 1996 and was actively amassing a portfolio of patents in relation thereto;

(b) since 1996, it had spent approximately EUR [several, 0-10]* million on Tetra Fast and had committed to spending a further EUR [0-10]* million in the year of the Original Notification;

(c) it had conducted […]*;

(d) it was conducting field tests that were producing […]* of PET bottles using the technology.

101. Notwithstanding the significant activities which were going on within Tetra vis-à-vis Tetra Fast throughout the period 1996 to the date of the Original Notification and throughout the administrative procedure following the Original Notification, Tetra failed to disclose the fact of Tetra Fast's existence and made statements inconsistent with that technology's existence.

102. The Commission only found out about the existence of Tetra Fast through the efforts of its Trustee as set out in recitals 31-38 above.

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[103] See recitals 1 to 13 of Case No IV/M.1543 Sanofi/Synthelabo of 28 July 1999.

103. Tetra is a multinational company with experience in merger proceedings and notifications. Throughout the proceedings it was advised by at least two legal firms with significant experience in merger proceedings. Therefore, the degree of diligence required in providing correct and complete information can reasonably be expected to be high.[104]

104. As noted at part C above, and as shown in several Tetra documents regarding Tetra Fast, the Tetra Fast technology is clearly related to the affected market for SBM machines. The relevance of the information is beyond doubt, as the significance of the Tetra Fast technology was relevant for:

(a) the competitive assessment of PET packaging markets and in particular the market for SBM machines;

(b) the assessment of Tetra's commitment to divest its SBM activities in the Tetra I proceedings in the Tetra I Prohibition Decision; and

(c) answering questions regarding Tetra's SBM activities post closure of Dynaplast put to the Commission by the CFI in the proceedings brought by Tetra for annulment of the Tetra I Prohibition Decision.

F. Nature and Gravity of the infringement

105. Under Article 14(3) of the Merger Regulation, in setting the amount of the fine, the Commission has to take account of the nature and gravity of the infringements.

(a) Nature

106. The infringement of Article 14(1)(b) and 14(1)(c) committed by Tetra took the form of grossly negligent failure to disclose the Tetra Fast technology which it had been developing since 1996.

(b) Gravity

107. In its response to the Statement of Objections Tetra did not make comments as to the gravity of the infringement. Neither did Tetra identify any mitigating factors.

108. The infringements in this case are very serious. The Original Notification is the basis and the starting point for the Commission's investigation of a concentration. It determines to a large extent the Commission's approach towards the case and the areas and focal points of its investigation. Incorrect and misleading information creates the risk that important aspects relevant for the competitive assessment of the transaction are neither investigated nor analysed by the Commission, or partially investigated and analysed resulting in its final decision being flawed since it is based on incorrect or incomplete information. As previously mentioned in assessing concentrations at part D.2 above, the Commission is subject to extremely tight deadlines. In this framework it is essential for the Commission's work that it can focus its investigation on the

[104] See recital 59 in Case COMP/M.1608 - KLM/Martinair (III) of 14 December 1999.

relevant issues from the very beginning of the procedure, based on a comprehensive and correct set of information provided in the notification.

109. The same may be said of the failure to provide correct information in the Article 11 Reply of 26 July 2001, which prevented the Commission from making a full and proper assessment of the merger.

110. The development of Tetra Fast was important to the Commission's analysis of the conditions of competition on PET packaging markets. The undisclosed information was highly significant for the assessment of Tetra's acquisition of Sidel in the Tetra I Prohibition Decision. Tetra's failure to disclose its activities in developing the Tetra Fast technology, and its potential significance to the future development of Tetra's aseptic carton and PET businesses precluded the Commission from taking this material factor into account in the Tetra I Prohibition Decision in its assessment of:

(a) the relevant product market definition for SBM machines;

(b) the Commitments offered by Tetra in the course of the Tetra I administrative procedure;

(c) the competitive impact of the transaction between Tetra and Sidel on the SBM market.

The potential of the technology would have had a significant impact on the Commission's assessment of:

(a) PET packaging markets;

(b) Tetra's ability and incentive to leverage its carton customers into PET;

(c) the future position of the merged entity on PET packaging markets, in particular on the relevant SBM markets.

111. Another factor to be taken into account in concluding that the infringement of Article 14(1)(c) is very serious is that Tetra gave incorrect replies to two questions, each having a different scope in the Commission's Article 11 request of 13 July 2001. Information on Tetra Fast should have been disclosed in response to each of these two questions, for different reasons.

112. The Commission notes that Tetra disagrees that the relevant information should have been provided in Section 8.10 of the Original Notification or in the Article 11 Reply of 26 July 2001. Tetra also disputes the relevance of information concerning Tetra Fast. As outlined in recitals 24 and 25 Tetra failed to communicate to the Commission the significant results of the ongoing field tests during the first administrative procedure and Tetra's favourable management assessment of these results, outlined in recital 14(c), second and third indent, above, which in any event would have qualified as material changes in the facts. The Commission learned of the existence of the Tetra Fast technology only because it was discovered by the monitoring trustee following the Tetra I Prohibition Decision. Tetra therefore only provided information subsequent to the Tetra I Prohibition Decision because it was required to do so by the monitoring trustee. It was not until 16 December 2002 that the

Commission had full information in respect of Tetra Fast. There is therefore no reason to take into account Tetra's co operation as a mitigating factor.

G. Amount of the fine

113. Taking account of the circumstances of the case, the Commission considers it appropriate to impose the following fines on Tetra:

(1) a fine of EUR 45 000, pursuant to Article 14(1)(b) of the Merger Regulation, for having supplied incorrect or misleading information in the Original Notification;

(2) a fine EUR 45 000, pursuant to Article 14(1)(c) of the Merger Regulation, for having supplied incorrect information in its Reply of 26 July 2001 to the Article 11 request of 13 July 2001.

(3) The total fine to be imposed on Tetra should therefore be EUR 90 000.

114. In the event of late payment, interest should be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this decision is adopted, which for July 2004 is 2,01%, as published in the Official Journal C 173/1 of 3.7.2004, plus 3,50 percentage points, that is to say 5,51%.

HAS ADOPTED THIS DECISION

Article 1

1. A fine of EUR 45 000 is imposed on Tetra Laval B.V. pursuant to Article 14(1)(b) of Regulation (EEC) No 4064/89 for having supplied incorrect or misleading information in a notification dated 18 May 2001.

2. A fine of EUR 45 000 is imposed on Tetra Laval B.V. pursuant to Article 14(1)(c) of Regulation (EEC) No 4064/89 for having supplied incorrect information in its reply of 26 July 2001 to a request for information pursuant to Article 11 of that Regulation dated 13 July 2001.

Article 2

The fines imposed in Article 1 shall be paid, within three months of the date of notification of this Decision to the following bank account of the European Commission:

Account N° 001-3953713-69 of the

European Commission with

FORTIS Bank, Rue Montagne du Parc 3, 1000 Brussels

(Code SWIFT GEBABEBB – Code IBAN BE71 0013 9537 1369)

After expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted which for July 2004 is 2,01 %, as published in the Official Journal C 173/1 of 3.7.2004, plus 3,50 percentage points, that is to say 5,51%.

Article 3

This decision shall be enforceable pursuant to Article 256 of the Treaty.

Article 4

This Decision is addressed to:

Tetra Laval B.V.
Amsteldijk 166
1079LH Amsterdam
The Netherlands

Done at Brussels,

For the Commission

Signed

Mario Monti
Member of the Commission

EUROPEAN COMMISSION
Competition DG

Policy Development and Coordination

OPINION

of the ADVISORY COMMITTEE on CONCENTRATIONS

given at its 124th meeting on 26 March 2004

concerning a draft decision relating to

Case COMP/M.3255 – TETRA LAVAL/SIDEL

1. The Advisory Committee agrees with the Commission that the absence of any mention of the Tetra Fast technology in Tetra Laval's original notification of 18 May 2001 was incorrect or misleading within the meaning of Article 14 (1) (b) of Council Regulation (EEC) Nº 4064/89.

2. The Advisory Committee agrees with the Commission that absence of any information on the Tetra Fast technology in Tetra Laval's Article 11 Reply to questions 4 and 5 of the Request for Information of 13 July 2001 was incorrect within the meaning of Article 14 (1) (c) of Council Regulation (EEC) Nº 4064/89.

3. The Advisory Committee agrees with the Commission's legal assessment of the facts, namely that Tetra Laval's behaviour in both cases constitutes a very serious infringement that must be considered grossly negligent.

4. The Advisory Committee agrees with the Commission that a fine should be imposed on Tetra Laval pursuant to Article 14(1) (b) of Council Regulation (EEC) Nº 4064/89.

5. The Advisory Committee agrees with the Commission that a fine should be imposed on Tetra Laval pursuant to Article 14(1) (c) of the Council Regulation (EEC) Nº 4064/89.

6. The Advisory Committee agrees with the Commission on the amount of the fines.

7. The Advisory Committee agrees on recommending the publication of this Opinion in the Official Journal of the European Union.

8. The Advisory Committee asks the Commission to take into account all the other points raised during the discussion.

BELGIË/BELGIQUE	DANMARK	DEUTSCHLAND	ELLAS	ESPAÑA
J. COMPERE	---	E. MÜLLER	---	M.J. RODRÍGUEZ GONZALEZ
FRANCE	IRELAND	ITALIA	LUXEMBOURG	NEDERLAND
J.-C. MAUGER	P. NEILL	E. CARLINI	---	A. WESSELS
ÖSTERREICH	PORTUGAL	SUOMI/FINLAND	SVERIGE	UNITED KINGDOM
---	R. MARQUES	L. PASSI	C. SZATEK	P. FRASER

EUROPEAN COMMISSION

The Hearing Officer

FINAL REPORT OF THE HEARING OFFICER IN CASE COMP/M.3255 - TETRA LAVAL/SIDEL

(pursuant to Article 15 of Commission Decision (2001/462/EC, ECSC) of 23 May 2001 on the terms of reference of Hearing Officers in certain competition proceedings – OJ L162, 19.06.2001, p.21)

The draft decision based on article 14 of Council Regulation N° 4064/89 in the present case does not give rise to particular comments on the proceedings.

On 1 August 2003 the Commission sent a statement of objections to Tetra Laval B.V. ("Tetra Laval"). Access to file was made available by way of CD-Rom. This CD-Rom was transmitted on 12 September 2003.

Tetra Laval submitted a written response to the Statement of Objections on 31 October 2003, but waived their right to be heard orally.

On 5 March 2004 the Commission addressed a letter to the parties setting out certain additional elements of fact that it intended to rely upon and gave the parties the opportunity to supply any comments. Tetra Laval responded on 12 March 2004.

Accordingly, I conclude that the rights to be heard have been respected in the present case

Brussels, 19 April 2004

(signed)
Karen WILLIAMS