EN

Case No COMP/M.2416 – Tetra Laval/Sidel

Only the English text is available and authentic.

REGULATION (EEC) No 4064/89
MERGER PROCEDURE

Article 8(4)
Date: 30/01/2002

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 30/01/2002

C(2002) 359

PUBLIC VERSION

COMMISSION DECISION
of 30/01/2002

setting out measures in order to restore conditions of effective competition pursuant to Article 8(4) of Council Regulation (EEC) No 4064/89

(Case No COMP/M. 2416 – Tetra Laval/Sidel)

(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, and in particular Article 57 thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings[1], as last amended by Regulation (EC) No 1310/97[2], and in particular Article 8(4) thereof,

Having regard to the Commission's decision of 30 October 2001 pursuant to Article 8(3) of Regulation (EEC) No 4064/89 declaring the concentration between Sidel S.A. and Tetra Laval B.V. incompatible with the common market and the functioning of the EEA Agreement ,

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],

1 OJ L 395, 30.12.1989, p. 1; corrected version OJ L 257, 21.9.1990, p. 13
2 OJ L 180, 9.7.1997, p. 1.
3 OJ C ...,...200. , p....

WHEREAS:

I. THE FACTS

The implemented concentration

(1) On 18 May 2001, the Commission received a notification pursuant to Article 4 of Regulation (EEC) No 4064/89 ("the Merger Regulation") of a proposed concentration whereby Tetra Laval S.A., France, belonging to Tetra Laval B.V. ("Tetra"), the Netherlands, a holding company within the Tetra Laval Group which is a privately held group of companies, proposed to acquire within the meaning of Article 3(1)(b) of the Merger Regulation control of the French company Sidel S.A. ("Sidel") by way of a public bid announced on 27 March 2001. In accordance with French law, the bid was unconditional.

(2) Article 7(3) of the Merger Regulation allows the implementation of a public bid which has been notified to the Commission in accordance with Article 4(1) of that Regulation provided that the acquirer does not exercise the voting rights attached to the securities in question. Pursuant to the bid, approximately 27.1 million shares, representing 81.3% of outstanding Sidel shares were tendered to Tetra Laval SA. In addition to those shares, Tetra Laval SA has also acquired approximately 3.5 million shares in Sidel either on the open market or in individual purchases from major shareholders. As a result Tetra currently holds just over 95%[5] of Sidel's shares and has implemented the proposed concentration.

The Decision pursuant to Article 8(3) of the Merger Regulation

(3) On 30 October 2001 the Commission adopted a decision pursuant to Article 8(3) of the Merger Regulation declaring the concentration between Sidel and Tetra incompatible with the common market and the functioning of the EEA Agreement ("the Prohibition Decision").

(4) For the reasons set out in the Prohibition Decision, the Commission concluded that the notified concentration would have created a dominant position in the market for PET (polyethylene terephthalate) packaging equipment, in particular SBM (Stretch Blow Moulding) machines used for the sensitive product segments (liquid dairy products, juices and nectars, fruit flavoured still drinks and tea/coffee drinks, together the "sensitive products"), and would have strengthened a dominant position in aseptic carton packaging equipment and aseptic cartons in the EEA as a result of which effective competition would have been significantly impeded in the common market and in the EEA.

The procedure under Article 8(4) of the Merger Regulation

(5) Since the concentration was effected by virtue of a public bid, Tetra has already acquired just over 95% of Sidel's shares. This concentration has been declared incompatible with the common market and the functioning of the EEA Agreement pursuant to Article 8(3) of the Merger Regulation. As a result, Tetra has already

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4 OJ C ...,...200. , p....

5 […]*

implemented a concentration which has been declared incompatible with the common market and the functioning of the EEA Agreement.

(6) Consequently, the Commission on 19 November 2001 sent Tetra a Statement of Objections pursuant to Article 18 of the Merger Regulation and Article 13(2) of Commission Regulation (EC) No 3384/94 of 21 December 1994 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings[6]. In the Statement of Objections, the Commission considered it appropriate by virtue of Article 8(4) of the Merger Regulation to order the separation of the two undertakings through the divestiture of Tetra's shareholding in Sidel, and to adopt measures necessary to restore conditions of effective competition pending the full separation of the two undertakings.

(7) Tetra replied to the Statement of Objections in writing on 3 December 2001. Both Tetra and Sidel presented their views at an Oral Hearing which was held on 14 December 2001.

II. ANALYSIS UNDER ARTICLE 8(4) OF THE MERGER REGULATION

(8) Pursuant to the exception provided for in Article 7(3) of the Merger Regulation from the suspensory obligation provided for in Article 7(1), Tetra has already acquired just over 95% of Sidel's shares through the public bid launched on 27 March 2001 and subsequent share purchases. Tetra has therefore already implemented the concentration. This concentration has been declared incompatible with the common market and the functioning of the EEA Agreement by the Commission's Decision of 30 October 2001 pursuant to Article 8(3) of the Merger Regulation.

(9) Tetra has thus already implemented a concentration which has been declared incompatible with the common market and the functioning of the EEA Agreement.

(10) This Decision is a consequence of and gives effect to the Prohibition Decision which found that the notified concentration would create and strengthen dominant positions as a result of which effective competition would be significantly impeded in the common market and declared the concentration incompatible with the common market. Where concentrations prohibited by the Commission have already been implemented, the Commission may, pursuant to Article 8(4) of the Merger Regulation, "*require the undertakings or assets brought together to be separated (...) or any other action that may be appropriate in order to restore conditions of effective competition*".

(11) Restoration of conditions of effective competition is the primary concern in proceedings pursuant to Article 8(4) of the Merger Regulation. Both the text and the scheme of the Merger Regulation indicate that this requires the removal of any residual structural impediments to effective competition on the relevant markets arising from the prohibited concentration.[7] Article 8(4) envisages that, in situations where concentrations prohibited by the Commission have already been implemented, the restoration of effective competition must, in principle, be effected by means of a separation of the undertakings or assets brought together through the prohibited transaction.

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6 OJ L 377, 31.12.1994, p. 1

7 See the seventh and ninth recitals in the preamble to the Merger Regulation.

(12) In applying Article 8(4) of the Merger Regulation the Commission has regard to the principle of proportionality. This principle dictates that, when the Commission is faced with different possible options, such as divestiture structures, which could restore conditions of effective competition as required by Article 8(4), the Commission should allow a choice or should adopt the least restrictive option.

(13) Having regard to proportionality, the Commission considers the legitimate interests of the undertakings concerned, when pursuing the primary Community interest of restoring conditions of effective competition by giving effect to its prohibition decision. This should include not only the interests of the acquiring undertaking, Tetra, which naturally wants to preserve as much of the value of its investment as possible, but also of the acquired undertaking, Sidel, which wants to minimise the period of uncertainty it faces and to continue its operations as an independent entity without the imposition of unduly disruptive or onerous measures. [8]

(14) In the light of the above and in order to restore conditions of effective competition pursuant to Article 8(4) of the Merger Regulation, under the particular circumstances of the present case, it is necessary to order the separation of Tetra and Sidel on the basis of the following principles: (1) the separation should be by means of an effective and final divestiture of such part of Tetra's shareholding in Sidel as will ensure that conditions of effective competition are restored by retaining Sidel as an independent and viable competitor; (2) the divestiture should result in Sidel regaining its full independence from Tetra and Tetra not retaining any minority stake or interest in Sidel which could impede the restoration of conditions of effective competition; (3) the divestiture should take place promptly within a period of not more than […][*] in order to safeguard Sidel's viability and effectiveness and thus to ensure the restoration of conditions of effective competition; (4) during the transitional period pending divestiture Tetra should appoint a Trustee to monitor the divestiture process and minimise Tetra's influence in Sidel.

1. Need to separate Tetra from Sidel through an effective and final divestiture of Tetra's shareholding in Sidel

(15) In the Prohibition Decision the Commission found that the notified concentration would create and strengthen dominant positions as a result of which effective competition would be significantly impeded in the common market and the EEA and therefore declared that the concentration was incompatible with the common market and the EEA Agreement.

(16) As the concentration has already been implemented, the Commission has concluded that it is necessary to order the separation of the two undertakings brought together

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8 It is important to note in this respect that not only Tetra but also Sidel is an undertaking concerned by these proceedings with specific rights granted under the Merger Regulation and Regulation (EC) No 447/98 (the Implementing Regulation). For example, Sidel is an "involved party" within the meaning of Article 13 of the Implementing Regulation. This imposes an obligation on the Commission to inform Sidel of the content of these proceedings and to allow Sidel to express its views in writing and orally. In this respect, the management of Sidel has a specific right to be heard by the Commission pursuant to Article 18(4) of the Merger Regulation.

* 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.

through the prohibited transaction in order to restore conditions of effective competition pursuant to Article 8(4) of the Merger Regulation.

Harm to conditions of competition

(17) Participation by Tetra in Sidel would impede the restoration of conditions of effective competition. The divestiture of Tetra's shareholding in Sidel would ensure that conditions of effective competition were restored by removing the direct structural/financial link between Tetra and Sidel. If Tetra maintained a shareholding in Sidel, its competitive behaviour would be influenced; conditions of competition between the two undertakings and on the markets on which they are active would not be effective. Moreover, any presence of Tetra in Sidel's capital would hinder the development of Sidel on the markets in question. Tetra's decisions as a shareholder with a participation in Sidel would be influenced by its own competitive position on the markets in question.

(18) Tetra does not dispute the need for the separation of the two undertakings. However, Tetra disputes the need for a prompt divestiture, *inter alia*, on the basis that, in Tetra's view, there is no immediate competitive harm. Tetra argues that "there is virtually no competition at present between the two businesses" as there are very few horizontal overlaps between the parties. In Tetra's view, there are therefore no concerns justifying a prompt divestiture. Tetra claims that most of the Commission's concerns were of a "conglomerate" nature and that hence there must be a direct link between the two companies to lead to anti-competitive results. According to Tetra, such a link could be effectively removed through the imposition of a hold-separate trustee. This would ensure there was no harm to competition.

(19) The Commission cannot share Tetra's view. The Prohibition Decision found serious and immediate competitive concerns. As set out in the Prohibition Decision, there are three core areas of horizontal overlap between the parties: low-capacity SBM machines; barrier technology; and aseptic PET filling machines. In these areas the parties are direct competitors. The Prohibition Decision also found significant vertical links between the parties as Sidel is a supplier of SBM machines and other PET equipment and, as considered in paragraph 38 below, Tetra is potentially a buyer of such equipment which it can use in its downstream converter activities. Tetra has not yet divested its SBM machine business or preforms business and, although it has expressed its desire to divest these businesses, there is no formally binding commitment to do so. In any event, even if such a divestiture took place, Tetra would retain significant activities in barrier technologies and PET aseptic filling equipment, key areas for the penetration of PET in the sensitive product markets where Sidel is a direct competitor. Despite Tetra's contention, there are therefore both horizontal and, potentially, vertical competitive relations between the two companies.

(20) Moreover, the Commission's concerns relating to the interplay between the carton and PET packaging equipment markets which have been set out in detail in the Prohibition Decision were serious and immediate. The Commission's analysis in this respect was based on events that are taking place today. It is <u>now</u> that both Tetra and Sidel are investing heavily in barrier technologies and PET aseptic technologies to promote the growth of PET in the future. Because of strategic decisions taken today, Tetra's carton business already faces and will continue to face increasing competitive pressure from Sidel's activities in a neighbouring, closely related antagonistic market. Indeed, Sidel's strategy as stated in the company's press releases is to contribute significantly

to the rapid growth of PET in aseptic packaging for fruit juices and liquid dairy products and to erode the lead of the still predominant carton packaging in this market segment.

(21) Those competition concerns are serious and immediate and as such require the effective, final and prompt separation of Tetra and Sidel as necessary remedial action pursuant to Article 8(4) of the Merger Regulation in order to restore conditions of effective competition. The existence of a hold-separate trustee is, as Tetra suggests in its Reply to the Statement of Objections, appropriate for a short transitional period but it cannot be regarded as a structural measure designed to guarantee the restoration of conditions of effective competition in a final manner in the long term.

Need to sell Sidel as a going concern

(22) An effective and final divestiture should consist of the sale of Sidel as a going concern without any change in its status, or in the scope or current range of its activities, which might weaken its viability and effectiveness as a competitor on the markets in question.

(23) Supervision of the manner in which Sidel is disposed of is necessary to ensure restoration of conditions of effective competition. If Sidel's core activities could be split and sold separately or retained by Tetra, Sidel would not be restored as an independent, viable and effective competitor in the market place. Thus, non-core activities should not be split, sold separately or retained by Tetra without the Commission's prior approval. Such activities and assets may be necessary for Sidel's viability and effectiveness.[9]

Method of divestiture and suitable buyer(s)

(24) With regard to the principle of proportionality and Tetra's request for flexibility, the Commission considers that Tetra should be allowed to choose in principle how and to whom to divest its shareholding in Sidel as long as the divestiture ensures, in a permanent manner, that conditions of effective competition are restored. The method of divestiture chosen should therefore ensure that Tetra and Sidel are separated in a permanent and final manner and should not impede the restoration of conditions of effective competition. This could arise, in particular, through the maintenance or creation of direct or indirect structural or financial links between the two companies.

(25) Therefore, as long as the restoration of conditions of effective competition is not impeded, Tetra may choose any method of divestiture. Thus, Tetra may wish to refloat Sidel's shares, to sell the shares to an industrial buyer, most likely a company active in the packaging sector, or buyers or to a financial institution. Tetra may decide to sell the shares in a different way subject to the Commission's prior assessment and approval. In order to maximise the chances for a successful outcome of the divestiture process in the shortest period of time, Tetra should ensure that the divestiture process, structures and methods chosen remain open to all types of buyers, for example industrial buyers and financial institutions, and that no preconditions are set limiting the potential number of buyers.

[9] This principle is established in the Commission's Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98 (the Remedies Notice), OJ C 68, 2.3.2001, page 3, at paragraph 17.

(26) The divestiture of Tetra's shareholding in Sidel should be made to an independent and viable buyer or buyers subject to the Commission's approval unless the sale is by way of a stock exchange flotation to third parties independent of and unconnected to Tetra or any directly or indirectly affiliated member of its group resulting in each of these third parties holding no more than 5% of Sidel's shares. The buyer or buyers should fulfil the "purchaser standards" set out in the Remedies Notice (paragraph 49). In particular, the buyer should be a viable entity independent of and unconnected to Tetra, possessing all the financial resources, proven expertise and having the incentive to maintain and develop Sidel as an active competitive force.

Need for the divestiture to be final

(27) In principle, a divestiture has to restore conditions of effective competition in a final and permanent manner[10]. Thus, an appropriate divestiture mechanism should not contain artificial legal structures enabling Tetra to buy back the shares at a later point in time dependent on the eventual outcome of litigation. No company could function effectively with such uncertainty as to the eventual owner of 95% of its shares. A non-final divestiture structure enabling Tetra to regain control of Sidel at a later point in time, would distort Sidel's competitive behaviour during the transitional period. Sidel would be unable to make strategic decisions such as major investments or significant acquisitions without taking into account the fact that, at a later point in time, Tetra might regain control of the company. Sidel would, in effect, be removed from the market place as an independent player for the duration of the transitional period. Sidel would be managed with a view to maximising value in the short term rather than taking long-term views which only a buyer with unfettered freedom of action could take. Sidel would also, in effect, be removed from the market as a target of acquisitions. For instance, no industrial buyer could buy the Sidel shares during the transitional period with restrictions allowing Tetra to regain control. This was confirmed by Tetra at the Oral Hearing.

Conclusion

(28) In the light of the foregoing, the Commission has concluded that it should order the separation of the two undertakings and that this separation should take place by means of an effective and final divestiture of Tetra's shareholding in Sidel which will ensure that conditions of effective competition are restored by maintaining Sidel as an independent and viable competitor.

(29) The divestiture should consist of a sale of the whole of Sidel as a going concern without any change in the status, scope or current range of activities of the company, which might weaken its viability and effectiveness as a competitor in the markets in question.

(30) Tetra should be allowed to choose in principle how and to whom to divest its shareholding in Sidel as long as the divestiture ensures, in a final and permanent manner, that conditions of effective competition are restored[11].. Thus, an appropriate divestiture mechanism should not contain mechanisms, legal or other, enabling Tetra to buy back the shares.

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10 See Remedies Notice paragraph 6.

11 See Remedies Notice paragraph 6.

2. Need to ensure that Tetra does not retain a minority shareholding or other financial interest in Sidel which would impede the restoration of conditions of effective competition

(31) Tetra maintains that it should be allowed to retain a minority shareholding in Sidel as this would not confer on it decisive influence over Sidel nor would it lead to a co-ordination of competitive behaviour between the two undertakings. Tetra believes that it would be disproportionate to prevent it from retaining a minority shareholding since normally it could do so without any need to notify the transaction under the Merger Regulation and as such the Commission does not have jurisdiction under Article 8(4) to prevent Tetra from retaining a minority stake in Sidel. In Tetra's view, the retention of a minority stake would not lead to any anti-competitive effects given that the concerns of the Commission were not of a horizontal nature. The retention of a minority shareholding would, according to Tetra, allow it to maintain the value of some of its investment.

(32) The Commission considers that Tetra's view has to be assessed in the light of the primary concern of Article 8(4) of the Merger Regulation, which is to restore conditions of effective competition. The Commission considers, in the particular circumstances of the present case and on the basis of the information currently available to it, that the retention of a minority shareholding would impede the restoration of conditions of effective competition and would have disproportionate effects on the target company.

Minority shareholding would hinder prospect of sale and would impede the restoration of conditions of effective competition

(33) The objective of restoring conditions of effective competition dictates that Tetra should not be allowed to retain any level of shareholding that might hinder Sidel's saleability, independence, effectiveness or viability in the market and hence impede the restoration of conditions of effective competition.

(34) The existence of a minority shareholding would allow Tetra to enjoy minority protection rights. According to French law, any shareholding above 33% would give Tetra the right to influence the management of the company directly. Even a stake above 5% would give Tetra legal rights, for example to prevent a change in the status of Sidel as a public company. A minority "squeeze-out" (the forced purchase of the remaining 5% of the shares which under French law is possible, if the majority shareholder has at the end of the public bid obtained 95% of both capital and voting rights) would be beneficial for the smooth management and further sale of Sidel. This has been confirmed by Sidel. The benefits which could be derived from a squeeze-out are mainly that the shares could be de-listed and placed outside the influence of the stock market, the owner would be able to restructure Sidel without reporting and justifying its strategy to the financial market and to raise finance as it sees fit. If Tetra retains more than 5% such a squeeze-out would not be possible. Given the fact that there is already a minority shareholding of 5% belonging to a dispersed number of buyers which are apparently unwilling to sell their shares, the retention of any minority stake by Tetra would rule out the possibility of a squeeze-out for the eventual owner of Sidel.

(35) Therefore, the existence of any minority shareholding by Tetra could make Sidel less attractive as an acquisition target and may thus hinder the prospects of the divestiture

or of further resale. Indeed, Sidel emphasised this at the Hearing. In the view of Sidel, the retention by Tetra of a minority stake may make a sale of the remaining shares held by Tetra more difficult. A potential buyer, and in particular a trade buyer, may understandably not want to acquire the shares with Tetra present as a minority shareholder. A sale of 95% or more of Sidel's shares, that is to say the full shareholding of Tetra in Sidel, would be more attractive than a sale of less than 95% of the shares as it would enable the buyer of the shares to "squeeze-out" the remaining dispersed minority shareholders if it so wishes. If Tetra was allowed to retain a minority stake, the potential number of buyers could be limited by excluding a number of buyers. Therefore, the Commission would, at this stage, require Tetra to refrain from setting any precondition for the sale of Sidel's shares, which could deter any potential buyers, by limiting the post-sale options of a squeeze-out.

(36) Moreover, it is important to recognise that, if the divestiture results in a situation where there is no majority shareholder, larger minority shareholders such as Tetra might have disproportionate influence as a result of superior ability to form voting coalitions that could jointly control the outcome at General Assemblies. In particular if Tetra were to float the shares whilst keeping a minority shareholding it is possible that it would hold the largest proportion of shares and would thus influence the company disproportionately to its shareholding. In addition, if Tetra were to sell its shares to a financial buyer or several financial buyers, who were buying purely for investment purposes, Tetra would be the only shareholder with in-depth market knowledge. Again the potential influence of Tetra could be greater than its actual shareholding.

(37) The incentives of Tetra as a minority shareholder would change as a result of Tetra's financial interests in Sidel. Such financial interest would give Tetra the right to receive a proportion of the profit stream generated by Sidel from its operations and investment. In the absence of any shareholding in Sidel, Tetra would seek a profit maximising outcome solely on the basis of the expected profit stream generated by its own operations. By retaining a stake in Sidel, Tetra would be likely to take into account its expected revenue stream generated by its financial interests in Sidel and would therefore be likely to consider how its actions would affect Sidel's profit stream. The incentives of Tetra to compete would therefore be changed as a result of the minority shareholding. For example, it might be in Tetra's interest to increase/not to decrease its carton prices although this might induce increased switching to PET by customers, if Tetra could capture both the increased carton profits from retained customers and compensate the loss of carton profits from switching customers by benefiting from a proportion of the increase in Sidel's profits resulting from increased demand for PET, whereas such a strategy would not be attractive in the absence of a shareholding in Sidel. The high levels of concentration in the closely related markets for carton and PET equipment, with Tetra and Sidel enjoying, respectively, dominance and a very strong position, facilitates such a strategy.

(38) A minority holding may also give rise to vertical concerns. Tetra is already a converter of HDPE bottles through "hole-through-the-wall" arrangements, whereby Tetra supplies customers with bottles produced in an adjacent location directly into the customers' production line and using its experience in carton and HDPE, could provide similar services producing PET bottles. Tetra is therefore a potential client of Sidel SBM high capacity machinery. This would enable Tetra to supply customers for sensitive products through a hole-through-the-wall arrangement. If Tetra were to hold

a minority shareholding in Sidel it would have an incentive to favour the purchase of Sidel machines for its hole-through-the-wall activities. Given Tetra's position with carton customers, and thus potential PET customers for sensitive products, it is likely that it could also become a major player as a converter in the provision of PET bottles through hole-through-the-wall arrangements to producers of sensitive products. If it were to purchase only from Sidel, it could significantly boost Sidel's sales whilst at the same time foreclosing Sidel's competitors from supplying Tetra with SBM machines. This would increase Sidel's already strong position substantially and could raise its market position to the point of dominance. SBM competitors would therefore be foreclosed from supplying Tetra, in particular, and if Tetra were successful in capturing a significant number of its original carton customers for hole-through-the-wall operations a substantial part of the market could become foreclosed.

(39) In this context, Tetra's contention that there are no possible horizontal or vertical competitive relations between the two companies and hence no possible anti-competitive effects arising from minority shareholdings is not correct. In addition to the horizontal concerns and leveraging concerns arising from the interplay between carton and PET, Tetra continues to retain PET and HDPE activities which make it a direct horizontal competitor of Sidel and provide possibilities for a vertical relationship with Sidel. Tetra still retains its low capacity SBM machine business and preforms business (even though it is apparently ready to commit to a divestiture no such divestiture has been effected). In addition, Tetra will retain other plastics activities such as aseptic PET filling machines, PET barrier technologies, and HDPE activities.

Conclusion

(40) On the basis of factual information currently available, it is concluded that Tetra should not be allowed to retain a minority shareholding in Sidel. Such a retention would be likely to impede the restoration of effective competition as it could hinder the prospect of a successful divestiture and would allow Tetra to retain economic incentives to refrain from competition with Sidel and to engage in exclusive vertical relations with Sidel.

3. Need for prompt divestiture within a period of […]*

(41) The Commission considers that Tetra should divest its shareholding in Sidel in a prompt and final manner which ensures the restoration of effective competition. In setting a time period for the divestiture the Commission has particular regard to the primary Community interest of restoring effective competition pursuant to Article 8(4) of the Merger Regulation. The Commission has regard also to Tetra's interest in minimising a potential financial loss which could arise from a speedy divestiture of Sidel's shares given the current market conditions and to Sidel's interest in avoiding unduly disruptive and onerous measures.

(42) In its Statement of Objections, the Commission considered that a period of six months was necessary given the negative effects on competition and the fact that prolonged periods of uncertainty might cause irreparable harm to Sidel as an effective and viable competitor.

(43) Tetra contests the need for a prompt divestiture within a period of six months as set out in the Statement of Objections. Tetra argues that: (a) the Commission's proposal is

disproportionate and goes against precedent; (b) the Commission should have regard to Tetra's investment and should not penalise Tetra for complying with French law; (c) the Commission should also have regard to Tetra's right of appeal against the Prohibition Decision which, in Tetra's view, prevents the Commission from imposing a final divestiture before Tetra's appeal has been decided; and, finally, (d) Tetra's proposed alternative divestiture structures restore competition effectively and are more proportionate than the Commission's proposal and should therefore be preferred.

(a) Commission's proposal for a prompt divestiture within a period of […]* is appropriate, proportionate and in accordance with relevant precedents

(44) The harm to conditions of effective competition and hence the need for a prompt restoration of conditions of effective competition has been discussed above. The Commission considers that a prompt divestiture is necessary to prevent irreparable damage to conditions of effective competition.

(45) Long-term interim structures, such as the ones proposed by Tetra, would not be sufficient to guarantee Sidel's effectiveness and viability and would hence result in a significant weakening of competition. Under long transitional structures such as the ones proposed by Tetra, and in addition to the anti-competitive effects arising out of the structural/financial link existing between Tetra and Side, Sidel would have to function with 95% of its shares in the hands of a trustee. It would face uncertainty as to its eventual owner. It would have to operate under tight controls under the supervision of a trustee and the Commission. It would be unable to have access to the capital market in an unfettered way, to make significant acquisitions or to become a target of acquisitions. Sidel would be tied in an artificial long-term legal structure which could not inspire confidence and would distort the company's future decisions and behaviour. Structures with hold-separate trustees and constant monitoring are inherently suitable only for short transitional periods pending a clear and final divestiture.

(46) The Commission therefore considers that there are strong reasons why a divestiture should take place in a final and prompt manner in order to prevent irreparable damage to conditions of effective competition. Having considered Tetra's request for a longer period which would allow it to preserve better the value of its investment and having considered Sidel's position as to the need to minimise a transitional period of uncertainty, it is concluded that a period of divestiture of not more than […]* is necessary to ensure restoration of conditions of effective competition.

(47) Despite this, Tetra maintains that it should be allowed at least a [more than 3 years]* period for the divestiture[12]. Tetra bases its argument on proportionality and the need to preserve Tetra's investment. According to Tetra, the Commission should take into account the current market conditions which would result in a destruction of Tetra's investment if a quick sale was ordered. As noted, the primary concern under Article 8(4) of the Merger Regulation is restoration of competition following an incompatibility decision. Minimising Tetra's losses which arise from factors beyond the Commission's control is an important but secondary consideration.

(48) Tetra maintains that the Commission should not confuse divestitures under the Remedies Notice which are voluntary and orders for divestiture under Article 8(4) of

[12] Tetra's Reply at paragraphs 103-116.

the Merger Regulation. The principles established over the years through the Commission's experience in assessing proposed remedies which have been encapsulated in the Remedies Notice are, to a certain extent, relevant in the context of proceedings under Article 8(4) of the Merger Regulation. Established principles such as the viability of the proposed purchaser, the preference for structural rather than behavioural remediesand for remedies that restore competition in a final and permanent manner are evidently relevant. In any event, it is clear that the Commission has not less but more extensive powers under Article 8(4) of the Merger Regulation than in the context of Article 8(3) proceedings where its role is limited to discussing the acceptability of remedies with the parties. The fact that, as Tetra claims, remedies divestitures cover secondary assets is an argument in favour of more not less decisive measures under Article 8(4) decisions. By definition, in Article 8(4) decisions there is a greater urgency to restore conditions of effective competition which have already been impeded because of the prohibited transaction.

(49) Tetra further claims that a [more than 3 years]* divestiture period is in line with Commission practice. Tetra refers to 3 cases which were cleared by the Commission with commitments: Guinness/Grand Metropolitan (M.938)[13], Alcan/Alusuisse (M.1663)[14] and KNP/Buhrmann (M.291)[15]. In Guinness/Grand Metropolitan, the Commission allowed 15 months for the divestiture of two whisky brands. In Alcan/Alusuisse, the Commission allowed 9 months (with two possible extensions of 3 months each) and in KNP/Buhrmann 8 months (with two possible extensions of 6 months each). In Tetra's view, the closest precedent is Volvo/RVI (M.1980)[16] where the Commission allowed Volvo […]* to divest a minority shareholding in Scania. Tetra maintains that in Volvo/RVI the competitive concerns were horizontal whereas the current case is based on looser conglomerate concerns.

(50) It is evident that none of the above precedents, which concern minority shareholdings in clearance decisions sanctioned a divestiture period of [more than 3 years]* as proposed by Tetra. Furthermore, in the special circumstances of an Article 8(4) decision following the prohibition of an implemented public bid, there should be no special obstacles to speedy disposal of the acquired undertaking as a going concern as it is a free-standing entity and, by virtue of Article 7(3) of the Merger Regulation has normally not been integrated into the business operations of the acquiring undertaking. The closest precedents, which Tetra has not discussed in its Reply are other divestiture orders pursuant to Article 8(4). There are only two such cases, Blokker/Toys "R" Us (M.890)[17] and Kesko/Tuko (M.784)[18]. In these cases divestiture periods ranged from 6-9 months. Tetra has not provided any exceptional reasons as to why the Commission should depart from this practice in this case. Periods of the length proposed by Tetra would deprive the Commission's Prohibition Decision from its *effet utile* and cause harm to Sidel and competition. Tetra's assertion that the Commission's initial proposal for a six month period for divestiture is not in conformity with precedents is therefore not correct.

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[13] Commission Decision of 15 October 1997, OJ L 288, 27.10.1998, p. 24.
[14] Commission Decision of 14 March 2000, not yet published in the OJ.
[15] Commission Decision of 4 May 1993, OJ L 217, 27.08.1993, p. 35.
[16] Commission Decision of 1 September 2000.
[17] Commission Decision of 26 June 1997, OJ L 316, 25.11.1998, p.1.
[18] Commission Decision of 19 February 1997, OJ L 174 , 02.07.1997, p. 47.

(b) Preservation of the value of Tetra's EUR 1.7 billion investment in Sidel

(51) Tetra maintains that the Commission's proposal in the Statement of Objections for a divestiture of Tetra's entire shareholding in Sidel within six months, would destroy Tetra's investment in Sidel. According to Tetra, this is due to the current unfavourable markets conditions and Sidel's weak economic performance. In Tetra's view, if the Commission ordered a quick divestiture destroying most of Tetra's investment, the Commission would in essence "penalise" Tetra for complying with the French rules which obliged it to launch an unconditional bid. Tetra maintains that the French rules which do not allow the possibility of a conditional bid create a conflict with the requirements of the Merger Regulation for which Tetra should not be penalised. In Tetra's view, even though the Merger Regulation does not explicitly deal with such situations in Article 8(4), there is an analogy to be drawn with Article 7(3) of that Regulation which recognises that a party to a transaction should be able to maintain the full value of its investments while that transaction is being reviewed. Under Article 8(4) of the Merger Regulation the Commission should also take into account this objective and avoid causing unnecessary and unreasonable losses to the affected party.

(52) In order to show the extent of the potential loss it may face, Tetra has used the firm of auditors Ernst & Young to calculate Sidel's current value. Ernst & Young made a presentation at the Oral Hearing which was kept confidential from Sidel. Ernst & Young calculated, on the basis of publicly available information, Sidel's present value at around […]* per share giving a total value for Tetra's shareholding of less than […]*. Tetra's bid was for EUR 50 per share and cost in total in excess of EUR 1.7 billion. As a result, Tetra claims that a forced sale within a period of 6 months would destroy most of its investment in Sidel. However, Tetra acknowledged at the Hearing that Ernst & Young's valuation was a worst case scenario and that it was probable that Tetra would be able to obtain a higher price for Sidel in a private sale.

(53) The Commission has examined the valuation provided by Ernst & Young and has concluded that it appears to be overly pessimistic. Considering the valuation, in the light of the more appropriate discounted cash flow calculation carried out by Tetra's financial advisers' prior to the public bid, and with all the customary prudence associated with the interpretation of the outcome of a forward-looking exercise such as a financial valuation, the Commission has concluded that, in the absence of dramatic changes in the industry over the interim period of less than a year, the fair value of Sidel on a stand-alone basis for an investor could reasonably be estimated at around […]* per share, within a value range of […]* per share.

(54) The Commission has however paid particular attention to Tetra's arguments regarding the preservation of the value of Tetra's investment in Sidel. The Commission, however, considers that the primary concern under Article 8(4) of the Merger Regulation is the Community interest in restoring conditions of effective competition. Tetra's interest in avoiding financial loss is also of great importance but cannot override the primary objective of Article 8(4).

(55) The flexibility provided for in Article 7(3) of the Merger Regulation recognises that in the short period of time pending the Commission's investigation and in exceptional circumstances, an exception from the general rule of suspensory effect for all merger transactions may be necessary to preserve the value of the acquirer's investment. These considerations cannot be applied automatically to the period following the

Commission's decision declaring a concentration incompatible with the common market. Article 8(4) simply envisages that a separation of the merged undertakings or other appropriate action may be required when a merger has been implemented and has not been declared compatible with the common market in order to restore conditions of effective competition.

(56) The fact that, in circumstances such as those faced by Tetra, some financial loss may be suffered is inherent to the natural uncertainty that affects all merger transactions. Such natural uncertainty is part of any preventive merger control system. Before launching its bid, Tetra was aware of the French rules and of the Community rules and was thus aware of the risk that a prohibition decision might expose it to financial loss. This is made clear in Tetra's internal documentation which discussed the possibility of a prohibition decision by the Commission. In addition, Tetra was not obliged to enter into the transaction in the precise way it decided to follow, that is to say, by launching an unconditional public bid. Article 7(3) of the Merger Regulation allows for this possibility by providing an exception to the general suspensory rule in Article 7(1). However, the responsibility for the consequences, including financial ones, of such transactions remains entirely with the undertaking concerned. In essence, Article 7(3) merely gives companies wishing to acquire listed targets the *possibility* of launching an unconditional public bid. It does not oblige companies to follow this route. Whilst the French rules may be seen by Tetra as unnecessarily rigid in not allowing the launching of a conditional public bid, Tetra could have explored other legal structures in order to minimise potential risks.

(57) In addition, Tetra entered into the transaction in full awareness of the uncertainty and risks and, on its own independent calculations decided to pay a substantial premium for Sidel's shares. Member States at the Hearing pointed out that there has been a general slow-down in the economy which has impacted on Sidel's valuation as well as that of other companies. It was also not clear why Tetra has paid such a substantial premium (Sidel shares were trading at EUR 30 prior to the public bid and Tetra offered EUR 50) for Sidel's shares. In any event, it was Tetra's own decision to pay a substantial premium for Sidel's shares when it launched its public bid in March 2001.

(58) The fact that Tetra decided to enter into the transaction with the uncertainty and risks that this entailed should not therefore prevent the Commission from carrying out its duties under the Merger Regulation to review transactions as to their compatibility with the common market and, in cases where they are found to be incompatible, to take the necessary remedial action pursuant to Article 8(4).

(59) Furthermore, it is not clear that Tetra would suffer a financial loss of the magnitude it is claiming. The Commission has conducted its own valuation of Sidel and is of the view that Tetra could achieve a much higher price for Sidel within the next […]* than that presented to the Commission at the Oral Hearing.

(60) Nonetheless, the Commission has been particularly careful to allow Tetra to preserve as much of its investment as possible. The Commission considers that a period of divestiture of […]* will allow Tetra to find a suitable buyer for Sidel at a reasonable price.

(c) An action for annulment should not prevent the Commission from seeking an effective remedy under Article 8(4) of the Merger Regulation

(61) In principle, a divestiture has to restore conditions of effective competition in a final and permanent manner[19]. However, Tetra maintains that the Commission does not have the power to impose a final and prompt divestiture because this would pre-empt Tetra's right to seek the annulment of the Prohibition Decision and would prejudge the outcome of the annulment action. If the action were successful, Tetra would have divested the shares, would have lost most of the value it invested and would be unable to buy back the shares. This would cause Tetra irreparable harm. As a result, Tetra is suggesting that the Commission should be prevented from ordering Tetra to divest the shares in a final manner.

(62) The Commission does not share Tetra's view. A decision pursuant to Article 8(4) of the Merger Regulation ordering a prompt divestiture would not affect Tetra's right to seek the annulment of the Prohibition Decision in any way. Tetra could still attack the decision and the judgement would be rendered regardless of the Commission's decision pursuant to Article 8(4). If Tetra believed that the Commission's Article 8(4) decision would cause it irreparable harm and would pre-empt the outcome of its action against the 8(3) decision, Tetra would have the right to seek the annulment of the Article 8(4) decision as well and ask the Court of Justice to suspend its effects. The arguments that Tetra makes are therefore arguments urging the Court to suspend a forthcoming Article 8(4) decision and not valid arguments against the Commission's right and duty to adopt an Article 8(4) decision in the first place in order to restore conditions of effective competition. In this context, it must be observed that the damage, which will allegedly be suffered by Tetra is largely or exclusively financial and does not threaten the solvency of Tetra. Pure financial damage, not likely to lead to insolvency, is not considered as constituting irreparable harm.

(63) Moreover, if Tetra's position was accepted, this would result in a situation where appeals against incompatibility decisions of implemented concentrations would deprive incompatibility decisions of their *effet utile* by preventing the Commission from taking actions necessary to restore conditions of effective competition pursuant to Article 8(4) of the Merger Regulation. In this way, all actions for annulment of decisions declaring implemented concentrations to be incompatible would automatically have a suspensory effect. This, however, is contrary to the general principle of Article 242 of the Treaty which clearly states that, generally, "actions brought before the Court of Justice shall not have suspensory effect".

(64) In addition, Tetra's position would result in an unjustified discrimination between implemented public bids and other concentrations. In implemented public bids the acquiring companies would benefit by being allowed to preserve the shares pending an appeal.

(65) Finally, if Tetra's view were accepted, the interests of target companies would be penalised by having to face a long period of uncertainty pending an appeal. Indeed, if Tetra's view were accepted, it would distort competition and cause Sidel irreversible harm by extending the uncertainty Sidel faces over a long period of time. Such harm to Sidel would also cause irreparable distortion of competition and would circumvent the Commission's Prohibition Decision.

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[19] See Remedies Notice paragraph 6.

(66) It is therefore concluded that Tetra's right to appeal against the Prohibition Decision should not prevent the Commission from adopting the necessary measures in order to restore conditions of effective competition pursuant to Article 8(4) of the Merger Regulation and in particular the order of a final divestiture of Tetra's shareholding in Sidel.

(d) Tetra's proposals will not restore conditions of effective competition and cannot be accepted

(67) In its Reply, Tetra argues that the Commission's proposal for a speedy divestiture is not justified as Tetra's own "divestiture" proposals restore conditions of effective competition and are more proportionate.[20]

(68) Tetra essentially proposes the following:

(a) Tetra should be allowed to divest its shareholding in Sidel in [more than 3 years]* so that its appeal can be decided and in order for the value of its investment to be preserved. Tetra should, in any event, be allowed to retain a minority shareholding.

(b) Tetra should be allowed a first transitional period of […]* during which it can still hold on to the shares in order to put into place the 4 proposed structures which will result in a second transitional period of [more than 3 years]*. During this time a hold-separate trustee would ensure Sidel's independence.

(c) In the long transitional period of [more than 3 years]* pending final divestiture, Tetra proposes 4 structures designed, according to Tetra, to ensure Sidel's viability and independence and hence the restoration of conditions of effective competition in accordance with Article 8(4) of the Merger Regulation.

(d) After [more than 3 years]*, Tetra will either divest the shares to an independent third party or will exercise call options to recover the shares in case its appeal is successful.

Initial […] transitional period - appointment of a hold separate trustee*

(69) Immediately following, or even prior to the Commission's Article 8(4) decision, Tetra proposes to appoint a "hold-separate" trustee. The hold separate trustee would ensure Sidel is run effectively and independently from Tetra. Tetra would not have the right to exercise voting rights and to interfere with Sidel's operations in any way. In Tetra's view, Sidel already has a strong and independent management team which will ensure Sidel functions effectively pending divestiture. During this initial […]* period Tetra would be allowed to legally hold the shares with no need to transfer them to a trustee.

Subsequent [more than 3 years] transitional period – the 4 "divestiture" options*

(70) Tetra proposes to enter into one of 4 "divestiture" options within […]*. These structures would be transitional and would last for [more than 3 years]* pending final divestiture to an independent third party. Tetra would retain the right to buy back the

[20] Reply, paragraphs 64-102.

shares under call options if its appeal is successful. These structures were presented to the Commission in further detail at the Oral Hearing by Tetra's financial advisers, Rothschild.[21]

*(i) […]**

(71) […]*

*(ii) […]**

(72) […]*.

*(iii) […]**

(73) […]*.

*(iv) […]**

(74) […]*.

Tetra's proposal does not restore conditions of effective competition

(75) Tetra maintains that any of the 4 "divestiture" structures would meet in full the requirements of Article 8(4) of the Merger Regulation and would be more proportionate than the Commission's proposal for a prompt and final divestiture. According to Tetra, all 4 "divestiture" structures would legally remove the ability to control Sidel from Tetra. Tetra would not control or own the Sidel shares during the transitional period. Sidel would still have the same amount of capital as before for its operations or its expansion and the structures would not interfere with Sidel's ability to raise funds. Tetra's investment in Sidel would thus be better preserved. The structures, in particular […]*, would offer sufficient incentives for Sidel to grow. The Commission would have the right to approve the final purchaser after [more than 3 years]*. The "divestiture" structures would be compatible with Commission precedents which show that parties can control the divestiture process and that structures such as […]* are acceptable in principle.

(76) In addition, Tetra argues that Sidel could remain independent through the appointment of a hold-separate trustee or other similar structures and could function effectively on the market place without influence or interference by Tetra. Tetra maintains that Sidel has an independent management, which will ensure Sidel's effectiveness in the

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21 It is to be noted that, at a meeting between the Commission services and representatives of Tetra held on 24 January 2002, i.e. following the discussion of the Decision at the Advisory Committee of 22 January 2002, Tetra proposed orally and subsequently in writing that it was willing to remove the "call option" element from the four proposed structures.

21 At a meeting between the Commission services and representatives of Tetra held on 24 January 2002, i.e. following the discussion of the Decision at the Advisory Committee of 22 January 2002, Tetra proposed orally and subsequently in writing that it was willing to remove the "call option" element from the four proposed structures. The Commission considers that the removal of the call option from the structures is desirable as it removes one of the Commission's objections to the proposals as set out in the following paragraphs of this Decision. However, the Commission's concerns such as the uncertainty and limitations which Sidel might face under some of the structures and the fact that Tetra would, under most of the options, retain an indirect legal or beneficial interest in Sidel remain valid.

market. Finally, Sidel has sufficient resources to fund its business. As a result, even a long transitional period would not result in uncertainty and would not hinder Sidel's development.

(77) Sidel does not share Tetra's view. Sidel has confirmed in writing and at the Oral Hearing that a long transitional period necessarily entails uncertainty and would hinder its proper development. Sidel's customers have already voiced concerns over the company's future. According to Sidel uncertainty is the single greatest cause of damage to Sidel's ability to compete effectively. Sidel also confirmed that transitional arrangements involving trustees and uncertainty as to the eventual owner of 95% of the company are complex and would damage Sidel if allowed for too long. Sidel stated that complexity carries increased risk of unforeseen problems, lends itself to misunderstanding by Sidel's customers and provides greater scope for competitors to disseminate damaging rumours about Sidel's stability. Sidel urged the Commission to avoid interim arrangements that are invasive, impede restoration of Sidel's position or impair Sidel's flexibility in financing or ability to dispose of non-core assets. Sidel also urged the Commission to allow the shortest possible period within which an appropriate buyer could be found. In Sidel's view 6 months may not be sufficient to find an appropriate buyer. Sidel thinks that 12 months would be appropriate and that it could not consider any period of more than 18 months as being appropriate.

(78) The Commission has paid particular attention to and has studied carefully the 4 "divestiture" structures proposed by Tetra especially in the light of Tetra's argument that these structures would enable Tetra to preserve the value of its investment. However, the Commission considers that these structures, as proposed[22], cannot restore conditions of effective competition.

(79) It is evident that the "divestiture" structures are not real divestitures but merely transitional arrangements akin to a trustee arrangement including a legal transfer of shares to the trustee. The main purpose of all 4 structures is the preservation of Tetra's investment and the preservation of Tetra's right to regain control of Sidel at an unspecified point in time should its appeal be successful. Indeed, under all four structures, Tetra would retain the right to buy back Sidel's shares under "call options" should its appeal be successful. Tetra would be the beneficial owner of the shares and/or would have a stake in Sidel's future financial performance. In addition, the call-option would enable Tetra to have a continued presence in Sidel by having the right to become Sidel's eventual owner at an indeterminate point in the future. Tetra confirmed at the Hearing that the only purpose of the call-options was to enable it to buy back the shares in case its appeal is successful.

(80) During the proposed long transitional periods the "owners" of Sidel's shares, for example, a financial institution, would not have unfettered freedom of action. They would not be able to on-sell the shares due to Tetra's call option and complex financial mechanisms preventing a free sale. Rothschilds, Tetra's financial [statement relating to the likelihood of divestiture to industrial buyers during the transitional period]* Other than the anti-competitive effects outlined above, the transitional structures would create precisely the kind of uncertainty that Sidel has confirmed would cause it irreparable harm. Sidel would have to operate for a long transitional period [more than 3 years]* without knowing who the ultimate shareholder of 95% of its shares would be. Sidel would have to operate under tight controls under the

supervision of a trustee and the Commission. Sidel would be tied to an artificial legal structure which cannot inspire confidence and would distort the company's future decisions and behaviour. Such structures with hold-separate trustees and constant monitoring are inherently suitable only for short transitional periods pending a clear and final divestiture. In addition, the fact that Tetra would still retain an important financial interest in Sidel's performance would have distortive effects on Tetra's competitive behaviour.

(81) Moreover, the precedents that Tetra uses to support its argument that the above transitional divestiture structures are in accordance with Commission practice, are not relevant. The precedent in Vivendi/Seagram/Canal+ (M.2050)[23] that Tetra relies on is not relevant except that a similar structure to Tetra's proposed […]* structure was used. In that case, however, there had not been an incompatibility decision and the interest to be divested was a minority shareholding. Tetra has not referred to any precedent supporting its view for a long [more than 3 years]* transitional period involving call options giving the "divesting" company the right to buy back the shares. Indeed, Tetra acknowledges that "*it is clear that there is no real precedent in the Commission's practice for the type of divestment proposals that Tetra Laval has outlined*".[24]

Conclusion

(82) The 4 "divestiture" proposals as put forward by Tetra do not adequately restore conditions of effective competition. They entail great uncertainty and complexity and would hinder Sidel's development and functioning as a viable competitor. In addition, the proposals are not in accordance with relevant Commission precedents. There is therefore no justification for Tetra's proposed [more than 3 years]* period for the transitional structures. The Commission also considers that Tetra's arguments regarding its right of appeal and preservation of the value of its investment do not override the primary concern of restoring conditions of effective competition. Such restoration must in principle take place promptly.

(83) Having considered Tetra's request for a longer period which would allow it to preserve better the value of its investment and having considered Sidel's position as to the necessity to minimise a transitional period of uncertainty, the Commission considers that a period of […]* would in the circumstances be appropriate.

(84) The Commission would also be prepared to allow, subject to its prior approval, structures enabling Tetra to preserve the value of its investment to the extent that such structures do not impede the restoration of conditions of effective competition. Such structures could include for example some form of limited credit or financial arrangements or other payment structures which would enable Tetra to preserve as far as possible the value of its investment provided that such structures would not impede the restoration of conditions of effective competition by jeopardising Sidel's viability and effectiveness or through the maintenance or creation of direct or indirect structural or financial links between the two companies. Such structures should, in principle be of a limited duration.

4. Need to appoint independent trustee during the transitional period

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23 Commission Decision of 13 October 2000.

24 Reply at paragraph 91.

(85) The Commission considers that the separation of the two undertakings should take place in a way that ensures that conditions of effective competition are restored in the long term and that any disruption of conditions of effective competition is minimised during the […]* transitional period pending the divestiture.

No further implementation of the prohibited concentration during the transitional period

(86) During the transitional period which precedes the restoration of conditions of effective competition following an Article 8(4) decision, no measure should be taken to implement the concentration such as for example exercising the voting rights attached to the shares or acquiring additional shares without prior approval of the Commission. Pending the divestiture, Tetra should refrain from any action or omission that would not preserve the full economic viability, marketability and competitiveness of Sidel. In particular, Tetra should not carry out any act which may be of such a nature as to alter the legal status, nature, scope or range of activities, the industrial or commercial strategy or the investment policy of Sidel.

Appointment of independent Trustee

(87) In order to restore conditions of effective competition during the transitional period following the Article 8(4) decision and pending the divestiture, during which period Tetra will continue to maintain a shareholding in Sidel, Tetra should appoint an independent trustee, such as an investment bank, management consultant or auditor, subject to the prior approval of the Commission. The Trustee should be appointed promptly and in any event within 10 days following the adoption of this Decision. The Trustee should be independent of Tetra or any directly or indirectly affiliated member of its group, possess the necessary qualifications to carry out the task and should not be, or become, exposed to a conflict of interest. The Trustee should also be remunerated in such a way as not to impede its independence and effectiveness in fulfilling its mandate.

(88) The Trustee's mandate should be subject to the Commission's approval to ensure the independence and effectiveness of the Trustee. The mandate should include all provisions necessary to enable the Trustee to fulfil its duties.

(89) Essentially, the mandate should provide the Trustee with all the necessary powers and independence to monitor the divestiture of Tetra's shareholding in Sidel to an independent and viable buyer or buyers subject to the Commission's approval unless the sale is by way of a stock exchange flotation to third parties independent of and unconnected to Tetra or any directly or indirectly affiliated member of its group resulting to each of these third parties holding no more than 5% of the Sidel's shares. The Trustee's mandate should include a power for the Trustee to sell the shares at no minimum price after the period of divestiture […]* has expired.

(90) The Trustee should be able to exercise the voting rights attached to Tetra's shareholding in Sidel subject to the prior approval of the Commission. The Trustee should also have the power to manage effectively Tetra's shareholding in Sidel and to ensure that Sidel operates as an effective competitor on the relevant markets. The Trustee should ensure in particular that the status and range of activities of Sidel is not altered in a way that weakens Sidel's competitive position on the markets in question. The Trustee should provide written reports to the Commission informing the

Commission on progress in the divestiture process as well as the monitoring of the operation and management of Sidel.

Transfer of shares to the Trustee

(91) Tetra does not contest the Commission's proposal to appoint an independent trustee with powers to monitor Sidel's independence and viability and exercise the voting rights attached to the shares. Tetra acknowledges that a Trustee should be appointed as soon as possible and proposes to appoint a hold-separate Trustee immediately following this Decision or even prior to the decision[25].

(92) However, Tetra maintains that an immediate transfer of the shares to a Trustee is not necessary. It considers that a sale constituting a final divestiture will have taken place after the passing of the time limit set out in its proposal.[26] Tetra refers to the Article 8(4) decisions in Blokker and Kesko/Tuko and the Remedies Notice to support the argument that the party required to divest can perform the divestiture itself. In both Blokker and Kesko/Tuko the transitional divestiture periods were limited to 6 or 9 months. A divestiture trustee was not appointed but a monitoring trustee was appointed in Kesko/Tuko. The Remedies Notice does not envisage divestiture trustees in the first divestiture period but does envisage them after the initial period expires.

(93) A transfer of shares to a Trustee is likely to contribute to the restoration of conditions of effective competition by minimising Tetra's influence during the transitional period. A transfer of shares would result in better monitoring during the transitional period, in more fluid and independent management in Sidel and possibly in more flexibility with issues such as voting of the shares and exercising other rights attached to the shares.

(94) A transfer of shares to a Trustee does not appear to entail harm to Tetra or Sidel and Tetra has not provided any arguments as to why such a transfer would be problematic. There is no reason why Tetra should not be able to enter into a suitable agreement to transfer the shares to a trustee pending final divestiture. In addition, most of the 4 "divestiture" proposals suggested by Tetra include a transfer of shares.

(95) The Commission therefore considers that it would be preferable for Tetra to transfer the shares to the Trustee as soon as practically possible.

Conclusion

(96) In the light of the foregoing, the Commission considers it necessary for Tetra to appoint an independent trustee such as an investment bank, management consultant or auditor, subject to the prior approval of the Commission. It is also concluded that it would be preferable for Tetra to transfer the shares to the Trustee as soon as practically possible. The Trustee's mandate should be subject to the Commission's approval to ensure the independence and effectiveness of the Trustee. The mandate should include all provisions necessary to enable the Trustee to fulfil its duties of monitoring Sidel's independence, managing effectively Tetra's shareholding in Sidel, ensuring that Sidel operates as an effective competitor on the relevant markets and conducting the divestiture of Tetra's shareholding in Sidel.

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[25] Reply, paragraph 47.

[26] Reply, paragraph 52.

III. CONCLUSION

(97) In the light of the fact that the concentration between Sidel and Tetra, which was declared incompatible with the common market and the functioning of the EEA Agreement on 30 October 2001, has already been implemented and in the light of the reasons set out above, it is concluded that it is necessary to order Tetra to separate itself from Sidel by divesting its shareholding in Sidel and to take additional appropriate measures in order to restore conditions of effective competition pursuant to Article 8(4) of the Merger Regulation as set out in the Annex to this Decision.

(98) In particular, it is necessary to order the separation of Tetra and Sidel on the basis of the following principles: (1) the separation should be by means of an effective and final divestiture of Tetra's shareholding in Sidel ensuring that conditions of effective competition are restored by retaining Sidel as an independent and viable competitor; (2) the divestiture should result in Sidel regaining its full independence from Tetra and Tetra not retaining any minority stake in Sidel or any interest in Sidel which could impede the restoration of conditions of effective competition; (3) the divestiture should take place promptly within a period of not more than nine months in order to safeguard Sidel's viability and effectiveness and thus to ensure the restoration of conditions of effective competition; (4) during the transitional period pending divestiture Tetra should appoint a Trustee to monitor Sidel's independence, ensure Sidel's viability and effectiveness and conduct the divestiture process.

(99) In ordering the measures set out in this Decision the Commission has paid particular regard to the principle of proportionality, to Tetra's request for flexibility and for measures allowing the preservation of as much of the value of Tetra's investment as possible as well as to Sidel's request for measures, such as the appointment of Trustees, that are not unduly onerous or disruptive to the extent that such measures achieve effectively the objective sought pursuant to Article 8(4) of the Merger Regulation, namely the restoration of conditions of effective competition,

HAS ADOPTED THIS DECISION:

Article 1

In order to restore conditions of effective competition, Tetra Laval B.V. is hereby ordered to separate itself from Sidel S.A. in accordance with the provisions of the Annex to this Decision.

Article 2

This decision is addressed to:

Tetra Laval B.V.
Amsteldijk 166
1071 LH Amsterdam
The Netherlands

Done at Brussels, 30/01/2002

For the Commission

Mario MONTI
Member of the Commission
(signed)

ANNEX

Point 1
Divestiture

1. Tetra Laval B.V. ("Tetra") shall divest its shareholding in Sidel S.A. ("Sidel") in a way that restores Sidel's independence in a final manner and ensures Sidel's viability and competitive effectiveness, in the short and long term.
2. In order to ensure that Sidel is sold in a manner consistent with this Decision, the divestiture shall be subject to the Commission's prior written approval of the purchaser and of the final binding sale and purchase agreement or other divestiture structures.
3. Sidel shall be divested as a going concern without any change in its status, scope or current range of activities which might weaken Sidel's effectiveness as a competitor in the markets in question. In particular, Tetra shall ensure that all tangible and intangible assets of Sidel, including without limitation, goodwill, all assets and facilities used by Sidel, all management departments of Sidel together with the relevant personnel, customer lists, and technical assistance will be divested as a going concern, including the transfer of personnel currently employed by Sidel.
4. The divestiture shall restore conditions of effective competition in a final and permanent manner. In particular, the divestiture mechanism chosen shall be subject to the Commission's prior written approval and shall not contain mechanisms, legal or other, enabling Tetra to buy back the shares. The method of divestiture chosen shall ensure that Tetra and Sidel are separated in a permanent and final manner and shall not impede the restoration of conditions of effective competition. This could arise, in particular, through the maintenance or creation of direct or indirect structural or financial links between the two companies.
5. Tetra shall divest its entire shareholding in Sidel so that, following the divestiture, neither Tetra nor any directly or indirectly affiliated member of its group hold any equity interest, either directly or indirectly, in Sidel.
6. Subject to the Commission's prior written approval and in accordance with this Decision, Tetra may choose in principle any method of divestiture to any buyer or buyers, including industrial buyers and financial institutions, as long as the buyer or buyers fulfil the "purchaser standards" set out in paragraph 49 of the Remedies Notice or a sale by way of a stock exchange flotation to third parties independent of and unconnected to Tetra or any directly or indirectly affiliated member of its group resulting to each of these third parties holding no more than 5% of Sidel's shares.
7. Subject to the Commission's prior written approval and to the extent that it does not impede the restoration of conditions of effective competition or Sidel's viability and competitive effectiveness, Tetra may choose in principle any payment structure enabling it to preserve as much of the value of its investment as possible. Such financial payment structures designed to preserve Tetra's value shall only last for a limited period of time following the divestiture.

Point 2
Transitional period

1. In the transitional period pending divestiture, Tetra shall not take any measure to implement the concentration without the Commission's prior written approval.
2. Tetra shall not exercise the voting rights attached to the shares or acquire shares without the Commission's prior written approval.

3. Tetra shall refrain from any action or omission which would jeopardise the full economic viability, marketability and competitiveness of Sidel pending divestiture. In particular, Tetra shall not carry out any act which may be of such a nature as to alter the legal status, nature, scope or range of activities, the industrial or commercial strategy or the investment policy of Sidel in the interim period pending divestiture.
4. Tetra shall continue to keep Sidel separate from Tetra and to ensure that employees of Tetra have no involvement in Sidel's businesses and vice versa. Tetra shall also ensure that the employees of Sidel do not report to any individual outside of that company save for the Trustee.
5. Tetra shall refrain from any act or omission which would prevent Sidel from continuing to be managed as a distinct and saleable entity separate from the business of Tetra. Tetra shall, and shall assist the Trustee to, ensure, in particular, that Sidel continues to have its own management which shall be under instructions to manage Sidel on an independent basis and to ensure its continued viability, marketability and independence from the business of Tetra.
6. Tetra shall implement all necessary measures to ensure that, from the date of adoption of this Decision, it shall not obtain from the management of Sidel any business secrets, know-how, commercial information, or any other information of a confidential, proprietary or sensitive nature, with the exception of public financial data normally made available to shareholders in a publicly listed company, such as the annual accounts.
7. Tetra shall not hire or solicit Sidel staff from the date of adoption of this Decision until the completion of the divestiture.
8. During the transitional period, Tetra shall report in full in writing to the Commission and the Trustee on developments in its negotiations with potential purchasers of Sidel or other actions it takes to complete the divestiture within 10 days after the end of every month following the date of adoption of this Decision, or otherwise at the Commission's request. Tetra shall forward to the Commission all the offer documents, prospectuses or other documents advertising the sale of its shareholding in Sidel and draft documents relating to the potential sale and purchase agreement and other divestiture structures including proposed payment terms. Tetra shall also provide the Commission with lists of potential acquirers.

Point 3
Appointment of Trustee

1. Within a period of no more than 10 working days following notification of this decision, Tetra shall appoint an independent Trustee with sufficient expertise and powers to monitor the divestiture process and Sidel's viability and effective functioning. The Trustee and its mandate shall be subject to the Commission's prior written approval.
2. The Commission shall have the discretion to approve or reject the proposed Trustee or Trustees, and to approve the proposed mandate subject to modifications, that the Commission deems reasonably necessary for the Trustee to fulfil its obligations.

   If only one name is approved, Tetra shall appoint or cause the individual or institution concerned to be appointed as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, Tetra shall be free to choose the Trustee to be appointed from among the names approved.

If all the proposed Trustees are rejected, Tetra will submit the names of at least two further such individuals or institutions within one week of being informed of the rejection, together with the full terms of the proposed mandate as agreed with the proposed Trustees as well as all information necessary for the Commission to verify that the proposed Trustees possess the necessary qualifications to carry out the task and shall not be, or become, exposed to a conflict of interest. If only one name is approved, Tetra shall appoint or cause the individual or institution concerned to be appointed as Trustee, in accordance with the mandate approved by the Commission. If more than one further name is approved, Tetra shall be free to choose the Trustee to be appointed from among the names approved.

If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a suitable Trustee which Tetra will appoint or cause to be appointed. As soon as the Commission has given approval to one or more proposed Trustees, Tetra shall appoint or cause the Trustee concerned to be appointed within one week thereafter, in accordance with the mandate approved by the Commission.

If the text of the mandate proposed by Tetra is rejected totally or partially by the Commission, the Commission shall adopt the text of the mandate which Tetra will implement and/or cause to be implemented by the Trustee/s.

3. The Trustee shall monitor and oversee the on-going management of Sidel with a view to ensuring its continued viability and marketability and monitor the compliance by Tetra with the conditions and obligations of this Decision.
4. The Trustee shall ensure that the status and range of activities of Sidel not be altered in a way that weakens Sidel's competitive position on the markets in question. The Trustee shall provide written reports to the Commission informing the Commission on progress in the divestiture process as well as the monitoring of the operation and management of Sidel.
5. The Trustee shall assess the suitability of the proposed purchaser or purchasers and/or the divestiture structures and payment structures and shall give its opinion to the Commission on whether the proposed divestment complies with the conditions and obligations under this Decision.
6. The Trustee's mandate shall include a power for the Trustee to sell the shares at no minimum price after the period of divestiture of […]* from the date of adoption of this Decision has expired. The Trustee's mandate shall provide the Trustee with all the necessary powers and independence to conduct the divestiture of Tetra's shareholding in Sidel.
7. The Trustee shall have the power to exercise the voting rights attached to Tetra's shareholding in Sidel subject to the prior written approval of the Commission.
8. The Trustee shall have the power to manage Tetra's shareholding in Sidel and to ensure that Sidel operates as an effective competitor on the relevant markets.

Point 4
Timing for divestiture

1. Tetra shall complete the divestiture within […]* from the date of adoption of this Decision, unless extended by the Commission in accordance with the provisions of this Decision.

2. Tetra shall be deemed to have complied with paragraph 1, if, within a period not exceeding […]* from the date of adoption of this Decision, it has entered into a binding agreement for the sale of its shareholding in Sidel in accordance with this decision or has published an offer for the public sale of the shares, provided that the closing of the sale takes place within […]* after the conclusion of the sales and purchasing agreement or the publication of the offer.
3. If Tetra is not able to complete the divestiture within […]* an extension may be granted by the Commission pursuant to paragraph 4. After the extended period expires or if no extension is granted, the Trustee shall have an irrevocable mandate to complete the divestiture within a period of […]* at no minimum price and without having regard to the financial interest of Tetra, that is to say, with no obligation to obtain the best price and terms possible.
4. The Commission may, upon request from Tetra and/or the Trustee showing exceptional circumstances and after hearing Tetra and/or the Trustee, where relevant, extend any period in this Decision allowed for the completion of the divestiture.