II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 7 July 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)

(notified under document number C(2004) 2500)

(Only the English version is authentic)

(Text with EEA relevance)

(2005/305/EC)

On 7 July 2004 the Commission adopted a Decision under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1], and in particular Articles 14(1)(b) and 14(1)(c) of that Regulation. A non confidential version of the full Decision can be found in the authentic language of the case and in the working languages of the Commission on the website of the Directorate General for Competition, at the following address: http://europa.eu.int/comm/competition/index_en.html

I. THE PARTIES

(1) Tetra Laval B.V. (Tetra) of the Netherlands, 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 S.A., (Sidel) is a French 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. THE TRANSACTION

(2) On 18 May 2001, the Commission received a notification (the Original Notification) pursuant to Article 4 of Council Regulation (EEC) No 4064/89 (the Merger Regulation) of a concentration whereby Tetra acquired within the meaning of Article 3(1)(b) of the Merger Regulation, control of Sidel by public bid announced on 27 March 2001.

III. PROCEDURE

(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 (Tetra I). By judgment (the Judgment) delivered on 25 October 2002, the Court of First Instance of the European Communities (CFI) 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) Merger Regulation. On 13 January 2003, the Commission decided not to oppose the notified

[1] OJ L 395, 30.12.1989, p. 1. Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p. 1).

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 (Tetra II).

(5) During the examination of the proposed concentration following the judgment of the CFI 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 to a request for information made pursuant to Article 11 of the Merger Regulation on 13 July 2001 (the Article 11 Reply).

(6) The Tetra Fast technology is a technology developed and patented by Tetra. It allows stretch blow moulding machines (SBM machines) to blow plastic PET bottles through a new method using explosive materials. The commercial advantages of this new method are significant as found by the Commission in Tetra II, which explained (at point 63) that: '*… the technology appears to offer a range of economic, operational and environmental advantages over conventional stretch blow moulding*'.

(7) During the Tetra I proceedings, Tetra failed to disclose the existence of the Tetra Fast technology in the Form CO itself as well as in replies to at least one Article 11 letter seeking information on PET packaging markets. The Commission was completely unaware of the technology's existence and hence of its importance.

(8) The Commission discovered the existence of Tetra Fast for the first time several months after the adoption of Tetra I. The matter came to the Commission's attention through the monitoring work of the Commission's Trustee. Tetra subsequently disclosed information on Tetra Fast during the Tetra II proceedings.

(9) Tetra's failure to disclose the relevant information falls within Article 14(1)(b) and (c) of the Merger Regulation which provides that the Commission may impose fines of EUR 1 000 to 50 000 on undertakings where intentionally or negligently they supply incorrect or misleading information in a notification or where they supply incorrect information in response to a request made pursuant to Article 11.

(10) The infringements on which the Commission bases the fines decision are:

(a) infringement of Article 14(1)(b) Merger Regulation due to Tetra's failure to disclose the Tetra Fast technology in Section 8.10 of Form CO requiring the disclosure of R&D in affected markets;

(b) infringement of Article 14(1)(c) Merger Regulation due to Tetra's failure to disclose the Tetra Fast technology in replying to the Commission's Article 11 request of 13 July 2001 in which:

(i) question 4 requested Tetra to describe developments regarding PET packaging for juice and liquid dairy products (LDP) (Tetra knew about the aseptic quality of Tetra Fast which is of particular relevance to packaging juice and LDP); and

(ii) question 5 asked for ongoing development in PET barrier technologies (Tetra had filed a coating patent based on the Tetra Fast technology).

(11) Tetra's infringements are particularly serious as the information was important for the Commission's assessment and Tetra ought to have known of this importance. Had the Tetra Fast information been disclosed during the Commission's Tetra I proceedings, it would have been an important element to the Commission's assessment. The Commission was thus seriously misinformed in its first analysis.

IV. **INFRINGEMENT OF ARTICLE 14(1)(b) IN THE ORIGINAL NOTIFICATION**

(12) Tetra started developing Tetra Fast as early as in 1996. Tetra had obtained a Swiss patent (1996) and a European patent (1997) for the new technology and by the time of the Original Notification in Tetra I (18 May 2001) had filed at least four other patent applications. More than EUR [0-10] million had been spent in developing Tetra Fast by the end of 2000 and a further investment of EUR [0-10] million was foreseen for the year of the Original Notification. Tetra's had carried out or commissioned studies in respect of the technology in 2000. Tests had also been carried out at or by university centres and institutes in 2000 and 2001. Tetra obtained safety approval requirements for the technology in 2000 and started field tests a few months before the Form CO was submitted to the Commission.

(13) The Form CO, in its section 8.10, requests the notifying party(ies) to supply information about R&D in the affected markets, in particular as carried out by the parties themselves. It requests:

'Explain the nature of the research and development in affected markets carried out by parties to the concentration.'

In doing so the parties are to take account of: *'(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.)' and '(c) the major innovations that have been made in these markets and the undertakings responsible for these innovations;'*

(14) The notification does not contain any reference to the Tetra Fast technology.

(15) Tetra's principal argument is that Tetra Fast does not form part of any market affected by the operation and does not closely relate to the affected market for SBM machines and that it was therefore not necessary for Tetra Fast to be mentioned in Section 8.10 of Form CO. 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.

(16) The Commission considers that this argument is manifestly wrong. It is evident that a technology which brings about a major change in the performance of SBM machines belongs to the affected market for SBM machines as long as the technology is not actually marketed separately (in which case Tetra would have had to submit the information on the basis of a separate technology market). Tetra's R&D overview for 2000, disclosed only during the Tetra II procedure, shows that Tetra itself saw Tetra Fast as part of the SBM machine market.

(17) The Commission also rejects Tetra's argument that the technology was irrelevant as it would not bring about a significant improvement to the way SBM machines operate. Tetra's internal documents clearly show that it saw a significant potential for, *inter alia*, reductions in power consumption.

Legal assessment

(18) 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.

(19) It is evident that in not disclosing the information on Tetra Fast in Section 8.10 of Form CO Tetra submitted incorrect information. While the Commission has no proof of Tetra acting intentionally Tetra's infringement must be considered grossly negligent.

(20) During the Commission's Tetra I investigation, field tests were being carried out and several management meetings were held. By the time of the adoption of the Commission's prohibition decision, millions of bottles were produced using the Tetra Fast technology. Even if Tetra had not been aware of the importance of the technology at the time of the notification, it had plenty of occasions during the administrative procedure of Tetra I to realise the incorrectness of the information it had provided in Form CO. It should be noted in this context that Article 4(3) of the Implementing Regulation contains an obligation to inform the Commission of any *'material changes in the facts'* arising during the administrative procedure.

V. INFRINGEMENT OF ARTICLE 14(1)(c) IN REPLY TO THE ARTICLE 11 REQUEST OF 13 JULY 2001

(21) In an Article 11 request of 13 July 2001, the Commission required the parties to:

'Q4. Please provide all available information on the future potential use of PET in the LDPs 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 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.'

(22) The parties submitted six annexes in response to the previous questions including many technical documents. However, in its answer of 26 July 2002 Tetra did not provide any document that contained any reference to Tetra Fast itself or to the barrier or coating technology (PCT/EP02/02160) that Tetra Laval had developed for use with its Tetra Fast technology.

(23) Tetra Fast is not only a method of blowing a PET bottle in a novel way (through explosion) but has two extra advantages: (i) the explosion has a sterilising effect on the bottle and (ii) by introducing special gases into the explosive process, the inside of the bottle may be coated by substances acting as a barrier.

(24) Tetra was fully aware of both. It had submitted a patent application for a new barrier technology related to Tetra Fast on 23 March 2001, which underlined both the aseptic quality of the Tetra Fast blown bottle and sought to patent the gas barrier enhancing properties of the new technology. Also, a Tetra internal analysis underlined these aseptic qualities.

(25) Tetra relies on what it considers to be the different character between Form CO and a Request for Information. 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) 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. 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).

(26) The Commission considers that Tetra's arguments must be rejected on the basis that the standard required by Form CO and by an Article 11 request is no different at least in respect to the provision of correct information. For the same reason Tetra's claim that the scope for imposing sanctions under Article 14 (1)(c) is more limited is unfounded.

(27) Regarding question 4, Tetra holds that the technology 'would not be needed' for the packaging of juice and LDP and therefore it was not required to disclose its existence in response to this question. However, the Commission notes the question requested all studies and internal documents discussing the potential use of PET in the LDPs and juice segments and asked what was needed to package LDPs and juice in order to compete successfully on the market. It also requested Tetra to discuss its, 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 compete effectively in future.

(28) As outlined above, Tetra had submitted a patent application for a new barrier technology related to Tetra Fast which, mentioning juice explicitly, underlined the gas barrier enhancing properties of the new technology and stressed its aseptic qualities, the latter being of high importance for commercially successful packaging of both juice and LDPs. Tetra itself outlines that improvements in gas barrier technologies are of high relevance for future packaging of juice and that aseptic filling is of high potential relevance for packaging juice and LDP. Consequently, it should have discussed Tetra Fast in its reply to Question 4 which asked for technologies which would be needed to enable PET to be used successfully for the packaging of LDPs and juice and requested Tetra to discuss its own activities.

(29) Regarding question 5, Tetra argues that Tetra Fast is not a barrier technology as such and therefore, it was not required to mention its existence in response to the question. The Commission notes that Tetra's coating technology patent application of 23 March 2001, unambiguously links Tetra Fast to barrier technologies. The patent application 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 which while also relating to the blowing of the bottle 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 technologies.

Legal assessment

(30) 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.

(31) Regarding Question 4, it is clear that a full discussion of the future potential competitive environment should have included a detailed explanation of Tetra Fast for both its potential for the application of barrier coatings through the Tetra Fast technology and for their enhanced aseptic quality. Gas barrier technology, as acknowledged by Tetra is of relevance for packaging of juices and aseptic filling is of importance for both the packaging of juices and LDP. Tetra's response was incorrect in that it did not give the Commission a full picture of the future potential for development of competition on the market.

(32) Regarding Question 5, Tetra was aware at this time of the potential of Tetra Fast to be used as a means of applying a coating to the inner side of the PET bottle. Tetra's failure to mention Tetra Fast renders its reply incorrect.

VI. **GRAVITY OF THE INFRINGEMENT AND AMOUNT OF THE FINE**

(33) While there are no indications that Tetra acted intentionally, Tetra's infringement must be considered grossly negligent. 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.

(34) In the Commission's view, the infringements in this case are very serious. A notification is the basis and the starting point for the Commission's investigation of a concentration. It determines to a large extent the approach of the Commission towards the case and the areas and focal points of its investigation. Incorrect information creates the risk that important aspects relevant for the competitive assessment of the transaction are neither investigated nor analysed by the Commission resulting in its final decision being flawed since it is based on incorrect or incomplete information. The same may be said of the failure to provide correct information in the Article 11 Reply which prevented the Commission from making a full and proper assessment of the merger.

(35) The development of Tetra Fast was important for 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 Tetra I. The potential of the technology would have had a significant impact on the Commission's assessment of: (a) PET packaging markets and in particular on SBM markets; and (b) the future position of the merged entity on PET packaging markets, in particular on the relevant SBM markets.

(36) 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 in the Commission's Article 11 request having a different scope, whereas in response to each of these two questions information on Tetra Fast, should have been disclosed for different reasons.

(37) For infringements of Article 14(1)(b) and Article 14(1)(c) the Commission may impose fines from EUR 1 000 to 50 000.

(38) In light of the foregoing, the Commission considers that a fine of EUR 45 000 for each of Tetra's two infringements, i.e. of Article 14(1)(b) and of Article 14(1)(c), is appropriate.

VII. **CONCLUSION**

(39) The Commission imposes two fines each of EUR 45 000 (totalling EUR 90 000) on Tetra for its infringement of Article 14(1)(b) and of Article 14(1)(c).