

## ***Tetra Laval ~ Is That Really a Lioness in the Park?***

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*"[S]ome things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian".*

Lord Hoffman, *Home Secretary v Rehman* (HL) [2001] 3 WLR 877, para 55.

Similar reasoning lay behind the recent judgment of the European Court of Justice ("ECJ") in C-12/03 *Tetra Laval BV* (judgment of 15 February 2005) in which the ECJ upheld the annulment by the Court of First Instance ("CFI") of the Commission's decision to block a merger between Tetra Laval BV ("Tetra") and Sidel SA ("Sidel"). Rather than peering through the gates of Regent's Park, the Commission, CFI and ECJ were required to peer into the future in an attempt to identify the likely competitive behaviour that would result from the merger.

Tetra and Sidel operated in the food packaging sector. Tetra was the holding company of the Tetra group of companies, which included Tetra Pak, the world leader in the sector. The companies operated in related but distinct markets. Tetra was dominant in the market for aseptic carton packaging, while Sidel, although not dominant, was a leading company in the market for the supply of 'SBM machines', used to manufacture plastic bottles.

The Commission's decision to block the merger was based in part on its reasoning that the merger would encourage Tetra to 'leverage' its dominant position in the carton packaging market so as to persuade customers on that market who were switching to plastic bottle packaging to choose Sidel's machines, thereby excluding Sidel's smaller competitors and turning Sidel's leading position on that market into a dominant position. On appeal, the CFI had subjected this aspect of the Commission's analysis to close scrutiny and concluded that the Commission had failed to establish that the potential leveraging would lead to the creation or strengthening of a dominant position on the relevant markets. The Commission appealed the CFI's judgment to the ECJ, arguing that the CFI had required it to satisfy a standard of proof and to provide a quality of evidence in support of its line of argument which was incompatible with the wide discretion which it enjoys in assessing economic matters.

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The ECJ found the Commission's argument to be unfounded. The ECJ accepted that the Commission had a certain margin of discretion when making economic assessments but stated that the Community Courts must not refrain from reviewing the Commission's interpretation of information of an economic nature, namely by establishing "whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it".

The ECJ noted that all mergers require a careful analysis, as the analysis is prospective and involves trying to predict future events. In relation to the Commission's leveraging hypothesis the ECJ stated that the "chains of cause and effect [were] dimly discernible, uncertain and difficult to establish" and it was therefore particularly important for the Commission to produce evidence to support its case. However, the fact that the assessment under review is a prediction of future conduct has on other occasions led courts to adopt a *lower* rather than a *higher* standard of review (*Cellcom* [1999] COD 105, para 26; *The Rail Regulator* [2003] EWHC 2607 (Admin), para 30), a tendency which has been acknowledged extra-judicially by President Vesterdorf of the CFI. The reasons are that it is obviously difficult to predict future events to a high degree of certainty, and specialised and experienced decision-makers are often better placed than courts to make such predictions. It therefore seems unlikely that the prospective nature of the analysis was in itself sufficient to justify the high level of review.

Rather, an indication of the crucial consideration is given by the ECJ's statement that a careful assessment was all the more necessary when assessing a conglomerate merger, namely a merger between two companies which did not have a pre-existing competitive relationship. The CFI had stated that "[s]ince the effects of a conglomerate-type merger are generally considered to be neutral, or even beneficial, for competition on the markets concerned ... the proof of anti-competitive conglomerate effects of such a merger calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects". Although the ECJ stopped short of expressly endorsing that passage, it is likely that its endorsement of a high level of review was strongly influenced by the generally benign nature of conglomerate mergers and the fact that the immediate effects of the merger between Tetra and Sidel were not such as to generate or strengthen a dominant position. In the light of those considerations, the Commission's conclusion that the merger was likely to generate anti-competitive effects as a result of leveraging by the merged entity over a period of time was, like the conclusion that it was a lioness rather than an Alsatian walking in Regent's Park, an inherently unlikely proposition requiring strong evidence to justify it. The judgments of the CFI in T-342 *Airtours v Commission* [2002] ECR II 2585 and of the Court of Appeal in *OFT v IBA Health* [2004] EWCA Civ 142 also support the proposition that when the immediate and inevitable consequences of a merger point clearly in one direction (i.e. that a merger should be blocked or cleared), compelling evidence and cogent reasons will be required to justify a conclusion that more temporally remote and inherently uncertain competitive effects are of sufficient likelihood and significance such as to demand the opposite approach.

*Julian Gregory is the co-author with Christopher Vajda Q.C. of a chapter on 'Judicial Review in a Competition Law Context', published in "Competition Litigation in the UK" by Tim Ward and Kassie Smith, Sweet & Maxwell (2005), which contains a more detailed analysis of this line of case law.*

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