

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
2 April 1993 *

In Case T-12/93 R,

Comité Central d'Entreprise de la Société Anonyme Vittel, an employees' representative body governed by Book IV of the French Code du Travail, and

Comité d'Établissement de Pierval, an employees' representative body governed by Book IV of the French Code du Travail,

each having its principal office in Vittel (France), represented by François Nativi, Hélène Rousseau and François Bienayme-Galaz, of the Paris Bar, assisted by Aloyse May, of the Luxembourg Bar, with an address for service in Luxembourg at the latter's Chambers, 31 Grand-Rue,

applicants,

v

Commission of the European Communities, represented by Francisco Enrique González Díaz, of its Legal Service, and Géraud de Bergues, a national expert seconded to the Commission's Legal Service under the scheme for that purpose, acting as Agents, with an address for service in Luxembourg at the office of Nicola Anecchino, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for suspension of operation of the Commission decision of 22 July 1992 relating to a proceeding under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (Case No IV/M.190 — Nestlé/Perrier) (OJ 1992 L 356, p. 1),

* Language of the case: French.

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

Facts

- 1 By application lodged at the Registry of the Court of First Instance on 3 February 1993, the Comité Centrale d'Entreprise of Vittel SA, the Comité d'Établissement of Pierval and the Fédération Générale Agroalimentaire CFDT brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of the Commission decision of 22 July 1992 relating to a proceeding under Council Regulation No 4064/89 on the control of concentrations between undertakings (Case No IV/M.190 — Nestlé/Perrier) (hereinafter 'the decision').
- 2 By a separate document lodged at the Registry of the Court of First Instance on 2 March 1993, the Comité Centrale d'Entreprise of Vittel SA and the Comité d'Établissement of Pierval (hereinafter 'the applicants') also applied, under Articles 185 and 186 of the EEC Treaty, primarily for suspension of the operation of the contested decision and, in the alternative, for an order from the Court of First Instance that the decision be suspended, in so far as it requires the transfer of Pierval, until the proceedings on the substance are determined.
- 3 The Commission lodged its written observations on the present application for interim measures on 17 March 1993. The parties presented oral argument on 23 March 1993.

- 4 The essential facts of the case before the Court of First Instance, as set out in the parties' pleadings and their oral arguments, may be summarized as follows.
- 5 On 25 February 1992 Nestlé SA (hereinafter 'Nestlé') notified to the Commission pursuant to Article 4(1) of Council Regulation No 4064/89 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1) a takeover bid for Source Perrier SA (hereinafter 'Perrier'). Having examined the notification, the Commission decided on 25 March 1992, pursuant to Article 6(1)(c) of Regulation No 4064/89, to initiate proceedings on the ground that the notified concentration raised serious doubts as to its compatibility with the common market.
- 6 On 22 July 1992, having regard in particular to the commitments given to it by Nestlé, the Commission adopted a decision declaring the concentration to be compatible with the common market. Conditions and obligations were attached to the decision to ensure that Nestlé complied with its commitments. One of the conditions imposed by the decision is that Nestlé must sell to a competitor to be approved by the Commission, within a period set in the decision itself, the brand names and sources Vichy, Thonon, Pierval, Saint-Yorre and certain other local sources and the bottling capacities relating to those sources.
- 7 On 26 January 1993, Nestlé indicated to the Commission a purchaser, the Castel group, already operating in the beverages sector. That purchaser declared itself interested in taking over three of the major sources which Nestlé had undertaken to resell (Vichy, Thonon and Saint-Yorre), and a number of less important sources. As the Commission did not consider that that transfer met all the terms of the decision, the Nestlé and Castel groups concluded a new agreement on 18 February 1993 which included transfer of the Pierval source as well as those mentioned above.

- 8 On 3 March 1993, the Commission published a press release to the effect that the purchase proposal from the Castel group contributed decisively to meeting all the requisite conditions and announced that it would proceed to bring the matter to a close once the obstacles to the actual transfer of the sources were removed, particularly regarding transfer to the Castel group of the rights to exploit the Vichy and Thonon sources, which were vested in the French State and the town of Thonon-les-Bains respectively.

Law

- 9 Under the combined provisions of Articles 185 and 186 of the EEC Treaty and Article 4 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, the Court may, if it considers that circumstances so require, order that application of the contested act be suspended or prescribe any necessary interim measures.
- 10 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that applications for interim measures under Articles 185 and 186 of the EEC Treaty must state the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the measures applied for. Those measures must be provisional in the sense that they do not prejudice the decision on the substance of the case (see, most recently, the order of the President of the Court of First Instance in Joined Cases T-7/93 R and T-9/93 R *Langnese-Iglo and Schöller v Commission* [1993] ECR II-131).

Arguments of the parties

- 11 The applicants consider that the legal preconditions for the grant of the interim measures applied for are satisfied in this case.
- 12 As regards urgency, they submit that the transfer of Pierval will cause them serious and irreparable damage, which is imminent and certain to occur and is directly linked with the contested decision. According to the applicants, the transfer of the assets of Pierval will be detrimental to the interests of its employees, in particular,

and to those of Vittel, in general, in that the transfer would undermine their right to maintenance of the assets of the undertaking, particularly since, in the circumstances of this case, they regard the financial consideration for the transfer as derisory. Furthermore, as a result of the transfer, the employees of Pierval will no longer be able to enjoy the considerable social advantages conferred on them either by their individual contracts or by the collective agreement in force for Vittel. In the applicants' view, such damage would be irreparable since the transfer, if effected, would have irreversible legal repercussions, notwithstanding the existence of conditions precedent or subsequent. That damage, moreover, flows directly from the decision of the Commission which made its declaration that the concentration between Nestlé and Perrier was compatible with the common market conditional upon the transfer of various sources, including Pierval.

- 13 As regards the pleas of fact and law establishing a *prima facie* case for the grant of the measure applied for, the applicants refer to the pleas and arguments in their application in the main proceedings, in which their criticisms of the Commission are essentially that:

- it infringed Regulation No 4064/89 by applying Article 2(3) to a market characterized as being predominantly oligopolistic;
- it erred in law by basing its decision not on the need to preserve a pre-existing competitive situation but on an endeavour to find ways of developing competition;
- it exceeded its powers;
- it erred in fact by making authorization in respect of the concentration notified subject to conditions that could not be fulfilled, such as the transfer of certain brand names and sources, including Thonon and Vichy, which are not included among the assets of either Perrier or Nestlé; and

- it misused its powers by reserving the right to revoke its decision and thereby declare the planned concentration incompatible with the common market, on the basis of a condition which could not be fulfilled.

- 14 The Commission contends that the main application is manifestly inadmissible and that the application for interim measures does not in any event disclose the existence of circumstances such as to establish urgency or contain pleas of fact and law establishing a *prima facie* case for the measures applied for.
- 15 The Commission maintains, in support of its contention that the main application is manifestly inadmissible, that in so far as the applicants did not seek to avail themselves of the procedural rights conferred by Regulation No 4064/89, the contested decision cannot be of individual concern to them within the meaning of the second paragraph of Article 173 of the EEC Treaty. In those circumstances, the present application for interim measures should be dismissed as inadmissible. In the Commission's view, that conclusion is not affected by the order of 15 December 1992 (Case T-96/92 R *CCE Grandes Sources and Others v Commission* [1992] ECR II-2579) in which the President of the Court of First Instance considered that the question of the extent to which a remedy is available to the recognized representatives of the workers of an undertaking taking part in a concentration in order to protect their legitimate interests calls for a detailed examination, with the result that the judge hearing an application for interim measures cannot hold that the application is manifestly inadmissible. According to the Commission, unlike the applicants in *CCE Grandes Sources and Others*, none of the applicants in this case fulfils the, if not essential then at least necessary, condition of having taken part in the proceedings provided for by the regulation.
- 16 As regards urgency, the Commission considers that the applicants have not demonstrated that the contested decision exposes them to certain and imminent damage. In particular, the Commission observes that it has not been established how the transfer of Pierval by Nestlé would necessarily weaken Vittel, since the strength of that undertaking must now be assessed in the context of the Nestlé group, to which it has belonged since 1987. The latter's position can only be enhanced by

the concentration since it would otherwise have declined to acquire Perrier. The Commission also observes that if the transfer price of Pierval were found to be, as the applicants seem to argue, contrary to the commercial rules applicable in France, it would be for them to commence proceedings in the appropriate national courts.

- 17 The Commission also considers that the transfer of part of the assets of an undertaking cannot in itself be damaging to the employees unless it inevitably undermines an interest specific to them, for instance by causing them to lose their jobs, which is not the case here. As regards the damage that would allegedly be suffered by the employees of Pierval, in particular, as a result of the transfer, the Commission contends that there is no certainty that transfer of the undertaking would necessarily affect the collective agreement and that, in any event, such agreements continue to apply for a year or until the entry into force of a substitute agreement; if no agreement is concluded in the year following transfer of the undertaking, moreover, the employees retain the individual advantages acquired by them under the agreement concluded prior to the transfer. Furthermore, the Commission states that the collective agreements could in any event have been repudiated by the management of Vittel, even without the sale of Pierval. It follows, according to the Commission, that the repudiation of such agreements is not a concomitant of the Pierval transfer, with the result that damage to the employees of that undertaking is neither certain nor imminent.
- 18 The Commission, whilst denying any causal link between the alleged damage and the decision, also claims that, even if the Court of First Instance were to consider that the applicants had demonstrated the existence of circumstances giving rise to urgency, the weighing of the respective interests of the parties should lead to the application for interim measures being dismissed since those measures would affect not only its own interests but also those of the Nestlé group and of the future purchaser of Pierval, which are not parties to these proceedings.
- 19 As regards the existence of a *prima facie* case, the Commission considers that the pleas in annulment advanced by the applicants are inadmissible or at any rate unfounded. The defendant analyses in detail each of the pleas and arguments put forward by the applicants and observes that, for the most part, they are covered by

Regulation No 4064/89 or by the text of the decision itself. As regards more particularly the plea alleging that the Commission committed an error of fact, in that neither the Thonon source nor the Vichy source belongs to Nestlé, the Commission contends that the applicants have no interest in bringing an action since, if the conditions laid down were found to be incapable of fulfilment, it would follow that the concentration plan notified would be declared incompatible, making the sale of Pierval devoid of purpose. The defendant also observes that it could not be held responsible if the condition at issue proved unfulfillable since the sale of those sources was proposed by Nestlé, which had at no time indicated that it did not own them. In any event, according to the Commission, the condition at issue could not in any event be regarded as incapable of fulfilment since Nestlé is in a position to waive its rights of exploitation and the authorities competent to grant those rights have every interest in having those sources exploited by a new undertaking, as is apparent, moreover, from the negotiations under way between those authorities and the Castel group.

Findings of the President

A — Manifest inadmissibility of the applications in the main proceedings

- 20 It has been consistently held that ‘... if it is claimed that the application is manifestly inadmissible, it is for the judge hearing the application for interim measures to establish that the application reveals *prima facie* grounds for concluding that there is a certain probability that it is admissible’ (see, most recently, the order in *CCE Grandes Sources and Others*, cited above).
- 21 Persons other than those to whom a decision is addressed may claim to be concerned within the meaning of the second paragraph of Article 173 of the EEC Treaty only if that decision affects them by reason of certain attributes which are peculiar to them, or by reason of circumstances in which they are differentiated from all other persons, and by virtue of those factors distinguishes them individually just as in the case of the person addressed (Case 75/84 *Metro v Commission* [1986] ECR 3021).

- 22 As the President of the Court of First Instance stated in his order in *CCE Grandes Sources and Others*, in its case-law on the *locus standi* of third parties in relation both to competition and State aid and to dumping and subsidies, the Court of Justice has held (Case 26/76 *Metro v Commission* [1977] ECR 1875, Case 191/82 *Fediol v Commission* [1983] ECR 2913, and Case 169/84 *Cofaz v Commission* [1986] ECR 391) that the need to protect legitimate interests may also be a decisive criterion in deciding whether a natural or legal person with the right to submit observations in an administrative procedure may be regarded as directly or individually concerned by a decision in the same way as an addressee.
- 23 In this case, it must be noted that, by contrast with the corresponding provisions of the regulations governing the procedures for the application of Articles 85 and 86 of the Treaty, Article 18(4) of Regulation No 4064/84 expressly gives the recognized representatives of the workers of the undertakings concerned the right to be heard, in the same way as other natural and legal persons.
- 24 Whilst it is true, as the Commission has pointed out, that the applicants did not ask to be heard in the course of the administrative procedure, it is undeniable that it was only at a very advanced stage of that procedure that the transfer of certain sources, including Pierval, was envisaged. Moreover, it is undisputed that the applicants had no notice of that planned transfer until after the adoption of the decision of 22 July 1992. Consequently, the applicants cannot in principle be criticized for not asking to be heard since, at first sight, they had no reason to suspect that authorization of the concentration would be subject to compliance with certain conditions, including the transfer of Pierval.
- 25 Accordingly, it seems necessary to consider in detail the extent to which a remedy may be available, in order to protect their legitimate interests, to the recognized representatives of an undertaking whose transfer constitutes a precondition for authorization of a concentration.

- 26 It follows that the President cannot at this stage decide that the application for annulment of the contested decision is manifestly inadmissible.

B — Application for interim measures

- 27 The present application for interim measures is intended primarily to secure suspension of the operation of the decision by which the Commission authorized the takeover of Perrier by Nestlé and, in the alternative, an order from the Court that the operation of the decision be suspended, to the extent to which it requires the transfer of Pierval, until determination of the proceedings on the substance of the case.
- 28 With regard to the application for suspension of the operation of the contested decision, it must first be noted that, as the President of the Court of First Instance stated in his order in *CCE Grandes Sources*, cited above, the effect of granting that request would be to suspend throughout the course of the proceedings before the Court the authorization given by the Commission for the concentration notified to it and, therefore, the exercise by Nestlé of its voting rights within the Perrier group, a result which would be liable seriously to upset the very functioning of the undertakings in the group.
- 29 As regards the application for an order suspending the operation of the decision, in so far as it requires the transfer of Pierval, until determination of the proceedings on the substance of the case, it must be emphasized that, according to the Commission itself (see the press release of 3 March 1993 mentioned in paragraph 8 above), the Commission intends 'to bring this matter to a close once the obstacles to the actual transfer of the sources have been removed, particularly regarding transfer to the Castel group of the rights to exploit the Vichy and Thonon sources by the French State and the town of Thonon-les-Bains'. It follows that fulfilment of the preconditions for authorization of the notified concentration is still dependent on decisions by the French State and the town of Thonon-les-Bains.

- 30 In view of that factual and legal situation, it is incumbent on the judge hearing the application for interim measures not only to balance the interests of the applicants against the Commission's interest in restoring effective competition but also to have regard to the interests of third parties such as Nestlé and Castel in order to avoid both the creation of an irreversible situation and serious and irreparable damage to one of the parties to the proceedings or to a third party or else to the public interest (see the order in *CCE Grandes Sources*).
- 31 Regardless of whether the transfer of part of the assets of an undertaking is liable to cause serious and irreparable damage to its employees, such a transfer normally gives rise, as the Commission agreed at the hearing, to irreversible legal and economic effects. Whilst it is true that the mere irreversibility of a situation does not of itself mean that the applicants will suffer serious and irreparable damage, the fact nevertheless remains that, in the present circumstances, the President must take account of the irreversible nature of the effects that might flow from the transfer of Pierval, particularly since it appears that fulfilment of all the preconditions for authorization of the concentration is still dependent upon approval by bodies not parties to these proceedings, namely the French State and the town of Thonon-les-Bains. It is necessary to ensure that the condition concerning the transfer of the assets of Pierval is not complied with before it has been established to a sufficient extent that all the other conditions laid down by the decision are actually capable of fulfilment and, consequently, to avert the possibility that such a transfer might prove to be devoid of purpose.
- 32 That conclusion is, at this stage, impervious to the Commission's argument that the applicants have no interest in bringing an action, since any finding that the above-mentioned conditions were incapable of being fulfilled would give rise to a declaration that the concentration was incompatible with the common market, thereby rendering the sale of Pierval devoid of purpose. Such an argument presupposes that Pierval will not in any circumstances be transferred before such a finding. How-

ever, there is nothing in the decision to suggest that the transfer of certain assets, and in any event the transfer of Pierval, is to take place only when all the conditions imposed have been fulfilled. Indeed, the decision merely states (paragraph 136): 'Nestlé agrees to sell the assets concerned by ... Nestlé shall be deemed to have complied with this obligation if, by ..., it has entered into a binding contract for sale of the divestiture assets to a purchaser approved by the Commission, *provided* that such sale is completed within a time-limit agreed to by the Commission'.

- 33 In those circumstances, and in order to prevent the creation of an irreversible situation as regards the parties to the proceedings or third parties, it seems justified to direct, by way of interim measure, that the Commission inform the Court of First Instance, as soon as it is in possession of the relevant information, that all the conditions relating to the transfer of assets laid down in the decision have been fulfilled and, in particular, that the obstacles to transfer of the rights to exploit Vichy and Thonon have been removed. It is also necessary, by way of protective measure, to order suspension of the operation of the decision, in so far as it makes any declaration as to the compatibility of the notified concentration subject to compliance with the condition concerning the transfer of Pierval, until such time as the judge hearing the application for interim measures is able to give a decision in the light of the information to be supplied to him by the Commission.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The Commission shall inform the Court of First Instance, as soon as it is in possession of the relevant information, that all the conditions relating to the transfer of assets laid down in its Decision of 22 July 1992 relating to a proceeding under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (Case No IV/M.190 — Nestlé/Perrier) have been fulfilled and, in particular, that the obstacles to transfer of the rights to exploit Vichy and Thonon have been removed.

2. The operation of the abovementioned Commission decision, in so far as it requires the transfer of Pierval, is suspended until such time as the judge hearing the application for interim measures gives a decision, in the light of the information to be supplied to him by the Commission pursuant to paragraph 1 above, on the application for suspension of operation.

Luxembourg, 2 April 1993.

H. Jung

J. L. Cruz Vilaça

Registrar

President