COURT OF JUSTICE
OF THE EUROPEAN UNION

PRESS RELEASE No 82/23
Luxembourg, 17 May 2023

Judgment of the General Court in Case T-321/20 | enercity v Commission

The action brought by the German municipal authority enercity against the approval by the Commission of the acquisition of generation assets of E.ON by RWE is inadmissible

The General Court provides clarification in that context of the novel question of the burden of proof so far as concerns the sending by the Commission of the questionnaire to conduct its market test

In March 2018, the companies RWE AG and E.ON, both governed by German law, announced that they wanted to engage in a complex asset swap by means of three concentration operations.

By the first operation, RWE, which is active across the whole supply chain of energy provision in several European countries, wished to acquire sole or joint control over certain generation assets of E.ON, an electricity provider which operates in several European countries. The second operation consisted in the acquisition by E.ON of the sole control over the distribution and retail energy business, as well as some production assets of Innogy SE, a subsidiary of RWE. As for the third operation, it concerned the acquisition of 16.67% of E.ON's shares by RWE.

On 24 July 2018, the German municipal authority enercity AG, which generates and provides energy in Germany notified the European Commission of its wish to participate in the procedure relating to the first and second concentration operations and, consequently, to receive the documents relating thereto.

Since the first concentration operation had been notified to the Commission on 22 January 2019, the latter conducted, inter alia, a market test by sending a questionnaire to certain undertakings. By decision of 26 February 2019 [1] ('the decision at issue'), the Commission declared that operation compatible with the internal market.

Enercity [2] brought an action for annulment of that decision which was dismissed as inadmissible by the Fourth Chamber of the General Court (extended composition), since the municipal authority was not individually concerned by the decision at issue. To reach that conclusion, the Court examines in particular the novel question of the burden of proof so far as concerns the sending of the questionnaire by the Commission in the context of conducting its market test.

Findings of the Court

As a preliminary point, the Court recalls that, under the fourth paragraph of Article 263 TFEU, a natural or legal

[1] Commission Decision C(2019) 1711 final of 26 February 2019, declaring that a concentration is compatible with the internal market and with the EEA agreement (case M.8871 – RWE/E.ON Assets).

[2] **Notably, ten other companies also sought the annulment of this decision. All of these actions were dismissed either as inadmissible, or on the merits.** See related series of cases: judgments of 17 May 2023, EVH v Commission, T-312/20, Stadtwerke Leipzig v Commission, T-313/20, Stadtwerke Hameln v Commission, T-314/20, TEAG v Commission, T-315/20, Naturstrom v Commission, T-316/20, EnergieVerbund Dresden v Commission, T-317/20, eins energie in sachsen v Commission, T-318/20, GGEW v Commission, T-319/20, Mainova v Commission, T-320/20, and Stadtwerke Frankfurt am Main v Commission, T-322/20.

person may institute proceedings against a decision addressed to another person only if that decision is of direct and individual concern to him or her.

In that regard, the Court confirms that enercity is directly concerned by the decision at issue since, by allowing the first concentration operation to be put into effect immediately, that decision was capable of bringing about an immediate change in the state of the relevant markets.

As regards whether enercity is individually concerned by a decision finding that a concentration is compatible with the internal market, the General Court notes that the individual concern of a undertaking which is a third party to that concentration depends, on the one hand, on the effect on its market position and, on the other, on its participation in the administrative procedure. On that latter point, it follows from the case-law that while the active participation by the third party in the administrative procedure is a factor regularly taken into account to establish, in conjunction with other specific circumstances, the admissibility of its action for annulment, mere participation in the procedure is not sufficient to establish that the decision is of individual concern to that third party.

In the present case, the Court notes from the outset that the participation of enercity in the administrative procedure relating to the first concentration is not being challenged. That being said, the Court finds on the basis of a detailed examination of the evidence submitted in this respect that that evidence is not sufficient to establish the 'active' nature of that participation. The Court holds, more specifically, that the observations made by enercity in that context, although they bear some relevance and have been dealt with by the Commission, were not conclusive in order to assess the effects of the concentration in question on the relevant market.

That finding is not invalidated by enercity's line of argument alleging, in substance, lack of care and attention of the Commission's services in its respect, both in relation to the sending of the questionnaire for the purposes of the conduct of a market test and to the action taken in response to its request that it be recognised as an interested third party.

In so far as enercity claims that it had not received that questionnaire, the Court states, first of all, that it is for the Commission to submit evidence that it had been sent. In that regard, the Court notes that the Commission, in compliance with a measure of organisation of procedure, submitted several items of evidence to demonstrate that the document at issue had been sent to enercity.

Next, in response to enercity's argument that the questionnaire was addressed to the wrong recipient, namely its press officer, the Court observes that it can reasonably be expected of such a person, in receipt not only of an email but also of a fax from an European institution, that it would let that institution know as soon as possible of the error in the recipient. Moreover, it was also possible for that person to contact the legal or commercial department of its undertaking to inform them of the receipt of those documents.

In any event, even if enercity had sent back the completed questionnaire, that mere correspondence was not sufficient for its participation in the administrative procedure to be classified as active and to distinguish enercity individually for the purposes of the fourth paragraph of Article 263 TFEU.

Lastly, even if enercity's request to the hearing officer to be recognised as an interested third party is evidence of its will to participate in the procedure relating to the concentration at issue, the Court also does not accept that such a request may establish the 'active' nature of its participation, since such a classification requires the existence of acts of the undertaking concerned which may have influenced the procedure at issue to be established.

In those circumstances, from which it is apparent that enercity did not actively participate in the first concentration operation and, moreover, having regard to the absence of specific circumstances relating to effects on its market position, the General Court considers that it is not individually concerned by the decision at issue. Accordingly, the Court concludes that energycity has not demonstrated that it has standing to bring proceedings and, consequently, dismisses its action as inadmissible.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

Press contact: Jacques René Zammit ✆(+352) 4303 3355