COURT OF JUSTICE
OF THE EUROPEAN UNION

PRESS RELEASE No 81/23
Luxembourg, 17 May 2023

Judgment of the General Court in Case T-312/20 | EVH v Commission

The action brought by the German electricity producer EVH against the approval by the Commission of the acquisition of E.ON assets by RWE is dismissed

The General Court points out in particular that an asset swap between independent undertakings does not constitute a 'single concentration'

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

By the first concentration 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 concentration operation consisted in the acquisition by E.ON of the sole control over the distribution and retail energy business, as well as some generation assets of Innogy SE, a subsidiary of RWE. As for the third concentration operation, it concerned the acquisition of 16.67% of E.ON's shares by RWE.

The first and second concentration operations were reviewed by the European Commission, while the third concentration operation was reviewed by the Bundeskartellamt (Federal Competition Authority, Germany).

In April 2018, the German undertaking EVH GmbH, which generates electricity on the German territory, from both conventional and renewable sources, notified to the Commission its wish to participate in the procedure relating to the first and second concentration operations and, consequently, to receive the documents relating thereto.

The first concentration operation was notified to the Commission on 22 January 2019. By decision of 26 February 2019 [1] ('the decision at issue'), the Commission decided not to oppose the notified operation and declared that it was compatible with the internal market pursuant to Article 6(1)(b) of Regulation No 139/2004. [2]

EVH [3] brought an action before the General Court seeking the annulment of the decision at issue. In dismissing that

[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] Council Regulation (EC) No 139/2004 of 20 January 2004, on the control of concentrations between undertakings (the EC Merger Regulation) (OJ 2004 L 24, p. 1). Under Article 6(1)(b) of that regulation, if the Commission finds that the concentration notified does not raise serious doubts as to its compatibility with the internal market, it must decide not to oppose it and must declare that it is compatible with the internal market.

[3] **Notably, 10 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, *Stadtwerke Leipzig v Commission*, T-313/20, *GWS 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, *enercity* v *Commission*, T-321/20, and *Stadtwerke Frankfurt am Main v Commission*, T-322/20.

action, the Court clarifies, first of all, the concept of 'single concentration' as far as concerns asset swaps. Next, it rules for the first time on the Commission's obligation to publish decisions adopted under Article 6(1)(b) of Regulation No 139/2004. Lastly, it clarifies the extent of the period which the Commission must analyse in order to assess the compatibility of the concentration at issue with the internal market and examines the concept of 'common shareholding'.

Findings of the Court

First of all, the Court rejects the plea of inadmissibility raised by RWE, based on EVH's lack of standing to bring proceedings.

In that context, the Court recalls that, under the fourth paragraph of Article 263 TFEU, a natural or legal 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.

As regards direct concern, the Court notes that the decision at issue, by allowing the first concentration operation to be put into effect immediately, is capable of bringing about an immediate change in the state of the relevant markets. It follows that EVH, active on that market, is therefore directly concerned by the decision at issue.

As regards whether EVH is individually concerned by a decision finding that a concentration operation is compatible with the internal market, the Court notes that the individual concern of an undertaking which is a third party to the concentration depends, on the one hand, on the effect on its market position and, on the other, on its participation in the administrative procedure. In the present case, in the light of the significant involvement of EVH in the administrative procedure, its status as competitor of the merging parties and the potential impact on the value of certain investments specifically identified by EVH following the concentration, it must be regarded as being individually concerned by the decision at issue.

Secondly, on the substance, the Court rejects, first of all, the plea seeking to criticise the Commission for having failed to review, on the one hand, the third concentration operation and, on the other hand, to consider the three concentration operations as components of a single concentration.

So far as concerns the third concentration operation, the Court finds that EVH is not justified in maintaining that it is a concentration for the purposes of Article 3 of Regulation No 139/2004. [4]

In that regard, the Court notes, in the first place, that the action concerns formally only the Commission decision declaring the first concentration operation compatible with the internal market. That decision does not explicitly determine the classification to be given to the third operation, in the light of the concept of 'concentration' and, consequently, whether the Commission has competence to assess its compatibility with the internal market. Therefore, EVH cannot ask the Court to rule on a question of competence which has not been considered by the Commission in the decision which is the subject of the action. Moreover, if EVH was of the opinion that the third concentration operation may have a Union dimension, it was for EVH to complain to the Commission in order to ask it to determine the case, since, in such a case, the Commission is required to decide on the principle of its competence as supervising authority.

In the second place, and in any event, the acquisition of a minority shareholding may give rise to control only where specific rights are attached to that minority shareholding, bringing about *de jure* sole control, or where a minority shareholder obtains, due to extraordinary circumstances, sole control on a de facto basis. [5] In this case, EVH has not claimed that specific rights were attached to the minority shareholding acquired by RWE, or shown that RWE had

[4] That provision, entitled 'Definition of concentration', provides the criteria that an operation must fulfil in order to be considered a concentration within the meaning of EU law.

[5] See, to that effect, paragraphs 57 and 59 of the Codified Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2008 C 95, p. 1).

acquired de facto sole control over E.ON.

As for the question whether the three concentration operations may be regarded as the components of a single concentration, the Court observes that, for that purpose, two conditions must be met. [6] First, the operations must be interdependent in such a way that none of them would be carried out without the others. Second, the result of those operations must consist in conferring on one or more undertakings direct or indirect economic control over the activities of one or more other undertakings. In the light of those conditions, **the concept of 'single concentration' cannot apply when independent undertakings gain control of different targets, as is the case in an asset swap.**

In this case, it follows from the Court's examination that the overall transaction meets the condition relating to interdependence but not that relating to result. There is no functional link between the three concentration operations, since the overall transaction in question is not a concentration by means of which several intermediate transactions are carried out in order for control over one or more undertakings to be gained by the same undertaking or undertakings. In those circumstances, since one of the two conditions is not met, the Commission validly took the view that the three concentration operations were not components of a single concentration.

That being said, there is nothing contentious in the Commission analysing separately the first and second concentration operations while taking into account, in the decision at issue, the effects which they have on each other respectively.

In that regard, the Court states as a preliminary point that, even if it were to confirm the existence of the rule of priority in the terms set out by the Commission, namely that a concentration must be examined in the light of all transactions previously notified, it would not apply in the present case. The first concentration operation was formally notified before the second concentration operation. The Court adds that, having regard to the interdependence in law and in fact of the concentration operations at issue, the mechanical application of that rule could have arbitrary effects on the scope of the Commission's analysis. Thus, to the extent that those concentration operations have a link allowing the Commission to gain an understanding of the probable effects on the market of each concentration, it is for the Commission to take it into account in the overall assessment of all the relevant evidence that it carries out in respect of each of those operations. Those constitute, in the light of the other operations, an element which the Commission must take into account in its overall analysis of the effects of the operation on the internal market.

Next, the Court rejects the plea alleging infringement of the right to effective judicial protection in that the publication of the decision at issue took place after a considerable amount of time had elapsed, observing that the late publication of an act of the Union has no bearing on the validity of that act.

In its analysis, the Court notes that although Regulation No 139/2004 does not require the publication in the Official Journal of the European Union of Commission decisions adopted under Article 6(1)(b) of that regulation, the Commission, in practice, has a self-imposed obligation to publish such decisions and to do so while ensuring that the confidentiality of information bound by professional secrecy or other public policy exemptions is preserved. [7] The Court considers that such an approach is consistent with the Commission's obligation to guarantee, by means of appropriate publicity, the right of third parties, directly and individually concerned by such decisions, to effective judicial protection.

Lastly, the Court rejects the plea alleging manifest errors by the Commission in its assessment of the compatibility of the concentration at issue with the internal market, due to, inter alia, the choice of a period of analysis which is allegedly too short and, second, to an examination of the influence that RWE is liable to have over E.ON which is

[6] See, to that effect, recital 20 and Article 3(1)(b) of Regulation No 139/2004.

[7] See paragraphs 2 and 5 of 'Guidance on the preparation of public versions of Commission Decisions adopted under the Merger Regulation of 26 May 2015.

claimed to be insufficient, in particular in the light of their common shareholding.

So far as concerns the period of analysis, the Court recalls that, in merger control, the Commission must assess whether a concentration is such as to significantly impede effective competition in the internal market or in a substantial part of it. A prospective analysis consisting in an examination of how a concentration might alter the factors determining the state of competition on a given market makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely. It follows that the Commission must carry out an assessment of the effects of the concentration over a period the maximum duration of which cannot exceed – with a sufficient degree of certainty – the time frame within which certain events may occur. From that point of view, the Commission cannot be required to carry out a prospective analysis on the basis of elements of which it is not able to envisage, within a reasonable margin of error, the long-term effects.

As for the collective influence exerted by RWE and a third company over E.ON, the Court does not rule out that the existence of a common shareholding, namely the possession by the same institutional investors of shares in competing undertakings and its non-coordinated competitive effects, may reduce competitive pressures on other competitors. For that reason, the effect of that reduction alone is not, in principle, on its own, sufficient to demonstrate a significant impediment to effective competition, in the context of a theory of harm based on non-coordinated effects. In the present case, the Court notes that EVH has not been able to identify indicative factors capable of establishing that the presence of the third company in question in the capital of RWE and E.ON amounts to evidence that there is already a tendency to collective dominance. It follows that the Commission cannot be found to have made a manifest error of assessment by failing to mention such evidence.

In the light of those considerations, **the Court dismisses the action in its entirety.**

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.

The full text of the judgment is published on the CURIA website on the day of delivery.

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