



Press and Information

General Court of the European Union

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Judgment in Case T-224/10

Association belge des consommateurs test-achats ASBL v European
Commission

Consumer associations have the right to be heard, in the context of the administrative procedure before the Commission relating to a merger investigation, subject to compliance with two conditions

In the present case, the fact that an association submitted its application to be heard prior to notification of the merger cannot make up for the non-renewal of that application subsequent to the formal initiation of the procedure

The Association belge des consommateurs test-achats (ABCTA) is a non-profit organisation which has as its main objective the protection of consumer interests and, in particular, of consumer interests in Belgium. With some 350 000 individual members, it is the largest consumer association in Belgium.

In June 2009, ABCTA learned that Électricité de France (EDF) had announced that it intended to acquire exclusive control of Segebel SA, the latter being a holding company whose only asset was a 51% shareholding stake in SPE SA, the second largest electricity operator in Belgium after the incumbent operator Electrabel SA, which is controlled by GDF Suez SA. At the material time, the French State held 84.6% of the shares in EDF. The French State held a minority shareholding interest of 35.91% in GDF Suez.

On 23 June 2009, ABCTA sent a letter to the European Commission expressing its concerns about the merger at issue. On that occasion, it requested the Commission to consider the negative consequences for competition which, it claimed, would be brought about as a result of the French State's shareholding in EDF and GDF Suez, particularly on the Belgian markets for gas and electricity. In July 2009, the Commission replied to ABCTA that its observations would be taken into account in the analysis of the merger at issue.

On 23 September 2009, EDF notified the merger at issue to the Commission. On 30 September 2009, a notification notice was published in the *Official Journal of the European Union*, inviting interested third parties to submit their observations. ABCTA did not react to that notification.

On 12 November 2009, the Commission adopted, first, a decision¹ by which it rejected a request from the competent Belgian authorities for partial referral of the merger investigation (the non-referral decision), and, second, a decision² by which it declared the merger at issue to be compatible with the common market (the clearance decision).

ABCTA applied to the General Court to have those two Commission decisions annulled.

The application for annulment of the clearance decision

The Court observes, first of all, that 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 the former. However, it follows from the case-law that, for Commission decisions relating to the compatibility of a merger with the common market, the locus standi of third parties concerned by a

¹ Decision C(2009) 8954 (Case COMP/M.5549 – EDF/Segebel).

² Decision C(2009) 9059 (Case COMP/M.5549 – EDF/Segebel).

merger must be assessed differently depending on whether they, on the one hand, rely on defects affecting the substance of those decisions ('first category' of interested third parties) or, on the other hand, submit that the Commission infringed procedural rights which are granted to them by the acts of European Union (EU) law governing the monitoring of mergers ('second category' of interested third parties).

So far as concerns the first category, it is necessary for those third parties to be individually concerned by the contested decision. In other words, the decision at issue must affect those third parties by reason of certain attributes which are peculiar to them or by reason of a factual situation which differentiates them from all other persons and thereby distinguishes them individually in the same way as the addressee. ABCTA, however, does not come within the first category since it is not individually concerned by the Commission decision.

As to the question whether ABCTA comes within the second category, the Court states that, **according to EU law, consumer associations enjoy a procedural right, that is to say, the right to be heard, in the context of the administrative procedure before the Commission relating to a merger investigation, subject to compliance with two conditions:** (1) the merger must relate to goods or services used by final consumers and (2) an application to be heard by the Commission during the investigation procedure must actually have been made in writing by the association.

While the Court finds that ABCTA satisfies the first condition – the merger at issue being likely to have effects, at least secondary effects, on consumers – that association does not, however, satisfy the second condition.

In that regard, the Court points out that **the steps which third parties are required to follow** in order to be involved in a merger investigation procedure **must be taken following the formal notification of the merger**. That makes it possible, in the interest of third parties, to avoid the situation in which such requests are made by them before the Commission has determined the purpose of the merger investigation procedure, at the time of notification of the transaction at issue. Furthermore, that means that the Commission does not have to separate systematically, from amongst the requests received, those which concern transactions attributable only to abstract hypotheses, or even to mere hearsay, from those which concern transactions resulting in a notification. The opposite scenario would be inconsistent with the need for rapid action which characterises the EU rules on merger investigation.

In the present case, ABCTA had asked the Commission to be heard in the context of the merger investigation procedure two months prior to notification of the merger. However, that fact cannot make up for the non-renewal of that application or for the lack of any initiative on the part of ABCTA, once the economic transaction envisaged by EDF and Segebel, of which ABCTA had had prior knowledge, had in fact become a duly notified merger and thus set in motion the procedure in the context of which ABCTA wished to be heard.

The application for annulment of the non-referral decision

According to settled case-law, a third party concerned by a merger is entitled to challenge, before the General Court, the Commission's **decision to uphold** a national competition authority's **referral request**.

By contrast, the Court holds that interested third parties are not entitled to challenge **a non-referral decision** by which the Commission rejects a request for referral brought by a national authority. The procedural rights and judicial protection that EU law confers on those third parties are not in any way jeopardised by the non-referral decision. Quite to the contrary, that decision ensures for third parties concerned by a concentration with a Community dimension, first, that that merger will be assessed by the Commission in the light of EU law, and second, that the General Court will be the judicial body having jurisdiction to deal with any action against the Commission's decision bringing the procedure to an end.

Consequently, the General Court dismisses the action as being inadmissible.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months of notification of the decision.

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.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery

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