JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
20 November 2002 *

In Case T-251/00,

Lagardère SCA, established in Paris (France), represented by A. Winckler, avocat, with an address for service in Luxembourg,

Canal+ SA, established in Paris (France), represented by J.-P. de la Laurencie and P.-M. Louis, avocats, with an address for service in Luxembourg,

applicants,

v

Commission of the European Communities, represented by W. Wils and F. Lelièvre, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for the annulment of the Commission decision of 10 July 2000 amending the Commission decision of 22 June 2000 declaring concentrations

* Language of the case: French.

compatible with the common market and the functioning of the Agreement on the European Economic Area (Cases COMP/JV40 — Canal+/Lagardère and COMP/JV47 — Canal+/Lagardère/Liberty Media),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Third Chamber, Extended Composition),

composed of: M. Jaeger, President, R. García-Valdecasas, K. Lenaerts, P. Lindh and J. Azizi, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 9 July 2002,

gives the following

Judgment

Legal and factual background

1 Article 6(1) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1, as

rectified, OJ 1990 L 257, p. 13, and as amended by Council Regulation (EC) No 1310/97 of 30 June 1997, OJ 1997 L 180, p. 1, 'Regulation No 4064/89') provides as follows:

'The Commission shall examine the notification as soon as it is received.

...

(b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

The decision declaring the concentration compatible shall also cover restrictions directly related and necessary to the implementation of the concentration.

...'

2 Article 3(1) of Council Regulation (EEC) No 447/98 of 1 March 1998 on the notifications, time-limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ 1998 L 61, p. 1), adopted on the basis of the first paragraph of Article 23 of Regulation No 4064/89, provides that 'notifications [of concentrations] shall contain the

information, including documents, requested by form CO', a model of which is shown in the annex to Regulation No 447/98. In point 11.1 of form CO it is stated that 'if the parties to the concentration, and/or other involved parties... enter into ancillary restrictions directly related and necessary to the implementation of the concentration, these restrictions may be assessed in conjunction with the concentration itself'. In this context, the parties to the concentration are asked to 'identify each ancillary restriction in the agreements provided with the notification for which [they] request an assessment in conjunction with the concentration' and to 'explain why these [restrictions] are directly related and necessary to the implementation of the concentration'.

3 In a notice dated 14 August 1990 on restrictions ancillary to concentrations (OJ 1990 C 203, p. 5, 'the notice on ancillary restrictions'), the Commission gave some guidance on how it interpreted 'restrictions directly related and necessary to the implementation of the concentration' within the meaning of the second subparagraph of Article 6(1)(b) of Regulation No 4064/89.

4 On 16 May 2000 Lagardère SCA ('Lagardère'), Canal+ SA ('Canal+') and Liberty Media Corporation ('Liberty') gave notice of two concentrations, one involving the acquisition by Lagardère of joint control, with Canal+ and Liberty, of the company Multithématiques and the formation of ordinary partnerships with equal shares between Lagardère and Multithématiques with a view to the common production of special-interest channels, and the other involving the acquisition by Lagardère of joint control, with Canal+, of CanalSatellite and the formation of two joint ventures between Lagardère and Canal+ for the production of special-interest channels ('JV 1') and of interactive services ('JV 2') respectively.

5 In addition, referring to Article 3(1) of Regulation No 447/98 and point 11.1 of form CO, the parties to the concentration gave notice of several contractual clauses which, according to them, were to be regarded as restrictions directly

related and necessary to the implementation of the concentrations within the meaning of Article 6(1)(b) of Regulation No 4064/89 ('the ancillary restrictions').

6 On 22 June 2000, pursuant to the decision-making procedure by authorisation, Ms Schreyer, a member of the Commission, adopted the Commission decision concerning the notified concentrations ('the decision of 22 June 2000'). The parties to the concentration were notified of the decision on the same day. The operative part of the decision is worded as follows:

'For the reasons set out above, the Commission has decided not to oppose [the notified concentrations] and to declare them compatible with the common market and with the EEA Treaty. This decision is taken on the basis of Article 6(1)(b) of [Regulation No 4064/89]'.

7 It is common ground that the decision of 22 June 2000 was made on the last day of the period referred to in Article 10(1) of Regulation No 4064/89 in conjunction with Article 6(4), Article 7(4) and (8) and Articles 8 and 23 of Regulation No 447/98 ('the period referred to in Article 10(1) of Regulation No 4064/89').

8 In paragraphs 54 to 66 of the grounds of the decision of 22 June 2000 the Commission comments on the various contractual clauses notified by the parties to the concentration as being directly related and necessary to the implementation of the concentrations. The Commission accepts certain clauses as being ancillary to the implementation of the concentrations for the entire period indicated in the notification (priority clauses for the planning and development of a special-interest channel and an interactive television service). Other clauses are deemed to be ancillary, but for a shorter duration than that indicated in the notification

(non-competition clause relating to distribution by satellite of a number of services and a clause prohibiting the development of a similar project). The other clauses of which the parties gave notice are classified as restrictions not ancillary to the concentration.

9 On 7 July 2000 the parties to the concentration learnt, informally and by chance, that the Commission was preparing a new decision concerning the notified concentrations.

10 On 10 July 2000 the Commission notified the parties to the concentration of its decision amending the decision of 22 June 2000 ('the decision of 10 July 2000' or 'the contested decision'). The introductory part of the decision, signed by Mr Monti, a Commission member, states as follows:

'As a result of a handling error, the text of the decision of 22 June 2000... which was signed and notified to you was incorrect. Consequently the Commission has decided to make certain textual amendments to it.'

11 The contested decision consists of, first, a list of words to be replaced in the grounds of the decision of 22 June 2000 and, secondly, the complete text amending paragraphs 58 to 67 of the grounds of the said decision concerning the assessment of the restrictions notified as being directly related and necessary to the implementation of the concentrations. It appears from the decision of 10 July 2000 that, with the exception of one of the priority clauses (see paragraph 8 above) which is still recognised as ancillary, but for a shorter period than that indicated in the notification, all the restrictions described in the notification of the concentrations are deemed to be not ancillary to the concentrations. On the other hand, the operative part of the decision of 22 June 2000 was not amended.

12 On 13 July 2000 the legal advisers of Lagardère and Canal+ sent a letter to Mr Monti informing him of their position with regard to the decision of 10 July 2000. In particular, the letter states:

'Legally, the Commission's new text dated 10 July 2000 can have no consequences for the notifying parties because the period referred to in Article 10 of Regulation No 4064/89 expired long ago. This act is therefore non-existent. The Commission's decision which we received on 22 June 2000 is and remains the only one validly taken on the basis of our notification of 16 May 2000'.

13 They also informed the Commission in the same letter that the parties to the concentration had already begun to implement some of the agreements on the basis of the decision of 22 June 2000. Finally, they asked the Commission to revoke the decision of 10 July 2000.

14 On 17 July 2000 Lagardère and Canal+ sent the Commission, at its request, a draft of the non-confidential version of the decision of 22 June 2000 with a view to publication.

15 On 27 July 2000 there was a meeting between the responsible services of the Commission and the legal advisers of Lagardère and Canal+. The Commission services stated that it had been necessary to rectify the error in the interest of consistency with Commission decision 1999/242/EC of 3 March 1999 relating to a proceeding pursuant to Article [81] of the EC Treaty (Case No IV/36.237 — TPS) (OJ 1999 L 90, p. 6). The latter decision has in the meantime given rise to the Court's judgment of 18 September 2001 in Case T-112/99 *M6 and Others* v *Commission* [2001] ECR II-2459, 'the *M6* judgment').

16 In a letter dated 31 July 2000, the Director-General of the Directorate-General for Competition, Mr Schaub, replied to the abovementioned letter of 13 July 2000 and explained the circumstances in which the error arose. He added:

'We do not regard this as simply a procedural matter because we consider that the text sent on 22 June [2000] contains errors of substantive law as to the legal assessment of certain clauses which were wrongly deemed to be ancillary. Under these conditions, we are not in a position to withdraw the letter of 10 July [2000] and I would inform you that the published version of the text will be prepared on the basis of that letter.'

17 On 8 September 2000 the legal advisers of Lagardère and Canal+ replied to Mr Schaub's letter of 31 July 2000 and, in substance, repeated the request in their letter of 17 July 2000.

Procedure

18 Lagardère, Canal+ and Liberty brought this action by application lodged at the Registry of the Court of First Instance on 15 September 2000.

19 By a separate document lodged at the Registry on 27 October 2000, the defendant lodged an objection that the action was inadmissible pursuant to Article 114 of the Rules of Procedure of the Court of First Instance. The applicants submitted their observations on the objection on 8 January 2001.

20 By order of 22 February 2001, the Court of First Instance (Third Chamber) joined the objection of inadmissibility raised by the defendant to the substance of the case.

21 By way of measures of organisation of procedure, the Court put certain written questions to the parties by letter of 24 July 2001, to which they duly replied.

22 On 10 January 2002 the Court decided, pursuant to Article 14(1) of the Rules of Procedure, to assign the case to the Third Chamber, Extended Composition.

23 By way of measures of organisation of procedure, the Court, by letter of 10 December 2001, asked the defendant to produce the preparatory documents relating to Regulations No 4064/89 and No 1310/97. The defendant duly complied. The applicants submitted their observations on the documents on 26 March 2002.

24 Liberty withdrew its application by letter of 2 July 2002. Consequently the President of the Third Chamber, Extended Composition, decided, by order of 9 September 2002, to remove that party's name from the register

25 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber, Extended Composition) decided to open the oral procedure. The parties presented argument and answered the Court's questions at the hearing which took place on 9 July 2002.

Forms of order sought

26 Lagardère and Canal+ ('the applicants') claim that the Court should:

— annul the decision of 10 July 2000;

— order the defendant to pay the costs.

27 The defendant contends that the Court should:

— dismiss the application as inadmissible;

— alternatively, dismiss the application as unfounded;

— order the applicants to pay the costs.

Admissibility

Arguments of the parties

28 The Commission claims that the applicants' action is inadmissible. It states that it is settled law that the applicants may contest only measures which are capable of producing binding legal effects affecting their interests. It also observes that, as is apparent from the Court's judgments in Case T-138/89 *NBV and NVB* v *Commission* [1992] ECR II-2181, paragraph 31, and in Joined Cases T-125/97 and T-127/97 *Coca-Cola* v *Commission* [2000] ECR II-1733, paragraph 79, only the operative part of the measure is capable of producing legal effects and, therefore, of adversely affecting such interests. The grounds of the decision in question, on the other hand, are open to review by the Community judicature only to the extent to which, as grounds of an act adversely affecting a person's interests, they constitute the necessary support for its operative part.

29 The Commission observes that, in its decision of 22 June 2000, it decided, on the basis of Article 6(1)(b) of Regulation No 4064/89, not to oppose the concentrations of which it was notified by the applicants and to declare them compatible with the common market and with the EEA Treaty. The Commission adds that the decision of 10 July 2000 made no changes in that aspect of the decision in so far as the 'conclusion' part of the decision is the same as that of the decision of 22 June 2000. The later decision amended the earlier one only in relation to the reasoning concerning the restrictions notified as being directly related and necessary to the implementation of the concentrations.

30 According to the Commission, its reasoning in both decisions with regard to the restrictions was not in the nature of a decision, but had the effect only of a

non-binding opinion. The Commission adds that 'restriction ancillary to the implementation of the concentration' is an objective concept in the sense that, if a clause is directly related and necessary to the implementation of the concentration, it is by virtue of that very fact covered by the decision approving the concentration. Otherwise it was not covered, irrespective of how it was assessed by the Commission in the decision.

31 In support of this argument, the defendant observes, first, that only the operative part of a measure can produce legal effects and, consequently, have adverse effects.

32 The operative parts of the decisions of 22 June and 10 July 2000 did not relate to the ancillary restrictions, but only to the concentrations as such. Likewise the defendant's reasoning concerning the ancillary restrictions did not constitute the necessary support for the operative part of the decision whereby the notified concentrations were declared compatible with the common market. The appraisal of the notified restrictions as being directly related and necessary to the implementation of the concentrations was totally independent of the declaration of compatibility with the common market and consequently had no impact on it. Whether a concentration was compatible depended solely on the question whether it created or strengthened a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it (Article 2 of Regulation No 4064/89).

33 Consequently, referring to the judgments in the *NBV and NVB* case, cited in paragraph 28 above (paragraph 31), and the *Coca-Cola* case, the Commission contends that its assessment of those restrictions cannot be subject to review by the Community Courts.

34 Secondly, the Commission submits that it has no legal basis for adopting decisions on whether certain restrictions are directly related and necessary in the context of the procedure laid down by Regulation No 4064/89.

35 According to the defendant, the second subparagraph of Article 6(1)(b) of Regulation No 4064/89, which provides that 'the decision declaring the concentration compatible shall also cover restrictions directly related and necessary to the implementation of the concentration', certainly does not require the Commission to give a ruling in its decision on whether a restriction disclosed with the notification of the concentration is ancillary. Similarly, this provision could not be interpreted as meaning that the ancillary nature of certain clauses and the resulting legal consequences depend on the Commission's classification of those clauses in its decision concerning the notified concentration.

36 The defendant goes on to observe that the purpose of Regulation No 4064/89 is to establish a single appraisal by the Commission (the 'one-stop' principle) of concentrations with a Community dimension after a rapid form of procedure. According to the Commission, the only decisions on the merits which it has power to take on the basis of Regulation No 4064/89 are the declaration of compatibility, whether subject or not to obligations and conditions, and the declaration of incompatibility. The defendant observes that these decisions are taken on the basis of a single, exclusive criterion which is that set out in Article 2 of Regulation No 4064/89.

37 In such a context, the defendant considers that, even if the validity of a restriction notified as being directly related and necessary to the implementation of the concentration cannot be assessed in isolation, but must be assessed in the context of the concentration as such, the defendant can properly categorise a contractual clause as a restriction ancillary to the concentration or otherwise only by interpreting Article 81 EC and not by applying Regulation No 4064/89.

38 Therefore, contrary to the applicants' submissions, and in the absence of a legal basis for taking a decision as to whether restrictions are ancillary in the framework of the procedure laid down by the said Regulation, the Commission's reasoning concerning such restrictions cannot have the same legal effect as a negative clearance within the meaning of Article 2 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87). Only by virtue of the latter provision could the Commission properly adopt a binding decision that certain restrictions were necessary.

39 However, the defendant observes that neither the contested decision nor any other decision adopted on the basis of Regulation No 4064/89 refers to Article 2 of Regulation No 17. Moreover, the Commission would not be able to make a genuine decision concerning restrictions notified as being directly related and necessary to the implementation of a concentration within the extremely short periods provided for by Regulation No 4064/89. That was why, in the preambles to decisions on concentrations, the Commission had in the past given only a brief statement of reasons with regard to restrictions and had often done no more than categorise a clause as 'probably ancillary, assuming that it can be deemed a restriction'.

40 The Commission submits that its argument is corroborated by Article 22(1) of Regulation No 4064/89, which provides that only that Regulation, and not Regulation No 17, is to apply to 'concentrations as defined in Article 3 [of Regulation No 4064/89]'. That wording showed that the application of Regulation No 17 was excluded only in relation to the concentration itself and not to restrictions notified as being directly related and necessary to the implementation of the concentration.

41 Similarly, the defendant contends that, if it does not take a decision within the prescribed time-limits, the implicit authorisation laid down by Article 10(6) of

Regulation No 4064/89 does not cover all clauses notified as being ancillary, but only those which, objectively, are directly related and necessary to the implementation of the concentration.

42 At the hearing, the defendant added, in this connection, that Article 18(1) of Regulation No 4064/89 requires the Commission to give the persons concerned an opportunity to make their views known before it adopts certain decisions listed in that Article, but the defendant observed that those decisions do not include a decision under Article 6(1)(b) of Regulation No 4064/98. According to the defendant, this shows that a decision under Article 6(1)(b) must be entirely favourable; that is to say, it must approve the notified concentration, so that the Commission's reasoning with respect to the ancillary restrictions cannot be described as being in the nature of a decision.

43 The defendant concludes that if, as the applicants maintain, the reasoning used by the Commission in concentration decisions since the entry into force of Regulation No 4064/89 concerning such restrictions had the same legal effect as negative clearance decisions, the concentration decisions would have no legal basis at all or, at least, would have a defective statement of reasons because they included no reference to Article 2 of Regulation No 17.

44 Thirdly, the defendant pleads the direct effect of Article 81(1) EC.

45 According to the defendant, it is for the national court to assess ancillary restrictions in the light of Article 81(1) EC if that court is required to give a ruling on the validity of such a restriction pursuant to Article 81(2) EC.

46 The same applied if the Commission's decision on the concentration included reasoning relating to such restrictions. In so far as, according to the defendant, that reasoning had the force of an opinion only, it was entirely without prejudice to a national court's appraisal of those restrictions.

47 According to the defendant, the applicants are mistaken in citing the judgment of the Court of Justice in Case C-344/98 *Masterfoods and HB* [2000] ECR I-11369 ('the *Masterfoods* judgment') in order to show that the national court is bound by the Commission's reasoning with regard to such restrictions in a decision on a concentration matter. The facts of the present case differed from those of the *Masterfoods* case in that the decision of 10 July 2000 did not find that there had been an infringement, did not prejudice in any way the legality of the ancillary restrictions under Community competition law, and merely amended the text of a decision which, in turn, could not be treated as a decision applying Articles 81 and 82 EC.

48 In any case, according to the defendant, the applicants are applying a 'maximalist reading' of the *Masterfoods* judgment. The defendant observes that in paragraph 52 of that judgment the Court of Justice stated that 'when national courts rule on agreements or practices which are already the subject of a Commission decision they cannot take decisions running counter to that of the Commission'. This conclusion cannot be extended to a situation where a national court has to consider the question of the compatibility with Article 81(1) EC of a restriction which the parties to a concentration approved by the Commission have agreed upon in the framework of the concentration. To interpret the abovementioned judgment in that way would deny the concurrent jurisdiction of the Commission and the national courts in applying Article 81(1) EC and would imply, wrongly, that the national courts were subordinate to the Commission.

49 The defendant adds that, in the light of the *Coca-Cola* judgment of the Court of First Instance, the *Masterfoods* judgment should be construed as meaning that, in

a situation such as that which gave rise to the latter judgment, the national court is obliged to respect the binding effect of the operative part of the Commission decision, but not the Commission's legal interpretation of the relevant provisions.

50 So far as the present case is concerned, the defendant concludes from the foregoing that, notwithstanding its reasoning in the decisions of 22 June and 10 July 2000 concerning the restrictions notified by the parties to the concentration as being directly related and necessary to the implementation of the concentration, a national court might still be required to rule on whether those restrictions were ancillary to the concentrations authorised by the Commission. Should a national court decide that some of those restrictions were not ancillary to the concentrations and that they were incompatible with Article 81(1) EC, with the result that the restrictions were void, the parties to the concentration would have to challenge the national court's judgment. In that case, the annulment of the restrictions would be the consequence of the national court's judgment alone, not of the decision of 10 July 2000. According to the defendant, it follows that, in the present case, the applicants are relying upon future and uncertain situations to justify their interest in applying for the annulment of a future act and therefore have no vested and present interest in the annulment of the decision of 10 July 2000 (see the *NBV and NVB* judgment cited in paragraph 28 above, paragraph 33).

51 Fourth, the defendant denies that its argument concerning the legal force of its reasoning concerning the restrictions notified as being directly related and necessary to the implementation of a concentration in the context of decisions on concentrations is weakened by its past decisions.

52 The defendant confirms that, since the adoption of Regulation No 4064/89, its established practice in decisions on concentrations included reasoning relating to such restrictions. However, it submits that the sole object of this policy was to give undertakings the benefit of its experience in that field, to make a

contribution to the development of a legal theory of ancillary restrictions and to amplify the guidance given on the interpretation of that concept in its notice relating to ancillary restrictions.

53 Fifth, the defendant contends that its submissions are also supported by two notices adopted and published after the adoption of the contested decision.

54 The defendant argues, first, that it is clear from the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EEC) No 4064/89, published in the Official Journal on 29 July 2000 (OJ 2000 C 217, p. 32 ('the simplified procedure Notice') that, in decisions adopted in accordance with that procedure, it does not rule on ancillary restrictions, which clearly shows that the Commission's reasoning concerning such restrictions is declaratory.

55 Secondly, in its rejoinder, the defendant submitted to the Court a new Notice on ancillary restrictions which was adopted on 27 June 2001 and published in the Official Journal on 4 July 2001 (OJ 2001 C 188, p. 5, 'the new Notice on ancillary restrictions'). The defendant observes that, in that notice, it took the following position:

'2. [The] legal framework [of Regulation No 4064/89, Regulation No 17 and other regulations for specific sectors] does not impose an obligation on the Commission to assess and formally address such [ancillary] restrictions. Any such assessment is only of a declaratory nature, as all restrictions meeting the

criteria set by the regulation on concentrations are already covered by Article 6(1)(b), second subparagraph, and Article 8(2), second subparagraph, second sentence, and are therefore cleared by operation of law, whether or not explicitly addressed in the Commission's decision. The Commission does not intend to make such an assessment in its merger decisions any more. This approach is consistent with the Commission's administrative practice introduced for cases qualifying for simplified treatment since 1 September 2000.

3. Disputes between the parties to a concentration as to whether restrictions are directly related and necessary to its implementation and thus automatically covered by the Commission's clearance decision fall under the jurisdiction of the national courts.'

56 The defendant observes that the reasons why it does not intend, as from 27 June 2001, the date of adoption of the notice, to assess whether the restrictions notified by the parties to a concentration are directly related and necessary is the increasing number of notifications of concentrations and the need to simplify administrative procedures. This new policy was announced by the defendant in a press release of the same date, which was submitted to the Court together with the rejoinder.

57 According to the defendant, the present case should be considered in the light of this change of direction. The defendant adds that it is convinced that it never considered that its appraisal of such restrictions in concentration decisions had a legal force different from that described in the foregoing paragraphs of the new notice on ancillary restrictions.

58 The applicants consider that the decision of 10 July 2000 produced binding legal effects likely to affect their interests in so far as, in changing its assessment of the restrictions notified as being directly related and necessary to the implementation of the concentrations in the body of the text of the decision, the Commission also changed the effect of the operative part of the decision of 22 June 2000.

59 The applicants deny that the Commission's assessment of the ancillary restrictions is a mere opinion. They contend that this is incompatible with the wording of the second subparagraph of Article 6(1)(b) of Regulation No 4064/89 and with the general scheme of the regulation. According to the applicants, the Commission's categorisation of certain clauses as clauses ancillary to a concentration or as non-ancillary clauses produces legal effects in relation to the applicability of Article 81(1) EC. The reason was that clauses which were declared ancillary by the Commission fell outside the scope of Article 81(1). On the other hand, clauses which were found to be inseparable from the concentration were likely to be covered by that Article in so far as they restrain competition. Consequently a Commission decision which categorises certain clauses as ancillary restrictions has, according to the applicants, a legal effect equivalent to that of a negative clearance, as provided for by Article 2 of Regulation No 17.

60 The applicants consider that the national courts can under no circumstances rule on whether restrictions are ancillary in relation to a concentration authorised by the Commission because, pursuant to Article 22(1) of Regulation No 4064/89, only the Commission is competent to examine in its entirety a concentration as defined in Article 3 of the regulation. Furthermore, referring to the *Masterfoods* judgment (paragraphs 50 and 51), and to the Commission notice on cooperation between national courts and the Commission in applying Articles [81] and [82] of the EEC Treaty (OJ 1993 C 39, p. 6), the applicants submit that, under Article 10 EC, national authorities and courts are required to abstain from any decisions which would be contrary to decisions taken by the Community institutions.

61 The applicants consider that they also have a vested and present interest in seeking the annulment of the decision of 10 July 2000. They submit that, since the notification of the decision, they have been in a situation of legal uncertainty which directly affects the progress of their concentrations in so far as the equilibrium and the commercial expediency of the concentrations depend on the validity of the restrictions notified as ancillary.

Findings of the Court

62 The defendant objects that the action is inadmissible on the grounds that, first, the decision of 10 July 2000 is not a challengeable act and, secondly, that the applicants cannot prove that they have a vested and present interest in the annulment of the decision.

Plea of inadmissibility: no challengeable act

— Introduction

63 It is settled case-law that any measure which produces binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action for annulment under Article 230 EC (see the judgments of the Court of Justice in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, and Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraph 62; judgments of the Court of First Instance in Case T-87/96 *Assicurazioni Generali and Unicredito* v *Commission* [1999] ECR II-203, paragraph 37, the *Coca-Cola* case, cited above, paragraph 77, and the *M6* case, cited above, paragraph 35).

64 To determine whether an act or decision produces such effects, it is necessary to look to its substance (order in Case C-50/90 *Sunzest* v *Commission* [1991] ECR I-2917, paragraph 12; judgment in the case of *France and Others* v *Commission*, cited above, paragraph 63, and *Coca-Cola* judgment, cited above, paragraph 78).

65 In the present case the applicants seek the annulment of the decision of 10 July 2000. By that decision, the Commission amended the grounds of the decision of 22 June 2000 concerning the assessment as to whether the restrictions notified by the applicants in connection with the concentrations were ancillary or not (see paragraph 11 above).

66 Consequently it is necessary to determine whether, by looking to the substance of the decision of 10 July 2000, the amendment to the grounds of the decision of 22 June 2000 produced binding legal effects such as to affect the applicants' interests by bringing about a distinct change in their legal position.

67 It must be observed, first, that the mere fact that the decision of 10 July 2000 did not amend the operative part of the earlier decision is not sufficient for the action to be ruled inadmissible. Although the courts have consistently held that only the operative part of an act is capable of producing binding legal effects and, thereby, of having adverse effects, nevertheless the statement of the reasons for an act is indispensable for determining the exact meaning of what is stated in the operative part (see, to that effect, the judgments in Case C-355/95 P *TWD* v *Commission* [1997] ECR I-2549, paragraph 21; Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 104, and the *Coca-Cola* judgment, paragraph 79).

68 It follows that the decision of 10 July 2000 can be the subject of an action for annulment only if, even without altering the terms of the operative part of the

decision of 22 June 2000, the amendment of some of the grounds of the latter changed the substance of what was decided in the operative part, thus affecting the applicants' interests within the meaning of the case-law cited in paragraph 63 above.

69 In this connection this parties' submissions are diametrically opposed.

70 The defendant considers in substance that its reasoning, in the grounds of both decisions, with regard to the restrictions notified by the parties to the concentration as being directly related and necessary to its implementation, did not constitute the necessary support for the operative part of those decisions. The decision of 22 June 2000 merely declared that the concentrations notified by the applicants were compatible with the common market. That declaration was not altered by the decision of 10 July 2000 and was an act entirely favourable to the applicants. The reasoning concerning the restrictions in the grounds of both decisions was totally independent of the approval of the concentrations and therefore also independent of the operative part of both decisions. In the defendant's opinion, the relevant provisions of Regulation No 4064/89 must be interpreted as meaning that restrictions which are, objectively, directly related and necessary to the implementation of the concentration are automatically covered by the Commission's decision of approval, irrespective of the reasoning concerning them in the grounds of the decision. On the other hand, restrictions which, objectively, did not fulfil those criteria were not covered by the decision simply because they were not ancillary. Furthermore, the defendant considers that it has no power to rule, under Regulation No 4064/89, on whether restrictions notified by the parties as ancillary are in fact ancillary, because such a decision can be made by the Commission only pursuant to Regulation No 17 or by a national court on the basis of Article 81(1) EC alone. Consequently, the Commission's reasoning in the decisions of 22 June and 10 July 2000 concerning such restrictions merely amounted to non-binding legal opinions which, notwithstanding the substantive alterations in the assessment of the ancillary restrictions, could not be the subject of an action for annulment.

71 The applicants, on the other hand, consider in essence that the restrictions notified by the parties to a concentration as being ancillary to it are approved only if, and in so far as, the Commission rules to that effect in the grounds of the decision approving the main operation and, therefore, that the Commission's reasoning concerning the ancillary restrictions was in the nature of a decision. Consequently the alteration in the reasoning was an act having an adverse effect.

72 The relevant provisions of Regulation No 4064/89, in particular the second subparagraph of Article 6(1)(b), must be interpreted in that context. If, according to the defendant's submissions, its reasoning in the grounds of the decisions of 22 June and 10 July 2000 has only the force of an opinion, without any binding legal effect, the action for annulment must be dismissed as inadmissible in the absence of an act open to challenge (see, to that effect, the order in the case of *Sunzest* v *Commission*, cited above at paragraph 64, paragraphs 12 to 14). On the other hand, if, as the applicants argue, the alteration made by the decision of 10 July 2000 in the reasoning of the grounds of the decision of 22 June 2000 altered the substance of what was decided in the operative part of the earlier decision, the later decision will have produced binding legal effects such as to affect the applicants' interests by bringing about a distinct change in their legal position.

— Interpretation of the second subparagraph of Article 6(1)(b) of Regulation No 4064/89

73 The second subparagraph of Article 6(1)(b) of Regulation No 4064/89 ('the contested provision') reads as follows:

'The decision declaring the concentration compatible shall also cover restrictions directly related and necessary to the implementation of the concentration.'

74 It must be observed, first, that the words 'also cover' in the various language versions of Regulation No 4064/89 tell in favour of the applicants' argument. The meaning commonly attributed to those words indicates that the description 'restrictions directly related and necessary to the implementation of the concentration' forms an integral part of the subject-matter of the decision approving the concentration both from the viewpoint of their assessment and from that of the resulting legal effects.

75 Next, the contested provision must be examined in its legislative context.

76 On this point, the defendant considers that the contested provision must be construed in the light of Article 22(1) of Regulation No 4064/89. Article 22(1) is entitled 'Application of the Regulation' and provides that '[Regulation No 4064/89] alone shall apply to concentrations as defined in Article 3, and that Regulations No 17, (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 shall not apply, save to joint ventures which have no Community dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings which remain independent'.

77 It is common ground that, by virtue of that provision, the application of Regulation No 17 and the other regulations listed therein for specific sectors is excluded so far as contractual clauses are concerned which, as a whole, form a concentration with a Community dimension as defined by Article 3 of Regulation No 4064/89. On the other hand, as the defendant rightly observes, other contractual clauses which the parties to a concentration may stipulate between themselves in the framework of the concentration may fall within the scope of Regulation No 17 and the other regulations listed for specific sectors in Article 22(1) of Regulation No 4064/89 with a view to determining whether there is an infringement of Articles 81 EC and 82 EC.

78 Nevertheless, it must be noted that, in this respect, the contested provision is an important exception: even if the other contractual clauses do not constitute concentrations within the meaning of Article 3 of Regulation No 4064/89, only that regulation — and not Regulation No 17 or the other regulations listed for specific sectors in Article 22(1) of Regulation No 4064/89 — is to 'apply' to such of the other clauses as are directly related and necessary to the implementation of the concentrations. Furthermore, that is clear from Recital 25 of the Regulation, which states that 'this Regulation should still apply where the undertakings concerned accept restrictions directly related and necessary to the implementation of the concentration'.

79 If the contested provision is read in conjunction with Article 22(1) of Regulation No 4064/89, it becomes clear that contractual clauses which constitute restrictions directly related and necessary to the implementation of a concentration approved by the Commission fall outside the scope of Regulation No 17 and the other regulations listed for specific sectors in Article 22(1) of Regulation No 4064/89.

80 If, by virtue of those provisions, such restrictions escape the application of the procedural provisions of Regulation No 17 and of the other regulations mentioned above, in favour of Regulation No 4064/89 alone, such clauses must be assessed in the framework of the procedure laid down by Regulation No 4064/89.

81 Therefore, to categorise a contractual clause notified in the context of a concentration as directly related and necessary to the implementation of the concentration is an 'application' of Regulation No 4064/89 within the meaning of Article 22(1) of that Regulation.

82 In addition, by means of the contested provision, the Community legislature not only excluded the application of Regulation No 17 and the other regulations listed for specific sectors in Article 22(1) of Regulation No 4064/89 in relation to the assessment whether the restrictions notified in the context of a concentration were directly related and necessary, but also conferred upon the Commission the exclusive power to make a binding decision in that respect.

83 In that connection, the contested provision must be read in the light of Article 21(1) of Regulation No 4064/89, which provides that 'subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation'. It is clear from this that the Commission's 'sole jurisdiction' with regard to the supervision of concentrations is not confined to decisions on the compatibility of concentrations, as defined in Article 3 of Regulation No 4064/89, but extends to all measures having binding force which the Commission is required to adopt pursuant to the 'application' of Regulation No 4064/89. That interpretation of Article 21(1) is confirmed by Recital 26 of the Regulation, which states that 'the Commission should be given exclusive competence to apply this Regulation...'.

84 Furthermore, the defendant cannot successfully plead the direct effect of Article 81(1) EC to argue that it is for the national court to rule whether restrictions are directly related and necessary to a concentration which the Commission has approved, without the national court being bound by the Commission's reasoning on that point in the grounds of the decision approving the concentration.

85 It is true, as the defendant observes, that the question whether particular contractual clauses are directly related and necessary to a concentration has been examined, in Community competition law, in the context of Article 81 EC (see, in particular, the judgment in Case 42/84 *Remia and Others* v *Commission* [1985]

ECR 2545, and the *M6* judgment). Similarly, even if the question is examined in the context of Regulation No 4064/89, such examination is a 'step in the interpretation of Article 81 EC' in so far as Regulation No 4064/89 was adopted on the basis of Article 83 EC, which is the legal basis for the adoption of regulations or directives with a view to applying the principles of Article 81 EC in particular.

86 However, the defendant overlooks the fact that, by incorporating the contested provision in Article 6(1) of the said Regulation, the Community legislature created a specific legal basis for considering the question whether restrictions notified as such are directly related and necessary to a concentration.

87 In view of the Commission's sole jurisdiction with respect to the supervision of concentrations having a Community dimension, and as that jurisdiction includes a decision on the assessment whether restrictions notified by the parties to a concentration are directly related and necessary to the implementation of the concentration, the parties' submissions concerning the application of the principles developed by the Court of Justice in the *Masterfoods* judgment are irrelevant. Those principles relate only to the legal situation of a jurisdiction shared by the Commission and the national courts.

88 That conclusion is confirmed by other provisions.

89 First, regarding the provisions governing the notification of concentrations, it must be borne in mind (see paragraph 2 above) that point 11.1 of 'form CO', a model of which is shown in the annex to Regulation No 447/98 and which forms an integral part of that Regulation, states that 'if the parties to the concentration, and/or other involved parties... enter into ancillary restrictions directly related

and necessary to the implementation of the concentration, these restrictions may be assessed in conjunction with the concentration itself.' In this context, the parties to the concentration are asked to 'identify each ancillary restriction in the agreements provided with the notification for which [they] request an assessment in conjunction with the concentration' and to 'explain why these [restrictions] are directly related and necessary to the implementation of the concentration'.

90 Therefore, under these provisions, when the parties to a concentration notify the Commission of contractual clauses as restrictions directly related and necessary to the implementation of the concentration, they must be deemed to form an integral part of the notification of the concentration. In the case of a clear and precise request falling within the competence of the Commission, the latter must provide an adequate reply (see, to that effect, in relation to an application on the basis of Article 3(2)(b) of Regulation No 17, the judgment in Case 26/76 *Metro* v *Commission* [1977] ECR 1875, paragraph 13, and also the *M6* judgment, paragraph 36). Consequently those provisions confirm that the Commission's reasoning in the grounds of the decision of approval with regard to such restrictions are in the nature of a decision in the same way as the approval of the concentration.

91 Secondly, contrary to the defendant's submissions, Article 10(6) of Regulation No 4064/89, which provides that, where the Commission has not taken a decision within the stated deadlines, 'the concentration shall be deemed to have been declared compatible with the common market', cannot be successfully relied upon to support the defendant's argument.

92 Even assuming that this provision had to be interpreted in the way proposed by the defendant (see paragraph 41 above), the fact remains that, in the present case, the Commission not only approved the concentrations by its decision of 22 June

2000, which was adopted within the prescribed period, but also gave its clear opinion on whether the notified restrictions were to be categorised as ancillary to those concentrations or otherwise.

93 Third, although it is true that Article 18 of Regulation No 4064/89 expressly provides that the undertakings concerned, which include the notifying undertakings, are to have the opportunity to make their views known before the adoption of certain specified decisions, and that Article 18 does not mention decisions adopted pursuant to Article 6(1)(b) of that Regulation, nevertheless, contrary to the defendant's submissions, this does not necessarily prove that the categorisation of a restriction as ancillary or not ancillary is not in the nature of a decision.

94 In this context it must be observed that observance of the rights of the defence in all proceedings which are initiated against a person and are liable to culminate in a measure adversely affecting that person is a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question (see the judgments in the cases of *France and Others* v *Commission*, cited in paragraph 63 above, paragraph 174, *Assicurazioni Generali and Unicredito* v *Commission*, cited in paragraph 63 above, paragraph 88, and in Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99 *Kaufring and Others* v *Commission* [2001] ECR II-1337, paragraph 151). Consequently, Article 18 of Regulation No 4064/89 cannot definitively limit the benefit of that right, as the Court of First Instance had occasion to find in the judgment in the case of *Assicurazioni Generali and Unicredito* v *Commission*, cited in paragraph 63 above, paragraphs 88 and 89, where the Court found that the decision provided for in Article 6(1)(a), whereby the Commission decides that the concentration notified does not fall within the scope of Regulation No 4064/89, is not mentioned in Article 18 of that Regulation, but that the Commission was nevertheless under an obligation, in a particular situation like that of the case in question, to hear the parties concerned before adopting such a decision.

95 Finally, it is necessary to ascertain the purpose of the contested provision.

96 On this point it must be observed, first, that the preparatory studies for Regulations Nos 4064/89 and 1310/97, as produced to the Court by the defendant in the content of a procedural organisation measure, do not support the Commission's argument in the present case. On the contrary, the documents show, as the parties confirmed at the hearing, that the question of the Commission's powers and duties arising from the contested provision was never raised in the course of the negotiations and preparations for those regulations.

97 It is clear from the preamble to Regulation No 4064/89, in particular Recitals 7 and 17, and as the Court has found on several occasions, that the primary purpose of that Regulation is to ensure the effectiveness of the control of concentrations and legal certainty of the undertakings involved (judgment in Case T-83/92 *Zunis Holding and Others* v *Commission* [1993] ECR I-1169, paragraph 26; the order of 2 December 1994 in Case T-322/94 R *Union Carbide* v *Commission* [1994] ECR II-1159, paragraph 36; see also, to that effect, the judgments in Case T-3/93 *Air France* v *Commission* [1994] ECR II-121, paragraph 48; Case T-290/94 *Kaysersberg* v *Commission* [1997] ECR II-2137, paragraph 109).

98 In this connection, it must be observed that, as the Commission itself pointed out in the notice on ancillary restrictions (see paragraph I 6), the question whether a restriction is 'directly related and necessary to the implementation of the concentration' cannot be answered in general terms. Whether a restriction is directly related and necessary in any particular case therefore requires complex economic assessments for which the competent authority has a broad discretion (see, to that effect, the judgment in *Remia and Others*, cited in paragraph 85 above, and the *M6* judgment, paragraph 114).

99 As the Commission also noted in the abovementioned notice (see point II 5), in Community competition law, to determine whether restrictions may be deemed directly related and necessary to the implementation of a concentration, it has to be established, in particular, whether they are objectively necessary to the implementation of a concentration in the sense that 'in their absence the concentration could not be implemented or could only be implemented under more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably less probability of success' (see also, to that effect, the *M6* judgment, paragraph 109).

100 It follows that restrictions which are directly related and necessary to the implementation of a concentration must be deemed to be economically inseparable from it.

101 If, as the defendant maintains, categorising such restrictions as ancillary or otherwise in the grounds of the decision approving the concentration does not give the parties to the concentration the legal certainty which attaches to such a decision, Regulation No 4064/89 would be partly deprived of practical effect because, in such a case, the parties to a concentration would not obtain the benefit of legal certainty as to the whole of the operation even though, where the conditions laid down by the contested provision are actually fulfilled, the whole operation is recognised as being economically inseparable.

102 Therefore, even if it is only by virtue of the contractual clauses forming the concentration itself that the parties modify the structure of their undertakings, an operation which is difficult to reverse and which justifies a greater need for legal certainty for the parties involved (see, to that effect, the judgment in *Air France* v *Commission*, cited in paragraph 97 above, paragraph 48), the benefit of legal certainty must, as the law stands at present, be deemed to extend also to

contractual clauses which are classified, in the grounds of the decision of approval, as restrictions directly related and necessary to the implementation of a concentration.

103 Consequently, without it being necessary to consider whether, generally, an assessment of such restrictions can be properly be made independently of an examination of the concentration, it must be concluded that, by incorporating the contested provision in Article 6(1)(b) of Regulation No 4064/89, the Community legislature intended to establish a decision-making procedure which enables the parties to a concentration within the meaning of Article 3 of the Regulation to obtain, in consideration of the binding system laid down by Articles 4 and 7 of the Regulation, of an obligation of notification and of the suspensory effect of that obligation, legal certainty not only in relation to the concentration but also as regards the restrictions notified by the parties to the concentration as being directly related and necessary to its implementation.

104 Likewise, to compel the parties, in return for legal certainty as to the restrictions which they consider economically inseparable from the concentration, to give notice of such restrictions pursuant to other provisions, in particular Regulation No 17, simultaneously with notification under Regulation No 4064/89, would be contrary to the principle of effective control of concentrations with a Community dimension. In addition, in the introduction to the Notice on ancillary restrictions, the Commission itself observed that 'this avoids parallel Commission proceedings, one concerned with the assessment of the concentration under [Regulation No 4064/89], and the other aimed at the application of Articles [81 EC and 82 EC] to the restrictions which are ancillary to the concentration'.

105 It is unnecessary to add that, in the decision of 22 June 2000, the Commission took the view that all the undertakings created or modified by the concentrations constituted full-function joint ventures within the meaning of Article 3(2) of

Regulation No 4064/89. In the Notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ 1998 C 66, p. 1), the Commission states that, in connection with such concentrations, it considers, first, under Article 2(4) of Regulation No 4064/89 and in accordance with the criteria of Article 81(1) and (3) EC, whether and to what extent such concentrations have the object or effect of restraining competition by the coordination of the competitive behaviour of the parties and, secondly, it assesses the restrictions directly related and necessary to the implementation of the concentration 'together with the concentration itself' (paragraph 16 of the Notice).

106 It follows from the foregoing that, as the law stands at present, the defendant's interpretation of the contested provision must be considered irreconcilable with the main aim of Regulation No 4064/89, namely to ensure effective control of concentrations and to provide legal certainty for the undertakings to which it applies.

107 In this situation, the defendant cannot validly contend that the Regulation imposes strict time-limits for adopting decisions on the compatibility of concentrations with the common market, that those time-limits do not enable the Commission to rule properly on the ancillary restrictions and that, therefore, it is necessary to simplify the procedure and to concentrate on the most important point in relation to compatibility, namely that laid down by Article 2 of the Regulation, which requires the Commission to ascertain whether the concentration creates or strengthens a dominant position.

108 First of all, it must be observed that, in the present case, the Commission carried out a detailed examination, within the time-limits laid down by Regulation No 4064/89, of whether the different restrictions notified by the applicants in connection with their concentrations were directly related and necessary. Secondly, although the Court has already had occasion to observe that the general scheme of the said Regulation is characterised by the need for speed in the

procedure before the Commission (see the judgments in Case T-221/95 *Endemol* v *Commission* [1999] ECR II-1299, paragraph 68, and in *Kaysersberg* v *Commission*, cited in paragraph 97 above, paragraph 113), the defendant's interpretation would deprive the parties to a concentration of some of the benefits allowed by Regulation No 4064/89, as noted in paragraph 101 above. The defendant cannot plead administrative difficulties, considerable though they may be, in order to render part of the Regulation meaningless. Its provisions can only be amended, if necessary, by the competent Community legislature on a proposal by the Commission.

109 Having regard to what has been said, it must be concluded that, taking into account the terms and the legislative context, as well as the origin and aims of the contested provision, it must be interpreted as meaning that where, as in the present case, in the grounds of a decision approving a concentration, the Commission categorises the restrictions notified by the parties to the concentration as ancillary restrictions, non-ancillary restrictions or ancillary restrictions for a limited period, the Commission is not delivering a mere opinion without binding legal force but, on the contrary, is making legal assessments which, by virtue of the contested provision, determine the substance of what the Commission has decided in the operative part of the decision.

— Application to the present case

110 By the decision of 10 July 2000 the Commission changed its assessment, in the decision of 22 June 2000, relating to the restrictions notified by the parties to the concentration as being directly related and necessary to the implementation of the concentration. The change in the assessment was against the applicants' interests. Certain restrictions which had been approved by the earlier decision for all or part of the period indicated in the notification no longer received approval or were approved for a shorter period by the decision of 10 July 2000.

Consequently, as a result of that decision and contrary to the legal situation created by the earlier decision, the restrictions in question are likely not only to fall within the scope of Regulation No 17, but also to give rise to an action before a national court for infringement of Community and national competition law.

111 The applicants are therefore justified in their argument that, since the notification of the decision of 10 July 2000, they have been in a situation of legal certainty which is less favourable than that which subsisted following the adoption of the decision of 22 June 2000. The applicants contend, and it is not denied by the defendant, that this change may affect the calculation of the profitability of the investments which was the main factor in the conclusion of the notified agreements.

112 Accordingly it must be concluded that the decision of 10 July 2000 produced binding legal effects such as to affect the applicants' interests by bringing about a distinct change in their legal position.

113 That conclusion is not called into question by the arguments concerning the two Commission notices, namely the simplified procedure Notice and the new Notice on ancillary restrictions (see paragraphs 54 and 55 above). It must be observed that these notices were not only published after the adoption of the contested decision, but they are, as such, without prejudice to the interpretation of the relevant provisions by the Community Courts, as expressly stated in paragraph 5 of the new Notice on ancillary restrictions.

114 Consequently the first plea of inadmissibility must be dismissed.

Plea of inadmissibility: no vested and present interest of the applicants in the annulment of the decision of 10 July 2000

115 It must be observed that an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the contested measure being annulled. Such an interest exists only if the annulment of the measure is of itself capable of having legal consequences (see the judgment in Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraph 40).

116 In the present case, it is common ground that the assessment of the different restrictions notified by the appellants in connection with the concentrations was substantially altered by the decision of 10 July 2000 and in a manner unfavourable to the appellants' interests. In view of the finding set out in paragraph 109 above, it must be concluded that the decision of 10 July 2000 altered the appellants' legal situation and that, contrary to the defendant's submission (see paragraph 50 above), that alteration does not depend on a judgment by a national court. Therefore the applicants may claim an interest in bringing proceedings because, if the said decision were annulled, they would once again be in the more favourable legal situation created by the decision of 22 June 2000.

117 Consequently, this plea of inadmissibility must also be dismissed.

118 It follows from the foregoing that the action is admissible.

The substance of the case

119 The applicants claim that the Commission had no power to adopt the decision of 10 July 2000. Alternatively, they claim breach of, first, the principles of legal certainty, legitimate expectation and observance of vested rights, secondly, breach of the obligation to state reasons and, thirdly, infringement of the rights of the defence. In the further alternative, the applicants contend that there are errors in the Commission's assessment of the restrictions notified by the parties to the concentration as being directly related and necessary to its implementation and that there is a manifest error of assessment in the contested decision.

The plea that the Commission had no power to adopt the decision of 10 July 2000

Arguments of the parties

120 According to the applicants, there are two reasons why the Commission manifestly had no authority to adopt the contested decision.

121 First, the applicants observe that the decision of 10 July 2000 was signed and notified to the parties more than 15 days after the expiry of the period referred to in Article 10(1) of Regulation No 4064/89. As the rules on time-limits in the Regulation must be interpreted and applied strictly (see the judgment in *Kaysersberg* v *Commission*, cited in paragraph 97 above, paragraph 113), the applicants consider that the Commission had no power *ratione temporis* to adopt the decision of 10 July 2000. They also take the view that the Commission had no power to revoke the decision of 22 June 2000 because the only circumstances in which a decision taken pursuant to Article 6(1) of Regulation No 4064/89 can be revoked are those laid down in Article 8(5) of the Regulation, namely where the decision is based on incorrect information or where it was obtained by deceit or where the undertakings concerned commit a breach of an obligation attached to the decision. The applicants stress that this provision does not apply in the present case and was not even referred to by the Commission in the contested decision.

122 Secondly, the applicants submit that, in adopting the decision of 22 June 2000, which was notified to the parties to the concentration on the same day, the Commission closed the procedure and exhausted its power under Article 6(1)(b) of Regulation No 4064/89. Therefore, according to the applicants, the Commission no longer had power to adopt the contested decision on the same basis.

123 The defendant rejects both limbs of this plea and refers primarily to its argument that its 'opinion' on the ancillary restrictions had no binding force. In the alternative, the defendant considers that in any case it had authority to revoke the decision of 22 June 2000.

Findings of the Court

124 First of all, it is necessary to establish the legal nature of the contested decision.

125 It is common ground that, although the Commission stated that the reason for the adoption of the decision was the need to make 'textual amendments' to the decision of 22 June 2000 in order to correct a handling error in the adoption of the earlier decision, the contested decision includes a substantive amendment to the Commission's reasoning in the grounds of the earlier decision with regard to whether the notified restrictions were directly related and necessary to the implementation of the concentrations, while the operative part of the decision was left unchanged.

126 As the reasoning in the grounds of a decision approving a concentration has binding force (see under 'Admissibility' above), the contested decision is a decision partly withdrawing, with retrospective effect, the decision of 22 June 2000.

127 Consequently, the applicants cannot validly object to the decision by reason of the time-limit referred to in Article 10(1) of Regulation No 4064/89 because that time-limit applies to 'the decisions referred to in Article 6(1) [of the same Regulation]', and not to a decision withdrawing such a decision with retrospective effect.

128 Next, it is necessary to ascertain whether the Commission had power to adopt the decision of partial withdrawal of the decision of 22 June 2000 with retrospective effect.

129 On this point, the applicants rightly observe that Regulation No 4064/89 provides for the revocation of a decision approving a concentration pursuant to Article 6(1) of the Regulation only where the decision is based on incorrect information, or where it was obtained by deceit, or where the parties concerned commit a breach of an obligation attached to the decision (Article 8(5) of Regulation No 4064/89). However, it is common ground that none of those situations arises in the present case.

130 It must observed nevertheless that Regulation No 4064/89 gave the Commission power to adopt in a general way decisions relating to concentrations with a Community dimension and, in particular, decisions that they are compatible with the common market. Therefore, in accordance with a general principle of law that, in principle, a body which has power to adopt a particular legal measure also has power to abrogate or amend it by adopting an *actus contrarius*, unless such power is expressly conferred upon another body, it must be found that, in theory, the Commission had power to adopt the contested decision.

131 The applicants' submissions seeking, in essence, to show that the Commission failed to observe the conditions required by case-law for the retrospective revocation of a Community act cannot invalidate this conclusion because in reality they involve the question whether the Commission correctly exercised that power in the present case. However, this question relates to the applicants' second plea in law.

132 Consequently, the first plea in law must be dismissed.

The plea of breach of the principles of legal certainty, protection of legitimate expectations and respect for acquired rights

Arguments of the parties

133 The applicants submit that, in amending the decision of 22 June 2000 by adopting that of 10 July 2000, the Commission failed to observe the conditions required by case-law for the retrospective revocation of Community acts (see the judgment in Case C-90/95 P *de Compte* v *Parliament* [1997] ECR I-1999). Therefore, according to the applicants, the contested decision breaches the principles of legal certainty, protection of legitimate expectations and respect for acquired rights.

134 In this context, the applicants note in particular that the decision of 22 June 2000 was made on the last day of the period referred to in Article 10(1) of Regulation No 4064/89 and it was not until 7 July 2000, namely more than two weeks after notification of the first decision, that they learnt, informally and by chance, that the Commission was preparing a new decision concerning the notified concentration. According to the applicants, neither the form nor the substance of the decision of 22 June 2000, nor the information provided by the Commission services in the course of the administrative procedure gave the applicants grounds for believing that that decision was not the final version and that it would be amended.

135 The defendant admits that, generally speaking, the amendment or revocation of a decision may infringe the principle of legal certainty. However, the applicants' interest in the observance of that principle had to be weighed against, first, the object pursued by the adoption of the contested decision and, secondly, the legitimate expectations of the parties arising from the conduct of the administration.

136 The defendant observes that the purpose of adopting the contested decision was to ensure observance of the principle of the legality of administrative acts, which means that unlawful administrative acts must be eliminated. The defendant adds that significant errors had crept into the decision of 22 June 2000 with regard to the assessment of restrictions notified as being directly related and necessary to the implementation of the concentrations. According to the defendant, it had to rectify those errors in the general interest of establishing a consistent legal theory of ancillary restrictions. The assessments it made in its concentration decisions were studied by undertakings and their legal advisers. It was essential to leave no doubts arising from contradictions between the assessment in the decision of 22 June 2000 and that in decision 1999/242, cited in paragraph 15 above, in so far as the restrictions at issue in both cases were similar. Therefore it was necessary to amend the assessment of those restrictions in the decision of 22 June 2000 by replacing it with an interpretation which was less likely to be contentious because it conformed more with the Commission's past decisions and with case-law. This would also give priority to the general interest over that of the applicants.

137 The defendant also considers that it adopted the decision of 10 July 2000 within a reasonable period. Referring to its arguments concerning the absence of binding force in its 'opinion' on those restrictions, the defendant adds that its assessment gave no guarantee of legality in that respect and therefore the amendment of the assessment could not betray the applicants' legitimate expectations. In any case, the defendant notes that the grounds of the decision of 22 June 2000 contained a sentence which manifestly ought not to have appeared in the final version. The reason was that in that sentence, which was in square brackets, the person responsible for drafting the decision had noted that a different wording from that chosen could also have been used, thus indicating to a colleague that it was possible to change the reasoning on that particular point. The defendant observes that the applicants, on reading the sentence in question, ought to have realised that the decision had been notified to them in error.

Findings of the Court

138 In the absence of specific provisions in the Treaty or in the relevant secondary law, the general principles of Community law have been taken by the Court of Justice and the Court of First Instance as the basis for developing the criteria in accordance with which the Community institutions may revoke, with retrospective effect, favourable Community acts.

139 In this connection it must be observed that, in general, the retroactive withdrawal of a legal measure which has conferred individual rights or similar benefits is contrary to the general principles of law (see the judgments in Joined Cases 7/56 and 3/57 to 7/57 *Algera and Others* v *Common Assembly of the ECSC* [1957] ECR 81, 115; Case 159/82 *Verli-Wallace* v *Commission* [1983] ECR 2711, paragraph 8; Case T-123/89 *Chomel* v *Commission* [1990] ECR II-131, paragraph 34, and Case T-197/99 *Gooch* v *Commission* [2000] ECR-SC I-A-271 and II-1247, paragraph 53).

140 Furthermore, if the retrospective withdrawal of illegal administrative acts is to be accepted, it is subject to very strict conditions. It has consistently been held that the retroactive withdrawal of an unlawful measure is permissible provided that the withdrawal occurs within a reasonable time and provided that the institution from which it emanates has had sufficient regard to how far the applicant might have been led to rely on the lawfulness of the measure (see the judgments in the case of *Algera and Others* v *Common Assembly of the ECSC*, cited in paragraph 139 above, p. 116; Case 54/77 *Herpels* v *Commission* [1978] ECR 585, paragraph 38; Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749, paragraph 10; Case 15/85 *Consorzio cooperative d'Abruzzo* v *Commission* [1987] ECR 1005, paragraph 12; *de Compte* v *Parliament*, cited in paragraph 133 above, paragraph 35; Joined Cases T-90/91 and T-62/92 *de Compte* v *Parliament* [1995] ECR-SC I-A-1 and II-1, paragraph 37; *Gooch* v *Commission*, cited in paragraph 139 above, paragraph 53).

141 It has been held that the institution responsible for the act has the burden of proving the illegality of the withdrawn act (see the judgment in *Gooch* v *Commission*, cited in paragraph 139 above, paragraph 53). Likewise it must be presumed that it is for that institution to prove that the other conditions for retrospective withdrawal are fulfilled.

142 With regard to the present case, it must be observed first that the decision of 22 June 2000 granted the applicants subjective rights in so far as not only did the Commission declare that the concentrations were compatible with the common market, but that decision also had the effect of approving the restrictions notified as being directly related and necessary to the implementation of the concentration to the extent indicated in the grounds of the decision.

143 Next, it should be noted that neither in the decision of 10 July 2000 nor in its submissions before the Court did the Commission seek to show that the decision of 22 June 2000 was illegal.

144 In the decision of 10 July 2000 the Commission merely informed the applicants that 'the text of the decision of 22 June 2000 which was signed and notified to [them] was incorrect'. Before the Court the Commission simply argued that 'errors of substantive law' had crept into the decision and they had to be corrected in the interest of developing a consistent theory of ancillary restrictions (see also, to that effect, Mr Schaub's letter of 31 July 2000, paragraph 16 above). Without attempting to show that its interpretation of 'ancillary restrictions' within the meaning of the contested provision was incorrect, the Commission contends that the interpretation adopted in the decision of 10 July 2000 was 'less subject to dispute because it was more in conformity with the Commission's past decisions and with case-law'.

145 Consequently, as the defendant has not proved that the act which was partly revoked by the contested decision was illegal, it should not have withdrawn the decision of 22 June 2000 with retrospective effect.

146 In any case, even assuming that the defendant, whose arguments are based mainly on the proposition, which was rejected as unfounded (see paragraph 109 above), that its statements concerning ancillary restrictions are mere opinions and cannot therefore be illegal, had succeeded in showing, before the Court, that the decision of 22 June 2000 was illegal, in the administrative procedure in the present case it did not comply with the very strict conditions mentioned in paragraph 140 above.

147 So far as respect for the applicants' legitimate expectations in the legality of the decision of 22 June 2000 is concerned, it must be observed that there is nothing in the decision to indicate that it was not the decision which the Commission intended to adopt and that it was notified to the applicants only because of a handling error in the process of adopting it. The mere presence of the sentence to which the defendant refers in the grounds of the decision (see paragraph 137 above) is not such a serious error that the addressees manifestly could not rely on the legality of the decision, Although it is not disputed that the sentence in question was not intended to appear in the final text of the decision, in the absence of any other indication arising from the decision of 22 June 2000 that it did not correspond to the intention of the institution responsible, the applicants could reasonably presume, particularly in the circumstances of a procedure such as that laid down by Regulation No 4064/89 which is characterised by very strict deadlines, that the error was merely one of wording which did not affect the legality of the decision.

148 Secondly, the defendant has no foundation for claiming, in this context, that the decision of 22 June 2000 is not consistent with its past decisions. Even assuming

that the alleged inconsistency might render the decision illegal, this circumstance was in any case not so manifest that, upon reading the decision, the applicants would have been bound to have doubts on the subject. This conclusion is all the more compelling in that, as the applicants contended at the hearing without being contradicted by the defendant, at no time in the course of the administrative procedure before or after notification of the concentrations did the responsible services of the Commission give any indication to the applicants' legal advisers that they intended to propose the adoption of a decision containing a substantially different assessment from that which ultimately appeared in the decision of 22 June 2000.

149 Consequently that decision had all the characteristics of an act which was not tainted by an error which would have been bound to give rise to doubts as to its legality in the minds of the applicants as careful business undertakings.

150 In a situation of that kind, the defendant cannot validly plead the need to preserve the consistency of 'legal theory' concerning ancillary restrictions in order to withdraw retrospectively an act which grants subjective rights to the interested parties even though the decision was made as a result of a handling error.

151 Therefore it must be concluded that the Commission failed to discharge its duty to ensure proper respect for the legitimate expectations which the applicants had with regard to the legality of the decision of 22 June 2000 and it is unnecessary to consider whether the decision of 10 July 2000 was adopted within a reasonable period.

152 In view of the foregoing, this plea in law must be upheld.

The plea of infringement of the obligation to state reasons

Arguments of the parties

153 According to the applicants, the reasons given for the decision of 10 July 2000 are not to the requisite legal standard. According to the applicants, in so far as the decision was, in relation to the decision of 22 June 2000, a fundamental change of position which was prejudicial to the applicants with regard to the ancillary restrictions, according to case-law (see the judgment in Case T-241/97 *Stork Amsterdam* v *Commission* [2000] ECR II-309), it ought to have been the subject of a specific and particularly rigorous statement of reasons.

154 The defendant replies that it is clear from the contested decision that the amendment to the decision of 22 June 2000 was justified by a physical error connected with the circulation of the documents within the institution. The applicants were wrong in seeking to rely on the abovementioned judgment because that case did not involve the correction of an administrative error, as the present case did. Furthermore, the defendant submits that, in the body of the contested decision, it explained at length the reasons justifying its appraisal of the restrictions. A comparison of the decisions of 22 June and 10 July 2000 would

make it easy to understand the reasons why the Commission considered the original assessment erroneous.

Findings of the Court

155 It has consistently been held that the extent of the obligation to state reasons depends on the nature of the measure in question and on the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning of the institution, in such a way as to give the persons concerned sufficient information to enable them to ascertain whether the decision is well founded or whether it is vitiated by a defect which may permit its legality to be contested, and to enable the Community judicature to carry out its review of the legality of the measure (see the judgments in the joined cases of *SCK and FNK* v *Commission*, cited in paragraph 67 above, paragraph 226, and the case of *Stork Amsterdam* v *Commission*, cited in paragraph 153 above, paragraph 73).

156 In the present case, first, it must be observed that, in the introduction to the decision of 10 July 2000, the Commission stated that 'as a result of a handling error, the text of the decision of 22 June 2000... was incorrect' and consequently the Commission had decided 'to make certain textual amendments to it'. Secondly, in the grounds of the decision of 10 July 2000, the Commission explained in detail the reasons why it considered that the different restrictions which it had recognised, in the earlier decision, as ancillary restrictions could not be regarded as ancillary to the notified concentrations.

157 These facts do not support a conclusion that the decision of 10 July 2000 discloses in a clear and unequivocal fashion the reasoning on which it was based by the institution adopting it.

158 Nowhere in that decision does the Commission show that the amendments which were made entailed, in the Commission's opinion, no change in the applicants' legal position and that the Commission's statements concerning the ancillary restrictions were merely non-binding opinions. However, such reasoning was necessary in order to give the persons concerned sufficient information to enable them to ascertain whether, having regard to the principles developed by the case-law of the Community Courts (see paragraphs 139 and 140 above), the decision was well founded or whether it was vitiated by a defect which might have permitted its legality to be contested.

159 It follows that the plea of breach of the duty to provide reasons is also well founded.

160 Therefore the decision of 10 July 2000 must be annulled and it is unnecessary to rule on the other pleas in law adduced by the applicants.

Costs

161 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful and the applicants have applied for costs, the Commission must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)

hereby:

1. **Annuls the Commission decision of 10 July 2000 amending the Commission decision of 22 June 2000 declaring concentrations compatible with the common market and the functioning of the Agreement on the European Economic Area (Cases COMP/JV40 — Canal+/Lagardère and COMP/JV47 Canal+/Lagardère/Liberty Media);**

2. **Orders the defendant to pay the costs.**

Jaeger García-Valdecasas Lenaerts

Lindh Azizi

Delivered in open court in Luxembourg on 20 November 2002.

H. Jung K. Lenaerts

Registrar President

Table of contents