

Case T-3/93

Société Anonyme à Participation Ouvrière Compagnie Nationale Air France

v

Commission of the European Communities

(Regulation No 4064/89 — Admissibility — Concept of ‘decision’ — Form of act — Competitor directly and individually concerned — Concentration with a Community dimension — Consultation of Member States — Principle of equal treatment between Member States)

Judgment of the Court of First Instance (Second Chamber), 24 March 1994 II - 126

Summary of the Judgment

- 1. Action for annulment — Measures against which actions may be brought — Concept — Measures producing binding legal effects — Statement attributable to the Commission excluding a concentration from the scope of the Community rules (EEC Treaty, Art. 173)*
- 2. Action for annulment — Measures against which actions may be brought — Concept — Measures producing binding legal effects — Measure embodied in an unusual form — Included (EEC Treaty, Art. 173)*

3. *Action for annulment — Action brought by a third party against a declaration by the Commission excluding a concentration from the scope of the Community rules — Admissible, notwithstanding that the third party can give formal notice to the Commission calling for the concentration to be notified*
(EEC Treaty, Arts 173 and 175)
 4. *Action for annulment — Measure capable of being challenged and refusal to modify it — Possibility of bringing the action against either act*
(EEC Treaty, Art. 173)
 5. *Action for annulment — Independent of recourse to the national courts*
(EEC Treaty, Art. 173)
 6. *Action for annulment — Natural or legal persons — Measures concerning them directly and individually — Declaration by the Commission that the Community rules do not apply to a concentration — Action brought by an economic operator competing with the parties to the concentration — Admissibility*
(EEC Treaty, second paragraph of Art. 173)
 7. *Competition — Concentrations — Concentration having a Community dimension — Concept — Turnover to be taken into consideration — Activities actually forming the subject-matter of the transaction*
(Council Regulation No 4064/89, Arts 1 and 5(2))
 8. *Competition — Concentrations — Exercise by the Commission of its powers under Article 8(2) of Regulation No 4064/89 — Scope of judicial review*
(Council Regulation No 4064/89, Art. 8(2))
 9. *Measures adopted by the institutions — Procedural formalities — Obligation to hold systematic consultations — None*
1. In order to ascertain whether measures are acts within the meaning of Article 173 of the Treaty, it is necessary to look to their substance. Any measure the legal effects of which are binding on, and capable of affecting the interests of, the 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.

In the context of the control of concentrations between undertakings laid down by Regulation No 4064/89, a statement by the spokesman for the Commissioner responsible for competition matters, made on behalf of the Commission, announcing that a proposed concentration between two undertakings falls outside the ambit of the aforementioned regulation, since it does not have a Community dimension within the meaning of Article 1, is capable of forming the subject-matter of an action for annulment.

from the obligation to notify the concentration in question to the Commission pursuant to Article 4(1) of the regulation and enables them to put their plans into effect forthwith;

- with regard to competitors, who may well see an immediate change in their market position as a result of the completion of the transaction.

A decision thus made public, which the Commission adopted after verifying its own competence in relation to the proposed transaction, produces legal effects

- with regard to Member States, in that, first, it confirms beyond all doubt the competence of the Member States whose territory is more particularly concerned to appraise the concentration in the light of their own national laws and, secondly, it removes any legal uncertainty as to the fulfilment of the conditions governing the application, by one or more of them, of Article 22(3) of the regulation;

- with regard to the parties to the concentration, in that it absolves them

2. Given that the choice of the form taken by an act of an institution cannot alter that act, and that the form which it takes is of no consequence as regards the possibility of contesting it by an action for annulment, the fact that an act takes an unusual form, inasmuch as there exists no written document other than a transcription made by a third party, and that it has not been notified in the regular manner, does not preclude the bringing of an action for annulment where the act has certainly produced legal effects with regard to third parties. That is the case where a statement made on behalf of a Commissioner is reported by a press agency.

3. Even though it is open to a third party, having knowledge of informal contacts between an undertaking and the Commission in the context of the control of concentrations between undertakings provided for by Regulation No 4064/89,

to give notice to the Commission calling upon it to require the undertaking formally to notify the proposed concentration, such that, if the Commission does not respond, it can bring an action for a declaration that it has failed to act or, if it refuses, an action for annulment, nevertheless that legal remedy is not such as to exclude other remedies and does not, in particular, render inadmissible a direct action for the annulment of a statement adopted and made public by the Commission to the effect that the proposed concentration falls outside its sphere of competence. Such an action may be justified on grounds both of procedural economy and of the effective exercise of judicial review.

4. Where the Commission, acting pursuant to the powers vested in it by Regulation No 4064/89, makes it known, in relation to a proposed concentration, that according to its appraisal that concentration falls outside its sphere of competence, a third party is entitled to institute proceedings directly for the annulment of that appraisal, rather than against the refusal to modify or withdraw it.

5. The possible existence of legal remedies before the national courts cannot preclude the possibility of contesting the legality of a decision adopted by a Community institution directly before the Community courts under Article 173 of the Treaty. That is particularly so where, as in the case of concentrations between undertakings, a review carried out under national law cannot be compared, as

regards its scope and effects, with that carried out by the Community institutions.

6. A statement by the Commission that a proposed concentration between undertakings does not have a Community dimension and does not, therefore, fall within its sphere of competence under Regulation No 4064/89 enables the proposed transaction, in law and in fact, to be put into effect immediately and is thus such as to bring about an immediate change in the situation in the market or markets concerned, depending solely on the wishes of the parties. Consequently, it is of direct concern to operators operating in the market or markets in question, who are moreover deprived of the procedural rights under Article 18(4) of the regulation which they would have been able to exercise if the concentration, having a Community dimension, had had to be notified.

Such a statement is of individual concern to an undertaking operating on the same market as that on which the parties to the concentration operate, where the position of that undertaking on the market in question is affected in a manner which distinguishes it from others as a result of the significant strengthening of the position of one of its competitors.

7. It follows both from Article 1 of Regulation No 4064/89 on the control of concentrations between undertakings and from the general scheme of Article 5 that the Community legislature intended that the Commission should intervene only where the proposed concentration is of a certain economic size, such that it has a Community dimension. Having regard to the objective of Article 5(2), which is to determine the real dimension of the concentration, the position in the case of the partial acquisition of an undertaking is that only the turnover relating to those parts of the undertaking which are actually acquired is to be taken into account for the purposes of appraising the dimension of the proposed concentration. The concepts of the 'partial transfer' and the 'partial discontinuance' of activities are comparable, inasmuch as they both allow a precise appraisal to be made of the exact subject-matter, composition and extent of the proposed concentration.
8. It is not for the Court, in the context of the annulment proceedings, to substitute its own appraisal for that of the Commission and to rule on the question whether,
- instead of taking cognizance of the fact that one of the parties to a proposed concentration undertook to discontinue part of its activities prior to completion of the transaction in question, the Commission should have imposed an obligation, by means of Article 8(2) of the Regulation, requiring discontinuance of the activity, particularly since that provision of the Regulation concerns the substantive examination of the compatibility of the proposed concentration with the common market carried out by the Commission in respect of a concentration which has been the subject of prior notification.
9. To require the Commission to go through the formality of consultation, where neither the provisions applicable to the matter under consideration nor any general principle of law impose any such consultation obligation on the institution, would oblige it to fulfil unnecessary formalities and needlessly delay the procedure.