

Case T-2/93

Société Anonyme à Participation Ouvrière
Compagnie Nationale Air France

v

Commission of the European Communities

(Competition — Concentrations between undertakings — Admissibility —
Sole or joint control — Definition of the market — Dominant position —
Legitimate expectations)

Judgment of the Court of First Instance (First Chamber), 19 May 1994 II - 327

Summary of the Judgment

1. *Actions for annulment of measures — Natural or legal persons — Measures of direct and individual concern to them — Decision finding a concentration compatible with the common market — Competitor taking part in the administrative proceedings — Admissibility (EC Treaty, fourth paragraph of Art. 173)*
2. *Competition — Concentrations — Appraisal of compatibility with the common market — Account taken of the nature of sole or joint control of an undertaking — Assessment criteria (Council Regulation No 4064/89, Arts 2 and 3(3))*

3. *Competition — Concentrations — Appraisal of compatibility with the common market — Point in time to be taken into consideration*
(Council Regulation No 4064/89, Art. 2)
4. *Competition — Concentrations — Appraisal of compatibility with the common market — Relevant market — Sectoral demarcation — Geographical demarcation — Air transport*
(Council Regulation No 4064/89, Art. 2(2))
5. *Competition — Concentrations — Appraisal of compatibility with the common market — Concentrations neither creating nor strengthening a dominant position*
(Council Regulation No 4064/89, Art. 2(2) and (3))
6. *Acts of the institutions — Statement of reasons — Obligation — Scope — Decision to apply the rules regarding concentrations between undertakings*
(EEC Treaty, Art. 190)
7. *Community law — Principles — Protection of legitimate expectations — Limits*

1. Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.

That is the position, in relation to a decision of the Commission finding a concentration between undertakings compatible with the common market, as regards an undertaking

— which, following the communication provided for by Article 4(3) of Regulation No 4064/89, submitted obser-

ventions that would, it was assured in reply, be taken fully into consideration;

— the particular circumstances of which were examined by the Commission in the course of the latter's assessment of the competitive situation in the markets concerned following the concentration;

— which had previously been obliged, pursuant to an agreement concluded between itself, the competent Member State and the Commission, to give up its interest in one of the undertakings which was a party to the concentration.

2. The sole or joint nature of the control to be exercised by one undertaking over

another following the completion of a concentration subject to control by the Commission is a relevant factor for the purposes of the assessment to be carried out by the Commission pursuant to Article 2 of Regulation No 4064/89.

Having regard to the factors which may, according to the wording of Article 3(3) of the aforementioned regulation, constitute control, the Commission was correct in finding that an undertaking, although exercising a substantial influence, only controlled another undertaking jointly with a third undertaking, since the holdings of shares in the controlled undertaking and the conferment of powers laid down by its statutes were such that major decisions could only be taken with the consent of the third undertaking.

3. The appraisal by the Commission of the compatibility of a concentration between undertakings with the common market must be carried out solely on the basis of the matters of fact and law existing at the time of notification of that transaction, and not on the basis of hypothetical factors, such as the acquisition of total control by the exercise of an option to purchase shares not yet held, the economic implications of which cannot be assessed at the time when the decision is adopted.

4. In assessing whether a concentration between undertakings creates or strength-

ens a dominant position, the Commission must first define the relevant market. In the present case, involving a concentration between undertakings in the air transport sector, the Commission, by defining as the relevant market each 'city-pair' constituting the point of departure and the point of arrival of the routes regarded as being directly concerned by the transaction at issue, correctly defined that market, as regards both the product concerned and the geographical area. That definition is based on the finding, first, that there is no substitutability between those two routes and other routes, and, secondly, that there is very little substitutability between the two routes themselves.

5. It follows from Article 2(2) and (3) of Regulation No 4064/89 that the Commission is bound to declare a concentration compatible with the common market where the transaction in question neither creates nor strengthens a dominant position and where competition in the common market is not significantly impeded by the creation or strengthening of such a position. If, therefore, there is no creation or strengthening of a dominant position, the transaction must be authorized, without there being any need to examine the effects of the transaction on effective competition.

Where the applicant has not claimed that the Commission committed an error of

assessment in finding that the transaction at issue neither created nor strengthened a dominant position on the markets regarded by the Commission as relevant, or on the market as it should, in the applicant's view, have been defined, the applicant cannot contest the legality of the Commission's decision to declare the transaction compatible with the common market. That result is not in any way vitiated by the fact that the concentration at issue may make it easier for the parties to the transaction to develop their commercial activities in the future.

6. Although the Commission is obliged, under Article 190 of the Treaty, to state the reasons on which its decisions are based, mentioning the factual and legal

elements which provide the legal basis for the measure in question and the considerations which have led it to adopt its decision, it is not required, in the case of a decision applying the rules relating to concentrations between undertakings, to discuss all the issues of fact and of law raised by every interested party during the administrative proceedings.

7. One consequence of the hierarchy of Community legal acts is that an act of general application cannot be implicitly altered by an individual decision. It follows that a Community institution cannot be forced, by virtue of the principle of the protection of legitimate expectations, to apply Community rules *contra legem*.