# Case T-210/01

## General Electric Company

## v

## Commission of the European Communities

(Action for annulment — Competition — Commission decision declaring a concentration incompatible with the common market — Regulation (EEC) No 4064/89 — Aeronautical markets — Acquisition of Honeywell by General Electric — Vertical integration — Bundling — Foreclosure — Horizontal overlaps — Rights of the defence)



Summary of the Judgment

1. *Actions for annulment — Subject-matter — Merger control decision — Decision based on several pillars of reasoning, each sufficient to justify the operative part — Criteria of incompatibility with the common market fulfilled in relation to at least one of the markets in question — Action unfounded*

*(Art. 230 EC; Council Regulation No 4064/89, Arts 2(1)(a) and (3))*

2. *Competition — Concentrations — Examination by the Commission — Economic assessments — Discretion — Judicial review — Scope — Limits*

   *(Council Regulation No 4064/89, Art. 2)*

3. *Competition — Concentrations — Assessment of compatibility with the common market — No presumption*

   *(Council Regulation No 4064/89)*

4. *Competition — Concentrations — Assessment of compatibility with the common market — Prospective analysis of potential developments on the market concerned — Need for a rigorous analysis — Judicial review — Scope*

   *(Council Regulation No 4064/89, Art. 2(2) and (3))*

5. *Competition — Concentrations — Assessment of compatibility with the common market — Conglomerate-type concentrations — Concept — Account taken of the likelihood of a dominant position being created or strengthened on the reference market of one of the undertakings party to the operation — Lawfulness — Whether the Commission may rely on the foreseeable conduct of the entity arising from the concentration — Conditions — Production of a rigorous analysis based on solid evidence*

   *(Council Regulation No 4064/89, Art. 2(2) and (3))*

6. *Competition — Concentrations — Assessment of compatibility with the common market — Conglomerate-type concentrations — Account taken of foreseeable anti-competitive conduct — Lawfulness — No obligation on the Commission to assess its likelihood in the light of the risks inherent in its adoption by an undertaking*

   *(Art. 82 EC; Council Regulation No 4064/89, Art. 2(2) and (3))*

7. *Competition — Concentrations — Assessment of compatibility with the common market — Criteria — Creation or strengthening of a dominant position significantly impeding effective competition in the common market — Cumulative nature — Interaction — Obligation expressly to link findings made in relation to the first criterion, but equally relevant to the second, to the latter — None*

   *(Arts 82 EC and 253 EC; Council Regulation No 4064/89, Art. 2(2) and (3))*

8. *Competition — Dominant position — Concept*

   *(Art. 82 CE)*

9. *Competition — Dominant position — Holding of a very large market share an indicator — Assessment of the strengthening of market shares in a bidding market characterised by the award of a limited number of high-value contracts*

   *(Art. 82 EC)*

10. *Competition — Dominant position — Existence — Relevance of lively competition on the market concerned — Not relevant where there is an undertaking able to act without having to take it into account — Financial concessions granted in order to win certain bids concerning high-value products — Not relevant*

    *(Art. 82 EC)*

11. *Competition — Community rules — Application by the Commission — Independent of assessments by the authorities of non-member States*

12. *Competition — Concentrations — Assessment of compatibility with the common market — Anti-competitive effects arising from a direct vertical relationship — Effects depending on the future behaviour of the merged entity — Onus on the Commission to produce convincing evidence as to the likelihood of the alleged anti-competitive behaviour — Unfettered evaluation of evidence*

    *(Council Regulation No 4064/89)*

13. *Competition — Dominant position in the sale of essential components — Refusal to sell — Abuse*

    *(Art. 82 CE)*

14. *Competition — Concentrations — Examination by the Commission — Demonstration that conduct will take place in the near future, creating or strengthening a dominant position — Duty to produce convincing evidence*

    *(Council Regulation No 4064/89)*

15. *Procedure — Introduction of new pleas during the proceedings — New plea — Definition — Reply to a question put by the Court of First Instance as a measure of organisation of procedure — Not included*

*(Rules of Procedure of the Court of First Instance, Arts 48 and 64(3))*

16. *Acts of the Community institutions — Statement of reasons — Obligation — Decision different from that previously taken in a case concerning similar or identical situations or the same market participants — Scope*

*(Art. 253 EC)*

17. *Competition — Community rules — Implementation — Rules for that purpose drawn up by the Commission — Duty of the Commission to comply with them — Notice on market definition — Scope*

*(Art. 82 EC; Commission Communication 97/C 372/03)*

18. *Competition — Concentrations — Examination by the Commission — Definition of the market in question — Criteria — Substitution of products — Concept*

*(Council Regulation No 4064/89; Commission Communication 97/C 372/03, point 36)*

19. *Competition — Concentrations — Assessment of compatibility with the common market — Market characterised by indirect and relatively weak competition — Acquisition by an undertaking in a dominant position of its sole competitor — Lawfulness — Conditions — Demonstration that there was no effective competition on the market before the operation*

*(Art. 82 EC; Council Regulation No 4064/89)*

20. *Competition — Concentrations — Examination by the Commission — Commitments by the undertakings concerned to render the notified transaction compatible with the common market*

*(Council Regulation No 4064/89)*

21. *Procedure — Application initiating proceedings — Formal requirements — Identification of the subject-matter of the dispute — Brief summary of the pleas in law on which the application is based*

*(Rules of Procedure of the Court of First Instance, Art. 44(1))*

22. *Competition — Concentrations — Administrative procedure — Access to the file — Observance of the rights of the defence — Limits*

*(Council Regulation No 4064/89)*

23. *Competition — Administrative procedure — Access to the file — Distinction between adverse and favourable factors*

24. *Competition — Administrative procedure — Access to the file — Observance of the rights of the defence — Limits*

25. *Competition — Concentrations — Administrative procedure — Access to the file — Refusal of access between the decision to bring proceedings and the statement of objections — Infringement of the right to a fair hearing — None*

*(Council Regulation No 4064/89, Art. 6(1)(c))*

26. *Competition — Concentrations — Administrative procedure — Access to the file — No right for the parties to the concentration to have access, in portions, throughout the proceedings*

*(Council Regulation No 4064/89, Art. 18(1))*

27. *Competition — Concentrations — Administrative procedure — Brevity of intermediate periods laid down at each stage of the procedure — Account to be taken, when assessing alleged infringement of defence rights, of the requirement for speed*

*(Council Regulation No 4064/89; Commission Regulation No 447/98, Arts 13 and 21)*

28. *Competition — Administrative procedure — Intervention of the hearing officer — Decision altering his status during the proceedings — Direct substitution of the new function for the old*

*(Commission Decision 2001/462, Art. 2(1) and (2))*

29. *Community law — Principles — Fundamental rights — Observance ensured by the Community judicature — Account to be taken of the European Convention on Human Rights*

*(Art. 6(2) EU)*

1. Where some of the grounds in a decision on their own provide a sufficient legal basis for the decision, any errors in the other grounds of the decision have no effect on its operative part.

Moreover, where the operative part of a Commission decision is based on several pillars of reasoning, each of which would in itself be sufficient to justify that operative part, that decision should, in principle, be annulled only if each of those pillars is vitiated by an illegality. In such a case, an error or other illegality which affects only one of the pillars of reasoning cannot be sufficient to justify annulment of the decision at issue because that error could not have had a decisive effect on the operative part adopted by the Commission.

That rule applies in particular in the context of merger control decisions. In that regard, the Commission must prohibit a concentration where the latter satisfies the criteria in Article 2(3) of Regulation No 4064/89. It follows from Article 2(1)(a) of that regulation that the Commission must take account, in the course of its appraisal of a concentration, of, inter alia, the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned. Thus, the Commission's appraisal of whether a transaction creates or strengthens one or more dominant positions as a result of which effective competition would be significantly impeded must be carried out by reference to the conditions on each of the markets liable to be affected by the merger notified. Therefore, if it finds that the criteria are satisfied with regard to just one of the markets concerned, the concentration must be declared incompatible with the common market.

It follows that such a decision can be annulled only if it is found not only that certain of its grounds are vitiated by illegality, but also that those grounds which are not so vitiated do not provide a sufficient legal basis for the merger to be declared incompatible with the common market. This finding does not, however, remove the need to consider whether certain factors pertaining to competition, identified by the contested decision, reinforce each other, and that it would therefore be artificial to analyse each of them in isolation.

(see paras 42-45, 48, 734)

2. The Commission has a margin of assessment with regard to economic matters for the purpose of applying the basic provisions of Regulation No 4064/89 on the control of concentrations between undertakings, in particular Article 2 thereof. It follows that the

Community judicature's power of review is restricted to verifying that the facts relied on are accurate and that there has been no manifest error of assessment.

As to the nature of that review, there is an essential difference between factual matters and findings, on the one hand, which may be found to be inaccurate by the Court in the light of the arguments and evidence before it, and, on the other hand, appraisals of an economic nature.

(see para. 61)

Although it must be recognised that the Commission has a margin of assessment when applying the substantive provisions of Regulation No 4064/89, that does not mean that the Community judicature must refrain from reviewing the Commission's legal classification of economic data. The Community judicature not only must establish, inter alia, whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.

(see paras 60, 62-63, 253)

3. Regulation No 4064/89 on the control of concentrations between undertakings does not establish a presumption as to the compatibility or incompatibility with the common market of a transaction which has been notified. It is not therefore the case that, where it has doubts, the Commission must find in favour of a concentration falling within its jurisdiction. In each case, it is for the Commission to form a clear opinion as to that compatibility and rule accordingly.

4. Having regard to the margin of assessment which the Commission has in economic matters for the purpose of applying the basic provisions of Regulation No 4064/89, effective judicial review is all the more necessary when the Commission carries out a prospective analysis of developments which might occur on a market as a result of a proposed concentration.

A prospective analysis of that kind must be carried out with great care since it does not entail the examination of past events — for which many items of evidence are often available to enable

their causes to be understood — or even of current events, but rather a prediction of events which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted. A prospective analysis consisting in an examination of how a concentration might alter the factors determining the state of competition on a given market, in order to establish whether it would give rise to a serious impediment to effective competition, makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely.

(see para. 64)

5. Conglomerate-type concentrations do not give rise to horizontal overlaps between the activities of the parties to the merger or to a vertical relationship between the parties in the strict sense of the term. Even though, as a general rule, such concentrations do not produce anti-competitive effects, they may none the less have such effects in some cases. In a prospective analysis of the effects of a conglomerate-type concentration, if the Commission is able to conclude that by reason of the conglomerate effects a dominant position would, in all likelihood, be created or strengthened in the relatively near future and would lead to effective competition on the market being significantly impeded as a result of the concentration, it must prohibit the concentration.

In that regard, conglomerate-type concentrations give rise to certain specific problems, in particular inasmuch as, first, the assessment of such a transaction may involve a prospective analysis covering a period of time stretching well into the future and, second, the specific conduct of the merged entity may determine to a great extent what effects the concentration has. Thus, the chains of cause and effect following a merger may be dimly discernible, uncertain and difficult to establish. That being so, the quality of the evidence produced by the Commission in order to form a sound basis for a decision declaring a concentration incompatible with the common market is particularly important, since that evidence must support the Commission's conclusion that, if such a decision were not adopted, the economic changes envisaged by it would be plausible.

(see paras 65-66)

6. Where the Commission analyses the effects of a conglomerate-type concentration, the likelihood of the adoption of certain future conduct must be examined comprehensively, that is to say taking into account both the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful.

However, it would run counter to the preventive purpose of Regulation No 4064/89 to require the Commission to examine, for each proposed merger, the extent to which the incentives to adopt anti-competitive conduct would be reduced, or even eliminated, as a result of the unlawfulness of the conduct in question, the likelihood of its detection, the action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue. It follows that the Commission must, in principle, take into account the potentially unlawful, and thus sanctionable, nature of certain conduct as a factor which might diminish, or even eliminate, incentives for an undertaking to engage in particular conduct. That appraisal does not, however, require an exhaustive and detailed examination of the rules of the various legal orders which might be applicable and of the enforcement policy practised within them, given that an assessment intended to establish whether an infringement is likely and to ascertain that it will be penalised in several legal orders would be too speculative.

Thus, where the Commission, without undertaking a specific and detailed investigation into the matter, can identify the unlawful nature of the conduct in question, in the light of Article 82 EC or of other provisions of Community law which it is competent to enforce, it is its responsibility to make a finding to that effect and take account of it in its assessment of the likelihood that the merged entity will engage in such conduct.

In that regard, whilst the Commission is entitled to take as its basis a summary analysis, based on the evidence available to it at the time when it adopts its merger-control decision, of the lawfulness of the conduct in question and of the likelihood that it will be punished, it must none the less, in the course of its appraisal, identify the conduct foreseen and, where appropriate, evaluate and take into account the possible deterrent effect represented by the fact that the conduct would be clearly, or highly

probably, unlawful under Community law.

(see paras 70-75, 303-304, 424-425, 468)

7. Article 2(2) and (3) of Regulation No 4064/89 on the control of concentrations between undertakings lays down two cumulative conditions, relating, first, to the creation or strengthening of a dominant position and, second, to the fact that competition will be significantly impeded in the common market as a result. Accordingly, a concentration can be prohibited only if the two conditions laid down by Article 2(3) of the regulation are both met.

Abuse of a dominant position may occur, however, if an undertaking in a dominant position strengthens such a position in such a way that the degree of dominance reached substantially impedes competition, that is to say that only undertakings remain in the market whose behaviour depends on the dominant one. It follows that the strengthening of a dominant position may in itself significantly impede competition and do so to such an extent that it amounts, on its own, to an abuse of that position.

It follows, a fortiori, that the strengthening or creation of a dominant position, within the meaning of Article 2(3) of Regulation No 4064/89, may amount, in particular cases, to proof of a significant impediment to effective competition. That finding does not mean that the second condition laid down in Article 2 of Regulation No 4064/89 is, from a legal perspective, subsumed within the first, but merely that it may be apparent from a single factual analysis of a given market that the two conditions are met.

The factors which may be invoked by the Commission in order to establish that an undertaking's competitors lack freedom of action to the degree necessary for a finding that a dominant position has been created or strengthened with regard to that undertaking are often the same as those which are relevant in an appraisal of whether, as a result of such creation or strengthening, competition will be significantly impeded in the common market. Indeed, a factor which significantly affects the freedom of competitors to determine their commer-

cial policy independently is also liable to result in effective competition being impeded.

It follows that, where it is apparent from the recitals to a decision finding a notified concentration to be incompatible with the common market — including those recitals dedicated to analysing whether a dominant position has been created or strengthened — that the transaction will produce significant anti-competitive effects, the decision should not be regarded as unlawful merely because the Commission has not expressly, and specifically, linked its description of those matters to the second condition in Article 2 of Regulation No 4064/89; and this is so irrespective of whether the lawfulness of the decision is being considered from the point of view of the requirement to state reasons laid down in Article 253 EC, or of the substance of the case. Indeed, any other approach would impose a purely formal obligation on the Commission, requiring it to repeat some of the same recitals, firstly in its analysis of whether a dominant position is created or strengthened in a given market and, a second time, in relation to the analysis of significant impairment of competition in the common market.

(see paras 84, 86-89)

8. A dominant position exists where the undertaking concerned is in a position of economic strength which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers. In order to establish that a dominant position exists, the Commission does not need to demonstrate that an undertaking's competitors will be foreclosed from the market, even in the longer term.

(see paras 85, 114, 243)

9. Although the importance of market shares may vary from one market to another, very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position. Such may be the case with a 50% market share.

However, in a market characterised by the award of a limited number of high-value contracts, the fact that a particular undertaking has had a number of recent 'wins' does not necessarily mean that one of its competitors will not be successful in the next competition.

Provided that it has a competitive product and that other factors are not heavily weighted in the first company's favour, a competitor can always win a valuable contract and increase its market share considerably at one go.

However, such a finding does not mean that market shares are of virtually no value in assessing the strength of the various manufacturers on a market of that kind, especially where those shares remain relatively stable or reveal that one undertaking is tending to strengthen its position. Even on a bidding market, the fact of a manufacturer maintaining, or even increasing, its market share over a number of years in succession is an indication of market strength. A time must come when the difference between one manufacturer's market share and that of its competitors can no longer be dismissed as a function of the limited number of competitions that constitute demand on the market.

(see paras 115, 149-151, 540, 571)

10. The fact that an undertaking is compelled by the pressure of its competitors' price reductions to lower its own prices is in general incompatible with that independent conduct which is the hallmark of a dominant position.

However, even the existence of lively competition on a particular market does not rule out the possibility that there is a dominant position on that market, since the predominant feature of such a position is the ability of the undertaking concerned to act without having to take account of this competition in its market strategy and without for that reason suffering detrimental effects from such behaviour. Thus, the fact that there may be competition on the market is indeed among the relevant factors for the purposes of ascertaining whether a dominant position exists, but it is not in itself a decisive factor in that regard.

In a market for products which are sold through bidding processes which take place periodically, each of which concerns high-value sales and which are characterised by protracted negotiations, the bidders will necessarily make financial concessions in one form or another, since such concessions are an integral part of such a negotiating process. In

such a context, the mere fact that an undertaking offered discounts in order to win certain bids does not in itself, in this context, preclude it having a dominant position.

(see paras 116-117, 184, 215, 249)

11. The fact that the competent authorities of one or more non-member States determine an issue in a particular way for the purposes of their own proceedings does not suffice per se to undermine a different determination by the competent Community authorities. The matters and arguments advanced in the administrative procedure at Community level — and the applicable legal rules — are not necessarily the same as those taken into account by the authorities of the non-member States in question and the determinations made on either side may be different as a result. If one party considers the reasoning underpinning the conclusion of the authorities of a non-member State to be particularly relevant and equally applicable to a Community procedure, it can always raise it as a substantive argument, but such reasoning cannot be conclusive.

(see para. 179)

12. The anti-competitive effects of a concentration, resulting from a direct vertical relationship of supplier and customer, depend on the future behaviour of the merged entity, without which that aspect of the merger would not have any harmful effect. The onus is thus on the Commission to produce convincing evidence as to the likelihood of such behaviour.

In some cases, such evidence may consist of economic studies establishing the likely development of the market situation and demonstrating that there is an incentive for the merged entity to behave in a particular way.

Since, however, it is an overriding principle in Community law that the evaluation of evidence should be unfettered, the absence of evidence of that type is not in itself decisive. In particular, in a situation in which it is obvious that the commercial interests of an undertaking militate predominantly in favour of a given course of conduct, such as making use of an opportunity to disrupt a competitor's business, the Commission does not commit a manifest error of assessment in holding that it is likely that the merged entity will actually engage in the conduct foreseen. In such a case, the simple economic and com-

mercial realities of the particular case may constitute the convincing evidence required by the case-law.

(see paras 295-297, 433)

13. If the fact that an undertaking is in a dominant position cannot deprive it of its right to protect its own commercial interests, certain conduct is unlawful if its object is specifically to strengthen this dominant position and abuse it. Thus, for example, a refusal by an undertaking in a dominant position to sell an essential component to its competitors in itself constitutes an abuse of that position.

(see para. 306)

14. Where the Commission analyses the effects of a concentration, it is for it to show in relation to the future development of the market, on the basis of convincing evidence and with a sufficient degree of probability, not only that any conduct foreseen by it will take place in the relatively near future but also that the conduct will result in the creation or strengthening of a dominant position in the relatively near future. It is not enough for the Commission to put forward a series of logical but hypothetical developments which, were they to materialise, it fears would have harmful effects for competition on a number of different markets. Rather, the onus is on it to carry out a specific analysis of the likely evolution of each market on which it seeks to show that a dominant position would be created or strengthened as a result of the merger and to produce convincing evidence to bear out that conclusion.

(see paras 327, 429, 433, 464)

15. Where the Court of First Instance takes into account answers given by a party to questions put by way of measures of organisation of procedure on the basis of Article 64(3) of the Rules of Procedure of the Court of First Instance, and where the other party has had, where appropriate, the opportunity of stating its views on those matters at the hearing, there is no infringement of Article 48 of the Rules of Procedure.

(see para. 505)

16. It does not follow from the fact that, contrary to what applies where a decision follows a well-established line of

decisions, the Commission cannot content itself with summary reasoning but must provide explicit reasons where it extends the ambit of a practice, that the Commission must, in addition to stating the reasons for its decision by reference to the case-file to which the decision relates, specifically set out its reasons for reaching a different conclusion than in a previous case concerning similar or identical situations or the same market participants.

(see para. 513)

17. The Commission may not depart from rules which it has imposed on itself. Thus, to the extent that the notice on the definition of the market in question for the purposes of Community competition law lays down in mandatory terms the method by which the Commission intends to define markets in the future and does not retain any margin of assessment, the Commission must indeed take account of the provisions of the notice.

In that respect, the Commission did not undertake, in the notice on market definition, to use one particular specific method in the assessment of demand-side substitutability. Instead, it stated that the approach which it will take has to vary depending on the circumstances of each individual case and it retained a large part of its margin of assessment in order to be able to deal with each individual case in an appropriate way.

(see paras 516, 519)

18. Concerning the Commission's examination of the compatibility with the common market of a concentration, inasmuch as point 36 of the notice on the definition of the market in question for the purposes of Community competition law states that '[f]unctional interchangeability or similarity in characteristics may not, in themselves, provide sufficient criteria, because the responsiveness of customers to relative price changes may be determined by other considerations as well ...', it follows from that citation, a contrario, that in certain

cases, indeed as a general rule. save where particular circumstances indicate otherwise, products which are functionally interchangeable and which have similar characteristics are substitutes.

(see para. 524)

19. Concerning the application of Article 82 EC, a finding that an undertaking is in a dominant position is not in itself a finding of fault but simply means that, irrespective of the reasons for which it holds such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition in the common market. In addition, the concept of an abuse, within the meaning of Article 82 EC, is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

In a situation in which the only immediate competition on a given market is indirect and already relatively weak, the acquisition by an undertaking of the only competitor which is still making sales on that market is particularly harmful. The abovementioned principles developed in the context of the prohibition on abuses of a dominant position are applicable, by analogy, to the related legal field of merger control, by holding that the greater the dominance of an undertaking, the greater is its special responsibility to refrain from any conduct liable to weaken further, a fortiori to eliminate, competition which still exists on the market.

Therefore, in such circumstances, it is for the parties to the merger to produce evidence demonstrating that no effective competition existed on the market prior to the merger.

(see paras 549-551)

20. Under Regulation No 4064/89 on the control of concentrations between undertakings the Commission has power

to accept only such commitments as are capable of rendering the notified transaction compatible with the common market. It must be held in that regard that structural commitments proposed by the parties will meet that condition only in so far as the Commission is able to conclude, with certainty, that it will be possible to implement them and that the new commercial structures resulting from them will be sufficiently workable and lasting to ensure that the creation or strengthening of a dominant position, or the impairment of effective competition, which the commitments are intended to prevent, will not be likely to materialise in the relatively near future.

(see paras 555, 612)

21. In order to ensure legal certainty and the sound administration of justice, if an action is to be admissible, the essential matters of fact and law on which it is based must be stated, at least in summary form, coherently and intelligibly in the application itself. In that regard, whilst the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which must appear in the application.

(see para. 592)

22. The procedure for access to the file in competition cases is intended to allow the addressees of a statement of objections to examine evidence in the Commission's files so that they are in a position effectively to express their views on the conclusions reached by it in its statement of objections on the basis of that evidence. The right of access to the file is justified by the need to ensure that the undertakings in question are able properly to defend themselves against the objections raised in that statement.

However, access to certain documents can be denied, in particular to documents or parts thereof containing other undertakings' business secrets, internal Commission documents, any information enabling complainants to be identified where they wish to remain anonymous, and information disclosed to the Commission subject to an obligation of confidentiality.

Although undertakings have a right to protection of their business secrets, that right must be balanced against safeguarding the rights of the defence. Thus, the Commission may be required to reconcile the opposing interests by preparing non-confidential versions of documents containing business secrets or other sensitive information. Those same principles are applicable to access to the files in merger cases examined under Regulation No 4064/89 on the control of concentrations between undertakings, even though their application may reasonably be adapted to the necessity for speed, which characterises the general scheme of that regulation. The rights of the defence are not to be applied with a standard of protection which is different or more extensive in merger control cases than in proceedings involving infringements of Community competition law.

(see paras 629-631)

23. In an administrative proceeding on competition matters, a distinction must be drawn between adverse evidence and documents which are favourable or contain favourable evidence. Adverse evidence is relevant only in so far as the Commission itself relies on it, in which case it must be made available, but if the evidence is not so relied on, the fact that it is not made available has no effect on the lawfulness of the procedure. Conversely, if it is shown that an undertaking was not granted access, during the administrative procedure, to a document favourable to its case, i.e. a document which could have been useful to its defence and which could therefore have changed the outcome of the administrative procedure if that undertaking had been able to make use of it, the reasoning in the decision affected by that document must, in principle be regarded as vitiated by error.

(see para. 649)

24. An application for confidential treatment may justify a refusal to grant access to documents emanating from third parties, such as complaints, in competition proceedings. An undertaking holding a dominant position on the market might adopt retaliatory measures against competitors, suppliers or customers who have collaborated in the investigation carried out by the Commission, and, in such circumstances, third-party undertakings which submit documents to the Commission in the course of its investigations and consider that reprisals

might be taken against them as a result can do so only if they know that account will be taken of their request for confidentiality.

(see para. 650)

25. The right to be heard in competition proceedings relates only to the objections which the Commission intends to sustain.

Thus, since the aim of a decision to initiate proceedings under Article 6(1)(c) of Regulation No 4064/89 on the control of concentrations between undertakings is not to address objections to the parties but merely to set out, provisionally, the Commission's serious doubts leading it to initiate the second phase of the investigation, an undertaking cannot claim that lack of access to the file, before service of the statement of objections, undermines its ability to defend itself. The fact that the undertaking actually had an opportunity to submit written and oral observations on the statement of objections after it had had access to the Commission's case-file means that it was able to express its point of view in good time on the objections adopted.

(see paras 692-693)

26. Although the terms in which Article 18 (1) of Regulation No 4064/89 on the control of concentrations between undertakings is couched do mean that the parties must be able to submit observations with effect from the initiation of the proceedings, they do not imply that the Commission must give access to its case-file at this earlier stage. The need for the parties to have access to the Commission's case-file in order to be able to defend themselves, ultimately, against the objections raised by the Commission in the statement of objections should not be interpreted as requiring the Commission to grant them access to its file in portions throughout the proceedings, a requirement which would represent a disproportionate burden on it.

(see para. 694)

27. If the Commission is to comply with the timetable thus laid down by Regulation No 4064/89 on the control of concentrations between undertakings, the intermediate periods laid down at each stage of the procedure must also be brief. Inevitably, this has an adverse effect on the conditions under which all the parties to the proceedings must work, but the gain in terms of the speed of the proceedings as a whole was regarded by the legislature as justifying those sacrifices, particularly in order to take account of the commercial interest of the parties to a merger in completing their proposed merger as quickly as possible. In that respect, when assessing alleged infringements of the rights of the defence in the context of proceedings under Regulation No 4064/89, it is necessary to take account of the need for speed, which characterises the general scheme of that regulation.

Moreover, under Article 21 of Regulation No 447/98 on the notifications, time limits and hearings provided for in Regulation No 4064/89, which applies, inter alia, to the time-limit set under Article 13 of that regulation for replying to the statement of objections, the Commission is to have regard to the time required for preparation of statements and to the urgency of the case. Thus, it is incumbent on the Commission to reconcile, as far as possible, the notified parties' rights of defence and the need for the rapid adoption of a final decision.

In those circumstances, the parties to a notified transaction may invoke the shortness of the periods allowed to them in the context of those proceedings only inasmuch as those periods are disproportionate to the duration of the proceedings as a whole.

(see paras 701-703)

28. Although the position of the hearing officer changed upon the entry into force of Decision 2001/462 on the terms of reference of hearing officers in certain competition proceedings, inter alia in that, in accordance with Article 2(2) thereof, he was thereafter attached, for administrative purposes, to the member of the Commission with special responsibility for competition, instead of being attached to the Directorate-General for Competition, it is clear from that decision that the new function of hearing officer is a direct replacement for the function of the person previously operating under that name under Decision 94/810. In those circumstances, in the absence of a decision terminating his mandate in accordance with Article 2(1) of Decision 2001/462, the former hearing officer remained in post after the entry into force of that decision.

That interpretation of the abovementioned provisions is supported by the objective need, with regard to the post of hearing officer, to ensure the continuity of his function in accordance with the principle of good administration. Decision 2001/462 necessarily entered into force at a time when the proceedings in certain cases were already under way. If the effect of the entry into force of Decision 2001/462 and of a failure to appoint a new hearing officer were that no one was authorised to perform that function, it would have been impossible to continue those proceedings, and that would have rendered both the provisions of Regulation No 4064/89 and those of Decision 2001/462 ineffective in respect of those proceedings. Therefore, the hearing officer in post when Decision 2001/462 entered into force was empowered to carry out that function until further notice, at least for the purposes of concluding proceedings already before him.

(see paras 719-720)

29. Fundamental rights form an integral part of the general principles of Community law whose observance the Community judicature ensures. For that purpose, the Court of Justice and the Court of First Instance draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. The European Convention on Human Rights has special significance in that respect. Moreover, according to Article 6(2) EU, 'the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights ... and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

(see para. 725)