

## Case T-251/00

Lagardère SCA and Canal+ SA

v

Commission of the European Communities

(Competition — Regulation (EEC) No 4064/89 — Amendment of a decision declaring a concentration compatible with the common market — Restrictions directly related to and necessary to the implementation of the concentration (ancillary restrictions) — Action for annulment — Admissibility — Actionable measures — Interest in bringing proceedings — Legal certainty — Legitimate expectations — Statement of reasons)

Judgment of the Court of First Instance (Third Chamber, Extended Composition), 20 November 2002 . . . . . II - 4829

### Summary of the Judgment

1. *Actions for annulment — Actionable measures — Measures producing binding legal effects — Measure altering the statement of reasons for a previous measure — Assessment by reference to the impact of the alteration on the decision-making substance of the measure in question*  
(Art. 230 EC)

2. *Competition — Concentrations between undertakings — Examination by the Commission — Approval decision — Legal certainty — Statement of reasons pronouncing on the ancillary and necessary character of restrictions on competition which have been notified — Legal assessment determining the substance of the decision set out in the operative part*  
(Council Regulation No 4064/89, Art. 6(1)(b))
3. *Acts of the institutions — Retrospective withdrawal — Conditions — Unlawfulness of the act withdrawn — Compliance with the principle of the protection of legitimate expectations — Burden of proof*
4. *Acts of the institutions — Statement of reasons — Obligation — Scope*  
(Art. 253 EC)

1. 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. To determine whether an act or decision produces such effects, it is necessary to look to its substance. Thus, a decision whereby the Commission alters only the reasoning of a previous decision may be the subject-matter of an action if that alteration changes the substance of what was decided in the operative part of the decision in question and, by so doing, brings about a distinct change in the legal position of the person to whom it is addressed. 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 a measure must be taken into account in determining the exact meaning of what is stated in the operative part.
2. Under Article 6(1)(b) of Regulation No 4064/89 on the control of concentrations between undertakings, the decision whereby a concentration is declared compatible with the common market also covers restrictions on competition directly related to the concentration and necessary for its implementation.

Taking into account the terms and the legislative context, as well as the origin and aims of that provision, it must be interpreted as meaning that where, 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 determine the substance of what it decided in the operative part of the decision.

(see paras 63-68)

If that were not so, 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 that provision are actually fulfilled, the whole operation is recognised as being economically inseparable. By incorporating Article 6(1) into 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 that 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.

To compel the parties to a concentration, 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 its 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 applying Articles [81 EC and 82 EC] to the restrictions which are ancillary to the concentration'.

(see paras 101, 103-104, 109)

3. 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.

In that regard, whilst the retroactive withdrawal of a legal measure which has conferred individual rights or similar benefits is contrary to the general principles of law, the retrospective withdrawal of an illegal administrative act must be accepted, albeit subject to very strict conditions. It is permissible only if it occurs within a reasonable time and sufficient account is taken of the legitimate expectations of the beneficiary of the act who may have been led to rely on its lawfulness.

The institution responsible for the withdrawn act has the burden of proving its illegality and of demonstrating that the other conditions for retrospective withdrawal of an illegal act are fulfilled.

(see paras 130, 139-141)

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.

4. The extent of the obligation to state reasons depends on the nature of the

(see para. 155)