Case T-374/00

Verband der freien Rohrwerke eV and Others

v

Commission of the European Communities

(Control of concentrations — Concentration partly covered by the ECSC Treaty and partly by the EC Treaty — Authorisation decision on the basis of Article 66(2) CS — Decision on compatibility with the common market on the basis of Article 6(1)(b) of Regulation (EEC) No 4064/89 — Conditions of admissibility according to the ECSC Treaty and the EC Treaty — Relationship between the systems for the control of concentrations laid down by the ECSC Treaty and the EC Treaty — Obligation to state reasons — Error of assessment)

Judgment of the Court of First Instance (Third Chamber), 8 July 2003 . . II-2283

Summary of the Judgment

1. *Actions for annulment — Action brought against an ECSC decision by an undertaking whose business does not fall under that treaty — No capacity to bring proceedings (Art. 33, second para., CS)*

2. *Actions for annulment — Natural or legal persons — Measures of direct and individual concern to them — Decision finding a concentration compatible with the common market — Third-party undertaking with the capacity of direct competitor and having actively participated in the administrative procedure — Admissible*
(Art. 230, fourth para., EC)

3. *Competition — Concentrations — Examination by the Commission — Mixed ECSC/EC concentration — Application of the respective substantive and procedural rules of the two systems — Need for two distinct prior authorisations — Commission's right to adopt two different decisions*
(Art. 66(1) and (2) CS; Art. 305(1) EC; Council Regulation No 4064/89)

4. *Competition — Concentrations — Examination by the Commission — Assessments of an economic nature — Discretion — Judicial review — Limits*
(Council Regulation No 4064/89, Art. 2)

5. *Competition — Concentrations — Assessment of compatibility with the common market — Creation of a collective dominant position significantly impeding effective competition in the common market — Conditions*
(Council Regulation No 4064/89, Art. 2(3))

6. *Acts of the institutions — Statement of reasons — Obligation — Scope — Decision applying rules on concentrations between undertakings*
(Art. 253 EC)

7. *Competition — Concentrations — Assessment of compatibility with the common market — Relevant market — Geographical definition*
(Council Regulation No 4064/89)

8. *Competition — Concentrations — Assessment of compatibility with the common market — Moment to be taken into consideration*
(Art. 81 EC; Council Regulation No 4064/89, Art. 2)

9. *Competition — Concentrations — Assessment of compatibility with the common market — Obligation to take account of the impact on the competitive structure of links of a financial and structural nature in exercising joint control of a joint venture*
(Council Regulation No 4064/89, Art. 2(2) and (3))

10. *Acts of the institutions — Statement of reasons — Obligation — Scope — Decision applying rules on concentrations between undertakings*
(Art. 253 EC; Council Regulation No 4064/89, Art. 6(1)(b))

1. The list in the second paragraph of Article 33 CS of the persons entitled to bring an action for annulment is exhaustive, so that persons not mentioned in it may not validly bring such an action. Thus, companies not producing or distributing in the coal and steel industries do not have the capacity to bring an action for annulment against an ECSC decision. That applies to companies producing steel pipes which, not being mentioned in Annex I to the ECSC Treaty, do not fall within its scope. Although the provisions of the ECSC Treaty must be interpreted widely in order to safeguard the legal protection of the persons concerned, that broad interpretation cannot contradict the clear terms of the ECSC Treaty. The Community judicature has no authority to derogate from the legal system established by the treaties.

(see paras 33-38)

2. It follows from the fourth paragraph of Article 230 EC that an undertaking may bring an action for the annulment of a decision authorising a concentration operation, of which it is not the addressee, only if that decision directly and individually concerns them.

An undertaking operating in the same market or markets as the parties to the concentration is directly concerned by such a decision if, in allowing the planned concentration operation to be carried out, the decision is likely to lead to an immediate change in the situation of the market or markets concerned depending solely on the wishes of the parties to the concentration.

An undertaking is also individually concerned by that decision if it is affected 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 persons addressed.

That is the case of an undertaking which is in direct competition with the parties to the concentration in a given product market, the concentration at issue therefore being capable of affecting it in its capacity as a direct competitor, and which sees the concentration at issue as also being likely to affect it as a buyer of raw materials necessary for the production of those products, since it repeatedly applied to one of the parties to the concentration in order to satisfy its needs in that regard, and which, following the notification provided for by Article 4(3) of Regulation No 4064/89, actively participated in the administrative procedure, notably by formulating objections that were taken into account by the Commission in its decision.

(see paras 46-55)

3. Since it follows from Article 305(1) EC that the rules of the ECSC Treaty and all the provisions adopted in implementation of that Treaty remain in force as regards the functioning of the common market, notwithstanding the supervening EC Treaty, the aspects of a mixed concentration which fall within the scope of the ECSC Treaty must be examined in the light of the rules laid down by Article 66 CS, while all other aspects of the concentration must be examined in the framework of the general system for the appraisal of concentrations established by Regulation No 4064/89.

Moreover, as both Article 66 CS and Regulation No 4064/89 lay down a prior authorisation system for concentrations, the parties to a mixed concentration can implement a notified proposal for a concentration only if they have two separate authorisations, namely one pursuant to Article 66(2) CS for those parts of the concentration covered by the ECSC Treaty, and the other pursuant to Regulation No 4064/89 for those parts which are within the scope of the EC Treaty.

By reason of those special features, the Commission may therefore adopt two different decisions for authorising a mixed concentration, that way of proceeding being all the more justified in that the rules of Article 66 CS and those of Regulation No 4064/89 differ in substantive and procedural respects. That conclusion is not called into question by the fact that one and the same indivisible concentration is involved. Although, from an economic viewpoint, a notified mixed concentration generally represents an indivisible whole for the persons giving the notification, that does not remove the need, from a legal viewpoint, for two

separate authorisations from the Commission.

In that respect, the mere fact that the Commission adopts two separate decisions in the context of the control of a mixed concentration does not, as such, breach the Commission's obligation to avoid inconsistency which may arise in the implementation of different provisions of Community law. The possibility that the adoption of separate decisions may ultimately result in the Commission authorising the concentration in its entirety or partly from the ECSC viewpoint and prohibit it in its entirety or partly from the EC viewpoint is not an inconsistency, but rather arises from the fact that concentrations or certain parts of concentrations are subject to different substantive and procedural rules, depending on whether they fall within the ambit of the ECSC Treaty or the EC Treaty. Moreover, the same applies with regard to the possibility that an application for the annulment of decisions approving a mixed concentration may lead to a different result for the decision adopted under Article 66 CS and for that adopted pursuant to Regulation No 4064/89. Regardless of whether the Commission adopts a single decision or two separate decisions, the Community Courts will necessarily have to review the legality of those decisions in the light of the different rules laid down by the two systems.

(see paras 68-70, 75-76)

4. Since the basic provisions of Regulation No 4064/89, in particular Article 2 thereof, confer a discretion on the Commission, especially with respect to assessments of an economic nature, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations.

(see para. 105)

5. A finding of a collective dominant position depends on three conditions being fulfilled: first, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy; second, the situation of tacit coordination must be sustainable over time, that is to say, there

must be an incentive not to depart from the common policy on the market; third, the foreseeable reaction of current and future competitors, as well as of consumers, should not jeopardise the results expected from the common policy.

(see para. 121)

It follows that, in a case where the Commission adopts two separate decisions in simultaneous procedures in order to authorise one and the same concentration, falling under both the ECSC Treaty and the EC Treaty, and those decisions are notified simultaneously, the statement of reasons given in one of the decisions must necessarily be assessed in the light of the statement of reasons in the other. In such a case, although the appraisal carried out by the Commission in the decisions is based on different substantive and procedural rules, the separate decisions nevertheless relate to one and the same concentration, so that in some respects the Commission's assessment may overlap.

6. Regarding the Commission's obligation to state reasons for its decisions, the statement of reasons is not required to discuss all the issues of fact and of law in so far as the question whether a statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. That means that, where a decision-making authority is competent to adopt, in simultaneous procedures, two separate decisions concerning the same factual situation and that authority gives notice of the decisions to one and the same interested party within a short interval, each decision may, from the viewpoint of the duty to state reasons to that party, be regarded as forming part of the context of the other decision and may therefore properly serve as an additional statement of reasons in relation to that party.

(see paras 123-124)

7. In assessing the scope of the impact of a concentration operation on competition, the relevant geographical market is a defined geographical area in which the product concerned is marketed and where the conditions of competition are sufficiently homogeneous for all economic operators, so that the effect

on competition of the concentration notified can be evaluated rationally.

(see para. 141)

8. When assessing the compatibility of a notified concentration with the common market, the Commission cannot be obliged, under Article 81 EC, to consider the hypothetical risk that the parties to the concentration may be required to conclude such restrictive agreements as a result of the concentration. According to the clear wording of Article 81(1) EC, the prohibition which it lays down applies only when anti-competitive agreements have actually been concluded. Appraisal by the Commission of the compatibility of a concentration with the common market must be carried out solely on the basis of matters of fact and law existing at the time of notification of that transaction, and not on the basis of hypothetical factors, the economic implications of which cannot be assessed at the time when the decision is adopted.

(see para. 170)

9. In exercising joint control of a joint venture, the parent companies will necessarily have to agree on the commercial management of the venture and, to some extent, on their own positions in relation to the joint venture in certain markets. It cannot therefore be ruled out that such indirect links might affect the competition behaviour of undertakings connected in that way in certain markets. It follows that the existence of such indirect links of a financial and structural nature is a factor which must be taken into account when assessing a concentration by reference to the conditions laid down in Article 2(2) and (3) of Regulation No 4064/89.

(see paras 173-174)

10. When the Commission declares a concentration compatible with the common market on the basis of Article 6(1)(b) of Regulation No 4064/89, it is a necessary and sufficient condition in relation to the duty to state reasons under Article 253 EC that the decision states clearly and unequivocally the reasons why the Commission considers that the concentration at issue does not raise serious doubts as to its compatibility with the common market. However, it cannot be inferred from that obligation that, in such a hypothetical case, the Commission must provide reasons for its assess-

ment of all the matters of law and of fact which may be connected with the notified concentration and/or which were raised during the administrative procedure. Not only is such a requirement difficult to reconcile with the need for promptness on the Commission's part when it exercises its power to examine concentrations and, in particular, when it approves a concentration on the basis of Article 6(1)(b) of Regulation No 4064/89, but, in addition, such a requirement is difficult to justify from the viewpoint of the very nature of that power. In the framework of the system established by Regulation No 4064/89, the Commission is obliged to assess, using a prospective analysis of the reference markets, whether the concentration which has been referred to it creates or strengthens a dominant position with the consequence that effective competition is significantly impeded in the common market or a substantial part thereof. Such a procedure requires that there be a close examination in particular of the circumstances which, in each individual case, are relevant for assessing the effects of the concentration on competition in the reference markets. It follows that, if a concentration does not modify, or modifies only to a very limited extent, the competition situation in a given market, the Commission cannot be required to set out specific reasoning on that point. Likewise, the Commission does not fail in its duty to state reasons if, in its decision, it does not include specific reasons concerning the assessment of a number of aspects of the concentration which seem to it manifestly irrelevant or insignificant or plainly of secondary importance for the assessment of the concentration.

It follows that the mere fact that a decision declaring a concentration compatible with the common market on the basis of Article 6(1)(b) of Regulation No 4064/89 does not give reasons in relation to some matters of fact or of law does not mean, as such, that the Commission failed in its duty to state reasons when it adopted that decision. The absence of reasons may also be interpreted as meaning that, in the Commission's opinion, those matters cannot raise serious doubts as to the compatibility of the concentration at issue with the common market.

(see paras 184-187)