JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)
25 March 1999 *

In Case T-102/96,

Gencor Ltd, a company incorporated under South African law, established in Johannesburg, Republic of South Africa, represented by Paul Lasok QC, instructed by James Flynn and David Hall, Solicitors, London, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 Rue Goethe,

applicant,

v

Commission of the European Communities, represented by Richard Lyal, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

* Language of the case: English.

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat, and Bernd Kloke, Oberregierungsrat, acting as Agents, Federal Ministry of Economic Affairs and Technology, Bonn, Germany,

intervener,

APPLICATION for the annulment of Commission Decision 97/26/EC of 24 April 1996 declaring a concentration to be incompatible with the common market and the functioning of the EEA Agreement (Case No IV/M.619 — Gencor/Lonrho) (OJ 1997 L 11, p. 30),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Fifth Chamber, Extended Composition),

composed of: J. Azizi, President, B. Vesterdorf, R. García-Valdecasas, R.M. Moura Ramos and M. Jaeger, Judges,

Registrar: J. Palacio González and A. Mair, Administrators,

having regard to the written procedure and further to the hearing on 18 February 1998,

gives the following

Judgment

Facts

1. *The concentration at issue*

Parties to the concentration

1 Gencor Ltd ('Gencor') is a company incorporated under South African law. It is the parent company of a group operating mainly in the mineral resources and metals industries.

2 Impala Platinum Holdings Ltd ('Implats') is a company incorporated under South African law bringing together Gencor's activities in the platinum group metal ('PGM') sector. Held as to 46.5% by Gencor and 53.5% by the public, it is controlled by Gencor for the purposes of Article 3(3) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1, corrigenda at OJ 1990 L 257, p. 13; 'the Regulation').

3 Lonrho Plc ('Lonrho') is a company incorporated under English law. It is the parent company of a diversified group with interests in mining and metals, hotels, agriculture and general trade.

4 Eastern Platinum Ltd ('Eastplats') and Western Platinum Ltd ('Westplats'), generally known under the name of Lonrho Platinum Division ('LPD'), are companies incorporated under South African law which bring together Lonrho's activities in the PGM sector. They are held as to 73% by Lonrho and as to 27% by Gencor through its subsidiary Implats. The latter stake is the subject of a shareholders' agreement ('the Principals' Agreement') entered into on 15 January 1990 by the Gencor and Lonrho groups. Under that agreement, an equal number of directors is to be appointed by each shareholder, those directors are to have equal voting rights and no director is to have a casting vote. The approval of the board of directors is required for certain decisions, in particular in relation to the following matters: diversification of the activities of LPD; the level of dividend distribution; the annual strategic plan and budget; approval of the annual financial statements; and changes in the rates of fees paid to shareholders. Decisions concerning major investments and divestments require the approval of the shareholders. Pursuant to agreements signed by Eastplats and Westplats ('the Management Agreements'), the management of those companies is provided by Lonrho Management Services ('LMS'), a company incorporated under South African law and controlled by Lonrho.

The proposed concentration

5 Gencor and Lonrho proposed to acquire joint control of Implats and, through that undertaking, of Eastplats and Westplats (LPD), in a two-stage operation. In the first stage, Gencor and Lonrho were to acquire joint control of Implats. In the second stage, Implats was to be granted sole control of Eastplats and Westplats. In return for the transfer by it of its interest in Eastplats and Westplats, Lonrho was to increase its holding in Implats.

6 Following the transaction, Implats was to have sole control of Eastplats and Westplats. Implats was to be held as to 32% by Gencor, 32% by Lonrho and 36% by the public. In addition, an agreement concerning the appointment of directors and voting arrangements was to govern the conduct of the two main shareholders with regard to the most important issues in the running of Implats, thus giving them joint control of that company.

2. *Administrative procedure*

7 On 20 June 1995 Gencor and Lonrho announced that they had entered into heads of agreement to merge their respective PGM operations. On the same day they sent the Commission a copy of the press release announcing the transaction.

8 On 22 August 1995 the South African Competition Board informed the parties that, having regard to the documents which they had sent to it on 14 August 1995, the transaction did not give rise to any concerns under South African competition law.

9 On 10 November 1995 Gencor and Lonrho signed a series of agreements relating to the concentration. These included the purchase agreement, completion of which was subject to the fulfilment of a number of conditions precedent including clearance of the concentration by the Commission by 30 June 1996 or, if the parties so agreed, by no later than 30 September 1996, as provided in clauses 3.1.8 and 3.3 of the purchase agreement.

10 On 17 November 1995 Gencor and Lonrho jointly notified the Commission of those agreements, together with the annexures thereto, by means of Form CO, in accordance with Article 4(1) of the Regulation.

11 By decision of 8 December 1995 the Commission ordered the suspension of the concentration, pursuant to Article 7(2) and Article 18(2) of the Regulation until it took a final decision.

12 By decision of 20 December 1995 the Commission found that the concentration raised serious doubts as to its compatibility with the common market and therefore initiated the proceedings provided for by the Regulation, in accordance with Article 6(1)(c) thereof.

13 On 13 March 1996 Anglo American Corporation of South Africa Ltd ('AAC') acquired a 6% stake in Lonrho, with a right of first refusal over a further 18%. Through its associated company, Amplats, which is the leading supplier worldwide, AAC is the main competitor of Gencor and Lonrho in the PGM sector.

14 Following a meeting held by the Commission on 13 March 1996, Gencor and Lonrho initiated discussions with the Commission to explore the scope for offering commitments under Article 8(2) of the Regulation.

15 On 27 March 1996 the Commission informed Gencor and Lonrho that one of its main concerns with regard to the concentration was that it might result in a restriction of output leading to upward pressure on prices. It pointed out in that connection that behavioural undertakings were not normally accepted by it.

16 On 1 April 1996, following a series of meetings and proposals in that regard, Gencor and Lonrho submitted the final version of the commitments offered by them. Those commitments concerned, in particular, the level of output at a particular site.

17 By letter of 2 April 1996, the Commission criticised those proposed commitments on the ground that they did not meet its concerns. In particular, it noted the difficulties which would be involved in monitoring them and the problems in setting the transaction aside if they were infringed. It added that they failed to take account of foreseeable growth in demand.

18 On 9 April 1996 the Advisory Committee on Concentrations ('the Advisory Committee') gave its opinion on the concentration and on the commitments offered by Gencor and Lonrho. It stated that it agreed with the Commission's draft decision as regards the nature of the concentration, its Community dimension, the relevant product and geographical markets and the inadequacy of the commitments offered. A majority of the Advisory Committee agreed with the Commission's analysis that the concentration would lead to the creation of a situation of oligopolistic dominance in the markets concerned, and with its conclusion that the concentration would be incompatible with the common market and the functioning of the Agreement on the European Economic Area ('the EEA Agreement'). A minority expressed doubts as to whether the Regulation could be applied to situations of oligopolistic dominance, and for that reason abstained on the question as to whether or not the transaction was incompatible with the common market and the functioning of the EEA Agreement.

19 On 19 April 1996 the South African Deputy Minister of Foreign Affairs officially submitted to the Commission his Government's observations on the proposed concentration. In that letter, he limited himself to stating that he did not intend to contest the policy position adopted by the Community in the field of concentrations and collusive practices but, having regard to the importance of mineral resources to the South African economy, he favoured action in actual cases of collusion when they arose. With regard to the case at issue, the South African Government considered that, in certain situations, two equally matched

competitors were preferable to the situation prevailing at that time, where a single mining enterprise was dominant in the sector. In the South African Government's view, although the bulk of platinum reserves were located in its country, those located abroad could theoretically satisfy demand for 20 years, excluding the significant potential resources of Zimbabwe. Finally, the South African Government expressed its desire to explore those issues with the Commission and asked for the decision to be postponed until such discussions had been held.

20 By Decision 97/26/EC of 24 April 1996 (OJ 1997 L 11, p. 30; 'the contested decision'), the Commission declared, pursuant to Article 8(3) of the Regulation, that the concentration was incompatible with the common market and the functioning of the EEA Agreement, because it would have led to the creation of a dominant duopoly position between Amplats and Implats/LPD in the world platinum and rhodium market as a result of which effective competition would have been significantly impeded in the common market.

21 By letter of 21 May 1996 Lonrho informed Gencor that it did not intend to extend from 30 June 1996 to 30 September 1996 the deadline set by the purchase agreement for fulfilment of the conditions precedent if the condition set out in clause 3.1.8 of that agreement, requiring clearance of the concentration to be obtained from the Commission, was not satisfied within the period laid down.

Procedure before the Court

22 On 28 June 1996 the applicant brought this action for the annulment of the contested decision.

23 On 3 December 1996 it made an application under Articles 49, 64 and 65 of the Rules of Procedure for measures of organisation of procedure or of inquiry, with a view to establishing precisely the legal status and meaning of the official letters from the South African competition authorities, the scope of South African competition law and the conditions for its application.

24 On 18 December 1996, 24 January 1997 and 30 July 1997, the Commission submitted its observations on that application.

25 On 25 November 1996 and 3 December 1996 the Federal Republic of Germany and the United Kingdom of Great Britain and Northern Ireland submitted applications for leave to intervene in support of the form of order sought by the Commission.

26 On 11 December 1996 and 3 January 1997, the applicant requested that confidential treatment be given to certain documents in the case, *vis-à-vis*, respectively, the Federal Republic of Germany and the United Kingdom.

27 On 19 February 1997 the Court invited the applicant and Lonrho to reply to a number of questions concerning the admissibility of the action and to produce certain documents. On 1 April 1997 and 10 March 1997 respectively, the applicant and Lonrho replied to the questions put by the Court. The applicant lodged the documents requested, including the Management Agreements entered into by Eastplats and Westplats with LMS on 15 January 1990 and the agreement known as the Principals' Agreement, concerning the control of LPD, which the applicant and Lonrho had concluded on the same date.

28 By order of 3 June 1997 the President of the Fifth Chamber, Extended Composition, granted the Federal Republic of Germany and the United Kingdom

leave to intervene and allowed in part the application for confidential treatment.

29 On 27 June 1997 the applicant submitted a further application for confidential treatment concerning certain data in the file.

30 By order of 16 July 1997 the President of the Fifth Chamber, Extended Composition, granted that application.

31 On 22 September 1997 the United Kingdom withdrew its intervention. On 26 September 1997 the Federal Republic of Germany lodged its statement in intervention.

32 Upon hearing the Report of the Judge-Rapporteur, the Court decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of the Rules of Procedure, the applicant and the Commission were requested to produce the full text of the commitments offered during the administrative procedure by the parties to the concentration. They produced the document requested, on 6 and 12 February 1998 respectively.

33 The main parties presented oral argument and answered oral questions put to them by the Court at the hearing on 18 February 1998.

34 By letter of 17 July 1998 the Court asked the applicant whether, in view of the judgment delivered by the Court of Justice on 31 March 1998 in Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, it

wished to withdraw its plea to the effect that concentrations creating joint dominance fell outside the scope of the Regulation. The applicant replied to the Court's question by letter of 29 July 1998.

Forms of order sought

35 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

36 The Commission contends that the Court should:

— dismiss the action as inadmissible;

— in the alternative, dismiss it as unfounded;

— order the applicant to pay the costs.

37 The Federal Republic of Germany claims that the Court should dismiss the action.

Admissibility

Arguments of the defendant

38 The Commission pleads that the action is inadmissible on the ground that the applicant no longer has any legal interest in bringing proceedings. The applicant's legal position would not be altered by a decision of the Court in its favour, since the notified transaction can no longer be implemented.

39 The Commission notes in that regard that the transaction envisaged between the applicant and Lonrho was subject to a number of conditions precedent, including the need to obtain clearance from the Commission under Article 6(1)(a) or (b) or Article 8(2) of the Regulation. The final date for fulfilment of that condition was 30 June 1996, failing which the entire purchase agreement lapsed, in accordance with clause 3.3 thereof. Lastly, the same clause allowed for the extension of the time-limit to 30 September 1996 by written agreement of the parties, but Lonrho rejected such an extension in a letter of 21 May 1996.

Findings of the Court

40 An action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the contested measure being annulled

(Case T-46/92 *Scottish Football Association* v *Commission* [1994] ECR II-1039, paragraph 14). Such an interest exists only if the annulment of the measure is of itself capable of having legal consequences (Case 53/85 *Akzo Chemie* v *Commission* [1986] ECR 1965, paragraph 21).

41 In that regard, it should be noted that under Article 176 of the EC Treaty the institution whose act has been declared void is required to take the necessary measures to comply with the judgment. Those measures do not relate to the elimination of the act from the Community legal order, because the very annulment by the Court has that effect. They are concerned in particular with eradicating the consequences of the act in question which are affected by the illegalities found to have been committed. The annulment of an act which has already been carried out or which, in the meantime, has been repealed from a given date is still capable of having legal consequences. The act could have produced legal effects during the period when it was in force and those effects are not necessarily eradicated by its repeal. An action for annulment is also admissible if it allows future repetition of the alleged illegality to be avoided. For those reasons, a judgment annulling an act is the basis upon which the institution concerned may be led to restore the applicant sufficiently to his original position or avoid the adoption of an identical act (see Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, paragraph 32, *Akzo Chemie* v *Commission*, cited above, paragraph 21, and Case 207/86 *Apesco* v *Commission* [1988] ECR 2151, paragraph 16).

42 The fact that the contested decision declaring the concentration incompatible with the common market was addressed to the applicant confers on it an interest in bringing proceedings and having the legality of that decision examined by the Community judicature.

43 Furthermore, as the applicant has pointed out, the contested decision is capable of altering its legal position as a potential purchaser of Lonrho's interest in LPD.

44 Under clause 11 of the Principals' Agreement (in particular 11.1 and 11.6), any sale by Lonrho of any part of its 73% stake in LPD or any proposal by Lonrho to list any part of that stake on a stock exchange would entitle Gencor to acquire the whole or part of that stake. Gencor's rights of acquisition would also be triggered if one of the intermediate companies holding shares in LPD left the Lonrho group and if any third party acquired 51% of Lonrho's share capital. The contested decision would constitute an obstacle to the exercise of those rights of pre-emption.

45 Finally, the Commission's argument would lead to the result that the legality of adverse decisions under the Regulation could not be reviewed by the Court in cases where the contractual basis for the transaction disappears before the Court gives judgment. The fact that the basis for the transaction has disappeared cannot in itself exclude judicial review of the Commission's decision.

46 It follows that the plea of inadmissibility raised by the Commission must be rejected.

Substance

47 The applicant relies in support of its action on a number of pleas, regarding: (i) lack of jurisdiction on the part of the Commission over the concentration at issue and related infringement of Article 190 of the Treaty; (ii) infringement of Article 2 of the Regulation, in that concentrations which create or strengthen a collective dominant position are not covered by the Regulation, and related infringement of Article 190 of the Treaty; (iii) infringement of Article 2 of the Regulation, in that the Commission wrongly found that the concentration would create a collective dominant position, and related infringement of Article 190 of the Treaty; and (iv) infringement of Article 8(2) of the Regulation and related infringement of Article 190 of the Treaty.

I — *The pleas alleging infringement of the Regulation, in that it did not confer jurisdiction on the Commission to examine the compatibility of the concentration with the common market, and infringement of Article 190 of the Treaty*

Arguments of the parties

48 The applicant submits, as its main argument, that the Regulation does not confer jurisdiction on the Commission to examine the compatibility of the concentration with the common market. In the alternative, if the Regulation does confer such jurisdiction, it is unlawful and therefore inapplicable pursuant to Article 184 of the Treaty.

49 The Regulation was not applicable to the concentration at issue since it related to economic activities conducted within the territory of a non-member country, the Republic of South Africa, and had been approved by the authorities of that country. The Regulation applies only to concentrations carried out within the Community.

50 That analysis is consistent with the principle of territoriality, a general principle of public international law which the Community must observe in the exercise of its powers (Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Åhlström and Others* v *Commission* [1988] ECR 5193 (the '*Wood pulp*' case), paragraph 18, and Case C-286/90 *Poulsen and Diva Corp.* [1992] ECR I-6019, paragraph 9).

51 The legal bases on which the Council adopted the Regulation, namely Articles 87 and 235 of the Treaty, cannot be construed in disregard of that principle in order to establish extra-territorial jurisdiction. The principles which are set out in Articles 85 and 86 and referred to in Article 87, and the objectives of the

Community mentioned in Article 235, concern solely competition within the common market and not competition between undertakings established within the common market and those outside the common market, nor competition between undertakings outside the common market. That conclusion follows both from the requirement in Articles 85 and 86 that there must be an effect on trade between Member States and from the objectives of the Community laid down in Articles 2 and 3(g) of the Treaty.

52 That limitation on the scope of the Treaty competition rules is reflected both in the first to fifth and ninth to eleventh recitals in the preamble to the Regulation and in Article 2 thereof, inasmuch as they indicate that the Regulation concerns only concentrations which take effect within the common market.

53 Although the Regulation does not expressly define its field of application by reference to the place where the concentration is effected, the 30th recital in its preamble and Article 24 imply that a concentration involving Community undertakings which is carried out in a non-member country falls within the purview of the authorities of that country and not within that of the Commission.

54 The applicant explains that its analysis does not mean that the Regulation can apply only to concentrations between undertakings established in the Community. It is in fact not so much the place of establishment of the undertakings concerned which matters, but rather the place or places where the concentration is carried out. The applicant relies in that regard on Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, in which the Court of Justice held that the Commission was competent to apply Article 86 of the Treaty to a concentration effected by an undertaking located outside the Community since the case concerned the acquisition of an interest in a Community undertaking.

55 The Regulation is thus applicable only if the activities forming the subject-matter of the concentration are located within the Community. More particularly, as the 11th recital in its preamble indicates, it applies to undertakings which have substantial operations in the Community. In the instant case, the location of the concentration notified to the Commission is South Africa, where the undertakings carrying it out have their main field of activity, namely the mining and refining of PGMs. Neither the fact that Lonrho has a subsidiary with an office in the Community through which it sells its entire PGM production nor the fact that it carries on other activities in the Community in the hotel and general trading fields means that it can be considered to have substantial operations in the Community within the meaning of the 11th recital in the preamble.

56 The applicant compares the above analysis with that contained in the judgment in *Wood pulp*, where the Court confirmed, in the context of pricing agreements, that the Community was competent to apply its competition rules to anti-competitive behaviour within the common market by undertakings located outside the Community where the agreement or concerted practice originated or was implemented on Community territory. In the instant case, the concentration originates and is implemented not within the Community but in the Republic of South Africa. It is thus primarily relevant to the industrial and competition policy of that non-member country. Consequently, the Commission lacked territorial jurisdiction (*Wood pulp*, paragraphs 11 to 18, and the Opinion of Advocate General Darmon in that case, point 20).

57 Even if the test for competence under the Regulation is whether the concentration has an immediate and substantial effect on competition within the Community, that test is not satisfied in the present case.

58 First, the Commission found (paragraphs 206 and 210 of the contested decision) that the concentration would lead to the creation of a dominant duopoly position in the medium term in the world platinum and rhodium markets. That finding is insufficient for the criterion of immediate and substantial effect to be met in this

case. The expression 'in the medium term' is ambiguous, inasmuch as it may refer either to the creation of a dominant position in the medium term or to its eventual disappearance. If the former is meant, the consequences of the concentration are not immediate, since they depend on the future conduct both of the undertaking resulting from the concentration and of the other member of the duopoly, namely Amplats. If the latter is meant, the consequences of the concentration are transitory and therefore not substantial.

59 Second, since the relevant markets are world markets, any dominant position which the concentration might create would not concern the Community more than any other authority; consequently, the effect of the concentration is not substantial. The contested decision (paragraphs 16, 18 and 98) does not assert any claim to jurisdiction for the Community that is wider than that of the Republic of South Africa or of any other non-member country, including Japan and the United States, but merely notes that the markets concerned are world markets, that European consumption of PGMs accounts for some 20% of world demand (17% on average for platinum) and that any effects on the world markets would necessarily be reflected in the Community and the EEA. Those factors are insufficient to confer jurisdiction on the Commission and do not, in any event, amount to adequate reasoning for the decision in accordance with the requirements of Article 190 of the Treaty.

60 The sectoral and geographical demand for platinum and rhodium at world level shows that western Europe (including the Community), which in the period 1991-95 accounted for only 17% to 22% of world demand, would be affected very little by a concentration taking place outside its territory, and would be less concerned by it than Japan, where consumption over the same period accounted for between 47% and 51% of world demand, or North America (including the United States), where consumption over that period accounted for between 19% and 21% of world demand. That analysis is borne out by the relatively low combined market shares (approximately (...) * % for platinum and (...)% for rhodium in 1994) and combined turnover (approximately ECU (...) million for platinum alone in 1994) achieved in respect of platinum and rhodium within the Community by the two undertakings involved in the concentration. In that

* Confidential information withheld.

regard, it is necessary, when assessing the Community dimension of the concentration and calculating the turnover of the undertakings concerned within the meaning of Article 5 of the Regulation, to construe the word 'undertaking' as referring to a company or legal person and not to an undertaking within the meaning of Articles 85 and 86 of the Treaty (see the contested decision, paragraphs 24, 34, 44, 56, 98, 100 and 209, and Table 6 set out at paragraph 96).

61 Third, as regards the creation of a dominant duopoly position in the platinum and rhodium markets, the risk, raised by the Commission, of collusion or parallel behaviour between the members of the oligopoly is essentially a matter for the competent South African competition authorities. The position could be otherwise only if the conditions laid down in the judgment in *Wood pulp* were fulfilled. However, the instant case can be distinguished from the *Wood pulp* case, since the latter did not concern a concentration carried out in a non-member country but a pricing agreement directed at, and carried out in, the Community (see *Wood pulp*, paragraph 13). In any event, the Commission cannot claim jurisdiction in respect of a concentration on the basis of future and hypothetical behaviour in which undertakings in the relevant market might engage and which might or might not fall within its purview under the Treaty.

62 Last, the agreements in issue have been the subject of a decision by the competent South African competition authorities, namely the South African Competition Board, dated 22 August 1995. That decision acknowledged that the notified transaction did not give rise to any concerns as regards South African competition policy. The transaction is thus lawful in the place in which it was to be carried out, so that, if the Commission were to declare it unlawful, it would necessarily create a conflict of jurisdiction with the South African authorities. The South African Deputy Minister for Foreign Affairs clearly set out his concerns in that regard in his letter to the Commission of 19 April 1996. The source of the conflict is the fact that the concentration constitutes an alteration in the industrial structure of a non-member country (the Republic of South Africa) which is more fundamental in its consequences for the undertakings involved, but also for the

economy of the State concerned, than mere agreements. To claim competence over such alterations consequently amounts to a more fundamental interference in the internal affairs of that State.

63 Finally, it may be inferred from the relatively limited impact of the concentration within the Community that the Commission's claim to have jurisdiction has no legal justification whatsoever and is disproportionate in nature.

64 The Commission submits that there are two fundamental bases founding its competence. The first is the principle of nationality, on the basis of which it has jurisdiction *ratione personae* over the activities of Lonrho, a company incorporated under the laws of a Member State. The second is the principle of territoriality.

65 The Commission observes, as a preliminary point, that it was the parties to the concentration which requested it to examine the compatibility of the transaction with the common market and the EEA, by notifying it of their agreement and by making the grant of Commission approval a condition precedent to its completion. In those circumstances, for one of the parties to act as if the matter had not been voluntarily submitted to the jurisdiction exercised under the Regulation runs counter to the principles *nemo auditur* ... and *venire contra factum proprium*.

66 The Commission criticises the applicant's arguments relating to the location of the economic activity affected by the concentration and to the criteria and detailed rules governing its powers under the Regulation.

67 With regard to the location of the economic activity affected by the concentration, the Commission agrees with the applicant that the Regulation, just like

Articles 85 and 86 of the Treaty, is concerned with competition within the common market, but does not, in the instant case, subscribe to the conclusion drawn therefrom by the applicant. Since the contested decision is based on the consideration that the notified concentration, while carried out in South Africa by combining means of production, would be implemented throughout the world and alter, both worldwide and at Community level, the competitive structure on the relevant product markets by reason of the global nature of the geographical market, it is wrong to claim, as the applicant does, that that decision is not concerned with the regulation of economic activities within the territory of the Community. Although the parties do not mine platinum in the Community, a significant proportion of their activities nevertheless take place there.

68 The Commission submits that its reasoning is consistent with the judgment in *Wood pulp* and with the Opinion of Advocate General Darmon in that case. It points out that, in that case, it was not so much the location of the undertakings concerned that was important as the location of the anti-competitive effect within Community territory. The crucial factor in the present case is thus not the place where the undertakings are located but the alteration of the competitive structure within the common market. That alteration concerns not the mining or refining of the products at issue, as the applicant argues, but the market for the sale of platinum in the Community.

69 As regards the rules and criteria governing the international jurisdiction of the Community under the Regulation, the Commission considers that the contested decision is consistent with the approach laid down in *Wood pulp*, where the Court of Justice specified the two acts required, namely the formation of the agreement and its implementation, and then observed that the agreement at issue was implemented within the common market. The concentration in the instant case would be implemented and would alter the competitive structure throughout the world. The Commission's competence therefore derives from the classic rules of international jurisdiction, a conclusion which is reinforced by the fact that LPD's worldwide sales are carried out through Western Metal Sales, a Belgian subsidiary of Lonrho based in Brussels.

70 The Commission considers that the applicant's line of argument relating to substantial and immediate effect is entirely unfounded, inasmuch as the contested decision correctly sets out how the concentration would have such an effect on the structure of competition within the common market and the EEA.

71 As regards the possibility of a conflict of jurisdiction with the South African authorities, the concentration at issue would have little effect on competition in South Africa since demand for platinum in that country is low. The Commission accordingly compares the proposed transaction with export cartels, which generally have no effect on the structure of competition within the home countries of the participant undertakings, and whose effects may even be regarded as beneficial by the authorities of those countries.

72 The German Government submits that the Regulation enables a proper assessment to be made of the compatibility of the notified concentration with the common market and the EEA. That analysis is consistent both with the principles of public international law and with the case-law of the Court of Justice on Article 85 of the Treaty.

73 First, the Regulation itself sets out rules regarding its extraterritorial scope. It is apparent from the 11th recital in the preamble, read in conjunction with Article 1(2)(b), that a conflict rule is laid down in relation to undertakings located outside the Community. The 11th recital envisages *inter alia* the application of the criterion laid down in Article 1(2)(b), namely the achievement by at least two of the undertakings involved in the concentration of an aggregate Community-wide turnover of more than ECU 250 million each, to concentrations effected by undertakings which do not have their principal fields of activities in the Community but which have substantial operations there. In the instant case, the transaction at issue meets the threshold fixed and the Commission has adequately demonstrated in its decision the effects of the concentration on the common market.

74 Secondly, as regards the consistency of that approach with public international law, the German Government states that both the conflict rule contained in the Regulation and its application in the present case fulfil the criteria arising from the 'effects doctrine', otherwise known as the principle of objective territoriality. The achievement by each of the two undertakings involved in the concentration of a turnover within the Community of at least ECU 250 million constitutes a sufficient connecting factor. Furthermore, the facts referred to by the Commission in its analysis of the impact of the concentration on the EEA confirm that the extraterritorial application of the Regulation is consistent with international law.

75 Thirdly, endorsing the relevant arguments put forward by the Commission, the German Government states that its interpretation of the Regulation is not inconsistent with the judgment in *Wood pulp*.

Findings of the Court

76 It is necessary first of all to reject the Commission's argument that, by notifying the concentration agreement for examination and by making clearance a condition precedent to its implementation, the applicant voluntarily submitted to the Commission's jurisdiction. Infringement of the obligations regarding notification and suspension laid down in Articles 4 and 7 of the Regulation for all concentrations with a Community dimension is punishable by severe financial penalties under Article 14. No voluntary submission whatever by the applicant to the jurisdiction of the Community can therefore be inferred from the notification of the concentration agreement or from the suspension of its implementation. Besides, in order for the Commission to assess whether a concentration is within its purview, it must first be in a position to examine that concentration, a fact which justifies requiring the parties to the concentration to notify the agreement. That obligation does not predetermine the question whether the Commission is competent to rule on the concentration.

77 In the instant case, two questions must be examined. It must be ascertained first whether the Regulation covers concentrations such as the one at issue and then, if it does, whether its application to concentrations of that kind is contrary to public international law on State jurisdiction.

1. Assessment of the territorial scope of the Regulation

78 The Regulation, in accordance with Article 1 thereof, applies to all concentrations with a Community dimension, that is to say to all concentrations between undertakings which do not each achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State, where the combined aggregate worldwide turnover of those undertakings is more than ECU 5 000 million and the aggregate Community-wide turnover of at least two of them is more than ECU 250 million.

79 Article 1 does not require that, in order for a concentration to be regarded as having a Community dimension, the undertakings in question must be established in the Community or that the production activities covered by the concentration must be carried out within Community territory.

80 With regard to the criterion of turnover, it must be stated that, as set out in paragraph 13 of the contested decision, the concentration at issue has a Community dimension within the meaning of Article 1(2) of the Regulation. The undertakings concerned have an aggregate worldwide turnover of more than ECU 10 000 million, above the ECU 5 000 million threshold laid down by the Regulation. Gencor and Lonrho each had a Community-wide turnover of more than ECU 250 million in the latest financial year. Finally, they do not each achieve

more than two-thirds of their aggregate Community-wide turnover within one and the same Member State.

81 The applicant's arguments to the effect that the legal bases for the Regulation and the wording of its preamble and substantive provisions preclude its application to the concentration at issue cannot be accepted.

82 The legal bases for the Regulation, namely Articles 87 and 235 of the Treaty, and more particularly the provisions to which they are intended to give effect, that is to say Articles 3(g) and 85 and 86 of the Treaty, as well as the first to fifth, ninth and eleventh recitals in the preamble to the Regulation, merely point to the need to ensure that competition is not distorted in the common market, in particular by concentrations which result in the creation or strengthening of a dominant position. They in no way exclude from the Regulation's field of application concentrations which, while relating to mining and/or production activities outside the Community, have the effect of creating or strengthening a dominant position as a result of which effective competition in the common market is significantly impeded.

83 In particular, the applicant's view cannot be founded on the closing words of the 11th recital in the preamble to the Regulation.

84 That recital states that 'a concentration with a Community dimension exists... where the concentrations are effected by undertakings which do not have their principal fields of activities in the Community but which have substantial operations there'.

85 By that reference, in general terms, to the concept of substantial operations, the Regulation does not, for the purpose of defining its territorial scope, ascribe greater importance to production operations than to sales operations. On the contrary, by setting quantitative thresholds in Article 1 which are based on the worldwide and Community turnover of the undertakings concerned, it rather ascribes greater importance to sales operations within the common market as a factor linking the concentration to the Community. It is common ground that Gencor and Lonrho each carry out significant sales in the Community (valued in excess of ECU 250 million).

86 Nor is it borne out by either the 30th recital in the preamble to the Regulation or Article 24 thereof that the criterion based on the location of production activities is well founded. Far from laying down a criterion for defining the territorial scope of the Regulation, Article 24 merely regulates the procedures to be followed in order to deal with situations in which non-member countries do not grant Community undertakings treatment comparable to that accorded by the Community to undertakings from those non-member countries in relation to the control of concentrations.

87 The applicant cannot, by reference to the judgment in *Wood pulp*, rely on the criterion as to the implementation of an agreement to support its interpretation of the territorial scope of the Regulation. Far from supporting the applicant's view, that criterion for assessing the link between an agreement and Community territory in fact precludes it. According to *Wood pulp*, the criterion as to the implementation of an agreement is satisfied by mere sale within the Community, irrespective of the location of the sources of supply and the production plant. It is not disputed that Gencor and Lonrho carried out sales in the Community before the concentration and would have continued to do so thereafter.

88 Accordingly, the Commission did not err in its assessment of the territorial scope of the Regulation by applying it in this case to a proposed concentration notified by undertakings whose registered offices and mining and production operations are outside the Community.

2. Compatibility of the contested decision with public international law

89 Following the concentration agreement, the previously existing competitive relationship between Implats and LPD, in particular so far as concerns their sales in the Community, would have come to an end. That would have altered the competitive structure within the common market since, instead of three South African PGM suppliers, there would have remained only two. The implementation of the proposed concentration would have led to the merger not only of the parties' PGM mining and production operations in South Africa but also of their marketing operations throughout the world, particularly in the Community where Implats and LPD achieved significant sales.

90 Application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community.

91 In that regard, the concentration would, according to the contested decision, have led to the creation of a dominant duopoly on the part of Amplats and Implats/LPD in the platinum and rhodium markets, as a result of which effective competition would have been significantly impeded in the common market within the meaning of Article 2(3) of the Regulation.

92 It is therefore necessary to verify whether the three criteria of immediate, substantial and foreseeable effect are satisfied in this case.

93 With regard, specifically, to the criterion of immediate effect, the words 'medium term' used in paragraphs 206 and 210 of the contested decision in relation to the creation of a dominant duopoly position are, contrary to the applicant's assertion, entirely unambiguous. They clearly refer to the time when it is envisaged that

Russian stocks will be exhausted, enabling a dominant duopoly on the part of Amplats and Implats/LPD to be created on the world platinum and rhodium markets and, by the same token, in the Community as a substantial part of those world markets.

94 That dominant position would not be dependent, as the applicant asserts, on the future conduct of the undertaking arising from the concentration and of Amplats but would result, in particular, from the very characteristics of the market and the alteration of its structure. In referring to the future conduct of the parties to the duopoly, the applicant fails to distinguish between abuses of dominant position which those parties might commit in the near or more distant future, which might or might not be controlled by means of Articles 85 and/or 86 of the Treaty, and the alteration to the structure of the undertakings and of the market to which the concentration would give rise. It is true that the concentration would not necessarily lead to abuses immediately, since that depends on decisions which the parties to the duopoly may or may not take in the future. However, the concentration would have had the direct and immediate effect of creating the conditions in which abuses were not only possible but economically rational, given that the concentration would have significantly impeded effective competition in the market by giving rise to a lasting alteration to the structure of the markets concerned.

95 Accordingly, the concentration would have had an immediate effect in the Community.

96 So far as concerns the criterion of substantial effect, it should be noted that, as held in paragraph 297 below, the Commission established to the requisite legal standard that the concentration would have created a lasting dominant duopoly position in the world platinum and rhodium markets.

97 The applicant cannot maintain that the concentration would not have a substantial effect in the Community in view of the low sales and small market share of the parties to the concentration in the EEA. While the level of sales in

western Europe (20% of world demand) and the Community market share of the entity arising from the concentration ((...)% in respect of platinum) were already sufficient grounds for the Community to have jurisdiction in respect of the concentration, the potential impact of the concentration proved even higher than those figures suggested. Given that the concentration would have had the effect of creating a dominant duopoly position in the world platinum and rhodium markets, it is clear that the sales in the Community potentially affected by the concentration would have included not only those of the Implats/LPD undertaking but also those of Amplats (approximately 35% to 50%), which would have represented a more than substantial proportion of platinum and rhodium sales in western Europe and a much higher combined market share held by Implats/LPD and Amplats (approximately (...)% to 65%).

98 Finally, it is not possible to accept the applicant's argument that the creation of the dominant position referred to by the Commission in the contested decision is not of greater concern to the Community than to any other competent body and is even of less concern to it than to others. The fact that, in a world market, other parts of the world are affected by the concentration cannot prevent the Community from exercising its control over a concentration which substantially affects competition within the common market by creating a dominant position.

99 The arguments by which the applicant denies that the concentration would have a substantial effect in the Community must therefore be rejected.

100 As for the criterion of foreseeable effect, it follows from all of the foregoing that it was in fact foreseeable that the effect of creating a dominant duopoly position in a world market would also be to impede competition significantly in the Community, an integral part of that market.

101 It follows that the application of the Regulation to the proposed concentration was consistent with public international law.

102 It is necessary to examine next whether the Community violated a principle of non-interference or the principle of proportionality in exercising that jurisdiction.

103 The applicant's argument that, by virtue of a principle of non-interference, the Commission should have refrained from prohibiting the concentration in order to avoid a conflict of jurisdiction with the South African authorities must be rejected, without it being necessary to consider whether such a rule exists in international law. Suffice it to note that there was no conflict between the course of action required by the South African Government and that required by the Community given that, in their letter of 22 August 1995, the South African competition authorities simply concluded that the concentration agreement did not give rise to any competition policy concerns, without requiring that such an agreement be entered into (see, to that effect, *Wood pulp*, paragraph 20).

104 In its letter of 19 April 1996 the South African Government, far from calling into question the Community's jurisdiction to rule on the concentration at issue, first simply expressed a general preference, having regard to the strategic importance of mineral exploitation in South Africa, for intervention in specific cases of collusion when they arose and did not specifically comment on the industrial or other merits of the concentration proposed by Gencor and Lonrho. It then merely expressed the view that the proposed concentration might not impede competition, having regard to the economic power of Amplats, the existence of other sources of supply of PGMs and the opportunities for other producers to enter the South African market through the grant of new mining concessions.

105 Finally, neither the applicant nor, indeed, the South African Government in its letter of 19 April 1996 have shown, beyond making mere statements of principle, in what way the proposed concentration would affect the vital economic and/or commercial interests of the Republic of South Africa.

106 As regards the argument that the Community cannot claim to have jurisdiction in respect of a concentration on the basis of future and hypothetical behaviour, namely parallel conduct on the part of the undertakings operating in the relevant market where that conduct might or might not fall within the competence of the Community under the Treaty, it must be stated, as pointed out above in connection with the question whether the concentration has an immediate effect, that, while the elimination of the risk of future abuses may be a legitimate concern of any competent competition authority, the main objective in exercising control over concentrations at Community level is to ensure that the restructuring of undertakings does not result in the creation of positions of economic power which may significantly impede effective competition in the common market. Community jurisdiction is therefore founded, first and foremost, on the need to avoid the establishment of market structures which may create or strengthen a dominant position, and not on the need to control directly possible abuses of a dominant position.

107 Consequently, it is unnecessary to rule on the question whether the letter of 22 August 1995 from the South African Competition Board constituted a definitive position on the concentration, on whether or not the South African Government was an authority responsible for competition matters and, finally, on the scope of South African competition law. There is accordingly no need to grant the application for measures of organisation of procedure or of inquiry made by the applicant in its letter of 3 December 1996.

108 In those circumstances, the contested decision is not inconsistent with either the Regulation or the rules of public international law relied on by the applicant.

109 For the same reasons, the objection, based on Article 184 of the Treaty, that the Regulation is unlawful because it confers upon the Commission competence in respect of the concentration between Gencor and Lonrho must be rejected.

110 As regards the reasoning in the contested decision justifying Community jurisdiction to apply the Regulation to the concentration, it must be held that the explanations contained in paragraphs 4, 13 to 18, 204 to 206, 210 and 213 of the contested decision satisfy the obligations incumbent on the Commission under Article 190 of the Treaty to give reasons for its decisions so as to enable the Community judicature to exercise its power of review, the parties to defend their rights and any interested party to ascertain the conditions in which the Commission applied the Treaty and its implementing legislation.

111 Accordingly, both pleas of annulment which have been examined must be rejected, without it being necessary to grant the application for measures of organisation of procedure or of inquiry made by the applicant in its letter of 3 December 1996.

II — *The pleas alleging infringement of Article 2 of the Regulation, in that the Commission is not empowered to prevent concentrations which create or strengthen a collective dominant position, and infringement of Article 190 of the Treaty*

Arguments of the applicant

112 The applicant maintains that the creation or strengthening of a collective dominant position cannot be prohibited under the Regulation.

113 It is clear from an examination of the wording of the Regulation that the concept of collective dominance is excluded from its scope. Unlike Article 86 of the Treaty, Article 2(3) of the Regulation makes no reference at all to the concept of a collective dominant position. Consequently, the Commission has no power to prohibit a concentration on that ground.

114 Moreover, the 15th recital in the preamble to the Regulation, which states that there is an indication of compatibility with the common market in particular where the market share of the *undertakings concerned* does not exceed 25%, suggests that the Regulation rules out the possibility of preventing a concentration on the ground that it creates a collective dominant position. In oligopolistic markets, a concentration between two of the participants need not result in the creation of a merged entity with a market share exceeding 25%. The participants in the alleged collective dominant position who are not involved in the concentration cannot be regarded as 'undertakings concerned' within the meaning of the Regulation.

115 The applicant refers to the legislative history of the Regulation and observes that the issue of collective dominance was debated at the time of its adoption. The fact that it does not cover oligopolies is not, therefore, the result of an oversight but a deliberate omission, inasmuch as the Member States within the Council did not reach agreement on that issue. In that context, it would be inappropriate and unnecessary to interpret the Regulation in a manner that was irreconcilable with the outcome of the intense negotiations conducted within the Council at the time of its adoption.

116 In the United Kingdom, Germany and France, merger control provisions specifically cover collective dominance, in sharp contrast to the Regulation. In addition, those systems provide for a special procedure involving all the companies alleged to be part of the oligopoly.

117 An interpretation of Article 2(3) of the Regulation which embraced collective dominance would create two particular legal problems by violating fundamental principles of the EC Treaty, namely the principle of legal certainty and the procedural rights of third parties.

118 Such an interpretation would be inconsistent with the principle of legal certainty in view, in particular, of the penalties which may be imposed on undertakings under the Regulation.

119 As regards the procedural rights of third parties, the applicant states that while, in practice, the Commission consults third parties in the relevant market in the course of the procedure and permits them to make observations and attend the hearing, they do not have the same rights or receive the same treatment as the undertakings involved in the concentration; this shows that the Regulation does not cover situations of collective dominance.

120 It is important to apply the Regulation strictly in accordance with its terms in the case of concentrations which only concern activities carried on within the territory of a non-member country, particularly where the government of that country urges, as the South African Government has done in the present case, that collusion should be controlled when it occurs rather than by anticipation.

121 The applicant notes that, in Decision 92/553/EEC of 22 July 1992 relating to a proceeding under Council Regulation (EEC) No 4064/89 (Case No IV/M.190 — Nestlé/Perrier) (OJ 1992 L 356, p. 1; 'the Nestlé-Perrier Decision'), the Commission stated when interpreting Article 2 of the Regulation that the fundamental objective, laid down in Article 3(g) of the Treaty, of ensuring that competition in the internal market is not distorted, would be jeopardised by the absence of any control of concentrations creating and/or strengthening a collective dominant position. According to the applicant, the Commission accepted in its 16th Report on Competition Policy that no such risk existed. In

that report, the Commission considered that it could use Article 86 of the Treaty to control abuses on the part of undertakings in a collective dominant position. In any event, the Commission's powers are defined in the instant case by the Regulation and not by a general policy objective of preventing potentially anti-competitive behaviour. The Commission's powers thus arise only where the concentration creates or strengthens a dominant position, thereby impeding effective competition, and not where it merely might impede effective competition.

122 Finally, the application of the Regulation to a concentration resulting in the creation of a collective dominant position without any reasoning as to the legal basis for doing so constitutes an infringement of Article 190 of the Treaty.

Findings of the Court

123 Article 2(3) of the Regulation provides:

'A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.'

124 The question thus arises as to whether the words 'which creates or strengthens a dominant position' cover only the creation or strengthening of an individual dominant position or whether they also refer to the creation or strengthening of a collective dominant position, that is to say one held by two or more undertakings.

125 It cannot be deduced from the wording of Article 2 of the Regulation that only concentrations which create or strengthen an individual dominant position, that is to say a dominant position held by the parties to the concentration, come within the scope of the Regulation. Article 2, in referring to 'a concentration which creates or strengthens a dominant position', does not in itself exclude the possibility of applying the Regulation to cases where concentrations lead to the creation or strengthening of a collective dominant position, that is to say a dominant position held by the parties to the concentration together with one or more undertakings not party thereto (*France and Others* v *Commission*, cited above, paragraph 166).

126 The applicant is not correct in its submission that, since other, national, systems contained specific provisions for the control of concentrations resulting in the creation or strengthening of collective dominant positions at the time when the Regulation was adopted, the deliberate choice of the Council not to enact such a provision in that regulation necessarily means that it does not cover situations of collective dominance. The choice of neutral wording of the kind found in Article 2(3) of the Regulation does not automatically exclude from its field of application the creation or strengthening of a collective dominant position.

127 Finally, it should be noted that, however specific they may be, the national laws which were applicable to the creation or strengthening of a collective dominant position before the Regulation entered into force can no longer be applied to such concentrations, in accordance with Article 21(2) of the Regulation. If the applicant's argument were followed, it would thus be necessary to accept that all the Member States whose systems for the control of concentrations applied to the creation or strengthening of collective dominant positions, that is to say France, Germany and the United Kingdom amongst others, have abandoned that form of control so far as concerns concentrations with a Community dimension. In the absence of clear indications to that effect, it cannot be assumed that such was the will of the Member States.

128 As regards the applicant's arguments relating to the legislative history of the Regulation, it is necessary, when interpreting a legislative measure, to attach less importance to the position taken by one or other Member State when the measure was drawn up than to its wording and objectives.

129 The legislative history cannot itself be considered to express clearly the intention of the authors of the Regulation as to the scope of the term 'dominant position'. In those circumstances, it provides no assistance for the interpretation of the disputed concept (*France and Others* v *Commission*, paragraph 167, and the judgment cited).

130 In any event, the fact that, after the adoption of the Regulation, certain Member States, in particular France, contested the view that it could apply to collective dominant positions cannot mean that it does not cover situations of that kind. Since the Member States are not bound by positions which they may have accepted at the time of the debate within the Council, the possibility cannot be ruled out that one of them may change its view after the adoption of a legislative measure or simply decide to raise the question of its legality before the Community judicature.

131 It is necessary, therefore, to interpret the Regulation, in particular Article 2 thereof, on the basis of its general scheme.

132 The applicant's argument that the scheme of the Regulation precludes its application to situations of collective dominance must be examined. The applicant maintains that such application would appear to be precluded by the reference to the 25% threshold in the 15th recital in the preamble to the Regulation.

133 That recital states:

'... concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market;... without prejudice to Articles 85 and 86 of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25% either in the common market or in a substantial part of it'.

134 As the Commission rightly points out, the reference to a 25% threshold for market share cannot justify a restrictive interpretation of the Regulation. Since oligopolistic markets in which one of the jointly dominant undertakings has a market share of less than 25% are relatively rare, that reference cannot remove cases of joint dominance from the scope of the Regulation. It is more common to find oligopolistic markets in which the dominant undertakings hold market shares of more than 25%. Thus, the market structures which encourage oligopolistic conduct most are those in which two, three or four suppliers each hold approximately the same market share, for example two suppliers each holding 40% of the market, three suppliers each holding between 25% and 30% of the market, or four suppliers each holding approximately 25% of the market. All those structures are consistent with the 25% threshold set in the 15th recital in the preamble to the Regulation.

135 Furthermore, that threshold is given purely by way of guidance, as is indeed made clear by the 15th recital itself, and it is not incorporated in any way in the provisions of the Regulation (*France and Others* v *Commission*, cited above, paragraph 176).

136 Accordingly, the interpretation of Article 2(3) of the Regulation in the light of the 15th recital in its preamble cannot substantiate the applicant's view that the Regulation is not applicable to collective dominant positions.

137 It is appropriate to consider next the applicant's argument regarding the principle of legal certainty and the right to be heard.

138 The applicant takes the view that, having regard in particular to the penalties which may be imposed on undertakings under the Regulation, it would be inconsistent with the principle of legal certainty to strain the ordinary meaning of Article 2(3) and extend its scope to situations of collective dominance.

139 The issue actually raised by the plea being examined is whether the correct interpretation of the Regulation is that advocated by the Commission. If it is, the decision is lawful from that point of view and the principle of legal certainty is not infringed. If, on the other hand, the true interpretation of the Regulation is that put forward by the applicant, the decision is unlawful for lack of competence, in which case there is no need to decide whether the principle of legal certainty may have been infringed.

140 Accordingly, the applicant's argument is misconceived.

141 As regards observance of the right to be heard, Article 18 of the Regulation provides:

'1. Before taking any decision provided for in Article 7(2) and (4), Article 8(2), second subparagraph, and (3) to (5), and Articles 14 and 15, the Commission shall give the persons, undertakings and associations of undertakings concerned the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them.

...

3. The Commission shall base its decision only on objections on which the parties have been able to submit their observations. The rights of the defence shall be fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets.

4. In so far as the Commission or the competent authorities of the Member States deem it necessary, they may also hear other natural or legal persons. Natural or legal persons showing a sufficient interest and especially members of the administrative or management bodies of the undertakings concerned or the recognised representatives of their employees shall be entitled, upon application, to be heard.'

142 Contrary to the applicant's submissions, those provisions do not automatically prevent members of the oligopoly which are not party to the concentration from being able to enjoy the same rights in terms of being heard as the undertakings which are.

143 Under the scheme of Article 18 of the Regulation, the level of protection conferred on a given undertaking as regards its right to be heard depends only on whether it is treated as an undertaking concerned, a party directly involved or a third party with a sufficient interest, a question which, in turn, depends on whether the decision which the Commission proposes to adopt is liable to affect it adversely. It follows that if the undertakings which are members of the oligopoly but not party to the concentration were to be regarded as parties directly involved, they would enjoy the same procedural rights as the undertakings party to the concentration.

144 If, on the other hand, the decision of the Commission was not such as to have an adverse effect on the undertakings not party to the concentration, they would have the right to be heard in so far as they were able to show a sufficient interest, in accordance with Article 18(4) of the Regulation, an approach which would be consistent with the case-law of the Court of Justice and the Court of First Instance on the procedural rights of third parties.

145 Even assuming that a finding by the Commission that a proposed concentration creates or strengthens a collective dominant position on the part of the undertakings concerned and a third party may in itself adversely affect that third party, it must be borne in mind that observance of the right to be heard is, in all proceedings liable to culminate in a measure adversely affecting a particular person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure (see, to that effect, Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, Case C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, paragraph 21, and *France and Others* v *Commission*, cited above, paragraph 174).

146 Given the existence of that principle, the fact that the Community legislature did not expressly provide in the Regulation for a procedure safeguarding the right to be heard of third party undertakings alleged to hold a collective dominant position together with the undertakings involved in the concentration cannot be regarded as decisive evidence of the Regulation's inapplicability to collective dominant positions (*France and Others* v *Commission*, paragraph 175).

147 It follows that the argument regarding the procedural rights of third parties cannot be accepted.

148 Since the interpretations of the Regulation, and in particular Article 2 thereof, based on their wording and the history and the scheme of the Regulation do not permit their precise scope to be assessed as regards the type of dominant position

concerned, the legislation in question must be interpreted by reference to its purpose (see, to that effect, Case 11/76 *Netherlands* v *Commission* [1979] ECR 245, paragraph 6, Joined Cases C-267/95 and C-268/95 *Merck and Others* v *Primecrown and Others* and *Beecham* v *Europharm* [1996] ECR I-6285, paragraphs 19 to 25, and *France and Others* v *Commission*, cited above, paragraph 168).

149 As is apparent from the first five recitals in its preamble, the principal objective set for the Regulation, with a view to achieving the aims of the Treaty and especially of Article 3(f) thereof (Article 3(g) following the entry into force of the Treaty on European Union), is to ensure that the process of reorganising undertakings as a result in particular of the completion of the internal market does not inflict lasting damage on competition. The final part of the fifth recital accordingly states that 'Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it' (see, to that effect, *France and Others* v *Commission*, paragraph 169).

150 Furthermore, it follows from the sixth, seventh, tenth and eleventh recitals in the preamble to the Regulation that it, unlike Articles 85 and 86 of the Treaty, is intended to apply to all concentrations with a Community dimension in so far as, because of their effect on the structure of competition within the Community, they may prove incompatible with the system of undistorted competition envisaged by the Treaty (*France and Others* v *Commission*, paragraph 170).

151 A concentration which creates or strengthens a dominant position on the part of the parties to the concentration with an entity not involved in the concentration is liable to prove incompatible with the system of undistorted competition laid down by the Treaty. Consequently, if it were accepted that only concentrations creating or strengthening a dominant position on the part of the parties to the concentration were covered by the Regulation, its purpose as indicated by the abovementioned recitals would be partially frustrated. The Regulation would thus be deprived of a not insignificant aspect of its effectiveness, without that being necessary from the perspective of the general structure of the Community system of control of concentrations (*France and Others* v *Commission*, paragraph 171).

152 The arguments regarding, first, the fact that the Regulation is capable of being applied to concentrations between undertakings whose main place of business is not in the Community and, secondly, the possibility that the Commission could control the anti-competitive behaviour of members of an oligopoly by means of Article 86 of the Treaty, are not capable of calling into question the applicability of the Regulation to cases of collective dominance resulting from a concentration.

153 As regards the first of those arguments, the applicability of the Regulation to collective dominant positions cannot depend on its territorial scope.

154 So far as concerns the possibility of applying Article 86 of the Treaty, it cannot be inferred therefrom that the Regulation does not apply to collective dominance, given that the same reasoning would hold for cases of dominance by a single undertaking, which would lead to the conclusion that the Regulation is not necessary at all.

155 Furthermore, since only the strengthening of dominant positions and not their creation can be controlled under Article 86 of the Treaty (*Europemballage and Continental Can*, cited above, paragraph 26), the effect of the Regulation not applying to concentrations creating a dominant position would be to create a gap in the Community system for the control of concentrations which would be liable to undermine the proper functioning of the common market.

156 It follows from the foregoing that collective dominant positions do not fall outside the scope of the Regulation, as the Court of Justice indeed itself held, subsequent to the hearing of 18 February 1998, in *France and Others* v *Commission* (paragraph 178).

157 Accordingly, the Commission was not required to include in the contested decision any reasoning on the applicability of the Regulation to collective dominant positions, in particular as it had already expressed its view on that subject both in the annual reports on competition policy and in other concentration cases, including the Nestlé-Perrier decision. Thus, the ground of challenge alleging infringement of the obligation to state reasons laid down by Article 190 of the Treaty is not founded.

158 The pleas under consideration must therefore be rejected.

III — *The pleas alleging infringement of Article 2 of the Regulation, in that the Commission wrongly found that the concentration would create a collective dominant position, and infringement of Article 190 of the Treaty*

A — *The contested decision*

159 In order to conclude that a collective dominant position between Implats/LPD and Amplats would be created as a result of which effective competition would be significantly impeded within the common market (paragraph 219 of the contested decision), the Commission made the following findings in particular (paragraphs 74 to 214):

— despite the fact that PGMs (platinum, palladium, rhodium, iridium, ruthenium and osmium) occur naturally together in the same ore body, they are not sufficiently interchangeable to be considered to form a single product market and therefore each PGM by itself constitutes a product market;

— PGMs are high-value goods sold throughout the world on the same terms and there is thus an integrated world market for each PGM;

— the world platinum and rhodium markets are characterised by product homogeneity, high market transparency, price-inelastic demand in the current price range, moderate growth in demand, mature production technology, high entry barriers, a high level of concentration of undertakings, financial links and contacts between suppliers on a number of markets, a lack of negotiating power for purchasers, and a low level of competition with only a few elements of competition in the past;

— following the concentration, Implats/LPD and Amplats would each hold approximately a 35% share of the world platinum market (a combined market share of approximately 70%) which, following the anticipated exhaustion of Russian stocks in two years, would rise to 40% each (a combined market share of approximately 80%), and each would hold 50% of a combined 89% share of estimated world PGM reserves;

— following the concentration, Implats/LPD and Amplats would have similar cost structures;

— the concentration would definitively remove the competitive threat previously posed by LPD in the market;

— following the concentration, Russia would be only a minor player in the market;

— the marginal sources of supply, that is to say suppliers outside the oligopoly, recycling undertakings, holders of stocks other than the Russian stocks and the substitution of palladium for platinum, would not be able to thwart the economic power of the duopoly comprising Implats/LPD and Amplats;

— new entrants in the platinum and rhodium markets were unlikely.

B — *General considerations*

160 The applicant claims that the evidence and reasoning in the contested decision are not sufficient to justify a finding of collective dominance in the present case, nor do they meet the standard of reasoning required by the case-law on Article 190 of the Treaty.

161 It maintains that, if the Commission had correctly applied the criteria previously used in its decision-making practice to the objective characteristics of the markets for platinum and rhodium, it would not have come to the conclusion that the concentration would result in the creation of a collective dominant position.

162 It should be borne in mind that, in accordance with Article 2(3) of the Regulation, a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it is to be declared incompatible with the common market.

163 In assessing whether there is a collective dominant position, the Commission is therefore obliged to establish, using a prospective analysis of the relevant market, whether the concentration in question would lead to a situation in which effective competition in the relevant market would be significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, in particular because of factors giving rise to a connection between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers and, ultimately, of consumers (*France and Others* v *Commission*, paragraph 221).

164 In that connection, the basic provisions of the Regulation, in particular Article 2 thereof, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature (*France and Others* v *Commission*, paragraph 223).

165 Consequently, 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 (*France and Others* v *Commission*, paragraph 224).

166 The various arguments relied on by the applicant must be examined in the light of those considerations.

C — *Alleged joint control of Gencor and Lonrho over LPD before the concentration*

Arguments of the parties

167 The applicant claims that the Commission seems to have failed to give sufficient weight to all the evidence submitted to it concerning the situation prior to the concentration, when the applicant and Lonrho had joint control of LPD. The factors which led the Commission to conclude that the proposed concentration would be incompatible with the common market already existed before the proposal. It is therefore difficult to understand what difference the concentration would have made to the level of competition in the common market or in a substantial part of it.

168 The Commission maintains that, contrary to the applicant's assertion, LPD was not jointly controlled by Gencor and Lonrho prior to the proposed concentration. According to the Commission, the applicant's statement runs counter to its assertion in the parties' reply to the statement of objections, namely that Implats and LPD were entirely separate entities and that Implats' involvement in LPD was solely as a minority shareholder.

Findings of the Court

169 In paragraphs 114 to 121 and 186 to 191 of the contested decision, the Commission analysed in detail the structural links existing between Implats and LPD before the concentration and the impact of the concentration on the structure of competition in the platinum market. According to the contested decision, the existence of those links did not prevent LPD from remaining an

independent competitor of Implats, but that independence would have been lost after the concentration.

170 It is therefore necessary to examine whether the concentration was liable to alter significantly the degree of influence which the applicant could exercise over LPD, and thereby the conditions and structure of competition in the platinum and rhodium markets, or whether, since the concentration made no substantial alteration to the pre-existing market structure, the Commission should have approved it.

171 Under clause 8.2 of the Principals' Agreement, the day-to-day management and ordinary control of the activities and business of Eastplats and Westplats, that is to say of LPD, are exclusively controlled by Lonrho through its subsidiary LMS.

172 That clause stipulates:

'The ordinary and day-to-day management and control of the business, undertaking and affairs of each of the companies will vest in LMS in terms of the management agreements and the parties shall procure that on the signature date, the companies will conclude the management agreements with LMS pursuant to which such management of the affairs of the companies will be carried out by LMS. LSA [Lonrho South Africa] shall procure that LMS shall inform the board of each of the companies regularly and fully regarding all material aspects of the business of each of the companies by means of (*inter alia*) monthly management accounts.'

173 Moreover, according to clause 8.5 of the Principals' Agreement, the marketing and the sale of LPD's production are also subject to the exclusive control of Lonrho through its subsidiary Western Metal Sales (paragraph 117 of the contested decision).

174 That clause states:

'The production of WPL [Westplats] and EPL [Eastplats], including the production of the mining operation acquired by WPL in terms of the main agreement, will be marketed and sold through the agency of WMS [Western Metal Sales]...'

175 In addition, clause 6.3 provides that 'for so long as the Lonrho Group holds in the aggregate 50% or more of the issued share capital of each of the companies, the chairman and managing director of each of the companies from time to time and the chairman of board meetings shall be a director appointed by LSA'. In that regard, it is not disputed that LMS, as the provider of management services to LPD, was in the powerful and privileged position of both knowing and running LPD's business and strongly influencing the outcome of all its business decisions (paragraph 118 of the contested decision).

176 Furthermore, the fact that the Gencor group exercised no influence over LPD's competitive strategies is borne out by the parties to the concentration themselves in their reply to the statement of objections (see Appendix 5 to the reply of Gencor and Lonrho to the statement of objections, fourth paragraph of the section headed 'Paragraphs 6, 7 and 8: control of LPD by Gencor and Lonrho'), where they assert that 'each of Implats and LPD were, and to date remain, entirely separate entities, managed individually on a day-to-day basis by their respective management with no reference to each other' and that 'Implats' interest in LPD was and remains... that of a 27% shareholder in LPD' (paragraph 118 of the contested decision). It is also borne out by clause 17 of the Principals' Agreement, which provides: 'The relationship of the shareholders [the Gencor and Lonrho groups], *inter se*, shall be governed by the terms of this agreement

and nothing contained herein shall be deemed to constitute a partnership, joint venture or the like...'.

177 Finally, it is not disputed, first, that LPD and Implats, by retaining separate marketing departments, competed with each other before the concentration and sold their products to certain common customers on different terms, for example as to the discounts offered (paragraph 117 of the contested decision) and, secondly, that during the past decade LPD had, with Russia, been the main element of competition in the market (paragraphs 174 to 177 of the contested decision).

178 It follows that Lonrho was able to control by itself, without the agreement of Gencor, a very important aspect of LPD's competitive strategy, namely its marketing policy.

179 After the concentration, however, that aspect of LPD's commercial policy would no longer have been under Lonrho's exclusive control, but under the joint control of Lonrho and Gencor. The transaction would have led to the absorption of Western Metal Sales and LMS by the new entity and to all the mining, processing, refining and marketing activities being brought together within Implats/LPD under single management (paragraphs 120 and 186 of the contested decision).

180 Accordingly, contrary to the applicant's submissions, the concentration was liable to alter significantly LPD's prospects of competing with regard to the marketing of PGMs.

181 So far as concerns production policy, the following clauses of the Principals' Agreement provided that decisions concerning any major investment beyond the programme already approved as well as the annual strategic plan and budget for each of the companies comprising LPD were subject to the prior agreement of Gencor and Lonrho:

'6.1 LSA and Implats shall have equal representation and voting powers on the boards of the companies...

...

8.3 Any further major investment above the already approved programme in relation to the business of any of the companies including the financing thereof and major divestment decisions will be a matter for agreement between the shareholders. Should the shareholders fail to agree on any such matter, the shareholders will seek the views of a mutually acceptable independent expert whose views will be taken into account.

8.4 Notwithstanding anything contained in the articles of association of each of the companies, the powers and functions of the board of each of the companies shall be the consideration and, as appropriate, approval of the following:

...

8.4.3 the annual strategic plan and budget for each of the companies'.

182 It is common ground that Lonrho may, without Gencor's support, increase LPD's current output level by up to a maximum of (...) ounces per annum from existing shafts and through other incremental expansions achieved by continual process improvements and relieving supply-line bottlenecks (paragraph 5.1 of the report drawn up in March 1996 by National Economic Research Associates, economic consultants; 'the NERA Report').

183 However, the applicant claims that the concentration would not have altered its potential to block future expansion of LPD's production capacity above that amount, given that, under the Principals' Agreement, its agreement was already needed for any major investment, including the investment necessary in order to expand the mine shaft known as (...). In its view, its rights of veto over the annual strategic plan and annual budgets enabled it to prevent LPD from obtaining the necessary funding (whether bank borrowings or customer finance) for developing the (...) shaft (NERA Report, paragraph 5.1).

184 It should be noted that, according to information provided by the parties and the analysis submitted by R.W. Rowland, the former chairman of Lonrho, LPD's planned development could, despite its debt, be financed through internally generated funds and that it was foreseen that limited additional capital expenditure would allow LPD to expand its production to 900 000 ounces per annum (end of paragraph 115 and paragraphs 121 and 191 of the contested decision). (...)

185 Under the final sentence of clause 8.3 of the Principals' Agreement, if Gencor and Lonrho disagreed as to the future expansion of LPD, they were to seek the views of an independent expert. It follows that, as the Commission points out, Gencor could not, for reasons unconnected with the proper operation of the undertaking, indefinitely block investment decisions which were necessary for the expansion of LPD's production capacity and liable to benefit all the shareholders (paragraph 191 of the contested decision).

186 Following the concentration, however, that kind of conflict of interests was less likely to occur, given the change in the parties' financial interests.

187 Before the concentration, Gencor controlled Implats and held a minority 27% stake in LPD which was coupled with the Principals' Agreement. Lonrho held 73% of LPD's capital but did not have any holding in Implats. In those circumstances, while it could have been in Gencor's interest before the concentration to impose decisions advantageous to the development of the operations which it controlled by itself (and which proportionately yielded a higher profit), that is to say the operations of Implats, if necessary to the detriment of LPD, that was not true for Lonrho whose sole interest objectively was the most rational development of the operations of its subsidiary LPD, since it operated in the PGM markets solely through LPD.

188 By contrast, that situation would have been liable to change radically following the concentration, inasmuch as both Gencor and Lonrho would have held identical shareholdings in the new entity Implats/LPD and would thus have been likely to share the same financial objectives and interests, at least as regards strategic decisions relating to the development of the new entity. In other words, the concentration was therefore liable to alter the balance of interests of the two main shareholders in LPD by bringing about greater convergence between the views of Gencor and Lonrho as regards, in particular, the development of the production capacity of the new entity, and thereby allow a duopolistic structure comprising, Gencor and Lonrho, on the one hand, and Amplats, on the other, to be created.

189 That conclusion is indeed confirmed by the parties themselves.

190 Paragraph 187 of the contested decision states:

'... As noted in the circular to the Lonrho shareholders prepared for the merger:

"Implats and Lonrho have in the past been unable to reach agreement on a number of issues including plans proposed by Lonrho to expand LPD's operations. The directors believe that following the merger, the interests of both Lonrho and Gencor in enhancing the value of the enlarged Implats will be aligned to both shareholders' benefit."'

191 Paragraph 188 goes on to state:

'Furthermore, according to projections presented to (...), the alignment of interests following the merger will involve the scaling back of expansion plans, thus leading to higher prices compared to a situation where the merger did not go ahead and both companies continued with their existing future planning. In particular (...) has been presented with two different production scenarios outlining the impact on production of Implats and LPD, if the merger were to be implemented or, respectively, not implemented:

(a) (...)

(b) (...)'

192 Finally, paragraph 189 states that (...) believed in particular, according to the report entitled (...) of August 1994, that there would be two main benefits on the market side from the concentration (in addition to possible cost savings):

'(...) maintaining current production levels (...) should positively influence (...) prices'; and, furthermore,

'(...) the merged group (...) will have a higher market capitalisation than the underlying value of the merged entities. This is due to its size and ability to exert greater influence in the market.'

193 In those circumstances, the Commission was justified, despite the structural links between the applicant and Lonrho under the Principals' Agreement, in considering that the proposed concentration would remove definitively the competitive threat posed by LPD to the high-cost operations of Implats and Amplats, as regards both marketing and production, and thus have a substantial effect on the pre-existing market structure.

194 The ground of challenge under consideration must therefore be rejected.

D — *The Commission's categorisation of the collective dominant position*

1. The market share criterion

Arguments of the parties

195 The applicant observes that the parties' shares of the world platinum market on which the Commission relied are respectively (...)% (for Implats) and (...)% (for LPD), representing a combined market share of (...)%. In the Community market, those shares amounted respectively to (...)% (LPD), (...)% (Implats) and (...)% (combined share). However, in other merger control cases in which collective dominance was found, such as those giving rise to the Nestlé-Perrier Decision and to Commission Decision 94/449/EC of 14 December 1993 relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89 (Case No IV/M.308 — Kali + Salz/MdK/Treuhand) (OJ 1994 L 186, p. 38; 'the Kali und Salz Decision'), the combined market shares were substantially higher than in the present case, yet the Commission allowed those concentrations to proceed.

196 In the Nestlé-Perrier case, Nestlé and BSN had a combined market share of 82% of the market at issue, namely the French mineral water market (paragraph 119 of that decision). The concentration was cleared subject to compliance with certain conditions.

197 In the Kali und Salz case, the market share of Kali und Salz increased from 17% to 25% of the Community market excluding Germany and resulted in a *de facto* monopoly consisting in a 98% share of the German market which was considered to be a relevant geographical market in its own right. Again, the concentration was conditionally cleared by the Commission.

198 The Commission maintains that the comparison made by the applicant between the market shares of the parties to the concentration and the aggregate market share of all the members of the oligopoly in the Nestlé-Perrier case (82%) is incorrect, as is the comparison drawn with the Kali und Salz case.

Findings of the Court

199 The prohibition enacted in Article 2(3) of the Regulation reflects the general objective assigned by Article 3(g) of the Treaty, namely the establishment of a system ensuring that competition in the common market is not distorted (first and seventh recitals in the preamble to the Regulation). The prohibition relates to concentrations which create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it.

200 The dominant position referred to is concerned with a situation where one or more undertakings wield economic power which would enable them to prevent effective competition from being maintained in the relevant market by giving them the opportunity to act to a considerable extent independently of their competitors, their customers and, ultimately, of consumers.

201 The existence of a dominant position may derive from several factors which, taken separately, are not necessarily decisive. Among those factors, the existence of very large market shares is highly important. Nevertheless, a substantial market share as evidence of the existence of a dominant position is not a constant factor. Its importance varies from market to market according to the structure of those markets, especially so far as production, supply and demand are concerned (*Hoffmann-La Roche*, cited above, paragraphs 39 and 40).

202 In addition, the relationship between the market shares of the undertakings involved in the concentration and their competitors, especially those of the next largest, is relevant evidence of the existence of a dominant position. That factor enables the competitive strength of the competitors of the undertaking in question to be assessed (*Hoffmann-La Roche*, paragraph 48).

203 Accordingly, the fact that the Commission has relied in other concentration cases on higher or lower market shares in support of its assessment as to whether a collective dominant position might be created or strengthened cannot bind it in its assessment of other cases concerning, in particular, markets in which the structure of supply and demand and the conditions of competition are different.

204 Thus, since there is no reliable evidence that the mineral water market and/or the potash market examined in the Nestlé-Perrier case and the Kali und Salz case, on the one hand, and the platinum and rhodium market under consideration in this case, on the other, have fundamentally similar characteristics, the applicant cannot rely on any differences in the market shares held by the members of the oligopoly which were taken into account by the Commission in one or other of those two cases in order to call into question the market-share threshold adopted as indicative of a collective dominant position in this case.

205 Furthermore, although the importance of the market shares may vary from one market to another, the view may legitimately be taken that very large market shares are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position (Case C-62/86 *Akzo* v *Commission* [1991] ECR I-3359, paragraph 60). An undertaking which has a very large market share and holds it for some time, by means of the volume of production and the scale of the supply which it stands for — without those having much smaller market shares being able rapidly to meet the demand from those who would like to break away from the undertaking which has the largest market share — is in a position of strength which makes it an unavoidable trading partner and which, already because of this, secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position (*Hoffmann-La Roche*, paragraph 41).

206 It is true that, in the context of an oligopoly, the fact that the parties to the oligopoly hold large market shares does not necessarily have the same significance, compared to the analysis of an individual dominant position, with regard to the opportunities for those parties, as a group, to act to a considerable extent independently of their competitors, their customers and, ultimately, of consumers. Nevertheless, particularly in the case of a duopoly, a large market share is, in the absence of evidence to the contrary, likewise a strong indication of the existence of a collective dominant position.

207 In the instant case, as the Commission stated in the contested decision (paragraphs 81 and 181), Implats/LPD and Amplats would, following the concentration, each have had a market share of about 30% to 35%, that is to say a combined market share of approximately 60% to 70%, in the world PGM market and approximately 89% of the world PGM reserves. Russia had a 22% market share and about 10% of world reserves, the North American producers held a 5% market share and 1% of world reserves, and the recycling undertakings had a 6% market share. It was probable that, after Russia had disposed of its stocks, that is to say in all likelihood in the two years following the contested decision, Implats/LPD and Amplats would each have had a market

share of about 40%, that is to say a combined market share of 80%, which would have constituted a very large market share.

208 Thus, having regard to the allocation of market share between the parties to the concentration and to the gap in market share which would open up following that concentration between, on the one hand, the entity arising from the merger and Amplats and, on the other, the remaining platinum producers, the Commission was entitled to conclude that the proposed concentration was liable to result in the creation of a dominant position for the South African undertakings.

209 The comparison drawn by the applicant between the market shares of the parties to the concentration and the aggregate market share of all the members of the oligopoly in the Nestlé-Perrier case (82%) is incorrect. As the Commission has pointed out, it would be necessary to compare the 82% share with the aggregate market share of the parties to the concentration and Amplats after the virtual elimination of the Russian producer (Almaz) as a significant influence on the market, that is to say a total of approximately 80%. So far as concerns the Kali und Salz case, the applicant was likewise wrong in comparing the market shares of the parties to the concentration in the instant case with those of Kali und Salz and MdK (98%) in Germany, where collective dominance was not an issue. In the Kali und Salz case, the Commission found that a collective dominant position existed on the European market excluding Germany, where the undertaking resulting from the merger together with the other member of the duopoly held an aggregate market share of about 60%. The applicant thus should have made a comparison with the latter figure, which is markedly lower than the combined market share of Amplats and Implats/LPD following the concentration.

210 As regards the applicant's argument that the combined market share of Implats/LPD following the concentration would have amounted to only (...)% in the Community, it should be noted, first, that the geographical market at issue is a defined geographical area in which the conditions of competition are sufficiently homogeneous for all businesses. In that area, the undertaking or undertakings

holding a dominant position would have had the potential to engage in abuses hindering effective competition (see, to that effect, Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraphs 11 and 44). Hence, the Commission was able to carry out a rational assessment of the effects of the concentration on competition in that area. Secondly, by reason of the characteristics of the PGM market set out in paragraphs 68 to 72 of the contested decision, the geographical market at issue in the instant case has a worldwide dimension, a fact which the parties do not contest.

211 It is accordingly not possible to refer to 'market shares' of the parties in the Community. In a world market, such as the platinum and rhodium market, the economic power of a group of the kind which Implats/LPD and Amplats would have formed following the concentration is the power attached to its share of the world market and not to its market share in part of the world.

212 The existence of regional differences in the market-share breakdown of the members of an oligopoly dominating the market in a fungible, readily transportable product which has its price set at world level merely reflects traditional business relationships which could either easily disappear if the undertakings in a dominant position decided to engage in predatory pricing in order to eliminate their competitors, or be difficult to break in the face of abusive pricing practices if the marginal sources of supply were not in a position comfortably to satisfy demand on the part of customers of the dominant undertakings which were engaging in such abusive pricing.

213 As the applicant itself acknowledges in paragraph 4.24 of its application, there is no evidence that the undertakings operating in the platinum markets outside the duopoly identified by the Commission, any more than the members of the duopoly itself, can isolate the common market, for example in order to counter selectively a decision by the members of the dominant oligopoly to increase prices at world level.

214 Even if, in the context of a world market such as the platinum and rhodium market, it were also necessary to consider the precise level of Community sales of the relevant businesses in the instant case, the fact remains that the market share held by Implats/LPD and Amplats as a whole in the Community was not substantially different from the share held by them in the world platinum market.

215 According to the information provided by the parties to the concentration on the notification form CO, the combined market share of Implats/LPD in the Community was approximately (...)% on average during the period 1992-95 (see paragraph 6.1.10 of Form CO, Annex 6 to the application), while the market share of Amplats was estimated in 1994 at approximately 35% to 50% and that of Russia at approximately 25% to 35%. In other words, the combined Community market share of Implats/LPD and Amplats as a whole was, at the time of the concentration, approximately (...)% to 65% and was to rise, following the exhaustion of Russian stocks, to approximately (...)% to 78% since, according to information provided by the parties to the concentration themselves, Russia had, from 1994, effected roughly 50% of its sales from stocks (see paragraph 7.3.2 of Form CO, Annex 7 to the application).

216 Accordingly, the ground of challenge relating to the criterion of market share must be rejected in its entirety.

2. Similarity of the cost structures of Implats/LPD and Amplats following the concentration

Arguments of the applicant

217 In the applicant's view, the Commission was wrong in considering that the merged entity and Amplats would inevitably act together on the market because

of their similar cost structures. The Commission's analysis ignores the wide variety in operating cost levels of different shafts both at Implats and LPD and at Amplats. To look at average costs only is wholly misleading, since production decisions are made on a shaft-by-shaft basis and competition takes place at the level of marginal cost.

Findings of the Court

218 The costs comparison carried out by the Commission is based on the graphs reproduced in Annex II to the contested decision showing the operating cost curves of the three South African producers, as drawn by the parties to the concentration themselves.

219 In paragraph 138(b) of the contested decision, the Commission states, without challenge from the applicant, that the platinum industry has an inflexible cost structure with high fixed costs, a fact which means that, in platinum mining, output cannot be varied significantly even if a number of operating shafts make little or no contribution to profitability. It adds that a strategy of closing the less profitable shafts in favour of the most profitable ones would mean that the fixed costs would have to be spread across the remaining shafts, making each marginal shaft less profitable and repeatedly making it necessary to close more shafts.

220 It was therefore entitled to conclude that, in the platinum industry, a producer must look at the overall cost of its operations in deciding the appropriate

production level and not simply at the operating costs of individual shafts. In those circumstances, the comparison of the costs of the merged entity and Amplats based on the costs of operating all their shafts was fully justified.

221 The applicant cannot reasonably maintain that the Commission's analysis ignored the wide variety in the operating cost levels of different shafts both at Implats and LPD and at Amplats. In view of the graphs drawn up by the parties to the transaction showing the operating cost curves, before and after that transaction, of the three South African platinum producers (Annexes II and IV to the contested decision), the concentration would — notwithstanding the differences noted by the Commission in the contested decision and linked to the quality of the ore extracted, to the cost of processing and refining operations and to administrative costs (paragraph 182) — have resulted in the creation of a new company whose cost structure for the operation of mines would have been similar to that of Amplats.

222 Consequently, given the similarity in the market shares, shares of world reserves and cost structures of the undertakings at issue, the Commission was entitled to conclude that, following the concentration, the interests of Amplats and Implats/LPD with regard to the development of the market would have coincided to a higher degree and that this alignment of interests would have increased the likelihood of anti-competitive parallel behaviour, for example restrictions of output.

223 The grounds of challenge under consideration must therefore be rejected.

3. Characteristics of the market

(a) Market transparency

Arguments of the parties

224 The applicant maintains that the analysis of the market carried out by the Commission is incorrect. According to the applicant, while platinum is a homogeneous product with high price transparency, such transparency does not automatically mean that there is transparency as far as competitors' sales levels, production decisions and resources are concerned, as is demonstrated by the fact that, in 1994, Amplats had been able to conceal its production problems for some months by leasing platinum to meet its delivery obligations.

225 The Commission states that, in paragraphs 145 and 146 of the contested decision, it set out the reasons why there was high transparency not only in terms of prices but also in relation to production, sales, reserves and new investment. The applicant has adduced no evidence to rebut the findings in the decision. Furthermore, price transparency is the most important element in determining the level of market transparency where there is an oligopoly. Finally, the Commission observes that, according to Lonrho, Amplats was unable to conceal its production problems from the market, contrary to what is stated in the NERA Report.

Findings of the Court

226 The applicant does not dispute that platinum is a homogeneous product for which the market has a transparent price-setting mechanism.

227 Price transparency is a fundamental factor in determining the level of market transparency where there is an oligopoly. By means of the price mechanism, the members of an oligopoly can, in particular, immediately discern the decisions of other members of the oligopoly to alter the *status quo* by increasing their market share and they may take such retaliatory measures as may be necessary in order to frustrate actions of that kind.

228 In the instant case, as is set out in the contested decision (paragraphs 144, 145 and 146), market transparency is relatively high, in particular because platinum is quoted on the metal exchanges, production and sale statistics are published, the limited number of direct customers on the market is known, the platinum industry comprises a small and relatively closed group of undertakings with close links between them, the main contracts used are of a specific kind, namely long-term contracts prohibiting resale of the product purchased, and new production capacity is normally added by means of investment projects whose details are usually known in the industry.

229 In those circumstances, it must be concluded that the Commission was fully entitled to find that there was high transparency not only in terms of prices but also in relation to production, sales, reserves and new investment.

230 The ground of challenge under consideration must therefore be rejected.

(b) Growth prospects in the platinum market

Arguments of the parties

231 According to the applicant, the analysis of the market carried out by the Commission is incorrect. The fact that growth in demand is slow cannot stand in the way of vigorous competition and resulting shifts in market shares. The applicant supports its assertion by referring to the NERA Report. According to paragraph 4.1.4 of that report, where, as in this case, there is overcapacity in the industry in question, the producers must compete, in particular by reducing their production costs, in order to avoid the shutting down of their surplus production. In the applicant's view, changes in market share and the reduction in real platinum prices between 1985 and 1995, as well as the reaction of Amplats, which increased its production at low prices, and of Implats, which adopted major rationalisation measures, demonstrate that the structure of the platinum market has not given rise to oligopolistic cooperation between the major producers.

232 The Commission submits that, following the proposed concentration, the two main producers would have had broadly similar cost structures. Parallel conduct, even in relation to cost reduction, would therefore have been an intelligent strategy. Moreover, it remains true that a market characterised by slow growth does not encourage new entrants or vigorous competition.

Findings of the Court

233 The applicant does not dispute that, in principle, a market characterised by slow growth does not encourage new entrants or vigorous competition. It simply relies

on past market trends to deny that that principle is applicable to the platinum market.

234 It has not disproved the Commission's analysis (paragraphs 160 to 172 of the contested decision) that there has in the past been a tendency towards oligopolistic dominance, which the Commission based on an examination of market growth and changes in market share over the past decade, on the low degree of direct price competition in respect of long-term customer contracts, on sustained high price levels and on the behaviour of the main players in the market.

235 The applicant's reasoning is founded on premisses, in terms of growth in demand, which are not comparable with the forecasts for growth in demand in respect of the period from 1995 to 2000. During the period from 1985 to 1995, in which the market share and price fluctuations and the reactions of Amplats and Implats referred to by the applicant occurred, demand had almost doubled, increasing from 2 830 000 to 5 205 000 ounces per annum (see NERA Report, Figure 3.1, p. 15), whereas in the period from 1995 to 2000 demand was not forecast to increase substantially, rising from 4 705 000 to 5 570 000 ounces per annum (see paragraph 127 of the contested decision).

236 Finally, the applicant's analysis fails to take into account the effect of the concentration on the market structure and of the new entity *vis-à-vis* its principal competitor, Amplats. Even if the applicant's analysis is correct in relation to the past, the effect of the concentration would none the less have been that the two main producers would have had broadly similar cost structures and that, having regard to the structure of the platinum market, anti-competitive parallel conduct would, economically, have constituted a more rational strategy than competing with each other, thereby adversely affecting the prospect of maximising combined profits.

237 In those circumstances, having regard to the stability of the platinum market, for which average annual growth of approximately 3% was forecast in respect of the period from 1995 to 2000, the Commission was entitled to conclude that new competitors would not be encouraged to enter that market, or existing competitors to adopt an aggressive strategy to capture that additional demand.

238 The ground of challenge put forward by the applicant must therefore be rejected.

(c) Balance between supply and demand

Arguments of the applicant

239 The applicant further claims that the Commission's concerns regarding a possible rise in the price of platinum were also clearly coloured by its unjustified view that a supply deficit was likely to arise (paragraph 136 of the contested decision).

240 The applicant considers that the Commission's view was out of line with the weight of industry opinion which pointed to a supply *surplus* that might balance out in the following years.

Findings of the Court

241 In paragraph 127 of the contested decision, the Commission refers to the various forecasts provided by the parties concerning future changes in demand, that is to say to the forecasts of the parties themselves and to the differing forecasts made by Anderson, Wilson & Partners Inc., BOE Nat West Securities, SBC Warburg and Engelhard.

242 In paragraphs 128 to 131 of the contested decision, however, the Commission also carried out a detailed analysis, which moreover is not disputed by the applicant, of the factors underlying the forecasts that growth would tend to increase moderately in the following years.

243 Those factors were:

— an increase in production of catalytic converters for automobiles, due to the envisaged tightening and/or introduction of emission control legislation in the United States, Europe, Brazil and Argentina between then and the end of the century, and greater use of platinum in catalytic converters for diesel cars;

— growth in demand for platinum in the jewellery sector in Japan, the United States and probably China;

— as regards industrial applications, replacement operations in the petroleum and chemical industries because plants shut down during the recession were being brought back on stream;

— increasing use of personal computers, since more platinum would be utilised in the disk coatings and other components;

— last, the use, in the long term, of fuel cells.

244 Furthermore, irrespective of which of the supply forecasts provided by the parties is the most accurate, the Commission explained in paragraphs 134, 135 and 136 of the contested decision that world platinum supply would, following the concentration, have been dominated by the South African undertakings and that any shortfall of supply in relation to demand could have been made good only by those undertakings.

245 Having regard to those statements, which have not been challenged by the applicant, it must be concluded that the Commission's analysis concerning changes in supply and demand for platinum was not vitiated by a manifest error of assessment.

246 The ground of challenge under consideration must therefore be rejected.

(d) Marginal and alternative sources of supply

Arguments of the parties

247 The applicant submits that, in its consideration of barriers to market entry, the Commission failed to take due account of:

— the *cumulative* effect of the various marginal and alternative sources of supply, in particular the growing potential for recycled platinum;

— the 4 000 000 ounces of platinum stocks built up since 1985;

— the increasing substitution of palladium for platinum;

— Russia's production and sales from its stocks;

— the substantial new production plans of marginal suppliers such as Stillwater in the United States and Hartley in Zimbabwe.

248 The applicant points out in that regard that the South African Government's letter of 19 April 1996 indicates that world reserves outside South Africa and Zimbabwe could theoretically satisfy world demand for 20 years.

249 The Commission essentially failed to consider the impact which the various marginal sources of supply and other competitive influences would have had in the event of a price rise of, for example, 10% or 20%. If such an increase could have been maintained, it would indeed have indicated that the merged entity, acting together with Amplats, was able to behave to an appreciable extent independently of its competitors, its customers and, ultimately, of consumers.

250 The Commission thus did not properly assess what would have happened to prices if none of the factors relied on by the applicant had existed, still less did it address the greatly enhanced role which those factors would have played in the future if the hypothetical price rise, which was the Commission's principal concern, had occurred. That constitutes a lack of reasoning in breach of Article 190 of the Treaty, inasmuch as it is obvious that the 37% of the market accounted for by the marginal sources of supply, together with other influences, would have enabled price increases to be contained.

251 The Commission, for its part, refers to paragraphs 91 to 95 of the contested decision concerning recycling, paragraphs 29 to 32 relating to the substitution of palladium for platinum, paragraph 138(c) which deals with stocks, paragraphs 122 to 125, 134, 135 and 173 on Russian production and sales from stocks, paragraphs 85 to 90 and 138(c) regarding new production and paragraphs 193 to 204 on the economic analysis presented by the parties. It concluded at the end of paragraph 138 of the contested decision that supply responses at the margin from stocks, new mines and recycling could not prevent an abuse of a dominant position. It also stated, in paragraph 203, that it was highly unlikely that suppliers outside the oligopoly, stocks outside Russia and the availability of recycled platinum would have a sufficient impact on the market to prevent an

abuse of a joint dominant position. The latter conclusion took into account the situation prevailing in Russia as the main source, other than LPD, of competition on the market.

252 As regards the applicant's argument that the 37% of the market accounted for by the marginal sources of supply and other influences would have curbed price increases, the Commission points out that the South African producers alone accounted for 63% of the market in 1995, a figure that was to increase significantly (to a level approaching 80%) when, from 1997, Russia would no longer be selling from its stocks. Furthermore, a significant proportion of the marginal competition was hypothetical and could not in any event have exerted any pressure on the market for some years.

253 It submits finally that the applicant has not substantiated its assertion that reserves other than those of South Africa could theoretically have satisfied world demand for the next 20 years. Nor does the applicant state what consequences that 'theoretical' sufficiency of other reserves might have had for the market.

Findings of the Court

254 The applicant's view has no factual basis.

255 In paragraphs 93, 94 and 95 of the contested decision, the Commission examines the limits of the potential for increases in platinum recycling, in particular recycling from catalytic converters where the limits relate to the costs of waste collection, to the number of vehicles which are exported to the third world and thus escape recycling systems, and to other factors.

256 In paragraph 138(c) of the contested decision, it takes due account of the 4 000 000 ounces of platinum stocks built up since 1985.

257 In paragraphs 29 to 32 it notes the limits on the growing trend for palladium to be substituted for platinum.

258 In paragraph 81 it considers Russia's production and sales from its stocks. In paragraphs 123, 124, 125, 134 and 173 it assesses the prospects for the expansion of Russian production. In paragraphs 171 and 173 it contemplates, but finally rules out, the possibility of Russia selectively using its stocks with a view to a possible monopolistic attempt to reduce production.

259 The plans of marginal suppliers such as Stillwater in the United States and Hartley in Zimbabwe are examined in paragraph 88.

260 The cumulative effect of the various marginal and alternative sources of supply is analysed in paragraphs 138(c) and 202.

261 It is therefore apparent that, contrary to the applicant's submissions, the Commission took due account of the abovementioned factors and gave proper reasons for its decision in that regard.

262 So far as concerns the applicant's argument that the Commission did not properly assess what would have happened to prices if none of the factors relied on by the applicant had existed, suffice it to note that when the Commission assesses the foreseeable impact of a concentration on the market it is not required to consider

what would have happened to the market in the past in the absence of one or other competitive factor. In its assessment, the Commission is required only to establish whether, by reason of, *inter alia*, previous developments in the conditions of competition in the market in question, the concentration may lead to the creation of a position of economic power for one or more undertakings, thereby enabling them to engage in abuses, particularly abuses involving price increases.

263 It follows that the grounds of challenge put forward by the applicant must be rejected.

(e) Structural links

Arguments of the parties

264 The applicant claims that the Commission did not take account of the case-law of the Court of First Instance (Joined Cases T-68/89, T-77/89 and T-78/89 SIV and Others v *Commission* [1992] ECR II-1403; the '*Flat Glass*' case) which, in the context of Article 86 of the Treaty, requires for findings of collective dominance that there be structural links between the two undertakings, for example through a technological lead by agreements or licences, which give them the power to behave independently of their competitors, of their customers and, ultimately, of consumers. In the instant case, the Commission has failed to demonstrate the existence of structural links or to prove that the merged entity and Amplats intended to behave as if they constituted a single dominant entity. That failure also infringes the obligation to state reasons laid down in Article 190 of the Treaty.

265 The applicant notes that, in the contested decision, the Commission refers to the following structural links between the merged entity and Amplats (paragraphs 156 and 157):

— links in certain industries, including a joint venture in the steel industry;

— AAC's recent purchase of 6% of Lonrho with a right of first refusal over a further 18%.

266 That analysis in inadequate in three respects.

267 First, neither of those matters directly concerned the PGM industry. The first matter specifically concerned links established with other industries, and both the first and the second were acts of AAC rather than its platinum subsidiary Amplats.

268 Second, those links were a long way from the kind of structural links envisaged in the *Flat Glass* judgment as sufficient to constitute joint dominance for the purposes of Article 86 of the Treaty.

269 Finally, AAC's recent investment in Lonrho was an action hostile to Gencor and to the concentration. It constituted in itself an indication that the links existing between the various companies did not stand in the way of aggressive competition between them.

270 The Commission states, first, that in its previous decision-making practice it had not always relied on the existence of economic links in order to make a finding of collective dominance, and second, that the Court of First Instance, in its judgment in the '*Flat Glass*' case (paragraph 358), did not lay down the existence of economic links as a requirement or restrict the notion of economic links to the structural links relied on by the applicant. The Commission is therefore entitled to understand that notion as including the relationship of interdependence which exists between the members of a tight oligopoly.

271 In addition, even assuming that the Court of First Instance did lay down a requirement of economic links in the context of Article 86 of the Treaty, that does not mean that the same requirement should exist in connection with the control of concentrations.

272 Furthermore, even if the notion of economic links were to be construed in a narrower sense, there were, despite the applicant's tendency to underestimate them, a number of such links between the parties to the proposed concentration and Amplats which could have reinforced the common interest of the members of a tight oligopoly (paragraphs 155, 156 and 157 of the contested decision).

Findings of the Court

273 In its judgment in the *Flat Glass* case, the Court referred to links of a structural nature only by way of example and did not lay down that such links must exist in order for a finding of collective dominance to be made.

274 It merely stated (at paragraph 358 of the judgment) that there is nothing, in principle, to prevent two or more independent economic entities from being united by economic links in a specific market and, by virtue of that fact, from together holding a dominant position *vis-à-vis* the other operators on the same market. It added (in the same paragraph) that that could be the case, for example,

where two or more independent undertakings jointly had, through agreements or licences, a technological lead affording them the power to behave to an appreciable extent independently of their competitors, their customers and, ultimately, of consumers.

275 Nor can it be deduced from the same judgment that the Court has restricted the notion of economic links to the notion of structural links referred to by the applicant.

276 Furthermore, there is no reason whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly within which, in a market with the appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those parties are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximise their joint profits by restricting production with a view to increasing prices. In such a context, each trader is aware that highly competitive action on its part designed to increase its market share (for example a price cut) would provoke identical action by the others, so that it would derive no benefit from its initiative. All the traders would thus be affected by the reduction in price levels.

277 That conclusion is all the more pertinent with regard to the control of concentrations, whose objective is to prevent anti-competitive market structures from arising or being strengthened. Those structures may result from the existence of economic links in the strict sense argued by the applicant or from market structures of an oligopolistic kind where each undertaking may become aware of common interests and, in particular, cause prices to increase without having to enter into an agreement or resort to a concerted practice.

278 In the instant case, therefore, the applicant's ground of challenge alleging that the Commission failed to establish the existence of structural links is misplaced.

279 The Commission was entitled to conclude, relying on the envisaged alteration in the structure of the market and on the similarity of the costs of Amplats and Implats/LPD, that the proposed transaction would create a collective dominant position and lead in actual fact to a duopoly constituted by those two undertakings.

280 To the same end, it was also entitled to take into account the economic links referred to in paragraphs 156 and 157 of the contested decision.

281 The applicant is not justified in challenging the relevance of those links on the ground that they did not directly concern the PGM industry and were acts of AAC rather than Amplats. Links between the principal platinum producers relating to activities outside PGM production (paragraph 156 of the contested decision) were taken into account by the Commission not as factors attesting to the existence of economic links in the strict sense given to that notion by the applicant, but as factors contributing to discipline over the members of an oligopoly by multiplying the risks of retaliation should one of its members act in a manner considered unacceptable by the others. That analysis is, moreover, confirmed by a consultant's study regarding the possible competitive responses of Implats in relation to LPD, which is one of the papers submitted to the board of Gencor and Implats dated 6 May 1994 (referred to in paragraph 158 of the contested decision): according to that consultant, one of the possible scenarios was 'disciplining attacks and signals — focused price wars, for example Rh [rhodium]'.

282 The fact that the links in question concern AAC and not Amplats directly cannot invalidate the Commission's reasoning. Since Amplats was controlled by AAC, the Commission was justified in considering that the links which existed between AAC and other undertakings, whether or not operating in the PGM markets, could have a favourable or an unfavourable impact on Amplats.

283 As for the argument that AAC's recent investment in Lonrho was an action hostile to Gencor and to the concentration, and constituted in itself an indication that the links existing between the various companies did not stand in the way of aggressive competition between them, the Court finds, first, that the applicant has not adduced the necessary proof of the hostile nature of that transaction, and secondly, that, irrespective of the reasons behind it, it tightened the links existing between the two most significant competitors in the market.

284 The ground of challenge under consideration must therefore be rejected.

(f) Means of competition other than technological development

Arguments of the parties

285 The applicant states that, although production and mining technology is mature, the Commission did not take into account the other non-technical aspects of competitive advantage, such as available mineral reserves, management of the business and the differing incentives of different producers, indicating amongst undertakings a wide diversity in competitive ability.

286 The Commission does not deny that competition is possible in an industry where technology is mature. However, the absence of technological change eliminates a powerful source of competition. Moreover, the applicant's argument highlights the importance of differing management styles and resource bases. One of the most important features of the proposed concentration from the point of view of

its impact on competition is that it would have eliminated a competitor (LPD) whose management style and cost structure differed significantly from those of Implats and Amplats.

Findings of the Court

287 Contrary to the applicant's submissions, the Commission took account, in paragraphs 152 and 153 of the contested decision, of the fact that, even in an industry where the technology is mature, competition remains possible through the application of new working methods and production technology, and of the fact that there were differences in management between the four major platinum producers, that technological progress in the platinum mining industry is relatively slow to develop and that no technological breakthroughs were expected which would fundamentally change the production structure of the platinum industry.

288 The contested decision thus took account of the other non-technical aspects of competitive advantage. The ground of challenge put forward by the applicant must therefore be rejected.

(g) Account taken of the reaction of interested third parties

Arguments of the applicant

289 According to the applicant, the Commission ignored the fact that, as pointed out in paragraphs 2.17 to 2.21 of the reply to the statement of objections, most customers and other third parties contacted by the Commission reacted neutrally

or positively towards the concentration. If those third parties did not believe that marginal and other competitive influences in the market would constrain any price rise, they would surely have reacted negatively.

Findings of the Court

290 The applicant adduces no evidence capable of proving its assertion. The fact that the Commission, following its own analysis of the market, endorsed the view of the customers and other interested third parties who had reacted negatively to the proposed concentration does not mean that it failed to take account of the point of view of those whose reaction had been positive or neutral.

291 In any event, while the opinions of customers and other third parties may constitute an important source of information on the foreseeable impact of a concentration on the market, they cannot bind the Commission when it makes its own assessment of the impact of a concentration.

292 The ground of challenge under consideration must therefore be rejected.

(h) Past oligopolistic tendencies

Arguments of the parties

293 The applicant claims that, in finding that there had been a past tendency in the platinum industry towards collective dominance, the Commission ignored the fact that market shares had fluctuated over time (NERA Report, table on p. 15) and that, as the Commission itself admits, the progressive decline in the market shares of the leading producers had indicated a level of competition in the market. Furthermore, prices had declined in real terms over the past decade (NERA Report, Table 3.2 on p. 18; Annexure 3 of Appendix 10 to the reply to the statement of objections, reproduced in Annex 11 to the application).

294 The Commission maintains that, while the contested decision itself acknowledges that there was some competition in the past, there was also parallel or cartel-like behaviour.

Findings of the Court

295 Contrary to the applicant's assertions, it is clear from paragraphs 166 and 173, as well as from paragraphs 168 to 172 and 204, of the contested decision that the Commission took due account both of the fluctuations in market share and of price movements in its analysis of the specific competitive framework within which the South African suppliers had operated before the transaction.

296 The ground of challenge put forward by the applicant must therefore be rejected.

(i) Conclusion

297 It follows from all of the foregoing that the Commission was fully entitled to conclude (paragraph 219 of the contested decision) that the concentration would have led to the creation of a dominant duopoly on the part of Amplats and Implats/LPD in the platinum and rhodium market, as a result of which effective competition would have been significantly impeded in the common market within the meaning of Article 2 of the Regulation. It also follows that the reasoning in the contested decision fulfils the requirements laid down by Article 190 of the Treaty.

298 Since all the grounds of challenge put forward by the applicant have been rejected, the pleas under consideration must be rejected as well.

IV — *The pleas alleging infringement of Article 8(2) of the Regulation, in that the Commission did not accept the commitments offered by the parties to the concentration, and infringement of Article 190 of the Treaty*

Arguments of the parties

299 The applicant asserts that the Commission erred in law by refusing to accept the commitments offered by the parties to the concentration, and that it also failed to justify the reasons for its refusal to the requisite legal standard, thereby infringing Article 190 of the Treaty.

300 It recalls that, according to paragraph 215 of the contested decision, the parties proposed to the Commission draft commitments which sought to allay the competition concerns raised by the transaction. Those commitments were

submitted to the Member States and discussed at the meeting of the Advisory Committee on 9 April 1996.

301 There were three commitments:

(a) the development of an extra (...) ounces of capacity at the (...) mine shaft;

(b) the maintenance of output at existing levels ((...) ounces (...));

(c) the creation of a new supplier in the market.

302 In the applicant's view, the Commission (paragraph 216 of the contested decision) was wrong to reject those commitments, considering that they were behavioural in nature and therefore could not be accepted under the Regulation. The applicant maintains that the Commission has previously accepted behavioural commitments under the Regulation. It cites a number of decisions in which the Commission clearly accepted commitments of that kind.

303 The applicant observes that the commitments are rejected in paragraph 216 of the contested decision on the ground that 'output could be reduced prematurely at other mine shafts, owned by the merged entity, simply to maintain output, at the (...) ounce level, thereby restricting overall supply'. In its view, that argument does not make sense. According to the applicant, the commitment was to develop an extra (...) ounces of capacity at the (...) mine shaft *and* to maintain output at

existing levels. Consequently, there could not have been any reduction in output before the additional capacity became available.

304 The applicant also challenges the Commission's argument (paragraph 216 of the contested decision) that if one supplier had maintained output at a constant level, that would have been known by Amplats, the other member of the oligopoly, thus generating upward pressure on prices. It states that the commitment did not provide for a cap on the output of the merged entity. Amplats could not therefore have assumed that the merged entity would react to a growth in demand by keeping its output at the existing level. In any event, businesses are entitled to derive a reasonable return from their economic activities, provided that it is not unacceptably or unfairly high from the point of view of competition law. Any behaviour on the part of the merged entity and Amplats which resulted in such a return could be dealt with by the South African authorities.

305 The applicant also claims that the Commission took no account whatsoever of the finding of the South African authorities that Amplats already occupied a dominant position and would have faced effective competition from the entity arising from the concentration. The Commission's attitude was thus inconsistent with the informed concerns of the South African authorities about the existing market structure.

306 As regards the creation of a new supplier which, according to the Commission, would have had a negligible impact, the applicant submits that if it is justified in its other criticisms of the Commission's approach to the commitments, that aspect of the contested decision cannot be upheld.

307 It also disputes the Commission's statement that the commitments did not reflect the market growth which all commentators agreed would take place (paragraph 216 of the contested decision). It considers that the Commission's view was out of

line with the weight of industry opinion, which pointed to a supply *surplus* that might balance out in a few years. That point of view was supported by at least three independent reports, attached to the parties' reply to the statement of objections, to which the Commission made only brief reference in the contested decision. Against that background, the parties' commitment to maintain output at its existing level constituted a step aimed at dispelling the Commission's main concern.

308 Furthermore, the applicant maintains that it would have been possible to ensure compliance with the commitments offered. In particular, the maintenance of output levels would have been verifiable by means of an obligation to produce quarterly production figures to the Commission. They could then have been checked each year against the production figures published in the annual report and accounts, which are audited. As regards the other commitment offered, namely the development of the (...) project, the applicant considers that, despite its structural nature, it could in any event have been easily verified by means of audited progress reports and annual site visits. It would thus have been no more difficult to enforce those commitments than commitments accepted in other cases.

309 Finally, the Commission could not, in rejecting the commitments offered, rely on the fact that there was an added difficulty in ensuring compliance because all the production facilities of the combined group would have been in South Africa. If the Commission has the power under Community law and international law to block a merger which is carried out entirely outside the Community, it must at the very least apply the same standards and tests in dealing with such a merger as it would apply to mergers within the Community.

310 The Commission denies that the commitment was to maintain production *and* to develop the (...) project, that is to say to *increase* output. According to the

Commission, the commitment offered was only to *maintain* the existing level of production while developing new production capacity. The contested decision (paragraph 216) explained why that would not in any event have been sufficient in a growing market. Moreover, the applicant's argument that Amplats could not have assumed that the entity arising from the concentration would refrain from increasing production in response to a growth in demand amounts to a denial of the existence of an oligopoly. Finally, for the reasons advanced in relation to the first plea for annulment, it is fanciful to suggest that the South African competition authorities would have had any interest in intervening in the event of a deliberate restriction of production.

311 The Commission considers that commitments which are behavioural in nature cannot be accepted. In the context of the Regulation, a remedy dealing with the concentration of economic power on the market which would result from a merger must itself be structural in nature. Since the purpose of the Regulation is to prevent situations from arising in which there is scope for anti-competitive conduct which does not involve concertation, only commitments which help to eliminate the possibility of abuse can be considered. Furthermore, Article 2 of the Regulation specifically prevents the Commission from authorising a concentration which creates or strengthens a dominant position. In those circumstances, a promise not to abuse a dominant position is inadequate and does not meet the requirements laid down by the Regulation.

312 The Commission does not agree with the applicant's analysis of commitments offered and accepted in certain previous cases. A commitment can be regarded as structural when it solves a structural problem, for example access to the market. There is no need to discuss the question whether the proposed commitment to develop the (...) project was itself structural, since it would not in any event have solved the competition problem at issue.

Findings of the Court

313 It is necessary to consider first of all what type of commitment may be accepted under the Regulation and in particular whether the Commission's view that behavioural undertakings cannot be accepted is correct in law.

314 In the light of the seventh recital in its preamble, which states that 'a new legal instrument should therefore be created... to permit effective monitoring of all concentrations from the point of view of their effect on the structure of competition in the Community', the principal objective of the Regulation is to monitor market structures, and not the behaviour of undertakings which is essentially to be controlled only under Articles 85 and 86 of the Treaty.

315 Article 8(2) of the Regulation provides:

'Where the Commission finds that, following modification by the undertakings concerned if necessary, a notified concentration fulfils the criterion laid down in Article 2(2), it shall issue a decision declaring the concentration compatible with the common market.

It may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into *vis-à-vis* the Commission with a view to modifying the original concentration plan ...'

316 It follows from those provisions and from Article 2(3) of the Regulation that where the Commission concludes that the concentration is such as to create or strengthen a dominant position, it is required to prohibit it, even if the

undertakings concerned by the proposed concentration pledge themselves *vis-à-vis* the Commission not to abuse that position.

317 Since the purpose of the Regulation is to prevent the creation or strengthening of market structures which are liable to impede significantly effective competition in the common market, situations of that kind cannot be allowed to come about on the basis that the undertakings concerned enter into a commitment not to abuse their dominant position, even where it is easy to check whether those commitments have been complied with.

318 Consequently, under the Regulation the Commission has power to accept only such commitments as are capable of rendering the notified transaction compatible with the common market. In other words, the commitments offered by the undertakings concerned must enable the Commission to conclude that the concentration at issue would not create or strengthen a dominant position within the meaning of Article 2(2) and (3) of the Regulation.

319 The categorisation of a proposed commitment as behavioural or structural is therefore immaterial. It is true that commitments which are structural in nature, such as a commitment to reduce the market share of the entity arising from a concentration by the sale of a subsidiary, are, as a rule, preferable from the point of view of the Regulation's objective, inasmuch as they prevent once and for all, or at least for some time, the emergence or strengthening of the dominant position previously identified by the Commission and do not, moreover, require medium or long-term monitoring measures. Nevertheless, the possibility cannot automatically be ruled out that commitments which *prima facie* are behavioural, for instance not to use a trademark for a certain period, or to make part of the production capacity of the entity arising from the concentration available to third-party competitors, or, more generally, to grant access to essential facilities on non-discriminatory terms, may themselves also be capable of preventing the emergence or strengthening of a dominant position.

320 It is thus necessary to examine on a case-by-case basis the commitments offered by the undertakings concerned.

321 In the instant case, while the applicant categorises the development of the (...) project as a structural commitment, it does not deny, as the Commission states in the contested decision (paragraph 216), that that commitment, like the other commitments offered, namely to maintain output at a specified level and to create a new supplier, was incapable of solving the question of the oligopolistic market structure created by the concentration.

322 The first two commitments do not in any way alter the structure of the market in question as a duopolistic market, but merely bring the production policy of Implats/LPD within the framework of a simple obligation as to minimum output which, while it may reduce the potential for abuse of a dominant position in the future, depending on changes in demand, does not ensure either that there will be no abuse of any kind or, more importantly, that the dominant position will actually be eliminated.

323 Nor can the applicant maintain that the Commission was unable to refuse the commitment on the ground that, if Implats/LPD had maintained output at a constant level, that would have been known to Amplats, thus generating upward pressure on prices. The argument expounded, far from proving that the commitment offered was capable of eliminating the dominant duopoly created by the concentration, merely challenges the very existence of a dominant position. The applicant's arguments on that point have, however, already been rejected in connection with the plea for annulment alleging infringement of Article 2 of the Regulation and relating to the finding that there was a collective dominant position.

324 So far as concerns the applicant's arguments, first, that businesses are entitled to derive a reasonable return from their economic activities and, secondly, that any behaviour on the part of the merged entity and Amplats which resulted in such a

return could have been dealt with by the South African authorities, suffice it to state that, whatever the merits of those arguments, they are irrelevant when it comes to assessing whether or not the commitment offered was capable of eliminating the impediment to the competitive structure created by the concentration.

325 As for the third commitment, namely the creation of a new supplier, it need merely be observed that the applicant does not dispute the Commission's analysis that it would have had a negligible impact on the amount of the future platinum supply to the ultimate consumer. The applicant merely states, thereby acknowledging the ancillary nature of that commitment, that if it were right in its other criticisms of the Commission's approach to the commitments, that aspect of the contested decision could not be upheld.

326 Since, as held above, the Commission was justified in rejecting the first two commitments, it did not manifestly err in its assessment by considering that, irrespective of its nature, the third commitment could not be accepted in view of its negligible impact on the market.

327 In those circumstances, the applicant's arguments concerning the possibilities for monitoring the commitments offered are entirely irrelevant. Since the commitments as a whole were not capable of eliminating the impediment to effective competition caused by the concentration, the Commission was justified in rejecting them, even if there were no particular difficulties in verifying whether they had been carried out.

328 Accordingly, the Commission neither erred in law nor manifestly erred in its assessment by rejecting the commitments offered by Gencor and Lonrho with a view to eliminating the competition problems raised by the concentration.

329 In the light of the above findings, the reasoning in the decision concerning the rejection of the commitments is accordingly sufficient.

330 The pleas examined must therefore be rejected.

Costs

331 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to pay the costs incurred by the Commission.

332 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs. The Federal Republic of Germany must therefore be ordered to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber, Extended Composition)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to bear its own costs and those incurred by the Commission;**

3. **Orders the Federal Republic of Germany to bear its own costs.**

Azizi Vesterdorf García-Valdecasas

Moura Ramos Jaeger

Delivered in open court in Luxembourg on 25 March 1999.

H. Jung J. Azizi

Registrar President

Contents