JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)
28 April 1999 *

In Case T-221/95,

Endemol Entertainment Holding BV, a company incorporated under Netherlands law, established in Zevenend, Netherlands, represented by Onno W. Brouwer and Peter Wytinck, of the Brussels Bar, and Martijn van Empel, of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 11 Rue Goethe,

applicant,

v

Commission of the European Communities, represented by Wouter Wils, 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,

* Language of the case: English.

APPLICATION for the annulment of Commission Decision 96/346/EC of 20 September 1995 relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89 (IV/M.553 — RTL/Veronica/Endemol) (OJ 1996 L 134, p. 32), which declared the agreement creating the joint venture Holland Media Groep to be incompatible with the common market,

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

composed of: P. Lindh, President, R. García-Valdecasas, K. Lenaerts, J.D. Cooke and M. Jaeger, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 15 July 1998,

gives the following

Judgment

Relevant provisions

1 Article 2 of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (corrected version, applicable in this case, at OJ 1990 L 257, p. 13) provides:

'1. Concentrations within the scope of this Regulation shall be appraised in accordance with the following provisions with a view to establishing whether or not they are compatible with the common market.

In making this appraisal, the Commission shall take into account:

(a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;

(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access

to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

2. A concentration which does not 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 shall be declared compatible with the common market.

3. 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.'

2 Article 3(1) states:

'A concentration shall be deemed to arise where:

(a) two or more previously independent undertakings merge, or

(b) — one or more persons already controlling at least one undertaking, or

— one or more undertakings

acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.'

3 Article 3(3) states:

'For the purposes of this Regulation, control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.'

4 Article 8(2) 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. The decision declaring the concentration compatible shall also cover restrictions directly related and necessary to the implementation of the concentration.'

5 Article 8(3) states:

'Where the Commission finds that a concentration fulfils the criterion laid down in Article 2(3), it shall issue a decision declaring that the concentration is incompatible with the common market.'

6 Article 11 provides:

'1. In carrying out the duties assigned to it by this Regulation, the Commission may obtain all necessary information from the Governments and competent authorities of the Member States, from the persons referred to in Article 3(1)(b), and from undertakings and associations of undertakings.

2. When sending a request for information to a person, an undertaking or an association of undertakings, the Commission shall at the same time send a copy of the request to the competent authority of the Member State within the territory of which the residence of the person or the seat of the undertaking or association of undertakings is situated.

3. In its request the Commission shall state the legal basis and the purpose of the request and also the penalties provided for in Article 14(1)(c) for supplying incorrect information.

4. The information requested shall be provided, in the case of undertakings, by their owners or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, by the persons authorised to represent them by law or by their statutes.

5. Where a person, an undertaking or an association of undertakings does not provide the information requested within the period fixed by the Commission or provides incomplete information, the Commission shall by decision require the information to be provided. The decision shall specify what information is required, fix an appropriate period within which it is to be supplied and state the penalties provided for in Articles 14(1)(c) and 15(1)(a) and the right to have the decision reviewed by the Court of Justice.

6. The Commission shall at the same time send a copy of its decision to the competent authority of the Member State within the territory of which the residence of the person or the seat of the undertaking or association of undertakings is situated.'

7 Article 19(2) states:

'The Commission shall carry out the procedures set out in this Regulation in close and constant liaison with the competent authorities of the Member States, which may express their views upon those procedures...'

8 Article 22(3) provides:

'If the Commission finds, at the request of a Member State, that a concentration as defined in Article 3 that has no Community dimension within the meaning of Article 1 creates or strengthens a dominant position as a result of which effective competition would be significantly impeded within the territory of the Member State concerned it may, in so far as the concentration affects trade between Member States, adopt the decisions provided for in Article 8(2), second subparagraph, (3) and (4).'

Facts

9 By Decision 96/346/EC of 20 September 1995 relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89 (IV/M.553 — RTL/Veronica/Endemol) (OJ 1996 L 134, p. 32; hereinafter 'the contested decision'), which was adopted under Article 8(3) of Regulation No 4064/89, the Commission declared the

concentration in the form of the creation of the joint venture Holland Media Groep to be incompatible with the common market.

10 The parties to that concentration were Compagnie Luxembourgeoise de Télédiffusion SA (hereinafter 'CLT'), NV Verenigd Bezit VNU (hereinafter 'VNU'), RTL 4 SA (hereinafter 'RTL'), Endemol Entertainment Holding BV (hereinafter 'Endemol') and Veronica Omroep Organisatie (hereinafter 'Veronica').

11 CLT is a broadcasting company incorporated under Luxembourg law which is involved in radio, television, publishing and related businesses in various national markets.

12 VNU is a company incorporated under Netherlands law which is involved in the publishing of consumer media, professional media and databanks. It holds stakes in broadcasting companies, including an indirect minority shareholding of 44.4% of the Belgian commercial broadcaster VTM and an indirect 38% shareholding in RTL.

13 RTL is a company incorporated under Luxembourg law which supplies television and radio programmes, partly in Dutch. Those programmes are broadcast by CLT which holds — directly or indirectly — 47.27% of RTL's share capital. CLT ultimately controls RTL, which in turn held 51% of the shares in Holland Media Groep (hereinafter 'HMG').

14 Veronica is an association established under Netherlands law which, until 1 September 1995, operated in the Netherlands television and radio market as a public broadcasting organisation. It was one of the four public broadcasting organisations whose programmes were broadcast on the public channel 'Nederland 2'. On 1 September 1995 Veronica left the public broadcasting system to become a commercial television channel.

15 Endemol is a company incorporated under Netherlands law which was created in 1994 by the merger of J.E. Entertainment BV and John de Mol Communications BV. The centre of Endemol's activities is in the Netherlands, but it has businesses elsewhere in Europe. Its principal business activities are the production of television programmes, the operation of television studios, the exploitation of television formats (that is to say original programme concepts which can be copied), the production and exploitation of theatrical programmes and the organisation of events.

16 For the purpose of the concentration, Veronica and Endemol set up Veronica Media Groep (hereinafter 'VMG'), a company incorporated under Netherlands law in which they respectively held 53% and 47% of the share capital. VMG held 49% of the shares in HMG.

17 The objective of the concentration was to create HMG, whose business was the 'packaging' and supply of television and radio programmes broadcast by itself, CLT, Veronica or others to the Netherlands and Luxembourg. All radio and television activities of the parties intended for the Netherlands were transferred to HMG. The assets transferred by RTL included the television channels RTL 4 and RTL 5, the assets related thereto and its rock music radio channel. RTL also assigned to HMG the benefit of CLT's broadcasting licence (the 'concession'), its business consisting in the supply and packaging of radio and television programmes (mainly in Dutch) to be broadcast in the Netherlands and Luxembourg, and its 50% shareholding in IPN SA, the advertising agency which sells advertising time for the RTL 4 and RTL 5 television channels. The assets transferred by Veronica and Endemol included the Veronica television channel and related assets, and Endemol's radio activities (that is to say its Holland FM Radio channel).

18 Endemol and HMG had also entered into a production agreement for a period of 10 years, corresponding to HMG's production needs for its three channels. Under that agreement, Endemol undertook to cover 60% of HMG's needs for Dutch-language productions. HMG agreed in return to buy from Endemol 60%, by

value, of its needs for specific programmes. In addition, HMG was granted a right of first refusal with regard to new television programme formats and stars launched, bought or discovered by Endemol.

19 On 19 April 1995 the Netherlands Government sent a letter to the Commission under Article 22(3) of Regulation No 4064/89, requesting it to examine the concentration, which did not have a Community dimension.

20 On 22 May 1995 the Commission adopted a decision pursuant to Article 6(1)(c) of Regulation No 4064/89, opening the second stage of the procedure laid down by that regulation.

21 As the initiation of a proceeding under Article 22 of Regulation No 4064/89 does not have the usual suspensory effect provided for in Article 7(1) of that regulation, the parties were able to implement the concentration as set out in paragraph 17 above. Accordingly, from 1 September 1995 the programmes of RTL 4 and RTL 5 were broadcast under the broadcasting licence granted to CLT by the Luxembourg authorities. Veronica's programmes were broadcast under a broadcasting licence for commercial programmes granted by the Netherlands authorities.

22 On 20 September 1995 the Commission adopted the contested decision, declaring that the agreement to create the joint venture HMG was incompatible with the common market because the concentration would lead to the creation of a dominant position in the television advertising market in the Netherlands and to the strengthening of Endemol's dominant position in the market for independent Dutch-language television production in the Netherlands, as a result of which effective competition in the Netherlands would be significantly impeded.

23 The Commission simultaneously invited the parties to propose, within a period of three months from notification of the contested decision, appropriate measures for restoring effective competition in the market for television advertising and independent Dutch television production in the Netherlands.

Procedure, events after the commencement of the action and forms of order sought

24 By application lodged at the Registry of the Court of First Instance on 4 December 1995, all the parties to the concentration brought the present action.

25 In a document lodged at the Court Registry on 7 May 1996, the applicants explained that negotiations were taking place with the Commission with a view to reaching agreement on a modified concentration which the Commission would be able to approve as compatible with the common market.

26 By Commission Decision 96/649/EC of 17 July 1996 relating to a proceeding pursuant to Regulation No 4064/89 (IV/M.553 — RTL/Veronica/Endemol) (OJ 1996 L 294, p. 14), the concentration, following modification by the parties, was declared compatible with the common market, subject to full compliance with the conditions and obligations contained in commitments entered into by them. Those conditions, which were set out in paragraphs 11 and 12 of that decision, were to the following effect:

(a) Endemol ended its participation in HMG and thus no longer holds shares in it; under the newly concluded merger agreement RTL holds 65% and Veronica 35% of HMG's shares;

(b) On 1 January 1997 HMG was required to cease operating RTL 5 as a general interest channel and to transform it into an information channel (that is to say, a television channel which is limited to broadcasting news and news-related programmes) along the lines of a draft business plan submitted by HMG to the Commission on 1 May 1996. According to the business plan, that channel would in time be operated as a pay television channel deriving most of its income from payment by viewers or cable operators. Upon the request of the parties, the Commission could extend the deadline for the transformation of RTL 5 into a news channel by three months, if that was absolutely necessary in order for the parties to realise that transformation. Within a period of five years following the adoption of the decision, HMG was neither to change the essential character of that news channel nor to deviate appreciably from the business plan without the Commission's prior approval.

27 That decision was notified to the parties by letter of 25 July 1996.

28 Veronica, RTL, CLT and VNU thereupon requested, by letter lodged at the Court Registry on 11 September 1996, that they be removed from the list of applicants in this case.

29 By order of the President of the Fourth Chamber, Extended Composition, of 7 October 1996, Veronica, RTL, CLT and VNU were removed from the list of applicants in this case and ordered to bear their own costs together with four-fifths of the costs incurred by the defendant up to the date of removal.

30 Endemol is thus the only remaining applicant in this action.

31 Upon hearing the Report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry. The applicant and the

Commission were however requested to reply to certain written questions and to produce certain documents. The applicant and the Commission replied to the questions asked and produced the requested documents on 6 July 1998.

32 In reply to questions put by the Court, the applicant indicated on 6 July 1998 that it was withdrawing two arguments raised under its fourth plea relating, respectively, to the position of HMG in the television broadcasting market and to the dominant position of HMG in the television advertising market.

33 The parties presented oral argument and answered questions put to them by the Court at the hearing on 15 July 1998.

34 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

35 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Substance

36 The applicant relies on four pleas in law in support of its application. The first plea is to the effect that the Commission had no competence to adopt the contested decision because it was authorised to investigate solely the television advertising market and not the television production market. The second plea alleges infringement of the rights of the defence, in that the applicant was granted inadequate access to the file. The third and fourth pleas are, respectively, that essential procedural requirements and Articles 2 and 3 of Regulation No 4064/89 were infringed.

1. *The first plea, alleging that the Commission lacked competence*

Arguments of the parties

37 The applicant submits that the Commission was authorised to investigate the television advertising market only and not the television production market. The Commission's competence in respect of concentrations which have no Community dimension is dependent upon a request being made by a Member State under Article 22(3) of Regulation No 4064/89. In the present case, the Netherlands Government requested the Commission to examine the concentration only so far as concerns the television advertising market. It follows that the Commission was entitled to investigate only that market and could not extend the investigation of its own motion.

38 The fact that the request was restricted to the television advertising market was expressly referred to by the Netherlands Government not only in its letter of 19 April 1995 but also in the explanatory note accompanying that letter, which stated that the possible implications for the television advertising market were the reason for which the Netherlands Government wished to have the concentration examined under Regulation No 4064/89.

39 The Commission argues that Article 22(3) of Regulation No 4064/89 was adopted in order to ensure effective control of concentrations in cases where a Member State lacks legislation fulfilling that purpose. Article 22(3) accordingly enables a Member State to request the Commission to examine a case where the national solutions are insufficient to remedy the perceived anti-competitive impact of a concentration.

40 Article 22(3) in no way allows a Member State to submit only one particular aspect of a concentration for consideration by the Commission; on the contrary, it necessitates consideration of the concentration *in toto*. Following such a request, the Commission must examine the concentration as if it had a Community dimension. The powers which it has in that regard would be inappropriate if it were expected that the Member State concerned should already have identified in its request the competition problem requiring a solution.

41 The Commission adds that, in the present case, the Netherlands Government did not confine its request to the television advertising market. It is clear from its letter to the Commission that it requested the Commission to examine the compatibility of the concentration as a whole with Regulation No 4064/89. It merely indicated that, in its view, the concentration would not significantly strengthen the parties' position except in the television advertising market and that the reason for its request to the Commission was its concern in that regard. Nor is there any suggestion in the explanatory note accompanying its letter to the Commission that it was asking the Commission to investigate only the television advertising market.

Findings of the Court

42 Article 22(3) of Regulation No 4064/89 provides that the Commission may, at the request of a Member State, examine whether a concentration which has no Community dimension is compatible with that regulation. The scope of the Commission's examination is circumscribed solely by the terms of Article 22. Thus, for example, Article 22(5) provides that the Commission is to take only the measures strictly necessary to maintain or restore effective competition within the territory of the Member State at the request of which it intervenes. On the other hand, Article 22 grants no power to the Member State either to control the Commission's conduct of the investigation once it has referred the concentration in question to it or to define the scope of the Commission's investigation.

43 Furthermore, it is clear from the documents before the Court that, contrary to the applicant's submissions, the Netherlands Government did not seek to restrict the Commission's examination of the concentration at issue.

44 The letter of 19 April 1995 which the Netherlands Government sent to the Commission shows that it expected the Commission to examine the concentration as a whole and not just one aspect of it. The first paragraph of the letter reads as follows:

'With reference to Article 22(3) of Regulation No 4064/89, I request you, on behalf of the Netherlands Government, to ascertain whether the joint venture between RTL, CLT, VNU, Veronica and Endemol is consistent with the merger control regulation.'

45 It is also apparent from the third paragraph of that letter that, while the Netherlands Government sought to draw the Commission's attention to the television advertising market in particular, it nevertheless did not seek to circumscribe the scope of the Commission's investigation. That paragraph states:

'So far as the Netherlands Government can judge, the partnership will take the form of a concentration... The Netherlands Government... considers it desirable that further attention be devoted to the question whether the concentration could lead to the creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded in the television advertising market in the Netherlands.'

46 That conclusion is borne out by the fact that, in its opinion of 5 September 1995 pursuant to Article 19 of Regulation No 4064/89 on the preliminary draft of the contested decision, the advisory committee supported the Commission's view that its examination had to relate to the concentration as a whole and not just to particular aspects of it. The committee was unanimous on the point, the Netherlands representative having registered his agreement in that regard.

47 The first plea must accordingly be rejected as unfounded.

2. *The second plea, alleging infringement of the rights of the defence*

Arguments of the parties

48 The applicant contends that the Commission infringed its rights of defence in the way in which it dealt with its right of access to the file.

49 Rights of the defence include the right of the undertakings concerned to obtain access to the documents relied on by the Commission in order to be able to comment on their veracity and relevance. The Commission has an obligation to offer to the undertakings involved in Article 85(1) proceedings all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation, save where the business secrets of other undertakings, the internal documents of the Commission and other confidential information are involved (Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 41).

50 Although that case-law has been developed in cases concerning proceedings under Articles 85 and 86 of the Treaty, the applicant submits that when the principle that the rights of the defence are to be protected is applied to proceedings under Regulation No 4064/89, it cannot result in any lesser right of access to documents in the Commission's file. Article 18 of Regulation No 4064/89, like Article 13 of Commission Regulation (EC) No 3384/94 of 21 December 1994 on the notifications, time-limits and hearings provided for in Regulation No 4064/89 (OJ 1994 L 377, p. 1), which was the implementing regulation in force at the time, contains provisions concerning the right to a hearing which are identical to Article 19(1) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) and Article 4 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition

1963-64 p. 47). It is therefore clear that the case-law cited applies fully to proceedings under Regulation No 4064/89.

51 The applicant states that the file to which the parties to the concentration were granted access was manifestly incomplete, mainly because the Commission had replaced many documents emanating from parties involved in the market with non-confidential summaries which did not indicate the identity of those parties. The Commission even refused to disclose the identity of undertakings which had not requested confidentiality, on the ground that such disclosure would allow the parties to the concentration to deduce which were the other companies. The applicant accepts that this position could be defensible as regards the Commission's first questionnaire to independent producers, which was sent to five independent producers of television programmes, but that it is difficult to understand in the case of the second general questionnaire which was sent to all of the other independent producers listed in the *Nederlands Omroep Handboek 1994/5* (Handbook of the Netherlands Broadcasting Office; hereinafter 'the Handbook').

52 In the absence of any indication as to the identity of the companies which replied, those non-confidential summaries present a misleading picture of market conditions and, without knowing the identity of those companies, the applicant is not in a position to respond to the claims.

53 The applicant also complains that the table of contents provided with the documents to which the parties to the concentration were given access did not indicate either the nature or the content of those documents. It claims that the table should have provided them with information which was sufficiently detailed to enable them to ascertain whether the documents described were likely to be relevant for their defence.

54 It claims that the parties to the concentration were not granted access to the answers of IDTV, an independent producer, to which a specific questionnaire was sent by the Commission. Furthermore, no questionnaire was sent to D & D

Productions International BV, the Dutch subsidiary of the Belgian production company D & D, or to Sleeswijk Entertainment BV, which was acquired by D & D.

55 The applicant alleges that the Commission acquired new documents after the parties to the concentration had been granted access to the file and that they were never informed of that fact or given the opportunity to see those documents. The Commission's conclusion that the in-house production of the public broadcasters was essentially for their own use can only be explained by the fact that it gathered information after the hearing. If that conclusion is based on information provided by the parties to the concentration, which is less likely, it is vitiated by a manifest error of fact.

56 The applicant also complains that replies were obtained by the Commission by telephone and never passed on to the parties to the concentration. The applicant was therefore unable to make known its views on that information. Moreover, as that information is in any event unverifiable, the Commission should not have used it. The gathering of information by telephone is contrary to the fundamental principles of the rights of the defence in competition cases. Not only may such information be misunderstood, but there is no written legal requirement obliging the person questioned to give exact figures, unlike the case of a request for information, which contains a clear warning as to the penalties should the information be incorrect. Furthermore, the gathering of information by telephone is manifestly contrary to the intention of the Community legislature and to the provisions adopted by it, and amounts in fact to a refusal by the Commission to apply Community law. Practical difficulties encountered by the Commission cannot relieve it of its obligation to apply Regulation No 4064/89.

57 The Commission accepts that the principles governing access to the file in proceedings under Articles 85 and 86 of the Treaty must also apply in proceedings under Regulation No 4064/89. However, because decisions on concentrations are subject to a very strict timetable in order to protect the interests of the parties involved in a concentration, the specific application of

those principles must reconcile the protection of the parties' rights of defence and the wider public interest in effective scrutiny of concentrations.

58 Access to the summaries of the replies which were given to the questionnaires sent to independent producers was sufficient to enable the applicant to contest the evidence obtained, as the summaries clearly showed the views of third parties on the likely consequences of the concentration. The credibility of those views is not affected by the identity of the persons who expressed them. What matters is that they illustrate the concerns of the players in the production market and the strength of the reasoning expounded in support of their views. The applicant was therefore able to respond to any assertion put forward by a third party with which it disagreed.

59 The Commission explains that, in order to be able to discharge its public duty of reviewing concentrations, it must be in a position to obtain full and frank views from third parties potentially affected. It must also be able to guarantee that their comments will be treated in confidence (judgment in Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraph 33, as confirmed in Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraphs 26 and 27).

60 The fact that not all the questionnaires sent had been replied to at the time when the applicant had access to the file does not devalue the evidence on which the Commission relied. Most of the more substantial independent producers listed in the Handbook did respond to the questionnaire sent to them, so that the replies available to the Commission when it drew up the statement of objections represented the views of the most important players in the market for Dutch-language television production.

61 The Commission states that the table of contents provided the parties to the concentration with general information as to the nature of the data gathered.

62 Also, they did have access to the replies of IDTV and D & D, by means of non-confidential summaries.

63 The Commission confirms that no documentary evidence was obtained by it after 26 July 1995, the date on which the parties inspected the file. It is, however, correct that independent producers who had not replied to the questionnaires were contacted by telephone after that date. That fact was brought to the attention of the parties during the hearings but they did not ask to see the extra information gathered in this way. That information related solely to the number of hours of television programmes produced by the undertaking questioned and to the value in guilders of those programmes. Since the information was of a kind which only the responding undertaking could have known accurately, its disclosure to the parties would not have enabled them to challenge it. Consequently, even if there had been a procedural defect, which the Commission disputes, it would not have prejudiced the applicant.

64 The Commission explains, finally, that it would have been disproportionate to use the procedure under Article 11(5) of Regulation No 4064/89 in a case such as this where most of the undertakings concerned are very small. It was therefore appropriate for the Commission to supplement the written replies which it had received with telephone enquiries.

Findings of the Court

Access to non-confidential summaries

65 It is clear from the case-law that the procedure for access to the file in competition cases is intended to allow the addressees of a statement of objections to examine evidence in the Commission's files so that they are in a position effectively to

express their views on the conclusions reached by it in its statement of objections on the basis of that evidence. The right of access to the file is justified by the need to ensure that the undertakings in question are able properly to defend themselves against the objections raised in that statement (*Cimenteries CBR*, cited above, paragraph 38).

66 However, the case-law also makes it clear that access to certain documents may be refused, in particular in the case of documents or parts thereof containing other undertakings' business secrets, internal Commission documents, information enabling complainants to be identified where they wish to remain anonymous and information disclosed to the Commission subject to an obligation of confidentiality (Case T-65/89 *BPB Industries and British Gypsum*, cited above, paragraph 29, as confirmed in Case C-310/93 P, paragraphs 26 and 27).

67 The Court has previously held that, while undertakings have a right to protection of their business secrets, that right must nevertheless be balanced against safeguarding the rights of the defence (Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847, paragraph 98). The Commission may therefore be required to reconcile the opposing interests by preparing non-confidential versions of documents containing business secrets or of other sensitive information (*ICI* v *Commission*, paragraph 103).

68 The Court considers that the same principles are applicable to access to the files in concentration cases examined under Regulation No 4064/89, even though their application may reasonably be adapted to the need for speed, which characterises the general scheme of that regulation (Case T-290/94 *Kaysersberg* v *Commission* [1997] ECR II-2137, paragraph 113).

69 In the present case, it is not disputed that some independent producers replied to the Commission's questionnaires on the condition that their identity was not to be revealed by the Commission to the parties to the concentration. It follows that the Commission cannot be criticised for having concealed the identity of those undertakings and provided the parties only with non-confidential summaries of their replies.

70 Furthermore, in order to enable the Commission to comply with that condition, it was necessary for it not to reveal the identity of the other independent producers, who had not sought confidentiality before replying to the Commission's questionnaires. As the Commission points out, the replies to the questionnaires give information on the market segment in which a particular respondent operates. In those circumstances, the Commission could not rule out the possibility of the parties deducing the identity of the producers who had asked for their replies to be treated confidentially were it to disclose the identity of those who had not done so.

71 Besides, as the Commission states, in the present case the replies to the questionnaires contained only the views of the third parties on the likely consequences of the concentration. The non-confidential summaries made those views clear. It was thus not necessary to know the identity of the third parties in question in order to be able to challenge the views expressed.

72 Accordingly, the fact that the applicant had access only to non-confidential summaries of the replies to the questionnaires sent to the independent producers does not amount to an infringement of its rights of defence.

Presentation of the table of contents

73 The presentation of the table of contents adopted by the Commission corresponds to that previously approved by the Court in its judgment in Case T-65/89 *BPB Industries and British Gypsum*, cited above, paragraphs 29 to 33, and confirmed by the Court of Justice on appeal (Case C-310/93 P, cited above).

74 In the present case, it is not disputed that the documents on the file to which the parties to the concentration had access on 26 July 1995 were presented in chronological order and that the Commission had prepared a summary list of all 279 documents which made up the file. That list, produced in Annex 16 to the application, contained information of two kinds. First, it gave a breakdown of the documents by type. For that purpose, a classification under 13 headings was notified to the companies concerned (annual reports, internal notes, requests for information and so forth). The list contained, for each document or group of documents, an indication of the key figure or, as the case may be, figures corresponding to the heading under which the document or group of documents fell. Secondly, the list indicated, for each document or group of documents, whether it was accessible to the companies concerned, partially accessible to them, confidential or not relevant.

75 It is apparent that the parties were refused access to five categories of documents, namely: (i) documents for purely internal Commission purposes; (ii) certain correspondence with the Member States; (iii) certain replies to requests for information made under Article 11 of Regulation No 4064/89; (iv) certain correspondence with third parties; and (v) one or more studies.

76 The applicant has no real grounds for complaining that the Commission refused it access to purely internal documents, which, as the Court has previously held, did not have to be disclosed (see paragraph 66 above). An identical answer must be given in respect of the correspondence with the Member States and certain

third parties, to which the Commission was entitled to refuse access on the basis of its confidential nature. So far as concerns the replies to requests for information addressed by the Commission to third parties, the Court has already held that, in the present case, the Commission did not infringe the rights of the defence by providing only non-confidential summaries of some of those replies (see paragraphs 69 to 72 above).

77 As regards the study or studies which were mentioned in the summary list referred to by the applicant in its reply and were not provided to the applicant, the Commission mentions only two studies in the contested decision and the statement of objections sent pursuant to Article 18 of Regulation No 4064/89. Those studies were, respectively, an econometric study for the purposes of the investigation, prepared by KPMG Management Consulting, and a study entitled Media in Europe, Europe Media Cost Comparison 1993, prepared by Young & Rubicam. A copy of the first study was sent to the parties and a copy of the second was included in the file to which the parties had access on 26 July 1995. The Commission does not refer to any other study in the contested decision or in the statement of objections and the applicant has provided no concrete information to the effect that those documents could have been based on information gathered from such a study.

78 It follows that the way in which the Commission presented the table of the file contents in this case does not infringe the rights of the defence.

The replies of IDTV and Sleeswijk-D & D

79 The applicant does not dispute the Commission's assertion that the applicant had access to the non-confidential summaries of the replies of IDTV and Sleeswijk-D & D. This ground of challenge must therefore be rejected.

Documents alleged to have been acquired after the applicant inspected the file

80 The Court considers that the applicant has not substantiated its claim that the Commission acquired new documents concerning the Netherlands television production market after the applicant had obtained access to the file and that it failed to disclose them to the applicant. In its application, the applicant had referred, in particular, to the first three sentences of paragraph 89 of the contested decision, which state:

'The in-house production of the public broadcasters is essentially used for their own purposes. Although these productions are sometimes offered on the international market, they are normally not offered to other broadcasters in the Dutch TV market. There is, therefore, no direct competition between in-house production and programmes produced by independent producers which are offered on the market.'

81 However, the Commission demonstrated at the hearing that the first two sentences are taken from the statement of objections and the parties' reply thereto respectively. The statement of objections is dated 18 July 1995 and thus precedes the parties' inspection of the file on 26 July 1995. The third sentence merely draws the logical conclusion from the first two sentences and does not contain any new information.

82 As regards the letter of 25 August 1995 from the Nederlandse Vereniging van Erkende Reclame Adviesbureaus (Netherlands Association of Advertising Agencies) to the Commission, since the applicant has withdrawn the argument as to the Commission's analysis of the position of HMG in the television advertising market (see paragraph 32 above), it is unnecessary to examine the question whether the Commission's treatment of that letter infringed the rights of the defence.

Gathering of information by telephone

83 It is not in dispute that the Commission sent a letter pursuant to Article 11 of Regulation No 4064/89, with a questionnaire annexed, to all the independent producers listed in the Handbook and that it then contacted by telephone those who had failed to reply in order to ascertain the number of hours of television programmes produced by them in 1994 and the value in guilders of the programmes. It needed those figures in order to estimate the size of the independent television production market and the proportion of that market held by the applicant.

84 Article 11 of Regulation No 4064/89 is intended to enable the Commission to gather all the information needed in order for it to carry out the tasks assigned to it by that regulation. When the Commission sends a request for information to a person, it is required to state the legal basis and the purpose of the request as well as the penalties laid down for supplying incorrect information. However, Article 11 does not require the undertakings contacted to reply in writing. In the present case, most of the major undertakings did in fact provide written replies. Having regard to the need for speed, which characterises the general scheme of Regulation No 4064/89 (*Kaysersberg*, cited above, paragraph 113), the Commission chose to obtain by telephone the replies of the undertakings which had been sent a letter under Article 11 but had not yet replied. Since the majority of the undertakings contacted in that way also provided the replies needed for the Commission's analysis, thus meeting their obligations under Article 11, it would have been excessive to use the formal procedure referred to in Article 11(5).

85 It follows that the Commission did not infringe Article 11 of Regulation No 4064/89 when, in order to complete its investigations, it contacted by telephone the undertakings to which it had already sent a letter under that provision and which had not replied.

86 While Regulation No 4064/89 was not infringed, it is still necessary, inasmuch as it is common ground that the information gathered by telephone was not submitted as such to the applicant, to establish whether the Commission thereby infringed the rights of the defence within the meaning of the case-law referred to above (paragraph 65).

87 Under that case-law, in order to hold that the rights of the defence have been infringed, it is sufficient for it to be established that the non-disclosure of the documents in question might have influenced the course of the procedure and the content of the decision to the applicant's detriment (*ICI* v *Commission*, cited above, paragraph 78).

88 An infringement of the rights of the defence must be examined in relation to the specific circumstances of each particular case (*ICI* v *Commission*, paragraph 70).

89 The Court thus notes, first, that the information gathered by telephone was used by the Commission in order to calculate the applicant's share of the market for independent Dutch-language television production, which it estimated at 'clearly more than 50%'. That global figure was notified to the applicant at the hearing on 8 August 1995. The Commission also calculated from that information the market share of the 10 other largest producers in the market. The Commission had already indicated to the applicant, in the statement sent to it pursuant to Article 18 of Regulation No 4064/89 on 18 July 1995 and at the time of the parties' inspection of the file on 26 July 1995, that, in its view, the applicant had a market share of around 60%. At the same time it had also provided an initial estimate of the market shares of the five other largest producers. The applicant had thus had the opportunity to comment on those estimates in writing in the parties' statement of defence, lodged on 4 August 1995, and to discuss the Commission's revised figures at the hearing itself.

90 Secondly, it is not in dispute that the information in question, as supplied by the individual undertakings, concerned solely the number of hours of television programmes produced by them as independent producers in 1994 and the value of those programmes. Only those undertakings could provide that information accurately. It follows that even if the Commission had disclosed the information, which was, moreover, of a confidential nature, the applicant would not have been able to challenge it.

91 Accordingly, the Commission did not infringe the applicant's rights of defence by failing to disclose that information in the form in which it was provided by individual producers.

3. *The third plea, alleging infringement of essential procedural requirements*

Arguments of the parties

92 The applicant maintains that many new and important matters of fact and of law emerged at the hearing of 8 August 1995. As a result, the advisory committee and the college of Commissioners could not have had full knowledge of the material facts in the case, because they were not provided with a report containing the minutes of the hearing. The fact that the hearing was recorded on audio cassettes does not remedy that breach of an essential procedural requirement, with the result that the contested decision must be annulled.

93 The Commission replies in effect that it is not required to draw up official minutes of hearings in cases falling under Regulation No 4064/89, nor could the failure to supply such minutes to the advisory committee or to the Commissioners have influenced the outcome of the proceedings in this case.

Findings of the Court

94 It is clear from the wording of Article 15(5) of Regulation No 3384/94 that the Commission is required merely to record the statements made by each person heard at a formal hearing. It is not however required to draw up minutes of such a hearing, unlike the procedure under Article 9(4) of Regulation No 99/63, which provides that the essential content of the statements made by each person heard 'shall be recorded in minutes which shall be read and approved by him'.

95 It follows also that the applicant cannot contend that such minutes should have been sent to the Commissioners or to the members of the advisory committee before the contested decision was adopted.

96 This plea must therefore be rejected as unfounded.

4. *The fourth plea, alleging infringement of Articles 2 and 3(1) and (3) of Regulation No 4064/89*

97 In its fourth plea, the applicant disputes the validity of the conclusion reached by the Commission that its stake in HMG strengthened its dominant position in the market for independent Dutch-language television production in the Netherlands. It puts forward two main grounds of challenge. First, it did not hold a dominant position in the relevant market. Secondly, its participation in the concentration did not strengthen its position in that market.

The applicant's dominant position

98 The applicant submits, on the one hand, that the Commission incorrectly defined the relevant market as the market for independent Dutch-language television production and, on the other, that even if the Commission's narrow definition of the relevant market could be accepted, the applicant could not be considered to hold a dominant position in that market.

Incorrect definition of the relevant market

— Arguments of the parties

99 The applicant contends that the Commission wrongly defined the relevant market in that it considered that the market for independent production of Dutch-language television programmes was separate from the market for in-house productions of the public broadcasters. The three grounds put forward by the Commission to justify that conclusion are misconceived, namely that the public broadcasters produce different types of programmes from the applicant, that the production of the public broadcasters is primarily for their own use, and that the public broadcasters are not in a position to decide freely whether to produce a programme themselves or to commission it from an independent producer.

100 First, the Commission was wrong in considering that the public broadcasters produce different programmes from the applicant's. They produce entertainment programmes which are comparable to its own, and it produces low-budget game shows, talk shows and 'infotainment'. In 1994 the big entertainment shows represented only 35% of its production in terms of value and 16.7% in terms of hours produced.

101 Second, the production of the public broadcasters is not primarily intended for their own use. The applicant points out that the public broadcasters have offered 345 programmes on the international market through the sales agency Nederlandse Omroepprogramma Stichting (NOS, an umbrella organisation which provides administrative services to the public broadcasting bodies), whereas its international catalogue is limited to 80 programmes.

102 Third, it is incorrect that a public broadcaster cannot choose freely whether to produce a programme itself or to commission it from an independent producer. Some broadcasters have very substantial in-house production departments, while others appear to have much more limited resources. The Commission's argument that, because of their considerable investment, the public broadcasters have no choice but to produce in-house, is therefore not in line with the Commission's factual description of the market. Furthermore, if a broadcaster has sufficient staff and facilities for a significant number of productions, that makes it easier for it to choose between in-house and external production.

103 The Commission maintains, first, that the public channels have a marked tendency to purchase high value entertainment programmes from outside while producing in-house those programmes which are inherent in their role as public broadcasters and low-value filler programmes. The applicant is much stronger in the field of big entertainment programmes. While it produces only 13.3% in terms of the total duration of programmes broadcast in the Netherlands, it accounts for 17.8% of production by value. Its production therefore costs 42% more per hour than production in the rest of the market, a fact which clearly shows that its production mix is very different.

104 Secondly, the Commission observes that in-house productions are not sold on, at least not in the Netherlands. Even though NOS offers 345 programmes produced by the public broadcasters on the international market, those international sales have no effect on the Netherlands market.

105 Third, the Commission contends that the option of a 'make or buy' decision is largely illusory. Where a public broadcaster has invested substantially in in-house production facilities, those facilities will represent a significant cost, much of which will be sunk costs. There is therefore no short-term choice but to use those facilities to the greatest extent possible. Since broadcasters without in-house production facilities are not faced with such a decision, they can hardly be considered to exercise influence over the independent production market.

— Findings of the Court

106 Before considering the Commission's definition of the relevant market, it should be observed that the basic provisions of Regulation No 4064/89, in particular Article 2 thereof, confer a discretion on the Commission, especially with respect to assessments of an economic nature. 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 (Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraphs 223 and 224).

107 In the present case, the Commission defined the market correctly, in that it concluded that the independent production of Dutch-language television programmes was a separate market from the market for in-house productions of the public broadcasters.

108 First, programmes produced by independent producers can be substituted only in part for programmes produced by the public broadcasters. The public broadcasters produce themselves, for the most part, the programmes essential to their role as public broadcasters and the low-value filler programmes. By contrast, it is

not disputed that the applicant, which is by far the most important independent producer in the Netherlands, is much stronger in the field of big entertainment programmes, which account for 35% of its production. According to the figures provided by the Commission, which the applicant has not contested, its hourly production costs are 42% higher than those in the rest of the market, a fact which clearly shows that its programmes have a different profile.

109 Second, although certain programmes produced by the public broadcasters are sold on the international market, those sales have no effect on the Netherlands market. The applicant concedes that, so far as concerns the Netherlands market, the in-house production of the public broadcasters is essentially intended for their own use. There is thus no direct competition between the in-house production of the public broadcasters, whose programmes are not, as a rule, offered to other broadcasters in the Netherlands market, and the programmes produced by the independent producers which are offered on that market.

110 Third, the Commission could reasonably conclude that a public broadcaster was generally not in a position to choose whether to produce a programme itself or to commission it from an independent producer.

111 On the one hand, the applicant has not refuted the Commission's argument that public broadcasters with significant in-house production activities have made substantial investment for that purpose, having, in particular, taken on the necessary production staff, a major element in the cost of producing a programme. In those circumstances, it was reasonable for the Commission to conclude that if public broadcasters were to increase significantly the number of commissions placed with independent producers, to the detriment of their in-house production, they would nevertheless have to bear the cost of their in-house production capacity without obtaining a return on the investment made in terms of programmes produced. Such a policy would not be commercially feasible, at least not in the long run.

112 On the other hand, the Commission's argument that, because of their substantial investment, the public broadcasters have no choice but to produce their programmes themselves is not invalidated by the fact that certain broadcasters have only very modest production departments, because it is clear that such broadcasters, lacking means of production themselves, must therefore commission programmes from independent producers.

No dominant position of the applicant in the relevant market

— Arguments of the parties

113 The applicant maintains that, even on the Commission's narrow definition of the market, it cannot be regarded as holding a dominant position. There are 97 producers in the Netherlands market. Only 29 producers replied in writing to the Commission's questionnaires and the information provided by the others over the telephone is not reliable. The Commission therefore calculated the applicant's market share on the basis of incomplete evidence.

114 The Commission infers from the fact that the applicant was unaware of the producers not included in the Handbook, which cited the names of 85 producers including the applicant itself, that they were so small as to be completely insignificant for the purposes of its analysis of the market.

115 It points out that very high market shares are considered to be extremely important when determining whether an undertaking holds a dominant position. An undertaking which holds a large and firm market share for a long period is likely to become an unavoidable trading partner, so that a dominant position could in such circumstances be inferred from the market share alone. In the

present case, the applicant held a market share of more than 50% and was by far the largest operator on the market.

116 The applicant also submits that the other factors relied on by the Commission in concluding that the applicant held a dominant position in the relevant market are misconceived.

117 First, it is incorrect that it has preferential access to foreign formats which are then adapted to the Dutch audience. It had produced only 38 programmes based on foreign formats in the previous three years and not in excess of 60 as the Commission claimed. It appears that the Commission relied on certain subjective replies from its competitors which are wholly unreliable because those competitors did not know precisely which formats were owned by it.

118 Besides, 45 of the 143 programmes which it produced in 1994 were not based on a format. Also, several of the popular formats which it uses are owned by broadcasters. It is incorrect that the applicant owned the most popular Dutch formats.

119 The Commission considers that it demonstrated satisfactorily that the applicant owned a large number of the most popular Dutch formats and had preferential access to foreign formats. In stating that the applicant had preferential access to those formats, it was only recording the view of many of the applicant's competitors that it was in a strong position, in particular because it had the capital base to purchase programmes by entering into 'output deals' (contracts with broadcasters for a specified volume of programmes). In 1993/94 the applicant produced half of the most popular non-sports entertainment programmes.

120 Second, the applicant states that it is not correct that it has a large number of the most popular Dutch television personalities under contract.

121 Nor is its presence in the theatrical field a matter of importance for television personalities, because hardly any of them make use of that opportunity. It is also irrelevant that it has its own agency for stars. It merely has an agency which deals with scheduling for events, and it has no power to enter into contracts of engagement on behalf of its stars.

122 The Commission states in reply that it concluded, in the light of the concerns expressed by other operators on the production market, that the applicant had many of the most popular Dutch television personalities under contract, often on an exclusive basis. The fact that they make little use of the opportunities for appearing other than on television is hardly important: the existence of those opportunities may lead them to choose to work with the applicant rather than with another company, thereby strengthening its position. In any event, it never considered that this was a particularly important factor in establishing the applicant's dominant position.

123 Third, the applicant states that the Commission wrongly assumed that profits made in other countries were liable to strengthen its position in the Netherlands. Those resources are used in the first place to develop the subsidiaries in the various countries concerned.

124 The Commission maintains that the applicant's large-scale activities outside the Netherlands strengthen its dominant position in the Netherlands market. Its subsidiaries give it preferential access to the international market and increase the resources of the whole group when financing major productions or determining

which further investment might be most profitable. That can be seen particularly from the fact that it is the largest supplier to RTL Germany, which is itself the leading German commercial television station.

125 Fourth, the applicant submits that a number of facts put forward by it but neglected by the Commission prove that it does not hold a dominant position. First of all, it is not able to exclude existing competition or prevent the entry of newcomers, several companies having entered the Netherlands production market in recent years. Nor are its customers dependent on it, as is shown by the fact that public broadcasters boycotted it following the creation of HMG and gave up three very popular programmes. Furthermore, the Commission failed to take sufficient account of the future growth of the television production market and of the fact that that growth would not benefit it. Thus, the new private channel, SBS, did not sign a production agreement with it, Kindernet, a second new channel, was to compete directly with RTL 4, and a third channel, Euro 7, did not intend to commission productions from it in 1995.

126 The Commission states that the undertakings which have succeeded in establishing themselves in the Netherlands market in recent years needed an established partner in that market. D & D joined with Sleeswijk, which was already a major Dutch producer. Grundy entered the Netherlands market through a joint venture with the applicant. It is therefore clear that even large international groups cannot enter the Netherlands market without the support of existing market players.

127 It adds that, while developments in the Netherlands television market would result in increased demand from all channels, the largest increase in demand by value would certainly be for additional programming for Veronica. Since the applicant was the main supplier to Veronica and would thenceforth have the benefit of a production agreement and a structural link by virtue of its joint control with RTL over HMG, it was very difficult to believe that most of Veronica's additional programming would not be supplied by it. Furthermore, since Veronica was financially the strongest broadcaster, its requirements were

likely to include more of the expensive dramas and entertainment programmes in which the applicant was particularly strong. On the other hand, the three other new private channels would have lower budgets and their production requirements would be relatively insignificant.

128 It states, finally, that it has shown that the revenue of the public broadcasters would decline in the future, which made an increase in the purchase of high-value programmes unlikely. It is incorrect that the in-house production capacity of the public broadcasters could have any significant competitive impact on the independent production market.

— Findings of the Court

129 It is appropriate to consider at the outset the method used by the Commission for calculating the applicant's share of the market for independent Dutch-language television production in the Netherlands.

130 First, the Commission was right to calculate the market shares of the various producers by reference to the value of programmes and not the number of hours produced. The applicant has not disproved the results of the Commission's investigation, which showed that the hourly value of television productions ranged from NLG 30 000 to NLG 300 000. In those circumstances, market share can be validly calculated only on the basis of value and not volume.

131 Second, the Commission's calculation of the applicant's market share is reasonable. It is clear from the written replies given by the Commission to the Court that the Commission had sent questionnaires to 84 independent producers, not only 75 as stated in the pleadings. Those 84 producers were all the producers referred

to in the Handbook other than the applicant itself. According to notes made during the investigation of the case, the Commission received written information from 29 producers, which related, *inter alia*, to the number of hours of television programmes produced in 1994 and to the value in guilders of those programmes. It also obtained information by telephone from 37 other producers on those two matters. It thus received replies from 78% of the 84 producers. It then estimated the value of the hours produced by the 18 producers for which it had no information, on the basis of the information supplied by other producers with a similar number of employees. Finally, it took into account the data provided by the applicant itself in order to calculate the size of the total market and the market share held by the applicant.

132 The Commission thus did not err by stating in the contested decision that the applicant's market share was 'clearly more than 50%'.

133 Furthermore, the Commission has demonstrated in its reply to one of the Court's written questions that, even though it had to include an estimate of the value of the programmes produced by a producer which was among the 29 which had replied in writing but which had failed to supply the necessary figure, that would not have altered its estimate of the applicant's market share, which would still have been clearly more than 50%.

134 It is necessary to examine next whether the Commission was right to conclude that, in this case, the applicant held a dominant position in the relevant market. According to settled case-law, a particularly high market share may in itself be evidence of the existence of a dominant position, in particular where, as here, the other operators on the market hold only much smaller shares (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 41, Case C-62/86 *Akzo* v *Commission* [1991] ECR I-3359, paragraph 60, and Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraphs 91 and 92).

135 The Commission found, on the basis of its investigations, that the second most important producer held a market share of between 5% and 10%, four other producers each held market shares of between 2% and 5%, and the five other largest producers each held market shares of between 1% and 2%, while all the other producers held a market share of less than 1% each. In those circumstances, the Commission did not manifestly err in its assessment when it concluded that the applicant held a dominant position in the relevant market.

136 The Commission also referred to the applicant's further strengths which gave it a position far superior to that of its competitors. The Court will consider those other factors in turn.

137 First, so far as concerns the applicant's preferential access to foreign formats, the applicant has not refuted the Commission's argument that it was in a strong position because of it its capital base, which enabled it to purchase programmes by entering into 'output deals'. As the Commission explained at the hearing, it is easier for a producer to obtain the necessary formats when it has already signed a contract with a broadcaster for a specified volume of programmes. Contrary to the applicant's submission, that explanation is not invalidated by the fact that the contract generally does not specify the content of the programmes. The fundamental point is that the producer already has a contract with a broadcaster guaranteeing that it will be able to produce a certain number of hours of programmes.

138 As regards formats in general, the applicant has not disputed that in 1993/94 it produced half of the most popular non-sports entertainment programmes and that 24 of those 28 programmes were based on a format. In those circumstances, the Commission's conclusions are not affected either by the fact that a third of the programmes produced by the applicant in 1994 were not based on a format or by the fact that, according to the applicant, broadcasters, and not itself, owned other popular formats.

139 The Commission was also correct in its assertion that the applicant had produced more than 60 programmes based on foreign formats in the three years preceding the concentration, as was demonstrated by the list which the applicant had itself submitted to the Commission as an annex to its reply of 14 July 1995 to the Commission's request for information of 7 June 1995, and is included in Annex 11 to the application. It is clear from that list that the figure of 38 programmes mentioned by the applicant in fact refers to the number of foreign formats used during that period and not to the number of programmes produced on the basis of those formats.

140 Nor could the Commission ignore the opinion of other producers, of broadcasters and of other private channels, which had considered that the applicant owned a large number of the most popular Dutch formats and enjoyed preferential access to foreign formats.

141 Second, the applicant's statement that a large number of television personalities are either linked to broadcasters or freely available to anyone is not sufficient to refute the Commission's assessment that it had a high number of the most popular Dutch television personalities under contract. So far as concerns the opportunities for those personalities to appear elsewhere than on television and the fact that the applicant has its own agency for stars, even if, as the Commission acknowledges, those are not important factors in establishing the applicant's dominant position, it cannot be ruled out that they may strengthen its position in the market to some extent.

142 Third, as regards activities outside the Netherlands, the applicant has not refuted the Commission's argument that the applicant's large-scale activities outside the Netherlands may strengthen its position in the Netherlands market, given that its subsidiaries give it preferential access to the international market and increase the resources of the group as a whole.

143 Fourth, the other facts put forward by the applicant do not substantiate its argument. While it is true that other companies entered the Netherlands production market during the years preceding the concentration, the applicant has not disproved that those new entrants needed an established partner in that market, at least initially. As regards the alleged boycott of the applicant by certain public broadcasters following the announcement of HMG's creation, it is to be observed that, as the applicant itself states, the applicant supplied 88.2% of its production in 1994 to the channels Veronica, RTL 4 and RTL 5, and it was therefore not unreasonable for the Commission to conclude that such a boycott would have only minor significance.

144 Nor has the applicant shown in what way the Commission was wrong in considering that Kindernet and Euro 7 would be very low budget channels, inasmuch as Kindernet planned to concentrate mainly on children's daytime programmes and Euro 7 was in essence to be a news and documentary channel, and that their production requirements would therefore be relatively insignificant in value. Furthermore, the programmes produced by the applicant are of no interest to Euro 7. Nor has the applicant disputed that Veronica's programme budget was almost three times the budget of SBS.

145 Moreover, the applicant has not proved that the Commission was wrong in considering that most of the additional demand for Dutch-language productions would come from Veronica, which would need programmes for four and a half days of extra broadcasting — while the public broadcasters would have to fill only two and a half days — following Veronica's departure as a public broadcaster. Since the applicant was already Veronica's main supplier, it was also reasonable for the Commission to conclude that most of Veronica's additional programming would be supplied by it.

146 In view of all of the foregoing, the Commission correctly defined the relevant market and the applicant's share of it, and was right in concluding that the applicant held a dominant position in that market.

147 This argument must accordingly be rejected as unfounded.

Strengthening of the applicant's dominant position

148 The applicant submits that the Commission wrongly concluded, first, that VMG, together with RTL, exercised joint control over HMG and, secondly, that the applicant's participation in the concentration strengthened its position in the market for independent Dutch-language television production in the Netherlands.

HMG not jointly controlled by VMG and RTL

— Arguments of the parties

149 The applicant states that HMG was composed of four bodies, namely the general meeting of shareholders, the shareholders' committee, the managing board and the programme directors. The managing board had to obtain the prior agreement of the general meeting of shareholders for the majority of important business decisions, including decisions concerning the strategy of HMG, the three-year business plan and annual budget, important capital investments and bonds or loans. The 'overall programming concept' was also part of that list, as were the appointment and dismissal of the programme directors and of the Director/ Secretary-General.

50 VMG and RTL had an equal number of representatives in the general meeting of shareholders. However, the applicant, joining forces with Veronica in VMG, had a minority interest, because VMG held only 49% of the capital of HMG and

under Luxembourg law, to which HMG was subject, VMG and RTL voted not according to the number of representatives but according to their respective holdings.

151 Under clause 3.4 of the merger agreement, the general meeting was to attempt to resolve problems by consent. If no consensus was reached, the question was to be put on the agenda of the next general meeting where 'the relevant proposal shall be capable of adoption by simple majority of the votes cast at such meeting'. In practice, that means that RTL, with 51% of the voting rights, had a majority at that second meeting.

152 The applicant refers to the judgment in Case T-2/93 *Air France* v *Commission* [1994] ECR II-323, where the fact that major decisions of the board had to be taken by at least one representative of TAT SA and one of British Airways supported the conclusion that there was indeed joint control, and considers that RTL had exclusive control because it was impossible for shareholders other than RTL to block major decisions.

153 The shareholders' committee of HMG, which also had an identical number of representatives of RTL and of VMG, took decisions unanimously but had competence only in respect of the issues listed in clause 3.3 of the merger agreement, that is to say rights relating to the normal protection of minority shareholders, which had nothing to do with the programming of HMG.

154 The applicant concludes therefrom that the Commission has not submitted any convincing argument or evidence to support its conclusion that the applicant, through its structural link to HMG, was in a position to influence the general strategy of HMG in programming and programme purchasing so as to strengthen

its position in the market for independent production (paragraph 100 of the contested decision).

155 It adds that, as it had only a minority holding in HMG, it did not satisfy the conditions, laid down by the Court of Justice in Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487 (hereinafter 'the *Philip Morris* judgment'), under which a shareholding of one competitor in another may be caught by the prohibition in Article 85 of the Treaty. The concentration did not therefore pose any competition problems.

156 The Commission points out that it concluded that HMG was jointly controlled by RTL and VMG because the most important strategic decisions taken by the managing board had to have the prior approval of the general meeting of shareholders. Although RTL could in theory impose its will eventually, it was not conceivable that it would do so having regard to the period of time which was laid down in the procedure set out in clause 3.4 of the merger agreement and to the fact that HMG and RTL had to maintain good relations with the applicant, since it was HMG's principal programme supplier under the production agreement. It follows that VMG exercised a decisive influence over HMG owing to the fact that, in practice, major decisions concerning it had to be taken jointly by RTL and VMG. It submits in that regard that the applicant misconstrues *Air France* v *Commission*, cited above.

157 It adds that the shareholders' committee existed in order to resolve issues requiring the consent of all the shareholders. A decision to make substantial changes in the profile, positioning or programming format of any of the three channels had to be taken unanimously. A similar procedure was necessary in order to change the general terms of the contracts of the staff of the channels. The requirement that such changes could only be authorised unanimously goes beyond what is necessary to protect the interests of a minority shareholder and thus supports the Commission's view that HMG was jointly controlled.

158 The Commission considers, furthermore, that the *Philip Morris* judgment is not relevant to this case.

— Findings of the Court

159 Under Article 3(3) of Regulation No 4064/89, control is constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking.

160 In the light of the considerations of fact and law in this case, the Commission was correct in concluding that VMG (Veronica and the applicant) and RTL exercised joint control over HMG.

161 Under the merger agreement, the most important strategic decisions had to be approved by the general meeting of shareholders before being put before the managing board. Those decisions covered, in particular, the strategy of HMG, the three-year business plan and annual budget, important investments, the 'overall programming concept' and the appointment and dismissal of the programme directors and of the Director/Secretary-General.

162 In accordance with clause 3.4 of the merger agreement, issues submitted to the general meeting had to be decided by consensus. The agreement of RTL and VMG had therefore to be sought for all those decisions and, if a consensus could not be obtained, a period of 15 days was laid down during which the representatives of RTL and VMG had to use all endeavours to reach such a consensus. Only after those two stages could a final decision be adopted by simple majority vote, when RTL, with 51% of the voting rights, had a majority.

163 Furthermore, the shareholders' committee, which took decisions by unanimous vote, had to give its prior approval to certain decisions of the managing board which went beyond what is necessary to protect the interests of a minority shareholder. Thus, a decision changing substantially the profile, positioning or programming format of any of the three channels could only be taken unanimously. The same was true of a decision creating a new channel which would compete directly with one of the three existing channels. Accordingly, those aspects of HMG's strategy and of its 'overall programming concept' were necessarily subject to unanimous agreement between RTL and VMG.

164 It follows that the Commission could reasonably conclude that RTL and VMG had joint control over HMG, having regard to the provisions of the merger agreement. It is therefore unnecessary to consider the applicant's arguments concerning RTL's alleged exclusive control and the *Philip Morris* judgment.

No strengthening of the applicant's position in the relevant market

— Arguments of the parties

165 The applicant submits that its stake in HMG did not enable it to exercise any influence on either HMG's general programming or its purchase of programmes. Its alleged ability to prevent access of other producers to HMG is based on the alleged joint control when, so far as concerns RTL 4, RTL 5 and Veronica, it had already been the main supplier of RTL and Veronica for five years and their

image had therefore already been determined to a large extent by its programmes over that period. Thus, its position was not strengthened, nor was competition impeded, by the creation of HMG.

166 The Commission considers that the parent companies could not manage HMG properly unless they were in agreement on the most important strategic decisions. It is inconceivable that the applicant's acquisition of a stake was solely a financial investment which did not procure for it the benefit of decisive influence over HMG. The Commission's essential concern was therefore to prevent the structural links between the applicant and HMG from closing the market in question to other producers and strengthening its position in that market.

— Findings of the Court

167 The Commission did not err in its assessment by concluding that, because of the structural link created between the parties to the concentration and the joint control which the applicant was therefore to exercise with RTL over HMG, in agreement with Veronica, the applicant had henceforth ensured a vast market for its production. Without that structural link it would have been realistic to envisage the possibility of other producers providing a much larger proportion of HMG's additional programme requirements. It was not possible for any other producer in the Netherlands to benefit from a guaranteed outlet for its productions nor to influence a broadcaster's programme acquisition policy. That conclusion could only be reinforced by the terms of the production agreement (see paragraph 18 above).

168 Furthermore, the parties themselves had stated that the supply relationship linking the applicant to RTL and Veronica was a major factor in determining the

image of RTL 4, RTL 5 and Veronica and that it would be equally important for the success of HMG. They had also acknowledged that the purpose of the concentration was partly to enable the applicant to reduce the risk to which it was exposed in producing new programme formats, in that the concentration would ensure that the applicant's income from the new formats was maximised. It was therefore reasonable for the Commission to conclude that the applicant would provide its most promising programmes or those of proven appeal to HMG, to the detriment of other broadcasters.

169 In those circumstances, the Court finds that the applicant has not proved that the Commission exceeded the limits of its discretion or that it manifestly erred when it concluded that the effect of the concentration would be to strengthen the applicant's dominant position in the market for independent Dutch-language television production in the Netherlands and that effective competition in the market would thus be significantly hindered.

170 It follows that this argument must be rejected and, therefore, that the application must be dismissed in its entirety.

Costs

171 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 it must, having regard to the defendant's pleadings and to the order of the President of the Fourth Chamber, Extended Composition, of 7 October 1996, be ordered to bear, in addition to its own costs, one fifth of those incurred by the defendant before the withdrawal of Veronica, RTL, CLT and VNU together with all of those incurred by the defendant after their withdrawal.

On those grounds,

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

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to bear, in addition to its own costs, one fifth of the costs incurred by the defendant until the withdrawal of the parties on 7 October 1996 together with all of those incurred subsequently.**

Lindh García-Valdecasas Lenaerts

Cooke Jaeger

Delivered in open court in Luxembourg on 28 April 1999.

H. Jung P. Lindh

Registrar President