

Case T-282/02

Cementbouw Handel & Industrie BV

v

Commission of the European Communities

(Competition — Control of concentration of undertakings — Articles 2, 3 and 8 of Regulation (EEC) No 4064/89 — Concept of concentration — Creation of a dominant position — Authorisation subject to compliance with certain commitments — Principle of proportionality)

Judgment of the Court of First Instance (Fourth Chamber, Extended Composition), 23 February 2006 II - 331

Summary of the Judgment

1. *Competition — Concentrations — Concept*
(Council Regulation No 4064/89, Art. 3; Commission Notice 98/C 66/02, point 19)
2. *Competition — Concentrations — Concept*
(Council Regulation No 4064/89, Art. 3(2))

3. *Competition — Concentrations — Acquisition of indirect joint control of a joint undertaking*
(Council Regulation No 4064/89, Arts 3(1)(b) and (4)(b))
4. *Community law — Principles — Protection of legitimate expectations — Conditions*
5. *Competition — Concentrations — Concept*
(Council Regulation No 4064/89, Art. 3)
6. *Competition — Concentrations — Existence — Concentration coming within the exclusive competence of the Commission — Conditions*
(Council Regulation No 4064/89, Art. 3)
7. *Competition — Concentrations — Concentration having a Community dimension — Criteria for assessment*
(Council Regulation No 4064/89, Arts 1 and 5)
8. *Competition — Concentrations — Examination by the Commission*
(Council Regulation No 4064/89, Art. 6)
9. *Competition — Concentrations — Concentration resulting from a number of legal transactions having a unitary nature on account of their interdependence*
(Council Regulation No 4064/89)
10. *Competition — Concentrations — Assessment of compatibility with the common market — Creation or strengthening of a dominant position*
(Council Regulation No 4064/89, Arts 2(2) and 3)
11. *Competition — Concentrations — Examination by the Commission — Economic assessments*
(Council Regulation No 4064/89, Art. 2)
12. *Competition — Dominant position — Existence — Barriers to market entry*
(Art. 82 EC)

13. *Competition — Dominant position — Existence — Relevance of the purchasing power of customers vis-à-vis the supplier*
(Art. 82 EC)
14. *Competition — Concentrations — Assessment of compatibility with the common market — Creation or strengthening of a dominant position*
(Council Regulation No 4064/89)
15. *Competition — Concentrations — Examination by the Commission — Commitments given by the undertakings concerned of such a kind as to render the notified transaction compatible with the common market*
(Council Regulation No 4064/89, Arts 2(2) and 8(2))

1. It follows from Article 3 of Regulation No 4064/89 on the control of concentrations between undertakings, entitled 'Definition of concentration', that a concentration is deemed to arise, in particular, where control of one or more undertakings is acquired either by an undertaking acting on its own or by two or more undertakings acting jointly, on the understanding that, no matter what form it assumes, the taking of control, having regard to the particular circumstances of fact and of law in each case, must confer the possibility of exercising decisive influence on the activity of the acquired undertaking as a consequence of rights, contracts or any other means.

exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking, that is to say, the power to block actions which determine the strategic commercial behaviour of an undertaking. Thus, joint control may result in a deadlock situation owing to the power of two or more undertakings to reject proposed strategic decisions. Those shareholders must therefore reach understanding in determining the commercial policy of the joint venture.

In accordance with paragraph 19 of the Commission Notice on the concept of concentration within the meaning of Regulation No 4064/89, joint control

While decisive influence, within the meaning of Article 3(3) of Regulation No 4064/89, need not necessarily be exercised in order to exist, the existence of control within the meaning of Article

3 of that regulation requires that the possibility of exercising that influence be effective.

(see paras 41, 42, 58)

2. The fact that a joint undertaking may be a full-function undertaking and therefore economically autonomous from an operational viewpoint does not mean that it enjoys autonomy as regards the adoption of its strategic decisions. The opposite conclusion would lead to a situation in which there would never be joint control of a 'joint undertaking' as soon as it was economically autonomous. The condition in Article 3(2) of Regulation No 4064/89 on the control of concentrations between undertakings that must be satisfied in order for the creation of a joint undertaking, that is to say one controlled by two or more undertakings, to be considered to constitute a concentration, namely that the joint undertaking must '[perform] on a lasting basis all the functions of an autonomous economic entity', proves that that is not the case.

(see para. 62)

3. Article 3(1)(b) of Regulation No 4064/89 on the control of concentrations between undertakings states that control may be acquired 'direct[ly] or indirect[ly]' by one or more persons, and Article 3(4)(b) of that regulation accepts that those having control may also be persons who, while not being holders of rights or entitled to rights under contracts, have the power to exercise the rights deriving therefrom.

The shareholders of the members of a joint undertaking may acquire indirect control within the meaning of Article 3 even where they are not direct holders of voting rights in the general assembly of that undertaking, which are exercised by the members themselves.

Provided that commercial companies comply in any event with the decisions of their exclusive shareholders, their majority shareholders or those jointly controlling the company, it necessarily follows that, where the member companies of the joint undertaking are all subsidiaries held either exclusively or jointly by two shareholders, an appointment to the joint undertaking's decision-making bodies presumes the agreement of the two shareholders. Otherwise, the

members will be unable to appoint the joint undertaking's decision-making bodies and the joint undertaking will be incapable of functioning.

making bodies, they will have to take those shareholders' views into account.

(see paras 72-74)

The fact that representatives of the parent companies are not entitled to sit on the joint undertaking's managing board or that they are able to represent only a minority within its supervisory board does not alter the fact that it is the members of that undertaking that decide on the composition of the decision-making bodies and, through the intermediary of those members, their two shareholders.

4. Three conditions must be satisfied in order to claim entitlement to the protection of legitimate expectations. First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the Community authorities. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules.

(see para. 77)

Furthermore, as regards the composition of the joint undertaking's two decision-making bodies, although its articles do not preclude that all the persons sitting on those bodies will themselves carry out functions within the decision-making bodies of the member undertakings of the joint undertaking, it is inevitable that those representatives will have been appointed by the shareholders of the members of the joint undertaking and that, in performing their functions within the joint undertaking's decision-

5. Whereas Article 3(1)(a) of Regulation No 4064/89 on the control of concentrations between undertakings treats as a concentration a relatively simple and identifiable phenomenon — that of a merger between two or more previously independent undertakings —, Article 3(1)(b) is intended to cover all the other situations in which one or more undertakings acquire control of the whole or parts of one or more other undertakings. That general and teleological definition

of a concentration — the result being control of one or more undertakings — implies that it makes no difference whether the direct or indirect acquisition of control was acquired in one, two or more stages by means of one, two or more transactions, provided that the end result constitutes a single concentration.

more complex operation, without which it would not have been concluded by the parties. In other words, in order to determine the unitary nature of the transactions in question, it is necessary, in each individual case, to ascertain whether those transactions are interdependent, in such a way that one transaction would not have been carried out without the other.

Nor does it matter whether, when they notify a concentration to the Commission, the parties propose to conclude two or more transactions or whether they have already concluded them before notifying them. It is for the Commission, in each case, to ascertain whether those transactions are unitary in nature, so that they constitute a single concentration for the purposes of Article 3 of Regulation No 4064/89.

That approach tends, on the one hand, to ensure that undertakings which notify a concentration have the advantage of legal certainty for all the transactions which complete that operation and, on the other, to enable the Commission to carry out an effective control of concentrations capable of significantly impeding competition in the common market or a significant part thereof. Those two aims constitute, moreover, the principal objective of Regulation No 4064/89.

Such an approach seeks to identify, in accordance with the circumstances of fact and of law specific to each case and with a concern to ascertain the economic reality underlying the transactions, the economic aim pursued by the parties, by examining, when faced with a number of legally distinct transactions, whether the undertakings concerned would have been inclined to conclude each transaction taken in isolation or whether, on the contrary, each transaction constitutes only an element of a

It follows that a concentration within the meaning of Article 3(1) of Regulation No 4064/89 may be deemed to arise even in the case of a number of formally distinct legal transactions, provided that those transactions are interdependent in such a way that none of them would be carried out without the others and that the result consists in conferring on one

or more undertakings direct or indirect economic control over the activities of one or more other undertakings.

(see paras 103-109)

6. Article 3 of Regulation No 4064/89 on the control of concentrations between undertakings defines the conditions of the existence of a 'concentration' and confines itself to defining, generally and materially, what is to be understood by a 'concentration'; it does not determine the question of the Commission's competence in respect of concentrations. Among the transactions which satisfy the definition in Article 3 of Regulation No 4064/89, only those having a 'Community dimension', such as those defined in Article 1 of that regulation, fall within the exclusive competence of the Commission, save where the regulation provides to the contrary. Consequently, the mere fact that a transaction satisfies the definition of Article 3 of Regulation No 4064/89 does not necessarily mean that it falls within the scope of the Commission's exclusive competence; the transaction must also have a 'Community dimension'.

(see para. 114)

7. It follows from the general structure of Article 5 of Regulation No 4064/89 on the control of concentrations between undertakings that the Community legislature intended to specify the scope of that regulation by defining, *inter alia*, the turnover of the participants to a concentration that must be taken into consideration for the purpose of determining whether it has a 'Community dimension' within the meaning of Article 1 of Regulation No 4064/89. Thus, it follows from Article 5(2) of that regulation that, in the context of the acquisition of parts of an undertaking, only the turnover relating to those parts of the undertaking which are actually acquired are to be taken into account for the purpose of assessing the dimension of the concentration in question.

That global assessment also includes the interpretation of the second subparagraph of Article 5(2) of Regulation No 4064/89, so that where the acquisition of parts of one or more undertakings takes place in a number of transactions within a two-year period between the same persons or undertakings, the turnover must relate to the acquired parts considered together. The underlying reason for the insertion of the second subparagraph of Article 5(2) of Regulation No 4064/89 is to ensure that the same undertakings or the same persons do not artificially break a transaction down into a number of partial sales of assets, over a period of time, with the aim of avoiding the thresholds laid down in Regulation No 4064/89 which determine the Com-

mission's competence in application of that regulation.

Commission will then ascertain whether the transaction thus identified has a Community dimension, for the purposes of establishing whether it is competent and of assessing the effects of the transaction on competition.

Accordingly, the fact that the second subparagraph of Article 5(2) of Regulation No 4064/89 allows the Commission to consider two or more transactions to constitute a single concentration for the purposes of calculating the turnover of the undertakings concerned with the aim of preventing any circumvention of the competence conferred on it by that regulation does not mean that that provision deprives the Commission of the right to determine, upstream, in application of Article 3 of that regulation, whether a number of transactions notified to it give rise to a single concentration or whether, on the contrary, those transactions must be regarded as giving rise to a number of concentrations.

(see paras 115-120)

8. The position defended by each of the parties notifying a concentration is by definition subjective and necessarily reflects that party's own interests. None the less, that cannot mean that the Commission, in its desire to ascertain the economic reality of a concentration, is precluded from using the explanations supplied by the parties which enable it to identify the true economic purpose pursued by the parties at the time when they concluded the transactions in question. Although the uncontested explanations provided by one of the notifying parties cannot be decisive in themselves, the Commission must be permitted to rely on those explanations where they enable it to support the assessments on which its analysis is based.

If it emerges from the examination carried out by the Commission that two transactions notified to it are not interdependent, those transactions will be assessed individually. Where one and/or the other does not have a Community dimension, the Commission will decline competence to assess that transaction. If it emerges from that examination that the transactions are of a unitary nature and can therefore be considered to be a single concentration, in application of Article 3 of Regulation No 4064/89, the

(see para. 147)

9. When examining together with a subsequent transaction from which it cannot be dissociated a transaction which, taken on its own, would not satisfy the 'Community dimension' criteria and which had for that reason been examined by the competent national competition authority, which had approved it, the Commission does not disregard the allocation of competence between national and Community competition authorities established by Regulation No 4064/89 on the control of concentrations between undertakings, provided that, owing to their unitary nature, the two transactions bring about a single concentration of a Community dimension.

(see paras 158-161)

10. The dominant position referred to in Article 2 of Regulation No 4064/89 on the control of concentrations between undertakings 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.

In that regard, the existence of very large market shares is highly important and the relationship between the market shares of the undertaking or undertakings involved in the concentration and their competitors, especially those of the next largest undertakings, 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. Furthermore, a particularly high market share may in itself be evidence of a dominant position, especially where the other operators on the market have only much smaller shares.

Likewise, the presence of competitors can as a general rule constitute a factor likely to modify or even eliminate, as the case may be, the dominant position of the entity in question only if those competitors hold a strong position which acts as a genuine counterweight.

Last, the absence of significant competitive pressure may also, in part, be inferred from the differentiated nature of the products on the relevant market. The differentiated nature of the products means that each product is not a perfect substitute for the other and that, consequently, an increase in the price of one of them does not necessarily have the effect that the undertaking which has

increased the price will lose market share to its competitors which produce the other product, as would be the case for perfectly substitutable products.

misuse of power. In particular, it is not for the Community judicature to substitute its own economic assessment for that of the Commission.

(see paras 196, 197)

(see paras 195, 198, 201, 212, 213)

11. The basic provisions of Regulation No 4064/89 on the control of concentrations between undertakings, in particular Article 2 thereof, confer on the Commission a certain discretion, 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.

12. Barriers to market entry may be of various kinds, in particular economic, commercial or financial factors, which are likely to expose potential competitors of the established undertakings to risks and costs sufficiently high to deter them from entering the market within a reasonable time or to make it particularly difficult for them to enter the market, thus depriving them of the capacity to exercise a competitive constraint on the conduct of the established undertakings.

(see para. 219)

It follows that review by the Community judicature of complex economic assessments made by the Commission in the exercise of the discretion conferred on it by Regulation No 4064/89 must be limited to ensuring compliance with the rules of procedure and the statement of reasons, as well as the substantive accuracy of the facts, the absence of manifest errors of assessment and of any

13. The purchasing power of a supplier's customers may compensate for the supplier's market power if those customers have the ability to resort to credible alternative sources of supply within a reasonable time if the supplier decides to increase its prices or to make the conditions of delivery less favourable.

In that regard, the dispersion of operators on the relevant market and the absence of a credible alternative supply for those operators on the market are two criteria which, without necessarily constituting exhaustive confirmation or denial of the existence of customer buyer power capable of counteracting a supplier's economic power, are very relevant. The criterion of the degree of concentration of buyers on the market means that their limited number may be capable of reinforcing their bargaining power vis-à-vis the supplier. Furthermore, the criterion of the presence of credible supply alternatives makes it possible to determine whether there is a strong probability that the supplier is forced to limit any increase in prices or indeed to refrain from increasing prices.

(see paras 230-232)

14. Regulation No 4064/89 on the control of concentrations between undertakings does not prohibit an examination, under its own provisions, of the possible aspects of vertical coordination between the joint venture and one or other of its founding undertakings which result from a concentration, without any pre-

judgment of the autonomy of the joint venture.

(see para. 250)

15. Under Regulation No 4064/89 on the control of concentrations between undertakings, the Commission has power to accept only such commitments as are capable of rendering the notified transaction compatible with the common market. 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) of that regulation.

Thus, in order to be accepted by the Commission with a view to the adoption of a decision under Article 8(2) of Regulation No 4064/89, such commitments must not only be proportionate to the competition problem identified by the Commission in its decision but must eliminate it entirely.

However, the notifying parties are not required to confine themselves to proposing commitments aimed strictly at

restoring the competitive situation existing before the concentration in such a way that the Commission may declare that transaction compatible with the common market. Under Article 8(2) of Regulation No 4064/89, the Commission is authorised to accept all commitments by the parties which allow it to adopt a decision declaring the concentration compatible with the common market.

Furthermore, given commitments which go further than the restoration of the situation existing before the concentration, the Commission does not have the discretion to refuse them and to adopt either a decision declaring the concentration incompatible with the common market pursuant to Article 8(3) of Regulation No 4064/89 or a decision declaring the concentration compatible with the common market pursuant to Article 8(2) of that regulation but with conditions attached aimed at restoring the situation preceding the concentration which it would impose unilaterally.

In the first hypothesis — involving the adoption of a negative decision — the Commission would fail to comply with Article 8(2) of Regulation No 4064/89, which requires it to adopt a decision declaring the concentration compatible with the common market if it finds that the concentration, following modifications by the undertakings concerned if necessary, satisfies the criterion defined in Article 2(2) of that regulation. In the second hypothesis — involving a positive decision with conditions attached aimed at strictly restoring the previous situation — the Commission would also come up against the wording of the second subparagraph of Article 8(2) of Regulation No 4064/89, which makes no provision for the Commission to make its declaration that a concentration is compatible with the common market subject to conditions which it has imposed unilaterally, independently of the commitments given by the notifying parties.

(see paras 294, 307-311)