

Joined Cases T-346/02 and T-347/02

Cableuropa SA and Others

v

Commission of the European Communities

(Competition — Control of concentrations between undertakings — Regulation (EEC) No 4064/89 — Decision to refer to national authorities — Concept of ‘distinct market’)

Judgment of the Court of First Instance (Third Chamber), 30 September 2003 II-4259

Summary of the Judgment

1. *Actions for annulment — Natural or legal persons — Measures directly concerning them — Decision to refer examination of a concentration operation to the competent authorities of a Member State — Third-party undertaking*
(Art. 230, fourth para., EC; Council Regulation No 4064/89, Art. 9(3))

2. *Actions for annulment — Independent of recourse to the national courts (Arts 230 EC and 234 EC)*

3. *Actions for annulment — Natural or legal persons — Measures concerning them individually — Decision to refer examination of a concentration operation to the competent authorities of a Member State — Third-party undertaking (Art. 230, fourth para., EC; Council Regulation No 4064/89, Arts 6(1)(b), 9(3) and 18(4))*

4. *Competition — Concentrations between undertakings — Investigation by the Commission — Referral of the examination of a concentration operation to the competent authorities of a Member State — Conditions — Judicial review — Scope (Council Regulation No 4064/89, Art. 9(2)(a))*

5. *Procedure — Introduction of new pleas in law in the course of the proceedings — Plea based on matters coming to light during the proceedings — Confirmation, by a judgment of the Court of Justice, of a legal situation known to the parties — Inadmissible (Rules of Procedure of the Court of First Instance, Arts 48(2) and 76a(3))*

6. *Competition — Concentrations between undertakings — Referral of the examination of a concentration operation to the competent authorities of a Member State — Relevant market — Determination of its distinctness — Geographical delimitation — Criteria for assessment (Council Regulation No 4064/89, Art. 9)*

7. *Competition — Concentrations between undertakings — Investigation by the Commission — Definition of the relevant markets — Discretion — Judicial review — Limits (Council Regulation No 4064/89, Art. 9)*

8. *Competition — Concentrations between undertakings — Investigation by the Commission — Decision to refer examination of a concentration operation to the competent authorities of a Member State — Discretion of the Commission — Judicial review — Limits (Council Regulation No 4064/89, Art. 9(3) and (8))*

9. *Competition — Concentrations between undertakings — Investigation by the Commission — Decision to refer examination of a concentration operation to the competent authorities of a Member State — Discretion of the Commission — Previous decision-making practice — Not relevant*
 (Council Regulation No 4064/89, Art. 9(3))
10. *Community law — Interpretation — Acts of the institutions — Statement of reasons — Account to be taken*
11. *Competition — Concentrations between undertakings — Referral of the examination of a concentration operation to the competent authorities of a Member State — Effects — Exclusive competence of the national authorities to rule on the operation — No possibility of the Commission binding the national authorities on the substance*
 (Art. 10 EC; Council Regulation No 4064/89, Art. 9(2)(a), (3), first para., (6) and (8))
12. *Acts of the institutions — Statement of reasons — Obligation — Scope — Decision to refer examination of a concentration operation to the competent authorities of a Member State*
 (Art. 253 EC; Council Regulation No 4064/89, Art. 9(3), first para.)

1. For a Community measure to be of direct concern to a natural or legal person within the meaning of the fourth paragraph of Article 230 EC, it must directly affect the applicant's legal situation and its implementation must be purely automatic and result from Community rules alone without the application of other intermediate rules. That is the case, in particular, where the possibility that addressees will not give effect to the Community measure is purely theoretical and their intention to act in conformity with it is not in doubt.

The purpose of a decision by the Commission under Article 9(3) of

Regulation No 4064/89 to refer the examination of a concentration operation to the competent authorities of a Member State is not to rule on the effects of the concentration on the relevant markets which are the subject of the referral, but to transfer responsibility for that examination to those national authorities which requested the referral in order that they may give a ruling in accordance with their national competition law. It is, however, capable of directly affecting the legal situation of a third party undertaking, since it effectively deprives that party of a review of the concentration by the Commission under Regulation No 4064/89, of the procedural rights for third parties under that regulation, and of the judicial protection provided for by the Treaty, and does not require

any additional implementing measure for the referral to become effective.

affects them by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee.

(see paras 49-50, 64-65)

2. The possible existence of legal remedies before the national courts cannot preclude the possibility of contesting the legality of a decision adopted by a Community institution directly before the Community judicature under Article 230 EC. Therefore, the fact that a third-party undertaking has the opportunity to bring an action, in accordance with national remedies, against a decision of the national authority for concentration matters taken after a referral by the Commission, and, where appropriate, to seek, within that framework, a preliminary ruling under Article 234 EC, cannot call into question the fact that a decision to refer a concentration operation to the national authorities directly concerns that third-party undertaking.

Since, as far as the application of Regulation No 4064/89 is concerned, a third-party undertaking would, in view of its capacity as the main competitor of the parties to the proposed concentration, of its intervention in the administrative procedure, and of the fact that the Commission took its position into account, have been regarded as individually concerned by a Commission decision declaring the operation compatible with the common market, it must equally be regarded as being so concerned by the decision to refer the examination of the operation to the competent authorities of a Member State, that decision depriving it of the opportunity to challenge before the Community judicature assessments which it could admissibly have challenged in the absence of the referral.

(see paras 67-68)

(see paras 69-71, 74-79)

3. Persons other than the addressees of a decision can claim to be individually concerned within the meaning of Article 230 EC only if that decision
4. For a concentration to be the subject of referral on the basis of Article 9 of Regulation No 4064/89, two cumulative conditions must be fulfilled. First, the concentration must threaten

to create or strengthen a dominant position as a result of which effective competition would be significantly impeded on a market within the Member State in question. Secondly, that market must present all the characteristics of a distinct market.

Rules of Procedure, paragraph 2 of which states that no new plea in law may be introduced in the course of the proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

Those conditions for referral are matters of law and must be interpreted on the basis of objective factors. For that reason, the Community judicature must, having regard both to the specific features of the case before it and the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a concentration falls within the scope of Article 9(2)(a) of that regulation.

In that regard, a judgment given after the actions were brought, to which the parties refer to justify an argument but which merely confirms the law as known to those parties at the time when they brought their action, cannot be regarded as a factor allowing a new plea in law to be introduced.

(see paras 101-102)

However, a plea which may be regarded as amplifying a plea put forward previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible.

5. Although Article 76a(3) of the Rules of Procedure of the Court of First Instance provides that, in the framework of an expedited procedure, the parties may supplement their arguments and offer further evidence in the course of the oral procedure, while giving reasons for the delay in offering such further evidence, it is clear from the actual wording of this provision that it applies without prejudice to Article 48 of the

(see paras 109-111)

6. It is clear from the wording of Article 9(3) of Regulation No 4064/89 that, when examining the possibility of referring the examination of a concen-

tration operation to the national authorities, the Commission is required to determine whether there is a distinct market on the basis of, first, a definition of the market for the relevant products or services and, secondly, a definition of the geographical reference market within the meaning of paragraph 7.

the conditions of competition in the markets for the products or services in question in a Member State are appreciably different and are therefore different geographical markets, those markets must be regarded as distinct markets within the meaning of Article 9(2) of Regulation No 4064/89.

(see paras 114-116)

As appears from Article 9(7) of Regulation No 4064/89 and from paragraph 8 of the Commission Notice on the definition of the relevant market for the purposes of Community competition law, the geographical market to be taken into account consists of the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas. It is necessary, in that assessment, to take particular account of the nature and characteristics of the products or services concerned, the existence of entry barriers, consumer preferences, the existence of appreciable differences in the undertakings' market shares, or substantial price differences.

7. When dealing with concentrations between undertakings, the Community judicature reviews assessments by the Commission concerning the definition of relevant markets by reference to a test of whether there was a manifest error of assessment.

(see para. 119)

8. Though the Commission has a wide discretion in exercising its choice whether or not to refer the examination of a concentration to the competent national authorities of a Member State pursuant to the first subparagraph of Article 9(3) of Regulation No 4064/89, that discretion is not unlimited. The Commission cannot decide to make such a referral if, when the Member State's request for a referral is exam-

Where the assessment of all these factors leads to the conclusion that

ined, it is clear, on the basis of a body of precise and coherent evidence, that such a referral cannot safeguard or restore effective competition on the relevant markets.

Review of that point by the Community judicature is a limited review which, in the light of Article 9(3) and (8) of Regulation No 4064/89, must be restricted to establishing whether the Commission was entitled, without committing a manifest error of assessment, to consider at the time the decision was adopted that the referral to the national competition authorities would enable them to safeguard or restore effective competition on the relevant markets so that it was unnecessary to deal with the case itself.

(see paras 174-176)

9. In the matter of concentrations between undertakings, the fact that, in a given sector, the Commission has decided itself to examine the concentration and has prohibited certain concentrations in the past can in no way prejudice the referral and/or examination of a later concentration because the Commission is required to carry out an individual appraisal of each notified concentration according to the circumstances of each case, without

being bound by previous decisions concerning other undertakings, other product and service markets or other geographical markets at different times. For the same reasons, previous decisions of the Commission relating to concentrations in a specific sector cannot prejudice the decision to be taken by the Commission on a request for referral to the national authorities of a concentration taking place in the same sector.

(see para. 191)

10. The operative part of a measure is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption.

(see para. 211)

11. When examining the conditions for referral under Article 9(2)(a) of Regulation No 4064/89, the Commission cannot, without depriving point (b) of the first subparagraph of Article 9(3) of its substance, conduct an examination of the compatibility of the concentration in such a way as to bind the national authorities in regard to their

substantive findings but must merely establish whether, *prima facie*, on the basis of the evidence available to it at the time when it assesses the merits of the request for referral, the concentration whose referral is requested threatens to create or strengthen a dominant position on the relevant markets. Provided the national competition authorities comply with the obligations arising from Article 9(6) and (8) of Regulation No 4064/89 and from Article 10 EC, they are free to rule on the substance of the concentration referred to them on the basis of a proper examination conducted in accordance with national competition law.

(see para. 217)

12. The Community institutions' obligation under Article 253 EC to state the reasons on which a decision is based is intended to enable the Community judicature to exercise its power to review the legality of the decision and the persons concerned to know the reasons for the measure adopted so that they can defend their rights and

ascertain whether or not the decision is well founded. In order to comply with that obligation, a referral decision adopted under the first subparagraph of Article 9(3) of Regulation No 4064/89 on the control of concentrations between undertakings must contain a sufficient and relevant indication of the factors taken into consideration in establishing that there is a threat of the creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded on a market within the Member State concerned, and that there is a distinct market.

However, whilst the Commission is obliged to state the reasons on which its decisions are based, mentioning the factual and legal elements which provide the legal basis for the measure in question and the considerations which have led it to adopt its decision, it is not required to discuss all the issues of fact and of law raised by every party during the administrative procedure.

(see paras 225, 227, 232)