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

23 February 2006 *

In Case T-282/02,

Cementbouw Handel & Industrie BV, established in Le Cruquius (Netherlands), represented by W. Knibbeler, O. Brouwer and P. Kreijger, lawyers,

applicant,

v

Commission of the European Communities, represented initially by A. Nijenhuis, K. Wiedner and W. Mölls, and subsequently by A. Nijenhuis, É. Gippini Fournier and A. Whelan, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

APPLICATION for annulment of Commission Decision 2003/756/EC of 26 June 2002, relating to a procedure pursuant to Council Regulation (EEC) No 4064/89, declaring a merger to be compatible with the common market and the EEA Agreement (Case COMP/M.2650 — Haniel/Cementbouw/JV (CVK)) (OJ 2003 L 282, p. 1, corrigendum published in OJ 2003 L 285, p. 52),

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

composed of H. Legal, President, P. Lindh, P. Mengozzi, I. Wiszniewska-Białecka and V. Vadapalas, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 6 July 2005,

gives the following

Judgment

Background

1 On 24 January 2002 Franz Haniel & Cie GmbH ('Haniel') and the applicant notified a concentration to the Commission pursuant to Article 4 of Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ 1989

L 395, p. 1, republished, after rectification, in OJ 1990 L 257, p. 13), as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1). According to the notification, in 1999 Haniel and the applicant acquired joint control, for the purposes of Article 3(1)(b) of Regulation No 4064/89, of the Netherlands undertaking Coöperatieve Verkoop- en Produktievereniging van Kalkzandsteenproducenten ('CVK') and its 11 member undertakings by means of an agreement and the purchase of shares held by the German company RAG AG ('RAG').

2 Haniel is a diversified German holding company active in the building materials sector where it produces and sells wall-building materials, such as sand-lime bricks, aerated concrete and ready-mixed concrete. Its activities are mainly in Germany. As regards the Netherlands, before the concentration took place Haniel held shares in several other undertakings which produced sand-lime bricks and were members of CVK.

3 The applicant, which was previously part of the Netherlands group NBM Amstelland BV, is active in the Netherlands in the building materials market and, more generally, the construction, logistics and raw materials supply markets. At the date of adoption of Commission Decision 2003/756/EC of 26 June 2002, relating to a procedure pursuant to Council Regulation (EEC) No 4064/89, declaring a merger to be compatible with the common market and the EEA Agreement (Case COMP/M.2650 — Haniel/Cementbouw/JV (CVK)) ('the contested decision'), the applicant was owned by CVC Capital Partners Group Ltd, an investment group.

4 CVK has been in existence since 1947 and was initially responsible for selling the output of its member undertakings, the Netherlands producers of sand-lime bricks. In 1989 it was transformed into a Netherlands-law cooperative in order to improve cooperation between its members.

5 Before the concentration, five of the eleven member undertakings of CVK — Kalkzandsteenfabriek De Hazelaar BV ('De Hazelaar'), Kalkzandsteenindustrie Loevestein BV ('Loevestein'), Steenabriek Boudewijn BV ('Boudewijn'), Kalkzandsteenfabriek Hoogdonk BV ('Hoogdonk') and Kalkzandsteenfabriek Rijsbergen BV ('Rijsbergen') — were subsidiaries of Haniel. Three brickworks — Kalkzandsteenfabriek Harderwijk BV ('Harderwijk'), Kalkzandsteenfabriek Roelfsema BV ('Roelfsema') and Kalkzandsteenfabriek Bergumermeer BV ('Bergumermeer') — were subsidiaries of the applicant, while two producers — Anker Kalkzandsteenfabriek BV ('Anker') and Vogelenzang Fabriek van Bouwmaterialen BV ('Vogelenzang') were subsidiaries of RAG. Finally, one producer, Van Herwaarden Hillegom BV ('Van Herwaarden'), was owned jointly by Haniel ([*confidential*]%),[1] the applicant ([*confidential*]%) and RAG ([*confidential*]%).

6 In 1998 the Nederlandse Mededingingsautoriteit, the Netherlands competition authority ('the NMa'), was notified of a proposed concentration whereby CVK was to acquire control of its member undertakings. Control was to be transferred in the context of a pooling agreement and by amending CVK's articles. On 23 April 1998 the NMa decided to open the 'second phase' procedure. By decision of 20 October 1998, the NMa closed the second phase procedure and authorised the proposed concentration.

7 Before the transaction was carried out, RAG decided to sell its shares in the member undertakings of CVK to Haniel and the applicant. In March 1999 the parties informed the NMa of their intentions. By letter of 26 March 1999 the NMa informed the parties that the proposed transfer would not constitute a concentration within the meaning of Article 27 of the wet van 22 mei 1997 houdende nieuwe regels omtrent de economische mededinging (Medingingswet) (Law of 22 May 1997 laying down new rules on economic competition) (Stb. 1997, No 242), provided that the transaction authorised by the decision of 20 October 1998 was completed no later than the time of the transfer.

1 — Confidential data omitted.

8 On 9 August 1999 CVK and its member undertakings concluded the pooling agreement referred to in paragraph 6 above. CVK's articles were amended on the same date to take account of the provisions of the pooling agreement (these two transactions are designated below as constituting 'the first group of transactions'). Also on the same date, RAG transferred its shares in three of the member undertakings of CVK (Anker, Vogelenzang and Van Herwaarden) to Haniel and the applicant ('the RAG transaction'), and Haniel and the applicant concluded a cooperation agreement governing their cooperation within CVK (these two transactions, taken together, are designated below as 'the second group of transactions').

9 The Commission became aware of the concentration of 9 August 1999 when it examined two other concentrations notified by Haniel (Cases COMP/M.2495 — Haniel/Fels and COMP/M.2568 — Haniel/Ytong) and, by letter of 22 October 2001, it informed the applicant and the other participating undertakings that the transaction must be notified to it pursuant to Article 4 of Regulation No 4064/89.

10 As indicated in paragraph 1 above, Haniel and the applicant notified the concentration pursuant to Article 4 of Regulation No 4064/89 on 24 January 2002.

11 On 25 February 2002 the Commission adopted a decision under Article 6(1)(c) of Regulation No 4064/89, in which it found that the notified concentration raised serious doubts as to its compatibility with the common market and with the Agreement on the European Economic Area ('the EEA Agreement').

12 On 25 April 2002 the Commission sent a statement of objections to the notifying parties. The applicant responded by letter of 13 May 2002.

13 On 16 May 2002 the Commission heard the parties concerned.

14 Following the submission of a first set of draft commitments on 28 May 2002, which the Commission regarded as insufficient to resolve the competition problem which it had identified, Haniel and the applicant submitted final commitments on 5 June 2002.

15 On 26 June 2002 the Commission adopted the contested decision, whereby it considered that the notified concentration was compatible with the common market and the EEA Agreement (Article 1 of the contested decision), subject to the condition that the commitments set out in points 27, 28, 32 to 35 and 40 of the annex to the contested decision were complied with in full by Haniel and the applicant (Article 2 of the contested decision) and that the other commitments set out in the Annex were complied with in full (Article 3 of the contested decision). The commitments referred to in Article 2 of the contested decision include, in particular, the dissolution of CVK within a period of [*confidential*] of the adoption of the contested decision. The contested decision, omitting the confidential data, was published in the *Official Journal of the European Union* of 30 October 2003 (OJ 2003 L 282, p. 1, corrigendum published in OJ 2003 L 285, p. 52).

Procedure and forms of order sought by the parties

16 By application lodged at the Registry of the Court of First Instance on 11 September 2002, the applicant brought the present action under Article 230 EC.

17 In application of Article 14 of the Rules of Procedure of the Court of First Instance, the Court, after hearing the parties in accordance with Article 51 of the Rules of Procedure, decided to refer the case to a Chamber of extended composition.

18 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber, Extended Composition) decided to open the oral procedure and, by way of measures of organisation of procedure, requested the parties to answer a number of questions in writing and to produce certain documents. The parties complied with those requests within the prescribed period.

19 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 6 July 2005.

20 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

21 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

22 In essence, the applicant raises three pleas in support of its application. The first plea alleges that the Commission was not competent to examine the transactions in question under Article 3 of Regulation No 4064/89. The second plea alleges errors of assessment by the Commission relating to the creation of a dominant position by the concentration, in breach of Article 2 of Regulation No 4064/89. Last, the third plea alleges breach of Article 3 and Article 8(2) of Regulation No 4064/89 and of the principle of proportionality.

1. *First plea: the Commission was not competent to examine the transactions in question under Article 3 of Regulation No 4064/89*

23 This plea is divided into three parts. The first part alleges that the Commission was not competent to examine the RAG transaction, on the ground that there was no change in the control of CVK. The second part alleges that the Commission was not competent to qualify two separate transactions as a single concentration and that in the present case there was no concentration within the meaning of Article 3 of Regulation No 4064/89. The third part alleges that the Commission was not competent to examine the taking of control by CVK of its member undertakings, since it had been authorised by the NMa.

First part of the first plea: the Commission was not competent to examine the RAG transaction, on the ground that there was no change in the control of CVK

Arguments of the parties

24 The applicant maintains that the Commission was not competent, under Regulation No 4064/89, to examine the RAG transaction, since that transaction did not lead to the establishment of joint control of CVK by Haniel and itself.

25 First, the applicant disputes the assertion in the contested decision that before the RAG transaction variable majorities at CVK shareholders' meetings were possible.

26 In the first place, the applicant finds that assertion surprising, since the NMa's decisions of 23 April and 20 October 1998 make no mention of that possibility.

27 Next, the applicant expresses surprise that the contested decision contains no analysis of whether variable majorities were actually possible at CVK shareholders' meetings before the RAG transaction. The Commission cannot, in the applicant's contention, merely do as it did in the contested decision and state that there were variable majorities before that transaction, without adducing the slightest evidence that there was no strong common interest between the shareholders or that there was no stable majority, in accordance with paragraph 35 of the Commission's Notice on the concept of concentration within the meaning of Regulation No 4064/89 (OJ 1998 C 66, p. 5). In the applicant's submission, the Commission did not succeed in

establishing that there was a 'no control' situation in CVK's case before the RAG transaction, whereas it was incumbent on the Commission to demonstrate that there was no control before the RAG transaction, in view of the strong joint interests existing between CVK's 'shareholders' before that transaction, in particular on the basis of the pooling agreement.

28 Second, the applicant maintains that the alleged veto rights which, according to the contested decision, it held with Haniel do not give rise to joint control of CVK, which is an independent economic entity.

29 In the first place, the Commission merely presumed the existence of the applicant's and Haniel's veto rights within CVK's decision making bodies.

30 Thus, first of all, the applicant asserts that the Commission ignored the guarantees which the applicant and Haniel gave to the NMa when notifying the draft pooling agreement approved by the decision of 20 October 1998. Those guarantees provided, first, that CVK's Board of Management must consist exclusively of representatives of members of CVK or independent persons and must not include any representative of companies belonging to a group to which the parent company of one or more of the members of CVK belonged. As regards CVK's supervisory board, moreover, a majority of that board was to be composed of independent members. The applicant maintains that those rules ensure that neither the applicant nor Haniel is able to influence CVK's strategic business decisions.

31 Next, the applicant maintains that under the Netherlands Civil Code the decision-making bodies of a cooperative such as CVK must adopt their decisions in the sole

interest of the undertaking and not in the interest of its shareholders. Consequently, neither the applicant nor Haniel was in a position, in law or in fact, to influence the strategic business decisions of CVK's decision-making bodies. It follows, according to the applicant, that the decision of 20 October 1998 accepting the guarantees offered by it and by Haniel gave rise to a legitimate expectation on its part, while it was for the Commission to demonstrate specifically that it was possible for Haniel and the applicant to exercise decisive influence on CVK's decisions.

32 In the second place, the applicant disputes the Commission's conclusion in paragraph 19 of the contested decision that the cooperation agreement concluded between the applicant and Haniel, the closure of three sand-lime brickworks which were members of CVK and certain documents for Haniel's internal use constituted evidence of the joint control which it and Haniel exerted over CVK. As regards the cooperation agreement between Haniel and the applicant, the applicant states that the stipulations cited in the contested decision concern only the use of [*confidential*], which cannot be automatically regarded as involving strategic decisions of CVK. As regards the closure of three undertakings which were members of CVK, the applicant observes that no agreement was concluded between it and Haniel on that topic and that, after the signing of the pooling agreement, it was CVK that decided, on the basis of its own commercial analyses, to close those undertakings. As regards Haniel's internal documents, the applicant maintains that since it was allowed to peruse those documents it is in a position to assert that they do not demonstrate the existence or non-existence of joint control for the purposes of the application of Regulation No 4064/89 but reveal the subjective and, for the purposes of the present case, irrelevant interests of Haniel.

33 Third, and last, the applicant maintains that the Commission failed to fulfil its obligation to provide sufficient reasons for the contested decision, in three respects: first, as regards the alleged existence of changing coalitions within CVK before the RAG transaction, in particular by failing to set out its reasons for adopting a different position from that taken by the NMa; then, as regards its reasons for concluding that the guarantees offered by Haniel and by the applicant to eliminate

the possibility of joint control were insufficient; and, last, as regards the finding that the cooperation agreement between Haniel and the applicant, the closure of a number of sand-lime brick producers and Haniel's internal documents revealed joint control of CVK.

34 The Commission makes the preliminary point that in the contested decision it did not consider the RAG transaction to be a separate concentration. The pooling agreement, that is to say, the acquisition of control of CVK from its member undertakings, and the RAG transaction, that is to say, the taking of control of CVK by Haniel and the applicant by the acquisition of the shares previously held by RAG in the capital of the member companies of CVK, constitute one and the same concentration.

35 That being so, the Commission replies, first of all, that as a general rule where two shareholders share equally the voting rights in an undertaking, that situation, which is described in paragraph 20 of the Commission Notice on the concept of concentration cited in paragraph 27 above, confers a veto right and therefore joint control of the undertaking on those shareholders. In the present case, before the concentration, neither the applicant, nor Haniel nor RAG had a veto right. Furthermore, while it cannot be precluded that in very exceptional cases minority shareholders without a veto right may exercise de facto joint control of an undertaking, the applicant did not claim in its application that powerful joint interests existed between the three abovementioned shareholders before the concentration was carried out. In that regard, the Commission also observes that the attempted argument to that effect outlined by the applicant in its reply, where it claimed that such joint interests existed, especially in the light of the pooling agreement, disregards the fact that that agreement is an integral part of the concentration and therefore has no relevance during the period before 9 August 1999. In those circumstances, in the Commission's submission, it must be held that the three shareholders had different interests and that variations in the majority within CVK were possible before the concentration.

36 Next, as regards the argument that it ignored the NMa's decision of 20 October 1998 and the guarantees offered to it by the applicant and Haniel, the Commission contends that the NMa examined a different concentration under different legal rules. The concentration notified to the NMa was not implemented as such and a different concentration — consisting of the first and second groups of transactions —, which ought to have been covered by the obligation to notify under Regulation No 4064/89, was concluded on 9 August 1999. Furthermore, the NMa assessed the concept of control by reference to Netherlands competition law, whereas the Commission did so by reference to the provisions of Regulation No 4064/89. Thus, in the Commission's submission, although the question of variations in majority was not relevant for the NMa, the Commission, on the contrary, when applying Regulation No 4064/89 to a different concentration, considered that those variations in majority were important, since in its view the fact that they became possible as a result of the concentration precluded any prior joint control of CVK. The guarantees to which the applicant refers do not alter that conclusion, since their sole purpose was to restrict the possibility of persons exercising functions within the 'final shareholders' of CVK sitting within its management boards. However, the members of those bodies are appointed by the meeting of members of CVK, on a proposal by the directors of those members, who are themselves appointed by their respective shareholders. The Commission therefore maintains that it is highly unlikely that the members of the managing bodies of CVK will act without taking account of the interests of those who ultimately decide on their appointment or removal — that is to say, the applicant and Haniel, in their capacity as 'final shareholders'.

37 The Commission further submits that the provisions of the Netherlands Civil Code do not alter the conclusion that the applicant and Haniel have joint control of CVK. While it is true that in Netherlands law the decisions of the managing bodies of an undertaking must be taken in the interest of the undertaking, the interest of the shareholders is still a factor to be taken into consideration for the purpose of establishing what is in the interest of the undertaking. Furthermore, the relationship between CVK and the applicant may be assimilated to that between a subsidiary and its parent company; since under Netherlands law undertakings are required to

follow the instructions of the parent company, the same should apply where two undertakings — the applicant and Haniel — jointly control a joint undertaking.

38 The Commission likewise disputes the applicant's criticisms of paragraph 19 of the contested decision, which states that the cooperation agreement, the closure of three member undertakings of CVK and Haniel's internal documents constitute evidence of the joint control exercised over CVK by the applicant and Haniel. In that regard, the Commission recalls that those factors serve merely to illustrate the existence of joint control, demonstrated in paragraphs 13 to 17 of the contested decision, which, moreover, the applicant acknowledged in its reply. Accordingly, the veto rights which the applicant and Haniel have in respect of the appointment of the administrative bodies of CVK are sufficient in themselves to establish their joint control of CVK. In any event, the Commission contends that the first two factors actually disclose the possibility for the applicant and Haniel to interfere in the activities and strategic decisions of CVK. As regards Haniel's internal documents, the Commission maintains that they support its argument that Haniel and the applicant intended to take joint control of CVK.

39 Last, the Commission also refutes the applicant's allegations that the reasoning in the contested decision was insufficient.

Findings of the Court

— Preliminary observations

40 It should be recalled *in limine* that according to Article 3 of Regulation No 4064/89, entitled 'Definition of concentration',

'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.

2. The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b).

3. 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 relevant bodies of an undertaking.

4. Control is acquired by persons or undertakings which:

(a) are holders of the rights or entitled to rights under the contracts concerned;

or

(b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

...'

41 It follows 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.

42 As the Commission states in paragraph 19 of its Notice on the concept of concentration, cited in paragraph 27 above — and reproduced, in substance, in paragraph 14 of the contested decision and not disputed by the applicant —, joint control 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. It follows, therefore, that those shareholders must reach understanding in determining the commercial policy of the joint venture.

43 In the present case, the Commission stated as follows in paragraphs 15 to 17 of the contested decision:

'(15) By buying RAG's shares, Haniel and Cementbouw acquired joint control of CVK. Their respective indirect stakes of 50% in CVK enable Haniel and Cementbouw to exercise veto rights at the meeting of CVK members (ledenvergadering). These rights were created by the withdrawal of RAG, whose presence at the meeting would have made variable majorities possible and hence ruled out control of the meeting by the shareholders.

(16) The meeting of members decides who will sit on CVK's decision-making bodies. These are the managing board (Raad van Bestuur) and the supervisory board (Raad van Commissarissen). The articles and the pooling agreement impose restrictions on the meeting's choice, since no member of the managing board, and only a minority of the members of the supervisory board, may at the same time hold a position in the companies of the shareowners of the CVK members.

(17) Choosing who sits on the decision-making bodies of a company is a basic strategic decision. A right to veto such a decision therefore gives its holder, for the purpose of the Merger Regulation, control over the company, in this case CVK, since the members of the decision-making bodies will not disregard the views of those who have the right to veto their decisions.'

44 In paragraph 19 of the contested decision, the Commission also states that:

'Further light is shed on Haniel's and Cementbouw's acquisition of control of CVK by the cooperation agreement which they concluded in the context of the pooling agreement. This [cooperation agreement] regulates various aspects of their cooperation within CVK (paragraph 11). In addition, certain strategic decisions implemented by CVK's corporate management after the [transaction] had been [completed] — in particular the closure of three of the eleven sand-lime brickworks — were already being discussed in detail by Haniel and Cementbouw before the [transaction] and thus, for the parties, plainly formed the basis for concluding the pooling agreement. Collectively, the documents preparing the decisions of the Haniel group's management with regard to the [transaction] in question show that, in Haniel's eyes at any rate, the pooling agreement would enable the parties jointly to control CVK.'

45 It follows from those passages in the contested decision that the Commission found that Haniel and the applicant had taken control of CVK, independently of the question, raised in the second part of the present plea, as to whether the present case involved one or more concentrations. Accordingly, even though the Commission observes in its written submissions that it did not adopt a position in the contested decision solely on the RAG transaction but on a concentration consisting of the first and second groups of transactions mentioned in paragraph 8 above, it must none the less be held that, in reaching its decision that Haniel and the applicant had taken joint control of CVK, the Commission relied solely on the second group of transactions.

46 In substance, the applicant gives the impression that initially, before the conclusion of the second group of transactions, and in particular before the RAG transaction, joint control of CVK was exercised by its three shareholders, namely the applicant, Haniel and RAG — as implied by the applicant's assertion that there were 'strong common interests between CVK's shareholders' (see paragraph 27 above), of the type indicated in paragraphs 30 to 35 of the Commission Notice on the concept of concentration — and criticises the Commission for not having shown 'the absence of common interests' between CVK's shareholders before the conclusion of the second group of transactions, prior to the finding of a 'taking of control' of CVK by Haniel and the applicant. The applicant then maintains that the guarantees offered to the NMa, in the context of the notification of the first group of transactions mentioned in paragraph 8 above, as regards the composition of CVK's managing and supervisory boards, preclude any joint control of CVK, namely the absence of rights held by Haniel and the applicant to veto the strategic decisions of the undertaking.

47 The examination which follows will therefore relate, first of all, to the applicant's assertion that CVK was jointly controlled by its three shareholders before the second group of transactions was concluded. Should the Court find that CVK was not so jointly controlled, it will then determine, second, whether, as the contested decision found, the second group of transactions, in particular the RAG transaction, entailed

the taking of joint control of CVK by Haniel and the applicant. Last, and third, the Court will examine the applicant's complaints concerning the insufficiency of the reasoning employed in the contested decision to support the finding that those parties took joint control of CVK.

— The applicant's assertions relating to the existence of joint control of CVK before the conclusion of the second group of transactions

48 It should be observed that the statement in paragraph 15 of the contested decision that RAG's presence at the meeting of CVK members made variable majorities possible and ruled out control of the meeting by the shareholders necessarily relies on the interpretation of the data relating to the division of the share capital and the corresponding voting rights set out in paragraph 5 of the contested decision.

49 Those data, which are reproduced below, represent the share, in percentage points, which each of the 11 members of CVK held in CVK's share capital — and the associated voting rights —, in accordance with CVK's articles:

— De Hazelaar [*confidential*]%

— Loevestein [*confidential*]%

— Boudewijn [*confidential*]%

— Hoogdonk [*confidential*]%

— Rijsbergen [*confidential*]%

— Harderwijk [*confidential*]%

— Roelfsema [*confidential*]%

— Bergumermeer [*confidential*]%

— Anker [*confidential*]%

— Vogelenzang [*confidential*]%

— Van Herwaarden [*confidential*]%

50 It should be borne in mind that, before the conclusion of the second group of transactions, Haniel owned the first five undertakings mentioned above, the applicant was the parent company of Harderwijk, Roelfsema and Bergumermeer, while RAG owned Anker and Vogelenzang. As regards Van Herwaarden, Haniel held [*confidential*]% of its capital, the applicant [*confidential*]% and RAG [*confidential*]%.

51 It follows that, before the conclusion of the second group of transactions, Haniel indirectly held [40 to 45]% [2] of CVK's capital ([*confidential*]% corresponding to the total share of the first five undertakings + [*confidential*]% corresponding to its [*confidential*]% stake in Van Herwaarden), while the applicant and RAG held,

2 — Confidential data omitted.

respectively, [40 to 45]% ([*confidential*]% corresponding to the total stake of its three subsidiaries + [*confidential*]% corresponding to its [*confidential*]% stake in Van Herwaarden) and [15 to 20]% [*confidential*] corresponding to its total stake in its two subsidiaries + [*confidential*]% corresponding to its [*confidential*]% stake in Van Herwaarden).

52 Having regard to the voting arrangements within the meeting of members of CVK, it would have followed, in principle, that if RAG had kept its stake in CVK, none of the three shareholders in CVK would have been able to block the adoption of decisions by that meeting, in particular the adoption of CVK's strategic decisions.

53 That assertion is not affected by the applicant's allegation that there were significant joint interests between the shareholders, comparable to those indicated by the Commission in its Notice on the concept of concentration, so that in fact CVK was jointly controlled by the three shareholders before that transaction.

54 In paragraph 30 of that Notice, the Commission stated that even in the absence of specific veto rights, two or more undertakings which acquire majority shareholdings in another undertaking may obtain joint control. It is clear from the Notice that such a situation predicates concertation between the minority shareholders resulting either from a legally binding agreement or from de facto circumstances. According to the Notice, the legal means of ensuring the joint exercise of voting rights may take various forms, such as a holding company or an agreement whereby the shareholders undertake to act in the same way (a vote-pooling agreement). As regards the de facto circumstances showing collective action, the Notice states, in paragraph 32, that, very exceptionally, collective action by the shareholders may be demonstrated where interests which unite the shareholders are so strong that they would not act against each other in exercising their rights in relation to the joint venture.

55 The Notice states, first, that in the case of acquisitions of minority shareholdings in a pre-existing joint venture, the prior existence of links between the minority shareholders or the acquisition of the shareholdings by means of concerted action will be factors indicating such a common interest. Second, where a new joint venture is established, there is a higher probability that the parent companies are carrying out a deliberate common policy when they acquire minority shareholdings in a pre-existing undertaking, in particular where each parent company provides a contribution to the joint venture which is vital for its operation (specific technologies, know-how, supply agreements, etc.). Last, the Notice points out, in paragraph 35, that in the absence of strong common interests such as those outlined above, the possibility of changing coalitions between shareholders will normally exclude the assumption of joint control. Where there is no stable majority in the decision-making procedure and a majority can on each occasion be any of the various combinations possible amongst the minority shareholders, it cannot be presumed that the minority shareholders will jointly control the target undertaking.

56 The applicant does not dispute the general appraisals of the existence of common interests which the Commission sets out in its Notice on the concept of concentration, but contends that in the present case the three shareholders already had such interests, within the meaning of that Notice, before the second group of transactions was concluded.

57 However, it must be pointed out that in its written submissions the applicant puts forward no evidence to support its assertion. At the most, it indicates that those common interests are based on the pooling agreement, that is to say, on one of the transactions forming part of the first group of transactions. In that regard, however, it must be borne in mind that it is common ground that the pooling agreement was not concluded until 9 August 1999, that is to say, on the same day as the second group of transactions. Contrary to the applicant's contention, therefore, that agreement cannot constitute the basis of proof of the existence of common interests between the three shareholders before the conclusion of the second group of transactions, on which it might be determined whether at the time there existed the

possibility of exercising decisive influence on the strategic decisions of CVK. The fact that the proposed pooling agreement was notified to the NMa does not alter that assertion, since the possibility under that contract for the applicant and Haniel to exercise decisive influence on CVK's strategic decisions was not effective before the conclusion of the second group of transactions.

58 In effect, 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. The mere fact that the proposed pooling agreement was notified to the NMa does not prove that, as a result of that notification, the three shareholders acquired the possibility of exercising decisive control over CVK before the second group of transactions was concluded.

59 It follows that, contrary to the applicant's contention, the Commission cannot be criticised for not having shown that there were no significant common interests between the minority shareholders in the joint undertaking CVK before the second group of transactions was concluded, since, even before the Court, the applicant was unable to indicate the evidence which would support those alleged joint interests.

60 Furthermore, the applicant's claim that the NMa's decisions of 23 April and 20 October 1998 do not mention the possibility of changing coalitions between the shareholders, and regard CVK as an autonomous economic entity, is inoperative.

61 In effect, on the one hand, even on the assumption that the NMa's decisions may be raised as against the Commission, in those decisions the NMa determined whether the proposed transaction forming the subject-matter of the pooling agreement

constituted a concentration for the purposes of the Netherlands law. The NMa was therefore not requested to make a determination in respect of the second group of transactions, of which it was unaware at the time of adopting the decisions. In any event, just as it did not mention the changing coalitions, the NMa does not state in its final decision of 20 October 1998 that the three shareholders had joint control of CVK before the conclusion of the second group of transactions, as the applicant claims in the context of this part of its plea.

62 On the other hand, the applicant is mistaken as to the concept of autonomous economic entity. 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 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.

63 Consequently, on the basis of the data in the contested decision and the evidence in the file which was available at the time of its adoption, the applicant has not shown that there was joint control of CVK by its three shareholders before the conclusion of the second group of transactions, the existence of which the Commission is alleged to have wrongly ignored.

64 The Court must therefore ascertain whether the conclusion of the second group of transactions entailed the taking of control of CVK by Haniel and the applicant, granting them a right to veto the strategic decisions of CVK.

— The taking of joint control of CVK by Haniel and the applicant upon the conclusion of the second group of transactions

65 First of all, it is common ground that by the RAG transaction Haniel and the applicant took joint control of the three undertakings Anker, Vogelenzang and Van Herwaarden, all members of CVK. That transaction, consisting in the purchase of RAG's shares, respectively exclusive and minority, in those undertakings constitutes a concentration in itself. The transfer agreement also contains restrictive clauses typically linked with concentrations, such as a no-compete clause, to which RAG committed itself for all the undertakings in its group, on the Netherlands market for the production of building materials for load-bearing walls.

66 Next, it must be observed that, in view of the division of CVK's share capital between its members as set out in paragraph 5 of the contested decision, Haniel and the applicant, by, on the one hand, each acquiring [*confidential*]% of the shares of Anker and Vogelenzang and, on the other hand, agreeing that the applicant would purchase the [*confidential*]% which RAG held in the share capital of Van Herwaarden, each indirectly acquired 50% of the share capital of CVK.

67 The fact that the shareholders held equal shares in CVK's share capital and in the associated voting rights means, in principle, that each of the shareholders can block the strategic decisions of the joint undertaking, such as those relating to the appointment of the decision-making bodies of the joint undertaking, namely the managing board and the supervisory board. In order to ensure that the strategic decisions of the joint undertaking are not thus blocked, the shareholders are therefore required to cooperate permanently.

68 In that regard, the applicant maintains, first, that the commitments given to the NMa as regards the composition of CVK's decision-making bodies preclude a right

of veto by each of the shareholders over those decisions. It submits, second, that under the Netherlands Civil Code CVK's decision-making bodies are required to take their decisions in the sole interest of CVK and not in the interest of the shareholders. Third, it disputes the Commission's finding that the pooling agreement which it concluded with Haniel and the other examples set out in paragraph 19 of the contested decision reflect the existence of joint control of CVK.

69 Those arguments cannot succeed.

70 As regards the first allegation, it must be pointed out that, in accordance with Articles 9 and 12 of CVK's articles, as amended, adopted on 9 August 1999, each member of the management board and the supervisory board is chosen by the general meeting of the members. Those articles, in accordance with the commitments given to the NMa, provide for certain restrictions concerning the persons eligible to sit on the decision-making bodies. Thus, as regards the managing board, Article 9(1) of the articles provides that that body is to consist solely of members of CVK or of independent persons and is not to include any representative of groups of companies to which the parent company of one or more members of CVK belongs. As regards the supervisory board, Article 12(2) of the articles states that the majority of members of that body, including its president, is to consist of representatives of the members or of independent persons, while a minority of members may consist of representatives of groups of companies to which the parent company of one or more members of CVK belongs.

71 However, as that type of restriction affects only the choice of persons sitting on CVK's decision-making bodies, it cannot preclude every possibility that the shareholders of the members of CVK will exercise decisive influence on CVK.

72 Admittedly, it must be accepted that the shareholders of CVK's members do not directly have voting rights in the general meeting of CVK, as those rights are exercised by the members themselves. None the less, it must be borne in mind that Article 3(1)(b) of Regulation No 4064/89 states that control may be acquired 'direct[ly] or indirect[ly]' by one or more persons, whereas 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. Since commercial companies comply in any event with the decisions of their exclusive shareholders, their majority shareholders or those jointly controlling the company and since, moreover, the member undertakings of CVK are all subsidiaries held either exclusively or jointly by the applicant and Haniel, it necessarily follows that an appointment to CVK's decision-making bodies presumes the agreement of the two shareholders. Otherwise, the members will be unable to appoint CVK's decision-making bodies and the joint undertaking will be incapable of functioning.

73 The fact that representatives of the parent companies are not entitled to sit on CVK'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 CVK that decide on the composition of the decision-making bodies and, through the intermediary of those members, their two shareholders.

74 As regards the composition of CVK's two decision-making bodies, it cannot be precluded that all the persons sitting on those bodies will themselves carry out functions within the decision-making bodies of the member undertakings of CVK, as permitted by the alternative provisions in Articles 9 and 12 of CVK's articles, which state that CVK's decision-making bodies are to 'consist solely of members of CVK or of independent persons'. If that is the case, it is inevitable that those representatives will have been appointed by the shareholders of the members of CVK and that, in performing their functions within CVK's decision-making bodies, they will have to take those shareholders' views into account.

75 In those circumstances, the applicant has adduced no evidence capable of calling in question the Commission's finding that all possibility of exercising decisive influence on CVK by Haniel and by the applicant following the conclusion of the second group of transactions is not excluded.

76 Nor can the applicant rely as against the Commission on an alleged legitimate expectation based on the interpretation of the concept of control employed by the NMa under the Netherlands law on competition.

77 In that regard, it must be borne in mind that 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 Case T-347/03 *Branco* v *Commission* [2005] ECR II-2555, paragraph 102 and the case-law cited).

78 In the present case, it is sufficient to observe that the applicant received no precise assurance from the Community authorities that, even on the assumption that there was any legal basis on which it could bind itself in that way, the Commission would assess the concept of control under Regulation No 4064/89 in the same way as the NMa had assessed that concept in its decision of 20 October 1998 in application of the Netherlands law on competition. Nor did the applicant receive any precise assurances on the part of the NMa, in particular in the letter of 26 March 1999 cited in paragraph 7 above, with which the Commission would have acquiesced and according to which the Commission would adopt the same approach as that taken in that letter, after the second group of transactions was concluded. In any event, even on the assumption that the applicant did receive such assurances, they could not have given rise to well-founded hopes on its part, since according to the reasoning set out above such assurances would not have been based on an assessment consistent with Article 3 of Regulation No 4064/89.

79 Nor does the second argument, based on the application of the Netherlands Civil Code, carry conviction. Although, as the applicant maintains, the Netherlands Civil Code provides that the decisions of a cooperative company must be taken in the interest of that company, the fact remains that it is the persons who directly or indirectly have the voting rights in that company that have the power to adopt those decisions. Accordingly, the applicant's arguments based on the Netherlands Civil Code do not call in question the existence of decisive influence on CVK on the part of Haniel and the applicant after the conclusion of the second group of transactions.

80 Last, as regards the third allegation, as the applicant accepts in its reply, the pooling agreement which it concluded with Haniel, the closure of three member undertakings of CVK and certain of Haniel's internal documents referred to in paragraph 19 of the contested decision do not constitute the essential part of the legal reasoning of the contested decision relating to the joint control of CVK — which focuses on the existence of veto rights exercisable by Haniel and the applicant — but serve to illustrate it. Consequently, even on the assumption that, as the applicant claims, those examples do not demonstrate the exercise of decisive influence on CVK — the possibility of which arises owing to the existence of the veto rights, previously established in paragraphs 13 to 17 of the contested decision and analysed above — and that, accordingly, the contested decision is vitiated by errors of assessment in respect of those elements submitted by way of example, that would not entail annulment of the contested decision, as the principle that Haniel and the applicant would be able to exercise the possibility of decisive influence on CVK remains perfectly valid.

81 For the sake of completeness, the Court observes that the closure of the three member undertakings of CVK (Boudewijn, Bergumermeer and Vogelenzang), which the applicant does not seriously deny constitutes a strategic decision, serves to illustrate sufficiently that control of CVK was taken by Haniel and the applicant.

82 In effect, as regards, more particularly, Vogelenzang — which, before the RAG transaction, was a subsidiary of that undertaking — after the conclusion of the

second group of transactions, neither Haniel nor the applicant could decide alone to close that undertaking, whose shares are held in equal parts by its two shareholders. At no time during the procedure before the Court, moreover, was the applicant able to support the assertion that it was CVK, on the basis of its own commercial policy, that decided to close that undertaking. It follows that only Haniel and the applicant were able to decide to close Vogelenzang.

83 For all of those reasons, it must be held that the Commission was correct to consider that by concluding the second group of transactions Haniel and the applicant took joint control of CVK for the purposes of Article 3 of Regulation No 4064/89.

— The alleged insufficiency of the reasoning

84 The applicant puts forward three complaints relating to the insufficiency of the reasoning of the contested decision as regards the finding that it and Haniel took joint control of CVK (see paragraph 33 above).

85 It must be borne in mind that, according to consistent case-law, the extent of the obligation to state reasons depends on the nature of the measure in question and on the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning of the institution, in such a way as to give the persons concerned sufficient information to enable them to ascertain whether the decision is well founded or whether it is vitiated by a defect which may permit its legality to be contested, and to enable the Community judicature to carry out its review of the measure (see Case T-251/00 *Lagardère and Canal+* v *Commission* [2002] ECR II-4825, paragraph 155 and the case-law cited).

86 In the present case, in spite of the reasoning implicit in the contested decision as to the absence of joint control of CVK by the three shareholders before the conclusion of the second group of transactions and, in particular, of the RAG transaction, the contested decision was capable of being understood in the context in which it was adopted, in particular on the basis of the data in paragraph 5 of the contested decision, of CVK's articles and of the contracts concluded on 9 August 1999. As the analysis carried out above reveals, the reasoning in the contested decision on this point does not hinder the review carried out by the Court either.

87 Nor can the applicant criticise the Commission for having insufficiently explained its reasons for considering that the guarantees provided to the NMa were not sufficient. It is clear from paragraphs 25 and 27 of the contested decision that the Commission stated the reasons why it was unable to extend the interpretation which the NMa put on the concept of control, in particular in its decision of 20 October 1998, on the basis of Netherlands competition law, to the interpretation of Article 3(3) of Regulation No 4064/89, competence for which devolves on the Commission, subject to review by the Community judicature. Those explanations were sufficient in themselves. Furthermore, judicial review is not hindered on that question either, as the preceding developments show.

88 The same conclusion must be reached as regards the examples which show the existence of joint control which are mentioned in paragraph 19 of the contested decision. Although the reasoning in the contested decision is succinct on this point, the applicant was perfectly capable of understanding the Commission's reasons for believing that those elements could reflect the existence of joint control of CVK by the applicant and Haniel, without judicial review being hindered.

89 In those circumstances, the complaints alleging that the reasoning in the contested decision is insufficient must be rejected.

90 Accordingly, the first part of the first plea must also be rejected.

Second part of the first plea: the Commission was not competent to treat two transactions as a single concentration and in the present case there was no concentration within the meaning of Article 3 of Regulation No 4064/89

Arguments of the parties

91 First, the applicant criticises the Commission for having considered in the contested decision that the taking of control by CVK of its member undertakings through the conclusion of, first, the pooling agreement and, second, the RAG transaction constituted one and the same concentration, owing to their interdependence from both a temporal and an economic aspect. According to the applicant's written submissions, Regulation No 4064/89 confers no general competence on the Commission to decide that two separate transactions must be regarded as a single concentration.

92 In that regard, the applicant submits that only the second subparagraph of Article 5(2) of Regulation No 4064/89 — which, in certain circumstances, authorises the Commission to treat two or more transactions as one and the same concentration for the purpose of calculating the turnover of the undertakings concerned which acquire parts of one or more undertakings — refers to such a situation. However, the applicant emphasises that that provision is not relevant in the present case. In the first place, the second subparagraph of Article 5(2) of Regulation No 4064/89 seeks to ensure that undertakings do not avoid the application of that regulation by artificially splitting a transaction into a number of transactions in such a way that it would fall below the turnover thresholds laid down in that regulation. In the present case, the contested decision contains no evidence that the applicant or Haniel

sought to circumvent the application of Regulation No 4064/89. In the second place, the applicant observes that in paragraph 23 of the contested decision the Commission concludes that the second subparagraph of Article 5(2) of Regulation No 4064/89 is not directly relevant in this case. In any event, the applicant maintains that the current limits on the scope of Regulation No 4064/89 were recognised by the Commission itself in the Green Paper on the examination of Regulation No 4064/89 (COM(2001) 745 final) and in the proposal for a Council Regulation on the control of concentrations between undertakings (OJ 2003 C 20, p. 4) submitted by the Commission and designed to amend Regulation No 4064/89.

93 Second, the applicant submits that even on the assumption that Regulation No 4064/89 does confer competence on the Commission to treat multiple transactions as a single concentration, the Commission has not provided sufficient support for its finding that in the present case there is interdependence between the two groups of transactions in question, in such a way that they must be regarded as a single concentration.

94 The fact that the first and second groups of transactions were concluded on the same date — 9 August 1999 — before the same notary does not assume particular importance as regards their interdependence. The applicant emphasises in that regard that it had already informed the Commission that both the pooling of profits and losses within CVK, involving several large-scale technical and commercial operations, and various ecological studies had delayed the conclusion of the pooling agreement until 9 August 1999.

95 Furthermore, the applicant disputes the Commission's finding that the conclusion of the pooling agreement was conditional upon completion of the second group of transactions, more particularly the RAG transaction. On that point, the applicant

recalls, first of all, that the pooling agreement had been notified to the NMa on 26 February 1998, which means that the intention to conclude that agreement was sufficiently precise, without the sale of RAG's shares in the member undertakings of CVK being known to the applicant, and, consequently, being relevant to the interdependence of the two transactions. The applicant further emphasises that there is no binding contractual agreement or other arrangement linking the two transactions. Last, the applicant claims that Haniel's opinion that the transactions were interdependent must also be considered irrelevant, since in order to assess such interdependence the Commission must base itself on the facts and not on the subjective assessments of one of the parties and since, given the background to the present case, Haniel might have had an interest in the dissolution of CVK, as required by the contested decision. In the applicant's submission, there are therefore indeed two separate concentrations.

96 As regards, in the first place, the argument relating to the Commission's general competence to treat a number of transactions as a single concentration, the Commission responds that Article 3 of Regulation No 4064/89, which concerns the concept of concentration, does not preclude the possibility that a concentration may cover more than one transaction. A concentration may, depending on the economic reality, consist of one or more transactions. In the Commission's submission, its own practice in taking decisions reveals several examples where that has been so.

97 Furthermore, according to the Commission, the applicant's reference to the second subparagraph of Article 5(2) of Regulation No 4064/89 is irrelevant. That provision concerns only the calculation of turnover for the purpose of determining whether or not a concentration has a Community dimension and seeks to prevent undertakings from avoiding the application of Regulation No 4064/89 by splitting their transactions into a number of separate concentrations carried out over a two-year period and not individually reaching the turnover thresholds. The concept of concentration is dealt with in Article 3 of Regulation No 4064/89.

98 The Commission also disputes the applicant's reference to the Green Paper and to the Commission's proposal to amend Regulation No 4064/89. Although the Green Paper proposed to extend the Commission's competence to certain particular types of transactions, it confirmed the general, broad definition of concentration, while the Commission proposal sought only to clarify its existing practice in taking decisions.

99 In the second place, the Commission does not subscribe to the applicant's criticism that it did not sufficiently demonstrate the interdependence between the two main transactions in issue.

100 The Commission submits that three elements, considered as a whole, permit the conclusion that such interdependence existed, as demonstrated in paragraphs 20 to 22 of the contested decision.

Findings of the Court

101 In the context of the present part, and although it qualified its position at the hearing, the applicant disputes, first, the Commission's general competence to treat a number of transactions as a concentration, in application of Article 3 of Regulation No 4064/89. Second, the applicant contends that the Commission's finding that the transactions concluded on 9 August 1999 were interdependent and constituted a whole from an economic viewpoint is incorrect.

— The possibility for the Commission to treat a number of transactions as a concentration, in application of Article 3 of Regulation No 4064/89

102 Under Article 3(1) of Regulation No 4064/89, a concentration is to be deemed to arise either where two or more previously independent undertakings merge (Article 3(1)(a)) or where 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 (Article 3(1)(b)).

103 Whereas Article 3(1)(a) of Regulation No 4064/89 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.

104 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.

105 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.

106 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 more complex operation, without which it would not have been concluded by the parties.

107 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.

108 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 (judgment in Case T-290/94 *Kaysersberg* v *Commission* [1997] ECR II-2137, paragraph 109; order of the President of the Court of First Instance in Case T-322/94 R *Union Carbide* v *Commission* [1994] ECR II-1159, paragraph 36; see also, to that effect, judgment in Case T-3/93 *Air France* v *Commission* [1994] ECR II-121, paragraph 48).

109 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.

110 That finding is not affected by the various arguments put forward by the applicant.

111 First, the allegation based on the second subparagraph of Article 5(2) of Regulation No 4064/89, which, because in the applicant's submission it is the only provision to make express reference to multiple transactions and because the Commission is alleged to have considered that it was not directly applicable in the present case, would deprive the Commission of its competence to treat two or more transactions as a single concentration for the purposes of Article 3 of Regulation No 4064/89, must be rejected as unfounded.

112 It must be borne in mind that Article 5 of Regulation No 4064/89, entitled 'Calculation of turnover', provides:

'1. Aggregate turnover within the meaning of Article 1(2) shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other

taxes directly related to turnover. The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4.

...

2. By way of derogation from paragraph 1, where the concentration consists in the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the transaction shall be taken into account with regard to the seller or sellers.

However, two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction.

...'

113 It follows from the very wording of that provision that it governs a different question from that referred to by Article 3 of Regulation No 4064/89.

114 Whereas Article 3 of Regulation No 4064/89 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 (see, to that effect, Case T-22/97 *Kesko* v *Commission* [1999] ECR II-3775, paragraph 138). 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'.

115 It follows from Article 1 of Regulation No 4064/89 that the Community legislature intended that, in the context of its role in respect of concentrations, the Commission would become involved only where the proposed concentration — or the concentration already carried out — attains a certain economic size and geographic scope, that is to say, a 'Community dimension'. It also follows from the general structure of Article 5 of Regulation No 4064/89 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.

116 Thus, it follows from Article 5(2) of Regulation No 4064/89 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 (*Air France* v *Commission*, paragraph 108 above, paragraph 103).

117 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.

118 The underlying reason for the insertion of the second subparagraph of Article 5(2) of Regulation No 4064/89 — the analysis of which, moreover, is common to the parties to the present dispute — 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 Commission's competence in application of that regulation.

119 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, contrary to the applicant's contention, 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.

120 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 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.

121 In any event, the application of Article 3 of Regulation No 4064/89 to a specific case has neither the object nor the effect of determining whether the Commission is competent to examine the concentrations identified, but of ascertaining whether the notified transactions constitute one or more concentrations.

122 In those circumstances, the applicant's argument based on the second subparagraph of Article 5(2) of Regulation No 4064/89 has no consequence as regards the interpretation of Article 3 of Regulation No 4064/89 which allows the Commission to examine whether the transactions in question fell within the scope of that provision owing to their unitary nature.

123 In the second place, concerning the applicant's claim that the Commission, in the context of the revision of Regulation No 4064/89, recognised that it was not competent to treat two or more transactions as a concentration within the meaning of Article 3 of Regulation No 4064/89, it is sufficient to observe that, even if that were so, the fact that the Commission has taken such a position is without prejudice to the interpretation of Article 3 of Regulation No 4064/89 stated above by the Court.

124 It follows that the applicant's complaint alleging that the Commission was not competent to treat a number of transactions as a single concentration, in application of Article 3 of Regulation No 4064/89, must be rejected.

— The independent nature of the transactions concluded on 9 August 1999

125 The applicant criticises the Commission for having made an error of assessment in considering that in the present case the first and second groups of transactions concluded on 9 August 1999, referred to in paragraph 8 above, were interdependent in such a way that they constituted a whole from an economic viewpoint.

126 First of all, it must be borne in mind that in the contested decision the Commission stated:

'(20) ... The operations took place within a narrow time frame and closely resembled each other. The legal acts giving Haniel and Cementbouw control of CVK and those giving CVK control of the 11 sand-lime brick companies were performed on the same day (9 August 1999) and were recorded by the notary in a uniform document. Moreover, it was the parties' intention to link the two acquisitions of control, so that one did not take place without the other. The conclusion of the agreements, which were submitted to the NMa, was thus postponed until the conclusion of the negotiations on the transfer of RAG's shares. This came about because RAG had in the meantime expressed the wish to withdraw from CVK, as it was no longer willing to be part of the cooperative's proposed new corporate structure. Economically too, therefore, the two acquisitions of control should be regarded as a unit. Even if one wanted to see these events as two transactions separated in time by a "logical second", they are dependent on each other in such a way that they should be regarded as a single merger.

(21) Haniel, too, took this line in its comments on the statement of objections and in the hearing. Cementbouw, however, proposed that, should the departure of RAG be seen as an acquisition of joint control over CVK by Haniel and Cementbouw — which Cementbouw disputes — the Commission's responsibility could relate only to that acquisition. CVK's acquisition of control over its member companies, on the other hand, was legally a separate concentration. It cannot be concluded that because the pooling agreement and the transfer of the RAG shares to Haniel and Cementbouw were agreed on the same day they form a single event in a legal or business sense; it was merely that practical difficulties which had not been described in full had prevented the pooling agreement from being concluded immediately after the NMa's authorisation on 20 October 1999. CVK's acquisition of control of the member plants, however, was legalised by the NMa's legally enforceable decision of 20 October 1998, so that there was no way the Commission's investigation in the present proceeding could cover that event as well.

(22) The Commission cannot share Cementbouw's view. All the agreements concluded on 9 August 1999 constitute a single economic event, as a result of which a joint sales organisation for 11 hitherto legally independent sand-lime brickworks belonging to a total of three different parent companies was changed into a full-function undertaking jointly controlled by Haniel and Cementbouw. Haniel confirmed more than once that for the parties involved in the transaction of 9 August 1999 (Haniel, Cementbouw and RAG) all these agreements were interdependent and formed an economically unified whole. When asked, Cementbouw could not give a convincing explanation why the transaction authorised by the NMa was postponed for more than nine months and only implemented when RAG withdrew. The Commission therefore assumes that RAG would not have been prepared to take part in implementing the pooling agreement as an indirect shareholder in CVK.

(23) From a formal point of view, admittedly, RAG did not conclude the pooling agreement before the sale of its share to Haniel and Cementbouw was completed. From the fact that the same notary officially recorded the pooling agreement and the alteration of the articles immediately before the sale of the RAG shares at the same meeting, and drew up a single document for the purpose, it is clear however that RAG can be said to have been involved in the implementation of the CVK structure authorised by the NMa only from a superficially formalistic perspective. Such a purely formal perspective is not enough to decide the question whether one or more business acquisitions constitute a concentration that has to be vetted under the Merger Regulation. The provision in the second [sub]paragraph of Article 5(2) of the Merger Regulation, which is not directly relevant here, also shows that an economic perspective is appropriate in this case. It can therefore be assumed that the agreements concluded on 9 August 1999 form a single concentration, whereby CVK acquired control over its member undertakings, and at the same time Haniel and Cementbouw acquired control over CVK.'

127 It follows from the grounds of the contested decision set out above that the Commission concluded that the transactions were interdependent on the basis of the following three factors: economic interdependence; the fact that the transactions were concluded at the same time before the same notary; and confirmation by Haniel that the transactions were interdependent.

128 It is common ground that the applicant does not dispute that the second group of transactions (the RAG transaction and the pooling agreement between Haniel and the applicant) was dependent on completion of the first group. The Court therefore finds that the second group of transactions would not have been concluded in the absence of the first group.

129 On the other hand, the applicant criticises the Commission for having wrongly considered that the first group of transactions was dependent on the second group. The applicant observes that at the time of notification to the NMa of the proposed pooling agreement between CVK and its member undertakings in February 1998, RAG had shares in three of the member undertakings. The applicant relies on that factor to maintain that at that point it was not aware that RAG would wish to give up its shareholdings in those undertakings, which demonstrates that the first group of transactions, of which the pooling agreement formed part, is an autonomous concentration. The applicant further maintains that at the time of conclusion of all of the transactions, on 9 August 1999, the contract whereby the RAG transaction was concluded stipulated that the parties had subscribed to it after the conclusion of the pooling agreement between CVK and the member undertakings, with the aim of complying — at least formally — with the NMa's position expressed in the letter of 26 March 1999, which was that, in order that the RAG transaction should not be considered to be a concentration within the meaning of the Netherlands competition law, the pooling agreement between CVK and its member undertakings must be concluded by no later than the time of the RAG transaction.

130 Those arguments cannot be accepted.

131 First, although it must, admittedly, be accepted that there is nothing in the case-file to rebut the applicant's assertion that at the time of the notification of the first group of transactions to the NMa, in February 1998, it was not aware that RAG would wish to sell its shares in three of the member undertakings of CVK, the fact remains that that transaction was not concluded until 9 August 1999, that is to say, the same day on which the second group of transactions was concluded. On that date, however, not only was it clear that RAG had decided to sell its shares in the member undertakings of CVK to Haniel and to the applicant but, in addition, the first group of transactions had been significantly altered owing to the conclusion on the same date of the second group of transactions, including, in particular, the RAG transaction, whereby Haniel and the applicant took joint control of CVK.

132 Faced with that situation, the Commission was correct to ask itself why the first group of transactions had not been concluded before 9 August 1999, as it did during the administrative procedure and again, in the absence of a satisfactory reply from the parties, in the grounds of the contested decision set out above.

133 Although, generally, the fact that a number of transactions are concluded simultaneously does not necessarily prove conclusively that they are interdependent, in the present case, on the other hand, the fact that the conclusion of the first group of transactions was postponed until the time of conclusion of the second group is a significant factor in so far as it may mean that RAG was not prepared to participate in the first group and that, in order that that group of transactions might none the less be concluded, it was necessarily conditional upon RAG's withdrawal as a shareholder in CVK or, in other words, upon the conclusion of the second group of transactions.

134 In order to explain why the first group of transactions was postponed until the time of conclusion of the second group, the applicant refers in its written pleadings to the technical and commercial difficulties associated with the pooling of profits and losses between the member undertakings. In its reply, the applicant also notes that

various ecological studies had to be carried out and that the summer holidays in the construction sector had also delayed the conclusion of the first group of transactions.

135 However, those reasons cannot be deemed to explain why a decision as important as the decision to combine all the activities of the member undertakings of CVK within a joint structure should be postponed for more than nine months after being authorised by the NMa.

136 First, as regards the alleged ecological studies and the summer holidays which delayed the conclusion of the first group of transactions, those reasons, which, moreover, were put forward by the applicant only at the stage of its reply, are unsubstantiated.

137 Second, as regards the allegation relating to the technical and commercial difficulties associated with the pooling of the profits and losses of the member undertakings of CVK, it must be pointed out that, apart from the fact that that allegation is also unsubstantiated, the weight of that justification would appear to be distinctly reduced by the actual evidence in the case-file. It should be noted — and it has not been disputed by the applicant, which was specifically questioned on that point by the Court at the hearing — that even at the time of the conclusion of all the transactions, on 9 August 1999, the cooperation agreement between Haniel and the applicant stated that the pooling of CVK's member undertakings' own accounts and funds was not fully settled, in particular for the undertakings formerly owned by RAG. If that question had been sufficiently important to require the postponement of the conclusion of the first group of transactions, it certainly ought to have justified postponing the conclusion of that group of transactions even beyond 9 August 1999. That was certainly not the case, precisely because to have postponed the conclusion of the cooperation agreement beyond the date of conclusion of the second group of transactions would also have been a strong indication that the first group of transactions was dependent on the second group.

138 As the applicant has put forward no other grounds, it must therefore be held that the factor on which the conclusion of the first group of transactions depended was the conclusion of the second group of transactions, namely the withdrawal of RAG from the capital of CVK.

139 Second, the fact that the contract whereby the RAG transaction was concluded refers to the earlier conclusion of the pooling agreement cannot mean that the first group of transactions must be recognised as autonomous by reference to the second group and, consequently, that the Court must find that the Commission made an error of assessment.

140 Admittedly, it must be noted that, contrary to the Commission's assertion in paragraph 23 of the contested decision, the notary before whom the contracts were concluded did not draw up a single document.

141 However, that error is not of such a kind as to entail annulment of the contested decision.

142 In the present case, that error cannot undermine the importance of the basic finding that the contracts were concluded on the same day, owing to the fact that RAG was not prepared to consent to the conclusion of the first group of transactions independently of the conclusion of the second group, which brought its participation in the first group to an end. From the point of view of the economic assessment of the interdependence between the transactions, the fact that the first group of transactions preceded the second group by some minutes, or indeed by some hours, is irrelevant.

143 In that regard, the applicant cannot rely as against the Commission on an alleged legitimate expectation in the NMa's letter of 26 March 1999, namely that that procedure for implementing the two groups of transactions was suggested to the applicant by the NMa so that the second group of transactions, including the RAG transaction, would not constitute a concentration for the purposes of the Netherlands competition law.

144 Without there being any need to take into consideration the reasoning set out by the NMa in that letter, it must be held that the applicant never received precise assurances that the transaction consisting in the two groups of transactions would escape the application of Regulation No 4064/89 and the competence of the Commission. In so far as the Commission's competence is not determined solely by the transactions which are notified to it beforehand (Case T-310/00 *MCI* v *Commission* [2004] ECR II-3253, paragraph 93), it was for the parties, in order to be entitled to benefit from the legal certainty linked with approval decisions issued by the Commission, to inform the Commission that they intended to conclude the concentration on 9 August 1999. However, they did not do so.

145 Third, although the applicant maintains that the first group of transactions is an autonomous concentration, it has not explained the economic purpose and logic pursued by the three shareholders when they agreed that the member undertakings of CVK would be combined within an economic unit under CVK, without those shareholders being able to take control of that undertaking, whereas the conclusion of the first group of transactions made full economic sense when, owing to RAG's withdrawal as a shareholder in CVK, Haniel and the applicant took joint control of CVK.

146 Fourth, it is apparent from the cooperation agreement concluded between Haniel and the applicant that those undertakings both considered that a legal fusion of the member undertakings of CVK into a single undertaking was desirable and that they would closely examine the possibility of such a fusion, so that CVK would be

transformed into a single undertaking, owned jointly by Haniel and the applicant. That element supports the Commission's argument by highlighting the fact that the first group of transactions was ultimately no more than a step in a larger concentration and had no real autonomy.

147 Fifth, and last, the Commission's analysis is also supported by the fact that Haniel maintained during the administrative procedure that the transactions were interdependent, while the applicant did not substantially dispute the truth of those assertions as described in the contested decision. Admittedly, it must be accepted, as the applicant maintains, that the position defended by each of the notifying parties is by definition subjective and that it 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, as in this case, be permitted to rely on those explanations where they enable it to support the assessments on which its analysis is based.

148 It follows that the applicant has not shown that the Commission had made an error of assessment in concluding, in the contested decision, that the two groups of transactions in issue in the present case were interdependent in such a way that together they constituted a single concentration for the purposes of Article 3 of Regulation No 4064/89.

149 Accordingly, the second part of the first plea must be rejected.

Third part of the first plea: the Commission was not competent to examine the taking of control over CVK by its member undertakings, as it had been authorised by the NMa

Arguments of the parties

150 In this part, the applicant maintains that even on the assumption that the Commission is competent to examine the RAG transaction under Article 3 of Regulation No 4064/89, it cannot examine the taking of control by CVK over its member undertakings by means of the pooling agreement, since that transaction has already been authorised by the NMa.

151 In support of its argument, the applicant states, first, that, contrary to what the Commission claims in the contested decision, there is no difference between the transaction as notified to, and then approved, by the NMa on 20 October 1998 and the transaction finally concluded on 9 August 1999. The applicant further notes that the Commission acknowledged that the transaction did not have a Community dimension and did not officially challenge the NMa's decision, as it ought to have done under Articles 226 EC and 228 EC, which created a legitimate expectation on the applicant's part. Next, the applicant submits that the Commission's argument that the NMa's decision is irrelevant on the sole ground that it is based on a national law is unconvincing. That argument, in the applicant's submission, overlooks the fact that the provisions of Netherlands competition law derive from those of Community law and must be interpreted in accordance with Community law. Last, the applicant disputes the Commission's suggestion in paragraph 30 of the contested decision that the parties concerned did not comply with guarantees which they had offered to the NMa in order to secure the NMa's authorisation of the transaction in question. The applicant maintains that that suggestion is unfounded.

152 Second, the applicant contends that the Commission failed to comply with its duty to state its reasons for considering that the NMa's decision was wrong.

153 The Commission rejects all of those arguments and contends that it neither disregarded Article 3 of Regulation No 4064/89 nor failed to comply with its duty to state the reasons on which the contested decision was based.

Findings of the Court

154 In the first place, as held in the context of the second part of this plea, examined above, the applicant has not shown that the Commission made an error of assessment in considering that the first and second groups of transactions referred to in paragraph 8 above constitute a single transaction for the purposes of Regulation No 4064/89.

155 Consequently, the fact that the NMa authorised the completion of the first group of transactions certainly did not allow the parties to carry out the concentration concluded on 9 August 1999. Because the concentration consisting in all of the transactions concluded on 9 August 1999 had a Community dimension, as found in paragraph 33 of the contested decision and not disputed by the applicant, the Commission was the only authority competent to examine and, if appropriate, to authorise that transaction.

156 In the second place, the applicant cannot rely on a legitimate expectation based on the fact that the Commission did not dispute the authorisation granted by the NMa for completion of the first group of transactions.

157 In effect, the authorisation granted by the NMa for completion of the first group of transactions, on the basis of an interpretation of the provisions of the Netherlands competition law, does not confer a right to claim the protection of a legitimate expectation as against the Commission, as that authorisation was not given by the Community authorities in accordance with the provisions applicable in the present case, namely, in particular, with Article 3 of Regulation No 4064/89 (see, to that effect, *Branco* v *Commission*, cited in paragraph 77 above, paragraph 102). In any event, the first group of transactions was not concluded on the same terms as those in which it had been notified to the NMa. The fact that its conclusion was postponed until the day on which the second group of transactions was itself concluded entailed a significant change in the elements of fact and of law on which the NMa had relied when authorising the first proposed group of transactions. As the Commission has rightly submitted, by the concentration concluded on 9 August 1999, the parties not only carried out a de facto fusion between the members of CVK and CVK but established a full-function joint venture jointly controlled by Haniel and the applicant. In short, the NMa authorised the completion of a group of transactions which was not in fact competed in that form.

158 Since the two groups of transactions cannot be severed, owing to their unitary nature, the Commission could make a determination only on the concentration in its entirety, owing to its Community dimension.

159 Nor does such an approach have the consequence of disregarding the allocation of competence between the national competition authorities and the Commission, as provided for in Regulation No 4064/89.

160 Admittedly, the result to which the Commission's approach may lead may, in certain circumstances, have the consequence that even though a transaction does not satisfy the criteria of a Community dimension, within the meaning of Regulation

No 4064/89, it may fall within the scope of that regulation owing to the interdependence which links it to one or more other transactions.

161 None the less, in that situation it is artificial to consider that the first transaction is economically autonomous.

162 In the third place, the applicant's argument that the Commission ought to have initiated infringement proceedings under Article 226 EC is inoperative. First, there is nothing in the case-file to indicate that the Commission disputed the NMa's competence to make a determination, in the decision of 20 October 1998, which was adopted on the basis of national law, on the first group of transactions, so that that decision might possibly constitute a breach of Community law by the Kingdom of the Netherlands. Quite to the contrary, the Commission acknowledged such competence and emphasised on a number of occasions that the contested decision did not relate to the same concentration owing to the postponement of the conclusion of the first group of transactions until the day on which the second group of transactions was concluded, that is to say, 9 August 1999. Second, having regard to the Commission's discretion in relation to the use of its resources and to its actions, there is no requirement for it to initiate proceedings under Article 226 EC against a Member State before adopting a decision relating to the assessment of a concentration having a Community dimension.

163 Last, and in the fourth place, as regards the applicant's other observations set out in paragraph 151 above, relating to the similarity of the provisions of the Netherlands competition law and those of Regulation No 4064/89 and also to compliance with the guarantees offered to the NMa by the notifying parties, those observations, which were rejected in the context of the first part of the present plea (see

paragraphs 70 to 78 above), cannot in any event entail the annulment of the contested decision. Furthermore, the applicant's allegation that the contested decision is insufficiently reasoned must also be rejected. Having regard to the circumstances of the present case, the Commission was not required to explain the reasons why the NMa's decision, which was adopted on the basis of the national legislation, was alleged to be incorrect.

164 Consequently, the third part of the first plea must be rejected, as must this plea in its entirety.

2. *Second plea: errors of assessment by the Commission relating to the creation of a dominant position by the concentration, contrary to Article 2 of Regulation No 4064/89*

165 The present plea may be divided into two parts. The first part alleges errors of assessment by the Commission as regards the existence of a dominant position of CVK. The second claims failure to show a causal link between the concentration and the creation of the dominant position alleged by the Commission.

First part of the second plea: errors of assessment by the Commission as regards the existence of a dominant position of CVK

Arguments of the parties

166 The applicant disputes the Commission's assessment of five factors which led it to find that CVK had a dominant position on the Netherlands market for building materials for load-bearing walls ('the relevant market').

167 In the first place, the applicant criticises the Commission for having incorrectly assessed the role played by materials competing with calcium-silicate bricks for the construction of load-bearing walls.

168 The applicant maintains that the Commission's finding in paragraph 96 of the contested decision that CVK is the only producer and supplier of sand-lime products in the Netherlands ignores the fact that sand-lime products are imported from Germany and that, according to the contested decision itself, there is no market for sand-lime bricks.

169 The applicant also disputes the Commission's conclusion, in paragraph 97 of the contested decision, that the concrete sector cannot be considered to exercise competitive pressure on CVK. The applicant maintains that the information provided by third parties to the effect that the market share of concrete in the market for building materials for walls cannot in itself lead to such a conclusion. In the applicant's submission, the Commission neither examined progressive changes in market shares in order to determine the competitive pressure brought to bear on CVK nor took into account the size of the concrete market and the significant financial and economic capacities of the operators active in that sector. Those elements, in the applicant's contention, mean that CVK is forced to take account of the concrete sector when determining its behaviour on the relevant market. Last, in order to evaluate the competitive pressure exercised by the *in situ* concrete market, the applicant claims, in its reply, that it is necessary to take into consideration the market share of *in situ* concrete on the relevant market ([10 to 15]%) and not only that held by the largest *in situ* concrete producer ([2 to 5]%).

170 In the second place, the applicant disputes the Commission's finding, in paragraphs 99 to 101 of the contested decision, that there are significant barriers to entry to the relevant market. In its analysis, the Commission, according to the applicant, ought to have examined all the costs and other potential barriers with regard to all the

products competing with sand-lime bricks. On the contrary, the Commission essentially confined its analysis to investment costs and to the long periods required to build sand-lime brick factories and commence production. The applicant also denies that the periods and capital requirements may constitute real barriers to market entry for the purposes of Regulation No 4064/89, in particular where capital markets function efficiently. The applicant further criticises the Commission for not having clearly examined the costs which other producers of building materials would have incurred if they had had to replace part of their production by materials competing with sand-lime bricks, even though the applicant had stated in response to the statement of objections that concrete could be produced for various uses, including wall construction, just like other materials such as bricks, gypsum and wood. Last, the applicant observes that the mere fact that, as stated in paragraph 101 of the contested decision, there is excess capacity for the production of sand-lime bricks, which makes market entry less attractive, is not sufficient for that excess capacity to be qualified as a barrier to entry to the relevant market.

171 In the third place, the applicant disputes a number of elements in the Commission's assessment as set out in the contested decision, according to which neither building material distributors nor building contractors have sufficient buyer power to offset CVK's supply-side dominant position.

172 As regards the distributors' buyer power, the applicant observes that the distributors belong to international groups or are composed of purchasing cooperatives, which means that they are in a position of strength vis-à-vis CVK. The fact, set out in paragraph 102 of the contested decision, that the five largest building materials wholesalers in the Netherlands represent almost [60 to 80]% of CVK's sales, including [20 to 30]% for the largest wholesalers, clearly shows that the wholesalers have significant buyer power and, with the exception of *in situ* concrete, may turn to products substitutable for sand-lime bricks. Furthermore, according to the

applicant, the fact that wholesalers are unable to supply *in situ* concrete gives them a greater incentive to obtain from CVK prices and other conditions which enable them to compete with concrete producers. Last, the applicant maintains that the wholesalers are also able to import sand-lime materials from Germany.

173 As regards relations between CVK, wholesalers and building contractors, the applicant disputes a number of the findings made in paragraphs 75 and 103 of the contested decision. The applicant thus disputes the Commission's assertion that CVK is generally well informed about the identity of users and the use to which its products are put, in particular by having access to architects' drawings, for deliveries of building materials accounting for half of its turnover. Furthermore, although the applicant acknowledges that CVK supplies a number of builders directly, it denies that CVK is able to know the use to which the products delivered are put, including where it knows the thickness of the sand-lime products delivered. Furthermore, the applicant indicates that the discounts granted to wholesalers by CVK, depending on sales for certain projects or for certain builders, are revealed only rarely and incidentally. In any event, that circumstance does not call in question the existence of buyer power on the part of wholesalers.

174 In the fourth place, the applicant maintains that the Commission's analysis concerning the absence of influence from the neighbouring market in non-load-bearing wall materials, on which CVK has a weaker position, is incorrect. The applicant observes that CVK cannot know whether its products will be used for load-bearing or for non-load-bearing walls. The applicant submits that CVK is therefore required to take account of its competitive situation on the market for non-load-bearing walls in order to determine its behaviour on the relevant market, independently of the fact that it sells [60 to 80]% of its sand-lime bricks on the latter market. The applicant further contends that a 'disciplinary effect' exercised by the non-load-bearing wall materials market on the relevant market is evident from the economic analysis carried out by Professor von Wieszäcker and Professor Elberfeld, which was communicated to the Commission but not referred to in the contested decision.

175 In the fifth place, the applicant disputes the Commission's finding that CVK's dominant position would be strengthened by the structural links between it and the applicant. First, the applicant recalls that it does not control CVK, which operates completely independently. Next, the applicant contends that the Commission wrongly ascribes to it a 'strong position' on the Netherlands market for wall-building materials, since its market share, at [2 to 5]%, is comparable with that held by a number of other operators and cannot lead to such a position. The same applies as regards the applicant's activities on the wholesale building materials market, where the Commission merely made simple allegations and suppositions, in particular as regards the reference to the annual report of NBM Amstelland, the group to which the applicant belongs, whereas the applicant's market share is only [2 to 5]%. Last, the applicant denies that CVK gives it preferential treatment at the wholesale building materials stage, contrary to the claims of third parties reported in the contested decision. In any event, even on the assumption that it does receive such preferential treatment, the applicant maintains that the evidence from those third parties is not in itself capable of giving rise to a presumption of a dominant position for the purposes of the application of Regulation No 4064/89.

176 In the sixth, and last, place, the applicant criticises the Commission for not having sufficiently stated in the contested decision its reasons for departing from the conclusion reached by the NMa in the decision of 20 October 1998 that CVK did not have a dominant position, although that decision and the market investigations carried out by the NMa precede the adoption of the contested decision by less than three years.

177 By way of preliminary observation, the Commission notes that the applicant has not disputed the factor concerning the market structure examined in paragraphs 90 to 95 of the contested decision. It contends that the elements found in regard to the market shares of CVK, the applicant and Haniel would already constitute in themselves a clear indication of the existence of a dominant position.

178 Having noted that, the Commission disputes all of the criticisms formulated by the applicant against the assessment of the other factors used to support the conclusion that CVK has a dominant position on the relevant market.

179 First, as regards the role of the various wall-building materials, the Commission observes that the applicant does dispute either that the geographic market is confined to the Netherlands, as imports of sand-lime bricks from Germany are purely marginal, or that CVK is the Netherlands' only producer of sand-lime bricks, the most popular building material in that State, as indicated in paragraph 98 of the contested decision. That situation, in the Commission's submission, helps to strengthen CVK's position on the relevant market, since owing to the high fixed investment costs, *in situ* concrete, even on the assumption that it forms part of the same market, competes with sand-lime products only in the case of large building projects.

180 The Commission further refutes the applicant's allegation that the contested decision did not show to the requisite standard that the concrete sector did not exert any competitive pressure on CVK. In that regard, the Commission observes that the wording of paragraph 97 of the contested decision refers solely to the absence of significant competitive pressure on the part of *in situ* concrete and not of the concrete sector in general. Nor is that conclusion based on a consideration of the *in situ* concrete sector alone. In examining the competitive pressure brought to bear by producers of *in situ* concrete, the Commission reiterates its position, indicated in the grounds of the contested decision, that it is necessary to take into account the market shares of competing producers of *in situ* concrete, none of which exceeds [2 to 5]% of the relevant market, and not the market share of the *in situ* concrete sector, as a product ([10 to 15]%), on that market. The Commission submits that such an approach is justified, in particular, by the fact that the relevant market is a differentiated product market and the percentage of [10 to 15]% 'of market share' tends to overestimate the competitive pressure on CVK, since it includes the market share held by the applicant itself in the *in situ* concrete sector. Having specified that, the Commission maintains that during the three years preceding the adoption of the

contested decision no concrete supplier obtained a market share greater than [2 to 5]%, while CVK's market share remained at [50 to 60]% on the relevant market. The Commission thus disputes the applicant's argument that the importance of the concrete sector and the weight of the operators in that sector might affect CVK's activity as a producer of sand-lime bricks and its position on the relevant market.

181 Second, the Commission rejects the applicant's allegations that it did not correctly assess the barriers to market entry described in the contested decision.

182 The Commission begins by observing that, contrary to what the applicant claims, the contested decision referred to the barriers existing to the production of all load-bearing wall materials and not just for sand-lime products.

183 The Commission then refutes the applicant's assertion that market entry costs and periods do not constitute real entry barriers for the purposes of Regulation No 4064/89. As the contested decision made clear, those costs and periods are considerable. In its rejoinder, the Commission recalls that market entries are rare and limited to the concrete sector, an assertion that has not been disputed by the applicant. Furthermore, the applicant's complaint that the Commission did not analyse the costs that would be incurred by other undertakings producing building materials which transferred part of their production (bricks, gypsum, wood) to products, such as concrete, which compete with sand-lime products is unfounded. The Commission contends that that analysis was irrelevant, since owing to the structure and characteristics of the construction sector in the Netherlands, producers of building materials other than concrete would not merely have had to transfer their production, but rather begin from zero to produce materials competing with sand-lime products.

184 Last, unlike the applicant, the Commission is of the view that the existence of excess capacity on a given market plays an important part in determining whether an entry on to that market may be foreseeable, that is to say, whether it will be sufficiently profitable. In the present case, the considerable excess capacity on the relevant market, owing to CVK, makes such an entry unattractive.

185 Third, the Commission maintains that the analysis carried out in the contested decision, which established that CVK's dominant position is not offset by buyer power on the part of building materials distributors, is correct.

186 First of all, the Commission maintains, generally, that in the context of Regulation No 4064/89, buyer power must be understood as the ability of large customers — in this case wholesale distributors of building materials — to resort to credible alternatives within a reasonable time if the supplier decides to increase its prices or to make the conditions of delivery less favourable. In the present case, the Commission emphasises that even if wholesale building materials distributors may have an incentive to ensure that CVK offers prices that can compete with those offered by concrete producers, those distributors have no alternative, since they do not sell *in situ* concrete, which represents [10 to 15]% of the relevant market, and therefore lack the necessary buyer power vis-à-vis CVK.

187 Next, as regards the applicant's argument that distributors could import sand-lime products from Germany, the Commission observes that the applicant has not denied that those imports were marginal and that one distributor had indicated at the hearing that those imports were hindered by Haniel or by CVK.

188 Last, the Commission restates its finding that CVK is generally informed about the identity of users and the intended use of its products, contrary to what the applicant maintains, albeit not without some contradiction and imprecision. In that context, the Commission observes that the discounts which CVK grants to wholesale distributors provided that they supply specific building projects or specific construction undertakings show that CVK is capable of influencing distributors' pricing policies vis-à-vis customer undertakings and therefore their margins for specific projects, which limits, if not excludes, their capacity to use their purchasing volume to exercise general pressure on CVK's pricing policy.

189 Fourth, as regards the applicant's criticisms concerning the influence of competition on the neighbouring market of building materials for non-load-bearing walls, the Commission maintains that it has demonstrated to a sufficient standard that CVK was capable of tracking or foreseeing whether its products would be used for load-bearing or non-load-bearing walls and also that in any event CVK established its price strategy mainly in the light of the relevant market. As regards the report by Professor von Wieszäcker and Professor Elberfeld, which, according to the applicant, demonstrates that CVK's position on the market for building materials for non-load-bearing walls has a disciplinary effect on the relevant market, while the Commission acknowledges that it did not expressly examine that report in the contested decision, it submits three observations. First, it claims that the pricing model set out in that report does not constitute an appropriate description of the relevant market, in particular where it proceeds from the assumption that CVK had to charge the same price in the relevant market and in the market for building materials for non-load-bearing walls. Second, the report examines what the Commission considers to be the irrelevant question of the circumstances in which CVK would set its prices at such a high level that it would make no sales on the market for building materials for non-load-bearing walls. Third, the Commission contends that, even on the assumption that the same prices were charged on both markets, the report is wholly consistent with the finding in the contested decision that CVK sets its prices principally on the basis of its position on the relevant market. It was for those reasons that the Commission deemed it unnecessary to address the report explicitly in the contested decision.

190 Fifth, the Commission maintains the analysis which it made in the contested decision, according to which CVK's dominant position is strengthened by the structural links between it and the applicant.

191 Sixth, the Commission also disputes the applicant's assertion that the reasoning in the contested decision is insufficient.

Findings of the Court

— Preliminary observations

192 Before the Court examines CVK's dominant position, it is appropriate to note at the outset that the applicant does not dispute the definition of the relevant market in the contested decision, namely the market for building materials for load-bearing walls in the Netherlands, a definition which is justified owing to the load-bearing function of the walls. It must be observed in that regard that the contested decision left open the question whether *in situ* concrete — owing in particular to the high investment costs which its use entails (see paragraph 77 of the contested decision), implying that that material competes with sand-lime bricks only for certain large projects — is to be included in the definition of the relevant product market, since the Commission considered that that question had no bearing on the assessment of the concentration (see paragraph 81 of the contested decision).

193 It should also be noted that it follows from the contested decision — and that finding has not been invalidated by the applicant — that the materials most used on the relevant market are, in descending order, as follows: sand-lime brick ([50 to 60]%

of all load-bearing walls being built with that material), *in situ* concrete ([10 to 15]%), precast concrete units ([5 to 10]%), bricks ([2 to 5]%) and aerated concrete ([0 to 2])%.

194 Next, it must be borne in mind that Article 2 of Regulation No 4064/89, entitled 'Appraisal of concentrations', provides:

'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.'

195 The dominant position referred to in Article 2 of Regulation No 4064/89 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 (Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraph 200; see also, to that effect, Case 85/76 *Hoffman-La Roche* v *Commission* [1979] ECR 461, paragraph 38).

196 It has consistently been held that the basic provisions of Regulation No 4064/89, 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 (Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* (*Kali und Salz*) [1998] ECR I-1375, paragraphs 223 and 224; Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraph 38; *Gencor* v *Commission*, paragraph 195 above, paragraphs 164 and 165; and Case T-432/99 *Airtours* v *Commission* [2002] ECR II-2585, paragraph 64).

197 It follows that review by the Community Court 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 misuse of power. In particular, it is not for the Court of First Instance to substitute its own economic assessment for that of the Commission (Case T-342/00 *Petrolessence and SG2R* v *Commission* [2003] ECR II-1161, paragraph 101).

198 Last, it must also be observed that in paragraphs 90 to 108 of the contested decision the Commission relied on six factors in order to establish the dominant position of CVK. Those factors are: (i) market structure; (ii) the absence of significant competitive pressure on CVK from producers of *in situ* concrete, whereas CVK is the only producer and supplier of sand-lime bricks, traditionally used in the Netherlands in the construction of walls; (iii) the existence of significant barriers to market entry; (iv) the absence of buyer power among CVK's customers; (v) the absence of any limitation of CVK's room for manoeuvre on the relevant market by the conditions of competition on the neighbouring market for building materials for non-load-bearing walls; and (vi) the existence of a structural link between CVK and the applicant which allows them, at the level of supply and also that of the distribution of building materials for load-bearing walls, to enjoy a significantly wider scope for manoeuvre than that enjoyed by their competitors.

199 In that regard, it is common ground that the applicant does not dispute any of the assessments set out in paragraphs 90 to 95 of the contested decision in respect of the first factor, concerning market structure, that is to say, the market shares of CVK, the notifying parties and their competitors.

200 It follows from the abovementioned grounds of the contested decision that CVK holds more than [50 to 60]% of the relevant market, in so far as that market includes

in situ concrete, whereas the second operator on the market as thus defined is the applicant, with approximately [2 to 5]% of the market, while the main competitor of the notifying parties has only [2 to 5]% and the remaining competitors have only market shares of below [0 to 2]%. It follows from the data provided in paragraph 91 of the contested decision that that situation is the one that is most favourable to the notifying parties, since, supposing that *in situ* concrete were wholly excluded from the relevant market, CVK's market share would be more than [60 to 70]%, whereas the market shares of all of its competitors would be, at most, [0 to 2]%. It is also common ground that the configuration of the relevant market has not substantially altered in recent years.

201 The existence of very large market shares is highly important and the relationship between the market shares of the undertakings involved in the concentration and their competitors, especially those of the next largest, is relevant evidence of the existence of a dominant position. That factor enables the competitive strength of the competitors of the undertaking in question to be assessed (*Hoffmann-La Roche* v *Commission*, paragraph 195 above, paragraphs 39, 40 and 48, and *Gencor* v *Commission*, paragraph 195 above, paragraphs 201 and 202). Furthermore, a particularly high market share may in itself be evidence of the existence of a dominant position, in particular where the other operators on the market hold only much smaller shares (Case T-221/95 *Endemol* v *Commission* [1999] ECR II-1299, paragraph 134).

202 For all of those reasons, the fact that CVK has a market share at least 14 times higher than that of its largest competitor, which the applicant does not deny, constitutes strong evidence that CVK has a dominant position on the relevant market.

203 The Court must consider whether the applicant has none the less been able to show that the Commission had made a manifest error of assessment of the other five factors analysed in the contested decision which would constitute a ground for its annulment.

— The factor consisting in the absence of significant competitive pressure on CVK from producers of *in situ* concrete

204 It should be borne in mind that in paragraphs 96 to 98 of the contested decision the Commission indicated that neither *in situ* concrete nor the producers of that material could exercise significant competitive pressure on CVK, which is the Netherlands' only producer of sand-lime bricks, the traditional material for wall construction and widely used in the construction of load-bearing walls. That assessment is based, in particular, on the market shares of CVK's competitors and on the differentiated nature of the products on the market in question, which allows an undertaking such as CVK to increase its influence beyond its apparent market share, owing to the fact that it is the only one to offer a product particularly appreciated by consumers or for certain applications.

205 In substance, without disputing the relevance of the factor identified by the Commission, the applicant contends that the assertion in paragraph 97 of the contested decision that CVK is the only producer of sand-lime bricks ignores the fact that sand-lime products are imported from Germany and that there is no market in sand-lime bricks. The applicant then refutes the Commission's conclusion, in paragraph 97 of the contested decision, that the concrete sector exerted no competitive pressure on CVK. In the applicant's submission, the Commission should have examined the changes in market shares and taken into account, in particular, the financial and economic capacities of the operators in that sector. Furthermore, the applicant maintains that it is not only the market share ([2 to 5]%) of the largest competitor producing *in situ* concrete that must be taken into account.

206 Those allegations must be rejected.

207 First, as regards the Commission's alleged failure to take into account the fact that sand-lime products are imported into the Netherlands from Germany, it must be pointed out that, in paragraph 84 of the contested decision, the Commission, when defining the market, said:

'Although imports of wall building materials from ... Germany do apparently take place in the border regions of the Netherlands, these are marginal and do not justify incorporating parts of ... Germany into the relevant geographic market. The market investigation has revealed the existence of barriers to market entry based, in particular, on building and industrial safety regulations. For example, ... building standards in Germany mean that walls of comparable wall thickness must be stronger and, given the extra materials that requires, are more expensive than in the Netherlands ...'

208 It should also be borne in mind that the applicant does not dispute either the definition of the relevant market or the finding that CVK is the only producer of sand-lime bricks in the Netherlands. Furthermore, the applicant merely indicates that building-materials wholesalers place sand-lime products on the Netherlands market, without providing any specific information as to the volume or the value of those imports, since in its response to the statement of objections, to which it referred in its written submissions, it merely stated that the range of sand-lime products offered by one of those wholesalers or importers and that offered by CVK were very similar.

209 In the second place, the applicant misreads the contested decision where it maintains that that decision found that there was no competitive pressure from the concrete sector. Paragraph 97 of the contested decision indicates, more specifically, that there is no significant competitive pressure from the *in situ* concrete sector and its producers, not that there is no such pressure from the concrete sector. Consequently, in the relevant grounds of the contested decision, the Commission did not deny the existence of competitive pressure from *in situ* concrete, but

deemed that it was insufficient in the light of CVK's position. In that regard, it is important to note that the Commission's analysis, which focused on *in situ* concrete, is shown to be correct by the fact that at least CVK's two immediate competitors on the relevant market produce only *in situ* concrete, a circumstance which must allow the Commission to consider whether CVK's position, as reflected by its market shares, could be counterbalanced by the presence of competitors offering that type of material on the relevant market.

210 The Commission also acted correctly when it did not merely take into account the share representing *in situ* concrete in general ([10 to 15]%) in the construction of load-bearing walls in the Netherlands, but also took into consideration the market share of CVK's main competitor ([2 to 5]%). As the first figure ([10 to 15]%) also includes the market share held by the applicant, which, owing to the control — as established above — which it exercises over CVK, cannot be regarded as an undertaking in competition with CVK, it was necessary to weight that percentage by also taking into consideration the market share of CVK's immediate competitor, in order not to overestimate any competitive pressure on CVK.

211 Furthermore, as regards the allegation that the Commission ought to have taken into account changing market shares in the concrete sector, in so far as that argument relates to *in situ* concrete, it was sufficient for the Commission to state, as it did in paragraph 97 of the contested decision, that the share of *in situ* concrete seemed to have remained stable, according to the information supplied by a Netherlands trade industry association, or even to have declined slightly according to certain operators, and it cannot be concluded that the competitive pressure on CVK from that sector of the market was significant. Furthermore, as regards the shares of the undertakings on the market, it is common ground that between 2000 and the time of adoption of the contested decision CVK's position and also that of its competitors, referred to above, had also remained virtually unaltered, as stated in paragraph 95 of the contested decision. That assessment necessarily refers to the *in situ* concrete sector,

in which, as is apparent from the table in paragraph 91 of the contested decision, CVK's two largest competitors were active, but in which one of them had a market share of less than [2 to 5]% and the other a market share of less than [0 to 2]%.

212 In that regard, it must be emphasised that, in general, the presence of competitors can 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 (see, to that effect, Case T-114/02 *BaByliss* v *Commission* [2003] ECR II-1279, paragraph 329). The applicant has not adduced probative evidence capable of invalidating the assessment which emerges from paragraph 97 of the contested decision that producers of *in situ* concrete — which, moreover, are CVK's immediate competitors on the relevant market — do not act as such a counterweight.

213 Last, it must be held that the absence of significant competitive pressure from the *in situ* concrete sector may also, in part, be inferred from the differentiated nature of the products on the relevant market, as the Commission emphasised in paragraph 98 of the contested decision. 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. The fact that *in situ* concrete is not perfectly substitutable for sand-lime bricks, owing in particular to the high costs which the use of *in situ* concrete entails, as explained in paragraphs 58 and 77 of the contested decision, without being disputed by the applicant, makes it possible to relativise the competitive pressure which that material and its producers exert on CVK.

214 Furthermore, even on the assumption that the Commission's assessment concerned the concrete sector in general, the applicant has still been unable to show, with the

help of precise and consistent evidence, that the producers on that segment of the relevant market were capable of acting as a genuine counterweight to CVK's position.

215 It follows that the Commission's assessment of the second factor in the contested decision is not vitiated by a manifest error.

— The factor consisting in the existence of significant barriers to market entry

216 In paragraphs 99 to 101 of the contested decision, the Commission states:

'(99) Notwithstanding the parties' and CVK's comments on the statement of objections and the discussion during the hearing, the Commission takes the view that there are substantial barriers to market entry. CVK controls all the sand-lime brickworks in the Netherlands and hence the production of by far the most important wall-building material in the relevant product market. The Commission's market investigation has shown that it would be possible for manufacturers of other wall-building materials to undertake the manufacture of sand-lime brick products only at great expense in terms of time and investment. The same is also true of other wall-building materials such as aerated concrete. The production processes and hence the production plants are different for each wall-building material.

(100) ... Haniel has put the investment costs for a sand-lime brickworks at only some EUR [*confidential*]. The setting-up of a ready-mix concrete plant costs,

according to Haniel, EUR [*confidential*]; Cementbouw has estimated these investment costs to be much higher. Moreover, the competitors questioned in connection with the investigation of the market have all stated that they would have considerable difficulties in expanding their existing capacities or launching production of another wall-building material. One competitor indicated that the establishment of a new sand-lime brickworks would require an investment of EUR [*confidential*] to [*confidential*], that the necessary official authorisation would be difficult to obtain, and that building the works alone would take two years. In contrast to the parties' view that the market entry barriers are low, the Commission accordingly assumes that no competitive pressure is exerted by possible market entries such as to control CVK's room for manoeuvre on the relevant market. Consequently, there have been only a few market entrants in recent times, and these were all limited to the concrete sector.

(101) There are also considerable excess capacities for sand-lime products, a fact which makes market entry an unattractive prospect, even now that CVK has closed 3 of its original 11 sand-lime brickworks. Moreover, CVK's remaining production facilities are evenly dispersed across the Netherlands, and it is therefore able to supply any customer from a local brickworks. The Commission's market investigation has shown that this factor also strengthens CVK's market position.'

217 The applicant complains that the Commission has essentially limited its analysis to the investment costs and long lead times for the construction and operation of sand-lime brickworks, whereas it ought to have examined all the costs and other potential barriers affecting all products competing with sand-lime bricks. The applicant also disputes the claim that the lead times and costs set out in the contested decision constitute genuine barriers to market entry, particularly if the capital markets operate efficiently. The applicant also complains that the Commission did not examine the costs that other producers of building materials would incur if they were to replace a part of their production by materials competing with sand-lime

bricks, even though the applicant indicated, in response to the statement of objections, that concrete could be produced for various applications, including wall construction. Last, the applicant denies that the excess capacities in the sand-lime bricks sector could constitute genuine barriers to entry to the relevant market.

218 First of all, the applicant's complaint that the Commission examined exclusively the lead times and costs necessary to undertake production in the sand-lime bricks sector must be rejected. The Commission's analysis also covers the other building materials, such as *in situ* concrete, as is clear from, inter alia, paragraph 100 of the contested decision. It also follows from paragraph 99 of the contested decision that the Commission stated that the long lead times and heavy costs were not confined to entry into the sand-lime bricks production sector but also applied to entry into the production of other building materials in the relevant market, such as aerated concrete. It follows that, contrary to the applicant's contention, the Commission did not confine its assessment of the barriers to entry to the relevant market to the sand-lime bricks sector.

219 Next, as regards the question whether the investment costs and the long lead periods described in the contested decision constitute 'barriers to market entry', the Court considers, first, and generally, that such barriers may consist in elements of various natures, in particular economic, commercial or financial elements, 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.

220 Second, while it cannot be precluded, in principle, that in highly capital-intensive sectors the financial resources necessary for the investments may be obtained on the

capital markets, it must be held that in the present case the applicant has failed to show that the Commission made a manifest error of assessment in finding that there were significant barriers to entry to the relevant market, in the light of all the factors used to support the contested decision.

221 As regards entry to the sand-lime bricks sector, the Commission relied on a series of factors of a regulatory and economic nature relating to the need to obtain administrative authorisation, the two-year period necessary for the construction of a brickworks and the high level of investment costs, while taking account of the fact that there were considerable excess capacities, even after the closure of three of the eleven manufacturing members of CVK (Boudewijn, Bergumermeer and Vogelenzang), making market entry less attractive, as CVK is able to supply any customer in the Netherlands from the other eight remaining undertakings.

222 Those factors, taken in conjunction with the fact, which the applicant has not succeeded in rebutting, that it would have been extremely difficult for the undertakings active on other sectors of the market to commence production of a different wall-building material, are sufficient to preclude any manifest error on the part of the Commission as regards the probability that a potential competitor of CVK would enter the sector. Incidentally, as regards the investments costs necessary to build a complete brickworks, the applicant, in answer to the written questions put by the Court, put forward the figure of EUR [*confidential*] million, an estimate which falls very precisely within the bracket indicated in paragraph 100 of the contested decision, without stating the reasons why the investment of a lower amount, also put forward in its answer, would be sufficient to permit entry to the relevant market.

223 As regards the other sectors of the relevant market, it must be held, first, that the applicant has not criticised the finding, in paragraph 100 of the contested decision, that there had been only a few entrants to the reference market, limited solely to the

concrete sector. It follows in that regard from the Commission's answers to the questions put by the Court, which were not disputed by the applicant, that those new entrants, active in the *in situ* concrete sector, were able to obtain at the most only [0 to 2]% market shares, whereas at the time of the adoption of the contested decision the concentration had taken place more than two years previously. Second, and although it follows from the documents in the file that the applicant effectively maintained its position that the investment costs of building a new *in situ* concrete facility, in the order of EUR [*confidential*] million, were significantly higher than the figure put forward by Haniel (EUR [*confidential*] million) and reproduced in the contested decision, the applicant has not denied that even CVK's present competitors find it extremely difficult to increase their production capacities, owing in particular to existing excess capacities, or to commence production of a different wall-building material, as the Commission further stated in its answers to the written questions put by the Court. All of those factors permit the conclusion that the Commission did not make a manifest error of assessment when it considered that there were also significant barriers to entry to the other sectors of the relevant market, thus preventing any effective competition for CVK on that market.

224 Incidentally, it should be noted that, generally, while the applicant refused to treat the existence of excess capacities on the relevant market as barriers to entry to that market, it none the less acknowledged at the hearing, in answer to a question from the Court, that such excess capacities had 'effects like a barrier to entry to the market'.

225 Third, the applicant's allegation that the Commission did not examine the capacity of producers of bricks, gypsum and wood, which are used in applications other than wall construction, to enter the market for the construction of load-bearing walls is ineffective. Having regard to the structure of the product market, it is common ground that the use of bricks in building load-bearing walls is quite secondary (see paragraphs 61 and 66 of the contested decision), while neither gypsum nor wood is a material used in building load-bearing walls (see paragraphs 53 and 60 of the

contested decision). It follows that an examination of the capacity of producers of bricks, gypsum and wood to use those materials in building load-bearing walls would clearly have been unable to alter the finding in the contested decision that there were significant barriers to entry on to the relevant market.

226 For all of those reasons, the Court rejects the complaints which the applicant has formulated in respect of the third factor alleging the existence of significant barriers to market entry.

— The factor based on the absence of buyer power among CVK's customers

227 Paragraphs 102 and 103 of the contested decision are worded as follows:

'(102) Notwithstanding the parties' and CVK's comments on the statement of objections and the discussion during the hearing, the Commission takes the view that the customers of CVK have no buyer power. No one customer buys a substantial part of CVK's output. Although the five largest building materials traders (the largest of which has a sales share of [20 to 30]%) account for [60 to 80]% of CVK's sales, this does not give the largest buyer any power since there are enough other traders on the market. Moreover, some of these traders are buying associations (*inkoopcombinaties*). What is important is the fact that the dealers are dependent on dealing in CVK's products. Sand-lime is the most important building material in the Netherlands. The next most important is concrete. However, this does not constitute an alternative for traders because neither *in situ* concrete nor, to any appreciable extent, precast concrete walling units are marketed via them.

Consequently, no other building material can replace sand-lime products for traders. This was confirmed by Raab Karcher during the hearing. It may be true that — as Haniel argued — the building materials trader risks losing the building project to concrete if his sand-lime brick offer is not cheap enough. However, this only means that the trader with his sand-lime brick offer — and indirectly also CVK — is in competition with concrete suppliers, not that the trader is in a position to exert buyer power on CVK.

(103) Moreover, CVK has considerable influence on determining the prices charged to building firms. Although materials traders bear the financial risk of sale, it is building firms and not traders that decide which materials to use. As already explained in detail, CVK is generally well informed about the identity of users and the use to which its products are put. For example, bricks are supplied direct by the works situated closest to the construction project. According to CVK, discounts are granted to dealers, whereby they might be bound to supply certain construction firms or projects. Moreover, construction firms are widely dispersed and not in a position to exert buyer power themselves. Similarly, the demand component of the large Dutch building groups such as Bam Groep, Koninklijke Volker Wessels Stevin, Heijmans, Ballast Nedam and HBG is too small individually to exert any buyer power such as could offset CVK's dominance on the supply side.'

228 The applicant maintains that the Commission's figures show that the distributors exert buyer power on CVK, especially where they belong to international groups or are organised in buying cooperatives. The distributors are therefore able to resort to products which compete with sand-lime bricks, with the exception of *in situ* concrete. The fact that distributors do not distribute *in situ* concrete gives them a greater incentive to obtain advantageous prices and conditions from CVK in order to compete with producers of concrete. The applicant reiterates its allegations that

the distributors also obtain sand-lime materials from Germany. Last, it disputes the Commission's finding that CVK is well informed about the users of its products and the use to which they are put and also rejects the significance and the frequency of the rebates granted to distributors, a fact which, in any event, does not alter the fact that the distributors have buyer power vis-à-vis CVK.

229 Those allegations cannot be upheld.

230 First of all, it should be observed that, as the Commission maintained in its written submissions, without being challenged by the applicant, the buyer 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.

231 In the present case, in order to reject the existence of buyer power on the part of the distributors of building materials that would offset the power which CVK derives in particular from its market shares and from the supply structure examined above, the Commission relied, first, on the dispersion of those operators on the market, that is to say, on the fact that the structure of the market for the distribution of load-bearing-wall building materials in the Netherlands is not concentrated and, second, on the absence of a credible alternative supply for those operators on the market, that is to say, in short, on the fact that those operators are dependent on CVK.

232 Although those two conditions do not necessarily constitute exhaustive confirmation or denial of the existence of customer buyer power capable of counteracting a supplier's economic power, they 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.

233 In the present case, as regards the dispersion of the distributors, and although it is common ground that the five main distributors of building materials in the Netherlands represent almost [60 to 80]% of CVK's sales, of which [20 to 30]% are sold to the largest distributor, the Court considers that, contrary to the applicant's contention, those data cannot in themselves prove that the distributors had buyer power vis-à-vis CVK. In effect, it is also common ground that no single customer accounts for a substantial part of CVK's turnover; and the applicant does not deny that there are other distributors, organised in buyer groups, and therefore capable of obtaining supplies in significant volumes, towards which CVK could if necessary steer its production, just as the applicant has not rebutted the fact that CVK directly supplies certain building firms (the end customers), which naturally increases the number of undertakings at which its supply of sand-lime bricks can be targeted.

234 Furthermore, according to the information provided by CVK in an annex to the rejoinder, the applicant itself is among the five main distributors mentioned in the contested decision. Owing to the control which the applicant exercises over CVK, it is highly unlikely at the least that the applicant will participate in the implementation of any buyer power of CVK's customers likely to counterbalance the latter's economic power.

235 As regards the absence of a credible alternative source of supply, the applicant admits that the building materials distributors do not distribute *in situ* concrete to an appreciable extent and did not comment on the suggestion that they do not distribute precast concrete units. In those circumstances, as regards *in situ* concrete,

although the suppliers of that material are CVK's main competitors on the relevant market, they cannot constitute a credible alternative for distributors. The same applies to obtaining supplies from the producers of precast concrete units, which are used in [5 to 10]% of all load-bearing walls in the Netherlands.

236 That finding is not undermined by the applicant's argument that the distributors would be able to obtain supplies of sand-lime products from Germany. It is sufficient to observe that it is common ground that imports of sand-lime materials from that State are marginal and that the applicant puts forward no specific data to support its allegation.

237 Furthermore, one of the main distributors of building materials for load-bearing walls in the Netherlands, Raab Karcher, confirmed at the hearing before the Commission on 16 May 2002 that CVK was not subject to any buyer power, and that assertion was not denied by the applicant; Raab Karcher had stated that its attempt to find alternatives, even minimum alternatives, had been unsuccessful owing to the significance of sand-lime bricks on the relevant market.

238 Next, as regards the Commission's finding that CVK is generally well informed of the identity of its users and the use to which its products are put, and is thereby able to exercise significant influence in fixing prices for building firms (the final customers), that possibility has no impact on any buyer power that the distributors would have over CVK. Since the Commission was able to conclude, without making a manifest error of assessment, that such buyer power on the part of the distributors did not exist, it is sufficient to state that the applicant's argument is inoperative; furthermore, no possible buyer power over CVK on the part of the building firms themselves was alleged.

239 It follows that the applicant's complaints in respect of the fourth factor relied on in the contested decision, based on the absence of buyer power on the part of CVK's customers, must be rejected.

— The factor based on the absence of a limitation on CVK's operational scope on the market for building materials for load-bearing walls by the conditions of competition on the neighbouring market for building materials for non-load-bearing walls

240 In paragraph 104 of the contested decision, the Commission stated:

'CVK's operational scope on the market in wall-building materials for load-bearing walls is not limited either by the conditions of competition on the [neighbouring] market in wall-building materials for non-load-bearing walls, on which its market position is weaker. The Commission's comment in the statement of objections that CVK is aware, when setting prices, of whether its products will be used for load-bearing or non-load-bearing walls and gears its prices primarily to the conditions of competition on the load-bearing-walls market, which for it is more important, was not refuted by the parties and CVK. Reference should be made to the comments in [paragraphs] 75 and 76 in this respect.'

241 According to those paragraphs:

'(75) In setting its prices for products used in load-bearing walls, CVK, as the only sand-lime brick producer in the Netherlands, is not restricted by prices charged on the market in products intended for non-load-bearing walls. The Commission's

market investigation shows that CVK is often aware of the specific use of its products. Firstly, in many cases, the company knows the place where its products will be used, since it is itself often responsible for delivering them to a particular building site. Secondly, as regards the delivery of sand-lime walling units, that make up half its turnover, CVK has access to the architect's plans. In addition, Haniel has indicated that the thickness of a substantial portion of sand-lime products means that they can be used in load-bearing or non-load-bearing walls. This information was confirmed by Raab Karcher during the hearing. In view of the comments of the parties and CVK on the statement of objections and the discussion of this question at the hearing, the Commission therefore takes the view that CVK is in a position to differentiate its prices according to the perceived competitive situation. In this respect, implicit price differentiation between large and small building projects through bulk discounts and uniform transport prices is possible. CVK has said that it grants builders' merchants project- and contractor-specific discounts.

(76) Even if CVK cannot differentiate the prices of sand-lime brick products for load-bearing walls from those for non-load-bearing walls, it is to be assumed that it tailors its pricing strategy primarily to the requirements of the market in load-bearing walls, since it sells [60 to 80]% of its products on that market.'

242 The applicant claims, first, that CVK would be required to take account of its competitive situation on the market in building materials for non-load-bearing walls, irrespective of the fact that CVK sells [60 to 80]% of its sand-lime bricks on the relevant market. Second, it maintains that there is a 'disciplinary effect' exercised by the neighbouring market in building materials for non-load-bearing walls on the relevant market, which is apparent from the report of Professor von Wieszäcker and Professor Elberfeld, which was communicated to the Commission but to which the contested decision makes no reference.

243 As regards the first argument, it should be observed that, irrespective of whether or not CVK is aware of the use to which its products will be put, and even on the assumption that, as the applicant contends, CVK is not aware of their intended use, that does not mean that CVK would be limited, in setting its prices on the relevant market, by the competitive situation on the neighbouring market for building materials for non-load-bearing walls, since it is common ground that CVK sells [60 to 80]% of its production of sand-lime bricks on the former market. Accordingly, it is not manifestly incorrect to find, as the Commission did in paragraph 104 of the contested decision, with reference to paragraph 76 of that decision, that CVK 'gears its prices primarily to the conditions of competition on the load-bearing-walls market, which for it is more important'.

244 As regards the applicant's allegation concerning a 'disciplinary effect' exerted on the relevant market by the market for building materials for non-load-bearing walls in the Netherlands, as established by Professor von Wieszäcker and Professor Elberfeld, the Court notes that that study was not actually cited in the contested decision. None the less, that fact is not capable of altering the finding made in paragraphs 76 and 104 of the contested decision. The analyses in that study correspond to the finding made in the contested decision that CVK gears its prices primarily to the relevant market. In particular, it follows from that study that if the fact that demand conditions on the 'marginal segment', namely the market in building materials for non-load-bearing walls, are taken into account results in price levels on the 'principal segment', namely the relevant market, lower than the price which would result if only the main segment were taken into account, the fact remains that even in those circumstances CVK gears its prices primarily to its position on the main segment, that is to say, the relevant market.

245 It should be added that in its reply the applicant confined itself to general considerations already submitted in the application and did not seriously contest the reasons, set out by the Commission in its written submissions and summarised in paragraph 189 above, which the Commission had given for not referring to the study by Professor von Wieszäcker and Professor Elberfeld in the grounds of the contested decision.

246 It follows that the applicant has not shown that the analysis of the fifth factor, based on the absence of a limit to CVK's operating scope on the relevant market by the conditions of competition on the neighbouring market for building materials for non-load-bearing walls, was vitiated by a manifest error of assessment.

— The factor based on the existence of a structural link between CVK and the applicant enabling them, both at the level of supply and of the distribution of building materials for load-bearing walls, to benefit from an operating scope appreciably wider than their competitors

247 It must be borne in mind that in paragraph 105 of the contested decision the Commission considered that CVK's dominant position was characterised by its structural links with the applicant, its controlling parent company. In the first place, as regards the relevant market, the contested decision stated, in paragraph 106, that taking into account the fact that the applicant supplied *in situ* concrete and precast concrete walling units, it, together with CVK, could offer, depending on the market definition employed, two or three of the main building materials for load-bearing walls. The Commission considered that that situation was likely to secure for those undertakings a wider operational scope than their competitors. In the second place, as regards the neighbouring market in the distribution of building materials, the Commission stated in paragraph 107 of the contested decision that the applicant was one of the largest wholesalers in the Netherlands and that, according to certain distributors, it received preferential treatment from CVK by comparison with independent distributors.

248 It should also be borne in mind that the applicant denies having control of CVK and maintains that it does not have a strong position on the relevant market, as its market share is only [2 to 5]%. It also explains that, as regards its building material distribution activities, its market share is only [0 to 2]%, that is not given preferential treatment by CVK and that even if that were the case, statements by third parties

cannot found a presumption of a dominant position for the purposes of Regulation No 4064/89.

249 Those allegations must be rejected.

250 It is necessary first of all to reject the applicant's argument that it does not control CVK, for the reasons set out in the context of the assessment of the first part of the first plea. Nor is there any reason why the Commission should not take the structural link between the applicant and CVK into consideration as an element characterising CVK's economic power or being to a certain extent capable of strengthening it. In so far as the applicant is present on the market of the joint venture and also on the downstream wholesale distribution market, the fact that it controls the joint venture may enable CVK to benefit from additional economic power necessarily arising from the coordination which will take place between those two undertakings on the market. Regulation No 4064/89 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 prejudgment of the autonomy of the joint venture.

251 Next, as regards the alleged strong position on the relevant market which, in the applicant's contention, the contested decision finds the applicant to have, the applicant misreads paragraph 106 of the contested decision. The contested decision merely finds that the applicant has a strong position on the sector for small units used principally in the residential construction sector and not on the relevant market in general. In any event, the fact that the applicant has a market share of [2 to 5]% on the relevant market, as it is able to supply precast concrete units and *in situ* concrete, while CVK's immediate competitor holds only a [2 to 5]% market share, allowed the Commission to conclude, without making a manifest error of

assessment, that CVK and the applicant could supply a range of products — according to the definition of the relevant market employed — that none of their competitors was able to supply.

252 Last, as regards the applicant's presence on the wholesale building materials distribution market, which the applicant does not dispute, it is permissible to conclude, in the absence of proof to the contrary, that the applicant's presence on that market enables CVK to take advantage of its founder's distribution network, regardless, moreover, of the size and market position of that network, in particular if the parties' competitors do not themselves have the advantage of vertical integration. Questioned on this point by the Court, the Commission stated at the hearing, without being contradicted by the applicant, that on the basis of the evidence in the file, only one brick producer had such an advantage. It must be made clear, however, that that circumstance has no real significance from the point of view of competition, since, in particular, having regard to the market structure, bricks, which represent approximately [2 to 5]% of all building materials used in the construction of load-bearing walls in the Netherlands, constitute material which is quite secondary on the relevant market. Consequently, the Commission's finding as to the power of the applicant's distribution network and as to the preferential treatment of the applicant by CVK cannot be called in question. In any event, even on the assumption that that finding were incorrect, it could not entail the annulment of the contested decision, as such a finding was made purely for the sake of completeness.

253 Furthermore, as regards the applicant's criticisms concerning the insufficiency of the reasoning in the contested decision, in so far as it departed from the conclusion of the NMa (see paragraph 176 above), it is sufficient to recall, first, that it follows from the answer to the first plea that the transactions concluded on 9 August 1999 constituted a single concentration coming within the exclusive competence of the Commission and, second, that the foregoing examination of the factors identified in the contested decision enables the Court to ascertain that the Commission had not made a manifest error of assessment in finding that CVK held a dominant position on the relevant market. It follows that, contrary to the applicant's contention, the

Commission was not required to indicate specifically its reasons for not sharing, where appropriate, the allegedly different assessment of the NMa.

254 For all of those reasons, it must be held that the Commission was correct to consider that CVK held a dominant position on the relevant market.

255 Accordingly, the first part of the second plea must be rejected.

Second part of the second plea: failure to demonstrate a causal link between the concentration and the creation of the dominant position

Arguments of the parties

256 The applicant maintains, in the first place, that even on the assumption that the RAG transaction constitutes a concentration, as the Commission contends, that transaction is separate from the pooling arrangement notified to the NMa, whereby CVK acquired control of its member undertakings, and clearly does not lead to the creation of a dominant position. In effect, the RAG transaction would merely have involved a change in the structure of control in CVK and would have had no effect on the latter's position on the market.

257 In the second place, the applicant claims that, contrary to what it is required to do under Article 2(2) of Regulation No 4064/89, the Commission has failed to show that there was a causal link between the concentration in question and the creation

or strengthening of the dominant position. In the applicant's submission, even before the RAG transaction, CVK, as a cooperative formed under Netherlands law, operated as a single economic entity and adopted the strategic decisions applying to its member undertakings and relating not only to sales of sand-lime products but also to pricing, sales conditions, production and purchases.

258 Contrary to what is stated in the contested decision, the applicant contends that the fact that it is easier to unravel the economic links which existed within a common distribution structure than those existing in the context of a full-function joint venture is irrelevant as regards the question whether the concentration has actually led to the creation of a dominant position. On the contrary, the Commission must demonstrate a causal link between the concentration and the creation of the dominant position. In the present case, the applicant observes that the contested decision did not analyse CVK's market shares both before and after the RAG transaction. If the Commission had carried out such an analysis, the analysis would have shown that the RAG transaction would not have had any effect on CVK's market share, as is illustrated by a comparison of the NMa's decision of 20 October 1998 and the contested decision.

259 Last, the applicant claims that the reasons why, according to the contested decision, it follows from the RAG transaction that the applicant's market share on the market for the wholesale distribution of wall-building materials must be attributed to CVK are not clear. In the applicant's submission, a similar appraisal could just as easily have been made before the shares were sold. In any event, the applicant contends that the attribution to CVK of the applicant's market shares on the wholesale wall-building materials market cannot lead to the creation of a dominant position.

260 In the third place, the applicant maintains that the Commission has not adduced additional evidence that the RAG transaction would have led to the creation of a dominant position.

261 First of all, the applicant does not agree that the increases in the price of sand-lime bricks described in paragraph 117 of the contested decision can amount to evidence of the creation of a dominant position. Like CVK at the hearing on 16 May 2002, the applicant maintains that those price increases can be attributed to increased costs and are consistent with general price fluctuations and not with a change in the structure of the market created by the RAG transaction. The applicant further notes that the periods taken into account in the contested decision all occurred after the RAG transaction and that the Commission made no attempt to compare prices before and after that transaction for the purpose of identifying the true effect of the RAG transaction on CVK's prices. In its reply, the applicant adds that the statements by competitors and purchasers reproduced in the contested decision, to the effect that the prices of CVK's products have risen abnormally since 1999, are not decisive either, since the Commission's file to which the applicant had access mentions numerous declarations which indicate the opposite.

262 The applicant then claims that the statements by operators and customers referred to in paragraphs 119 to 121 of the contested decision, concerning CVK's conduct, also fail to demonstrate that the RAG transaction led to the creation of a dominant position. Likewise the statements by operators concerning Haniel's conduct, referred to in paragraph 120 of the contested decision, are irrelevant, since, although they concern a shareholder in certain members of CVK, they relate to a third party to the dominant position. Furthermore, since the RAG transaction did not lead to an increase in CVK's market share, the applicant disagrees with the Commission's conclusion that CVK had greater freedom to act independently of its competitors and its customers after that transaction.

263 Last, the applicant maintains that the reference in paragraph 125 of the contested decision to the 'cartel procedure' before the NMa is also irrelevant for the purpose of determining whether the RAG transaction led to the creation of a dominant position. That reference, moreover, is difficult to reconcile with the Commission's general position that it is not bound by the decisions of other authorities adopted under different laws.

264 The Commission recalls the content of the relevant grounds of the contested decision and disputes all of the applicant's arguments.

265 First, the Commission contends that if the applicant's assertion that CVK was already operating on the relevant market as a single entity before the concentration were correct, that would deprive *ex post facto* control of the concentration of its practical effect. It would mean that where independent undertakings which were part of a joint selling organisation combine their activities in a full-function joint venture, the latter could not lead to the creation of a dominant position. The Commission maintains that the transformation of a joint sales organisation into a full-function joint venture constitutes a structural change on the market which can lead to the creation of a dominant position and should therefore in principle be subject to control under the provisions on concentrations.

266 In the present case, the Commission observes that, following the concentration, CVK has sole management of the 11 member undertakings for the entire Netherlands sand-lime sector, which enables it to focus all of the competition parameters centrally in order to maximise the profits of the joint venture, incorporating far more functions than the marketing-related functions which it performed before the concentration. The Commission also observes that the applicant's assertion that before the concentration CVK carried out, in particular, production and buying functions are imprecise and were never supported during the administrative procedure. Nor does the applicant explain why if, as it contends, CVK was already a 'single economic entity' before the concentration, it was then necessary for the applicant to conclude a cooperation agreement with Haniel and for the parties to initiate a notification procedure before the NMa. The Commission observes that the difference in terms of stability between the joint venture and a distribution organisation is a relevant factor which shows that the market underwent a lasting structural change.

267 Second, as regards the causal link, the Commission rejects the applicant's argument that it did not analyse the market shares before and after the RAG transaction. The RAG transaction is not distinct from the merger and CVK had no market share before the concentration. In that regard, the Commission states that the market share calculated by the NMa in the decision of 20 October 1998, to which the applicant refers, constituted the sum of the shares of the independent undertakings before any concentration. Furthermore, the attribution to CVK of the applicant's market shares on the market for the wholesale distribution of building materials may be explained by the fact that, owing to the joint control which it exercises over CVK with Haniel, the applicant cannot be regarded as an operator competing with CVK.

268 Third, as regards the 'additional evidence' to establish the existence of a causal link between the concentration and the creation of a dominant position, the Commission observes, generally, that the concentration had already been implemented at the time of the adoption of the contested decision, which explains why it was able, in paragraphs 117 to 121 of the contested decision, to carry out an *ex post* analysis which confirmed that the concentration had led to the creation of a dominant position. For the remainder, the Commission contests the other arguments put forward by the applicant.

Findings of the Court

269 The Court observes at the outset that under Article 2(2) of Regulation No 4064/89 a concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded on the relevant market is to be declared compatible with the common market (*Kali und Salz*, paragraph 196 above, paragraphs 109 and 110).

270 In the present case, the Court must therefore ascertain whether the concentration concluded on 9 August 1999 is the cause of the dominant position examined in the first part of the present plea. Contrary to the applicant's contention, review by the Court is not confined to the link between CVK's dominant position and the RAG transaction, since, as the Court held when it examined the second part of the first plea, the first and second groups of transactions referred to in paragraph 8 above have a unitary character owing to their interdependence, so that they form a single concentration. Furthermore, in so far as examination of the first part of the present plea led the Court to find that CVK has a dominant position on the relevant market, to disregard the causal link between the creation of that dominant position and the concentration, as the applicant claims, could be logically possible only if a dominant position existed before the transaction of 9 August 1999.

271 Next, it must be borne in mind that in paragraphs 110 to 115 of the contested decision the Commission rejected both the existence of an individual dominant position of CVK and the existence of a joint dominant position of the three groups of producers of sand-lime bricks — namely the producers controlled by the applicant, those wholly controlled by Haniel and those in which RAG had shares —, before the concentration of 9 August 1999, specifying the market shares of those three groups on the relevant market. It should further be pointed out that in paragraphs 116 to 125 of the contested decision the Commission identified certain elements which confirmed the causal link between the concentration and CVK's dominant position.

272 In the first place, as regards the applicant's assertions relating to the individual dominant position which CVK is alleged to have held before the concentration, it is necessary to reject the claims which the applicant bases on the failure to analyse in the contested decision CVK's market shares before the concentration and also on the Commission's refusal, set out in particular in paragraphs 113 and 114 of the contested decision, to regard CVK as an independent economic entity before the concentration.

273 On the first point, it is sufficient to observe that the lack of analysis is to be explained by the fact that the question of the attribution of market shares to CVK is conditioned by the question raised by the second point, namely whether, before the concentration, CVK was to be regarded as a full-function joint venture for the purposes of Regulation No 4064/89 and not merely as an instrument of cooperation between its members in relation to the marketing of sand-lime bricks in the Netherlands, a situation in which the market shares must be attributed to the groups to which the members of CVK belonged.

274 As regards the second point, it must be borne in mind that, as the pooling agreement concluded on 9 August 1999 states, the 'parties form an economic entity, under the conduct of CVK, having as its object the production and marketing of sand-lime brick products and of anything capable of assisting it in the wide sense' (recital B of the pooling agreement). It follows from Article 1 of that agreement that management is centralised within CVK under the direction of the managing board, which is responsible for 'the administration of CVK and of its brickworks, in the sense that, as regards total production and marketing of ... sand-lime bricks and of everything that may assist it in the wide sense, the managing board is responsible for the central management of CVK and of the brickworks, as it deems appropriate, taking account of the interests of CVK and of its members'. According to the same provision, the tasks of the managing board include giving directions to the member undertakings of CVK relating, in particular, to product development, marketing and sales, purchases, investments and disposals, orders, sand exploitation and personnel.

275 On the contrary, there is no indication in the case-file that such an economic unit existed before the transaction of 9 August 1999. Before the concentration, CVK existed as a common distribution organisation for the sand-lime bricks produced by the member undertakings of CVK in the Netherlands and it had no other economic function. Before the concentration, CVK could therefore be treated by the Commission as a sales counter for the benefit of its members. Although the

applicant claims in its reply that at that time CVK also carried out functions relating to the production of sand-lime bricks, it has failed to demonstrate that that was really the case.

276 Admittedly, in general, it is not precluded that a joint distribution organisation may possibly assume the character of a full-function joint venture if, at the level of that organisation, the products or services which it distributes acquire significant added value or if it functions as a genuine player on the market by obtaining supplies, to an appreciable extent, from other suppliers which compete with its own member undertakings.

277 However, that is not what the applicant claims in the present case.

278 The applicant disputes only the less lasting nature of the joint distribution organisation, described in paragraph 114 of the contested decision, by comparison with what is known as a 'full-function' joint venture. In that regard, it is sufficient to observe that the assessment set out in paragraph 114 of the contested decision, introduced by the adverb '[m]oreover', was formulated only for the sake of completeness. For the remainder, the applicant has failed to upset the Commission's finding that it followed from the concentration that CVK had become a full-function undertaking responsible for the various functions of the previously separate undertakings, a fact which determined the attribution of market shares to that new entity and, accordingly, its possible dominant position on the relevant market.

279 In the second place, as regards the question of the absence of a joint dominant position of the three groups of producers of sand-lime bricks, it is sufficient to observe that the applicant has not claimed that the three groups held such a

position. Furthermore, the evidence in the case-file, in particular the market shares attributed to the three groups before the concentration, namely [20 to 30]% for Haniel and the applicant and [5 to 10]% for RAG, do not in themselves permit the conclusion that a joint dominant position existed before the concentration of 9 August 1999.

280 In the third place, as regards the evidence confirming the existence of a causal link between the concentration of 9 August 1999 and CVK's dominant position, the Court considers that although the Commission is entitled to take such evidence into account in a situation, such as that in the present case, where the concentration has already been completed when the contested decision is adopted, such evidence is not by definition strictly necessary for the finding, criticised by the applicant, that CVK's dominant position is the result of the concentration of 9 August 1999. It follows that, even on the assumption that the applicant's arguments are well founded, they cannot have the effect of invalidating the assessment made on the basis of the above paragraphs.

281 In any event, as regards in particular the analysis in paragraph 117 of the contested decision, concerning CVK's pricing approach after the concentration, it must be held that the applicant has not demonstrated with the help of specific and consistent evidence that it was manifestly incorrect.

282 More specifically, the applicant has not, first, disputed the reality of the price increases applied by CVK since the implementation of the concentration ([5 to 10]% in 2001 and [5 to 10]% in 2002) or the Commission's assertions in its written submissions that the information on price changes since 1997 was based on a methodological study of all producers and 18 distributors of wall-building materials, explaining accordingly that the level of price increases for 1999 and 2000 ([0 to 5]%) were examples reflecting the period before the date on which the actual effects of the concentration were felt on the market. Nor has the applicant disputed that there is excess capacity in the sand-lime bricks segment, or that demand for wall-building materials fell somewhat during the reference period taken by the Commission. In

those circumstances, the applicant's unsubstantiated allegation that the price increase was due solely to an increase in production costs and to the change in the general level of prices seems unrealistic, since after the implementation of the concentration it would have been more likely that a fall in demand and the existence of excess capacity would lead to a reduction or, at the very least, stability in the prices of sand-lime bricks.

283 In that regard, the applicant's complaints concerning the relevance of the statements obtained by the Commission from operators on the market as regards the level — stable or falling — of the prices of other building materials between 1999 and 2002 cannot be upheld. It follows in particular from the statement for February 2002 of the distributor Stenncentrum Utrecht, contained in the Commission's file and relied on by the applicant in support of its theory that the prices of sand-lime bricks applied by CVK would not have increased or that, on the other hand, that 'the prices applied by certain brick producers had fallen by [20 to 30]% regard being had to the market mechanisms', that 'the same thing had happened in the ready-mix concrete sector', whereas 'for CVK, the sole supplier of sand-lime bricks, that undertaking had not encountered that handicap and had increased its prices significantly in 2001 and 2002'. That statement therefore does not support, in the least, the applicant's claims.

284 Furthermore, the applicant has also failed to explain the reasons why the explanations of Raab Karcher — given at the hearing before the Commission on 16 May 2002 — to the effect that before the concentration price negotiations with individual producers of sand-lime bricks were still possible in certain cases, whereas since the operation those undertakings refused to enter into individual discussions with customers and referred them to CVK, were incorrect.

285 It follows that the Commission's assessment concerning CVK's pricing conduct after the implementation of the concentration confirms to the requisite legal standard that a dominant position was created by the concentration in question, allowing that undertaking to act, to a large extent, independently of its competitors and of its customers. Accordingly, there is no need to examine the applicant's other complaints.

286 In those circumstances, the Commission did not breach Article 2 of Regulation No 4064/89 when it concluded, in paragraph 126 of the contested decision, that the concentration in question had led to the emergence of a dominant position on the part of CVK on the relevant market as a result of which effective competition within the common market or a substantial part thereof was significantly obstructed.

287 Accordingly, the second part of the second plea must be rejected in its entirety.

3. *Third plea: breach of Article 3 and Article 8(2) of Regulation No 4064/89 and also of the principle of proportionality*

Arguments of the parties

288 The applicant maintains, first, that the Commission was not competent to require further commitments under Regulation No 4064/89 in addition to the commitments proposed by Haniel and the applicant which were to put an end to those undertakings' joint control of CVK and to enable changing coalitions once again within CVK, since by that proposal the concentration which had to be notified under Regulation No 4064/89 ceased to exist. In the applicant's submission, following the proposed commitments, as there was no longer a concentration within

the meaning of Regulation No 4064/89, the Commission could no longer require further commitments under that regulation leading to the splitting-up of CVK, as required by the contested decision. In its reply, the applicant states that that rule is also valid in the case of a concentration which has already been brought about, as here. The applicant also emphasises that, contrary to the Commission's contention, it is irrelevant that in spite of the first commitments CVK would still hold a dominant position on the relevant market. Regulation No 4064/89 requires the adoption of legally binding decisions only in respect of concentrations having a Community dimension and does not allow the Commission to adopt measures aimed at breaking up any undertaking alleged to be in a dominant position. Consequently, by requiring commitments in addition to the initial commitments proposed, the Commission exceeded its competence, in breach of Article 3 and Article 8(2) of Regulation No 4064/89.

289 Second, the applicant contends that by requiring commitments leading to the dissolution of CVK, going beyond the reinstatement of the situation existing before the concentration, the Commission also breached the principle of proportionality. In so far as commitments satisfy the requirements laid down in Regulation No 4064/89, the Commission is required to accept the least restrictive set of commitments proposed, which in the present case it failed to do.

290 As regards the question relating to its competence, the Commission accepts at the outset that if the notifying parties decide not to proceed with the notified concentration and withdraw the notification, it does not have to insist on commitments.

291 In the present case, however, the Commission considers that the situation is different, since the concentration in question had already been carried out. In such a case, the Commission considers that it has to take action under Article 8(4) of

Regulation No 4064/89 to dissolve the concentration or to restore effective competition by other appropriate actions. The Commission also observes that in this case the concentration is made up of two transactions. In its view, termination of joint control of CVK by Haniel and the applicant would not suffice to restore effective competition, since CVK would continue to hold a dominant position on the relevant market. If the parties gave a commitment to end joint control, then in the Commission's contention it would not thereby lose its competence to examine the concentration under Regulation No 4064/89. Its competence is to be determined solely by reference to the transaction which gave rise to the obligation to notify and not by the fact that a commitment proposal is submitted. The Commission concludes that, subject to compliance with the commitments set out in the annex to the contested decision, it was required to declare the concentration compatible with the common market under Article 8(2) of Regulation No 4064/89.

292 As regards the alleged breach of the principle of proportionality, the Commission contends that it fully respected that principle. The first set of commitments simply did not allow it to ensure effective competition in the common market, since CVK would still have held a dominant position on the relevant market. Only the second set of commitments would have remedied that situation.

Findings of the Court

293 It should be borne in mind at the outset that Article 8(2) of Regulation No 4064/89 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 rendering the concentration compatible with the common market. ...'

294 It should also be noted that under Regulation No 4064/89 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 (*Gencor* v *Commission*, paragraph 195 above, paragraph 318).

295 Next, in the present case, it is apparent from paragraph 127 of the contested decision and from paragraph 13 of the annex thereto that the Commission initially refused a draft commitment which provided that Haniel and the applicant would end the cooperation agreement which they had concluded, and that their shares in Anker, Vogelenzang and Van Herwaarden, acquired following the RAG transaction, would be sold to an independent third party, whereas the pooling agreement and CVK's articles would be maintained.

296 In paragraph 132 of the contested decision, the Commission gave the following reasons for its refusal:

'The commitments submitted by the parties initially in draft form are, in the Commission's view, not sufficient to dispel the competitive doubts as regards the Dutch market in wall-building materials for load-bearing walls. The draft commitments remove only the joint control of Haniel and Cementbouw over CVK, without at the same time removing CVK's dominant position created by the merger. The draft commitments are based on the assumption, which as explained in Section II of this Decision is incorrect, that only the acquisition of joint control by

Haniel and Cementbouw over CVK was subject to examination by the Commission in these proceedings, while the simultaneously completed acquisition of control by CVK over its member undertakings was, because of the decision taken by the NMa on 20 October 1998, not subject to the Commission's jurisdiction.'

297 However, the Commission accepted the final commitments described in paragraphs 129 to 131 of the contested decision, being of the view that they were sufficient to allow it to declare the concentration compatible with the common market.

298 The terms of the commitments are as follows:

— within [*confidential*] of the adoption of the Commission Decision, revocation of the pooling agreement, undoing of the amendment to CVK's articles and dissolution of CVK;

— revocation of the cooperation agreement with immediate effect;

— simultaneously with the ending of the pooling agreement, a commitment by the applicant and Haniel to end joint control of the firms Anker and Van Herwaarden, according to the procedures described in paragraph 129 of the contested decision;

— commitment of the applicant and Haniel to end joint control of Vogelenzang according to the same procedures as for Anker and Van Herwaarden, should Vogelenzang resume its activities;

— commitment of Haniel and Cementbouw to [commitment concerning CVK's internal organisation];[3]

— appointment of a trustee with responsibility for supervising compliance with the commitments by the parties.

299 Although it does not deny that the notifying parties were in a position to propose adequate corrective measures capable of putting an end to the 'competition problems' identified by the Commission in the statement of objections, the applicant maintains, in substance, that since only the second group of transactions had to be notified to the Commission under Regulation No 4064/89, the first draft commitments, which consisted in terminating the second group of transactions and restoring the situation which existed before the concentration, as the applicant understands it, entails the amendment of the transaction in such a way that it no longer exists. In those circumstances, the Commission was no longer competent to ask the parties to propose further commitments, in particular the dissolution of CVK, since the basis of its competence under Regulation No 4064/89 had ceased to exist. At the same time, the applicant contends that the Commission was obliged to accept the first draft proposals, since they were sufficient and less restrictive than the final commitments. The applicant therefore submits that the Commission has breached the principle of proportionality.

300 However, that line of argument must be rejected.

301 In the first place, the applicant's claims are once again based on an incorrect premiss, which was rejected by the Court when it examined the second part of the first plea. In effect, there is only one concentration, concluded on 9 August 1999,

3 — Confidential data omitted.

comprising the first and second groups of transactions, which comes within the competence of the Commission under Regulation No 4064/89. Consequently, contrary to the applicant's contention, the first draft commitments do not alter the concentration in such a way that it no longer exists.

302 The argument that the Commission lacked competence must therefore be rejected.

303 In the second place, the same conclusion must be reached in respect of the complaint alleging that the first draft commitments were proportionate and that the final commitments accepted by the Commission were disproportionate, in particular the commitment to dissolve CVK within [*confidential*] of the adoption of the contested decision, on which the declaration of compatibility was made conditional.

304 First, it must be noted that the applicant has not explained how the first draft proposals, set out in paragraph 295 above, could have allowed the Commission to conclude that the concentration was compatible with the common market, when it is common ground that, in the context of those draft proposals, CVK's dominant position as resulting from the concentration concluded on 9 August 1999 would have remained unaltered. In effect, in particular, in spite of the fact that joint control of CVK would have been abandoned, it would have continued, depending on the definition of the market, to hold at least [50 to 60]% of the relevant market, with no increase in the market shares of its main competitors.

305 Contrary to the applicant's contention, therefore, the Commission was not required to accept the first draft commitments, in application of Article 8(2) of Regulation No 4064/89, since they did not allow it to conclude that the concentration of 9 August 1999 would not create a dominant position within the meaning of Article 2(2) of that regulation.

306 That finding is supported, moreover, by the wording of the eighth recital to Regulation No 1310/97, cited by the applicant in its written submissions, which states that '... the Commission may declare a concentration compatible with the common market in the second phase of the procedure, following commitments by the parties that are proportional to and would entirely eliminate the competition problem ...'.

307 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, the parties' commitments must not only be proportionate to the competition problem identified by the Commission in its decision but must eliminate it entirely; and that objective was clearly not achieved in the present case by the first draft commitments proposed by the notifying parties.

308 Second, as regards the final commitment whereby the parties proposed to dissolve CVK within [*confidential*] of the adoption of the contested decision — the only commitment really at issue between the parties to these proceedings —, while it is true that that commitment goes further than restoring the situation preceding the concentration, since, upon expiry of that period, CVK will have ceased to exist even in its previous form of a sales counter, the fact none the less remains that the notifying parties are not required to confine themselves to proposing commitments aimed strictly at restoring the competitive situation existing before the concentration in order to allow the Commission to 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.

309 It should be noted, moreover, that, given the final commitments of the notifying parties, as summarised in paragraph 298 above, the Commission did 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 have imposed unilaterally.

310 In the first hypothesis — involving the adoption of a negative decision — the Commission would have failed 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 Regulation No 4064/89.

311 In the second hypothesis — involving a positive decision with conditions attached aimed at strictly restoring the previous situation — the Commission would also have 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.

312 In those circumstances, the applicant cannot plead failure to respect the principle of proportionality. In the light of the circumstances of the present case, only the final commitments given by the notifying parties could allow the Commission to declare the concentration in question compatible with the common market, in application of Article 8(2) of Regulation No 4064/89.

313 That finding is not affected by the applicant's allegation that the notifying parties would have been arbitrarily required by the Commission to propose to dissolve CVK within a period of [*confidential*] from the adoption of the contested decision.

314 Admittedly, upon reading the statement of objections and the applicant's response, it must be acknowledged that the Commission may have exercised a certain influence on the terms of the commitments proposed by the parties, which it finally accepted in the contested decision. The statement of objections indicated that the Commission was prepared, in application of Article 8(4) of Regulation No 4064/89, to adopt measures which would restore effective competition, including the dissolution of CVK, if the parties did not propose corrective measures.

315 It is also true that, so far as Haniel is concerned, the proposal to dissolve CVK may have been based on the fact that it might allow Haniel to acquire shares in Ytong Netherlands, which was active in the production of aerated concrete, in accordance with recitals 141, 142 and 151 to Commission Decision 2003/292/EC of 9 April 2002 declaring a concentration to be compatible with the common market and the EEA Agreement (Case COMP/M.2568 — Haniel/Ytong) (OJ 2003 L 111, p. 1).

316 However, it is common ground that, as stated in paragraph 138 of the contested decision, the parties gave the commitment to dissolve CVK within the relevant period 'because they consider[ed] that in the event of termination of the pooling agreement, it was not foreseeable that CVK [would] continue to exist as a joint distribution organisation'.

317 Furthermore, as regards the Commission Decision of 9 April 2002 (see paragraph 315 above), which concerns only Haniel, that decision does not require any particular procedure in relation to the future structure of CVK in order for the condition relating to the sale of Haniel's shares in Ytong Netherlands to be lifted. That decision states that the sale commitment given by Haniel would be devoid of purpose if CVK were dissolved or if another undertaking in which Haniel had a direct or indirect share no longer had a stake in CVK (recital 142). Recital 151 to the decision of 9 April 2002 further states that the commitment would also be

unnecessary if CVK should be dissolved. In any event, it cannot be inferred from the grounds of that decision that it required the applicant to propose the final commitments referred to above in the context of the present case, as the applicant was not concerned by the decision of 9 April 2002.

318 Last, the applicant does not explain how the period of [*confidential*] from the date of adoption of the contested decision within which CVK was to be dissolved, which was accepted by the Commission in the light of the exceptional circumstances of the present case, was proposed under the arbitrary constraint of the Commission and was disproportionate.

319 Accordingly, it must be held that it has not been established that the notifying parties were arbitrarily forced by the Commission to propose the corrective measure consisting in the dissolution of CVK within a period of [*confidential*] from the adoption of the contested decision. Nor is it apparent from the documents in the case-file that the parties were arbitrarily forced to propose the other corrective measures in their final commitments designed to restore effective competition.

320 In those circumstances, and since the applicant does not maintain that the Commission made a manifest error of assessment in considering that the final commitments proposed by the parties, including the commitment to dissolve CVK within a period of [*confidential*] from the adoption of the contested decision, allowed effective competition to be restored, the Court considers that the Commission was correct to conclude that those commitments, provided that the parties complied with them, allowed it to declare the concentration in question to be compatible with the common market and the operation of the EEA Agreement.

321 It follows that the third plea must be rejected and the application dismissed in its entirety.

Costs

322 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

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

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Legal Lindh Mengozzi

Wiszniewska-Białecka Vadapalas

Delivered in open court in Luxembourg on 23 February 2006.

E. Coulon H. Legal

Registrar President

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