



Reports of Cases

Case T-471/11

Éditions Odile Jacob SAS
v
European Commission

(Competition — Concentrations — Book publishing market — Decision declaring the concentration compatible with the common market subject to sale of assets — Decision approving the purchaser of the assets sold — Decision taken following the annulment by the General Court of the initial decision concerning the same procedure — Legal interest in bringing proceedings — Breach of Article 266 TFEU — Failure to comply with the commitments imposed by the conditional clearance decision — Distinction between conditions and obligations — Principle of non-retroactivity — Assessment of the prospective purchaser — Purchaser's independence from the seller — Misuse of powers — Obligation to state reasons)

Summary — Judgment of the General Court (Second Chamber), 5 September 2014

- Judicial proceedings — Intervention — Objection of inadmissibility not raised by the defendant — Inadmissibility*
(Statute of the Court of Justice, Arts 40, fourth para., and 53; Rules of Procedure of the General Court, Art. 116(3))
- Judicial proceedings — Intervention — Pleas different from those of the main party supported — Inadmissibility*
(Statute of the Court of Justice, Arts 40, fourth para., and 53; Rules of Procedure of the General Court, Art. 116(3))
- Actions for annulment — Natural or legal persons — Interest in bringing proceedings — Need for an actual and current interest — Interest relating to a future but certain situation — Admissibility*
(Art. 263, fourth para., TFEU)
- Actions for annulment — Natural or legal persons — Interest in bringing proceedings — Action by the addressee of a judgment of an EU court directed against a measure of an institution taken in implementation of that judgment — Admissibility — Basis of a possible action for compensation*
(Art. 263, fourth para., TFEU)
- Judicial proceedings — Pleas in law — Legal classification of a plea distinct from that advanced in another dispute — Admissibility*
(Art. 263, fourth para., TFEU; Charter of Fundamental Rights of the European Union, Art. 47)

6. *Actions for annulment — Judgment annulling a measure — Scope — Absolute authority of res judicata — Scope — Both operative part and grounds to be taken into account — Point of law constituting an obiter dictum pronounced beyond the limits of the dispute before the EU judicature — Not included — Effects of annulment — Obligation of the author of the new decision to have reference to the date of adoption of the annulled measure and to take account of the provisions then in force*

(Arts 264 TFEU and 266 TFEU)

7. *Actions for annulment — Judgment annulling a measure — Measures to comply with the judgment — Refusal to adopt measures going beyond replacement of the annulled measure — Objection concerning the scope of the obligation to implement — Remedy — Actions for failure to act — Challenge to the legality of the measure adopted to replace the annulled measure — Remedy — Actions for annulment*

(Arts 263 TFEU, 265 TFEU and 266 TFEU)

8. *Competition — Concentrations — Examination by the Commission — Distinction between conditions and obligations imposed on undertakings in the context of a procedure for conditional authorisation of a concentration — Effects*

(Council Regulation No 4064/89, Arts 8(2) and (5)(b), and 14(2)(b) and (c); Commission Notice 2001/C 68/03, point 12)

9. *EU law — Principles — Protection of legitimate expectations — Legal certainty — Protection refused to the author of an infringement of the legislation in force — Primacy of the principle of legality over the principles of legal certainty and the protection of legitimate expectations justified by the need to preserve equal treatment*

10. *Acts of the institutions — Temporal application — Non-retroactivity — Exceptions — Conditions — Accomplishment of an objective in the general interest and respect for legitimate expectations — Annulment of a decision approving the purchaser of assets transferred in the context of a concentration operation by reason of lack of independence of the agent — Adoption of a retroactive decision seeking to cure the initial illegality — Lawfulness*

11. *Actions for annulment — Judgment rejecting an action for annulment — Effects — Relative authority of res judicata — Maintenance of the presumption of legality of the contested measure — Inadmissibility of a new action having the same subject-matter, between the same parties and based on the same cause of action*

(Art. 256(1) TFEU)

12. *Actions for annulment — Judgment annulling a measure — Effects — Obligation to implement — Annulment of a decision approving the purchaser of assets transferred in the context of a concentration operation — Decision not necessarily having to be on the same grounds as those appearing in the annulled measure — Account taken of information relating to the period subsequent to the date of adoption of the annulled measure — Lawfulness*

(Art. 266 TFEU)

13. *Competition — Concentrations — Examination by the Commission — Economic assessments — Discretionary power of assessment — Judicial review — Limits*

(Council Regulation No 4064/89, Art. 2)

14. *Competition — Concentrations — Examination by the Commission — Commitments of the undertakings concerned capable of rendering the notified operation compatible with the internal market — Undertaking to sell all assets — Criteria for selecting the purchaser — Commission not able to select the purchaser most likely to ensure perfect competition on the market — Transfer of assets to a purchaser not having experience in the sector concerned — Lawfulness — Conditions — Judicial review — Limits*

(Council Regulation No 4064/89, Art. 2(1)(a), (2) and (3); Commission Notice 2001/C 68/03, point 49)

15. *Competition — Concentrations — Examination by the Commission — Commitments of the undertakings concerned capable of rendering the notified operation compatible with the internal market — Undertaking to sell all assets — Criteria for selecting the purchaser — Current or potential competitor — Independence of the purchaser from the seller — Same person present in certain organs of the seller and the purchaser — Lawfulness — Conditions*

(Council Regulation No 4064/89, Art. 2(1)(a), (2) and (3); Commission Notice 2001/C 68/03, point 49)

16. *Acts of the institutions — Statement of reasons — Obligation — Scope — Decision to apply the rules on concentrations between undertakings — Decision authorising a concentration operation — Statement of reasons complementing a statement already sufficient in itself*

(Art. 296 TFEU)

1. See the text of the decision.

(see para. 36)

2. See the text of the decision.

(see paras 36, 37)

3. See the text of the decision.

(see para. 39)

4. The addressees of an EU court judgment annulling an act of an institution have a legal interest in bringing proceedings in a dispute relating to compliance with that judgment by the institution in question, even if the contested act has exhausted its effects. The mere fact that, even if the contested decision were annulled, the applicant would not have any way to acquire the assets that had been transferred to another undertaking, that operation having been validated by the annulled decision, cannot call that principle into question. Where the adoption of a decision is the means by which the Commission intends to comply with a judgment, the applicant has a legal interest in bringing proceedings against the contested decision by reason simply of its capacity as a party to that case.

Moreover, an undertaking included on a shortlist of five potential purchasers of the assets to be sold in connection with a concentration shows an interest in having annulled the Commission decision approving another one of those five undertakings because that decision could inevitably affect its commercial situation, irrespective of whether, in the case of the annulment of the contested decision, it might be approved as purchaser of the assets in question.

In addition, an applicant has an interest in seeking the annulment of an act which directly affects him in order to obtain a finding, by the European Union judicature, that an unlawful act has been committed against him, so that such a finding can then be the basis for any action for damages aimed at properly restoring the damage caused by the contested act.

(see paras 40, 41, 43, 44)

5. No provision of the Statute of the Court or of the Rules of Procedure prohibits a party from making a legal characterisation of a plea in law that is different from that which it made in another case. A natural or legal person's right to bring proceedings before the General Court under the fourth paragraph of Article 263 TFEU cannot be limited in the absence of a specific legal basis without infringing the fundamental principles of the rule of law and of respect for the rights of the defence and the rights to an effective remedy and of access to an impartial tribunal guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union.

Although the parties determine the subject-matter of the dispute, which cannot be modified by the Court, the Court must interpret the pleas in law by reference to their substance rather than their characterisation and thus characterise the pleas in law and the arguments in the application.

In EU law, the principle of estoppel merely refers to the fact that it is not possible for a party to challenge before the appellate court a factual or procedural element recognised before the court of first instance and included in the record of the hearing before that court.

(see paras 50-52)

6. Annulment judgments given by the European Union Courts have force of *res judicata* with absolute effect as soon as they become final. This applies not only to the operative part of the judgment annulling a decision, but also to the grounds which are its essential basis and are inseparable from it.

However, the principle of *res judicata* in respect of a judgment extends only to the matters of fact and law actually or necessarily settled. Furthermore, an *obiter dictum* in a judgment annulling an act does not have force of *res judicata* with absolute effect. Thus, Article 266 TFEU requires the institution which adopted the annulled measure only to take the necessary measures to comply with the judgment annulling its measure.

The procedure for replacing an annulled measure must be resumed at the very point at which the illegality occurred. The annulment of an act concluding an administrative proceeding which comprises several stages does not necessarily entail the annulment of the entire procedure prior to the adoption of the contested act, regardless of the grounds, procedural or substantive, of the judgment pronouncing the annulment. The author of the act must thus have reference to the date on which it had adopted the annulled act with a view to adopting the replacement act, by reference to the provisions then in force and the facts then relevant. It may, however, rely, in its new decision, on grounds other than those on which it based its first decision. In addition, it is not required to rule again on aspects of the initial decision which were not called into question by the judgment annulling that decision.

(see paras 56-59, 63, 66, 67, 125)

7. See the text of the decision.

(see para. 71)

8. Regulation No 4064/89 and the Commission Notice on remedies acceptable under Regulation No 4064/89 and under Commission Regulation (EC) No 447/98 draw a distinction between conditions and obligations imposed on undertakings in the procedure for conditional clearance of a concentration. Where the undertakings concerned commit a breach of an obligation attached to the Commission decision, the Commission may revoke the decision and fine those undertakings. On the other hand, Regulation No 4064/89 does not expressly provide for specific consequences for failure to comply with a condition.

In those circumstances, where a party fails to comply with a condition, a structural measure without which the concentration could not be authorised, the decision declaring the concentration compatible with the common market no longer stands. Moreover, in the case of non-compliance with an obligation attached to a decision declaring a concentration compatible with the common market, the Commission may revoke that decision and impose a fine on the undertaking which failed to comply with that obligation, but it is not required to adopt such measures.

(see paras 73, 76, 77, 80, 83)

9. See the text of the decision.

(see paras 92-94)

10. The principle of legal certainty, which constitutes a general principle of Union law, precludes, as a general rule, a measure from taking effect from a point in time before its publication. According to settled case-law, however, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected. That finding is not based on a distinction between individual decisions and regulatory acts.

Respect by the administration of legality and the force of *res judicata* constitutes an aim of general interest. Such an objective is thus satisfied by a Commission decision seeking to fill the legal vacuum created by the annulment of a first decision by the EU judicature approving a purchaser of assets to be sold pursuant to undertakings attached to a decision authorising a concentration operation, and thus to protect the legal certainty of the undertakings subject to the application of Regulation No 4064/89 on the control of concentrations between undertakings.

Nor does the principle of the protection of legitimate expectations preclude the adoption of a new retroactive approval decision where implementation of the commitments laid down in the conditional clearance decision, which are still binding on the undertaking which undertook to transfer assets with a view to realising the concentration, implies, first, that that undertaking proposes a purchaser of the assets to be sold to the Commission for approval and, second, that the Commission decides on the proposal for the purchaser made by the undertaking.

(see paras 102, 103, 106, 108)

11. The judgments dismissing an action for annulment of a measure of an EU institution have the force of *res judicata*, the only consequence of which is to render inadmissible any new action with the same subject-matter, involving the same parties and based on the same cause of action. Such a judgment does not therefore mean that the contested act is valid, but only that none of the pleas in law raised by the applicant was well-founded and that the same was true of the pleas concerning a matter of public policy which the Court must raise of its own motion. Consequently, the contested act continues to benefit from a presumption of legality, which also imposes upon all persons subject to Union law the obligation to acknowledge that that act is fully effective so long as it has not been declared to be unlawful.

(see paras 117, 144)

12. Following the annulment of an administrative act, its author must adopt a new replacement act by reference to the date on which it had been adopted, on the basis of the provisions in force and the relevant facts at that time. It may, however, rely, in its new decision, on grounds other than those on which it based its first decision.

The review of concentrations calls for a prospective analysis of the state of competition to which the concentration under examination is likely to give rise in the future, particularly as regards the assessment of the viability of a purchaser and its capability of maintaining and developing effective competition on the markets in question.

Thus, where the Commission is forced to carry out an *a posteriori* analysis of the state of competition to which a concentration operation has given rise, it is entitled to examine whether its analysis based on the facts of which it was aware on the date of the adoption of the annulled decision is corroborated by information relating to the period subsequent to that date.

(see paras 125, 127, 128, 134)

13. See the text of the decision.

(see paras 135-138)

14. See the text of the decision.

(see paras 145, 146, 148)

15. In the context of a concentration operation, the condition of the independence of the purchaser seeks, *inter alia*, to ensure the capability of the purchaser to act on the market as an effective, autonomous competitor, without its strategy and policies being open to influence from the seller. That independence can be assessed by examining the capital, financial, commercial, personnel and material links between the two companies.

The fact that the same person is present in the management bodies of the purchaser and the supervisory bodies of the seller does not necessarily establish that the purchaser is dependent on the seller.

Where, at the request of the Commission, the purchaser has formally undertaken, before the adoption of the approval decision: (1) that that person will leave his positions within that company within a year of the approval of the bid; (2) that in the intervening period he will not participate in the deliberations of the board of directors or other internal committees when dealing with business concerned by the concentration operation; and (3) that he will not be given any confidential information relating to that business by the purchaser company's senior staff or operational managers, the Commission may be regarded as having ensured that the presence of the same person as aforesaid could not impair the purchaser company's independence and thus the preservation and development of effective competition on the relevant market.

(see paras 152, 155, 158, 159)

16. See the text of the decision.

(see paras 175-177, 182)