



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber)

12 December 2012 *

(Competition — Concentrations — Decision imposing a fine for putting into effect a concentration — Obligation to suspend the concentration — Obligation to state reasons — Error of assessment — Limitation period — Amount of the fine)

In Case T-332/09,

Electrabel, established in Brussels (Belgium), represented by M. Pittie and P. Honoré, lawyers,

applicant,

v

European Commission, represented by A. Bouquet and V. Di Bucci, acting as Agents,

defendant,

APPLICATION, principally, for annulment of Commission Decision C(2009) 4416 of 10 June 2009 imposing a fine for putting into effect a concentration in breach of Article 7(1) of Council Regulation (EEC) No 4064/89 (Case COMP/M.4994 — Electrabel/Compagnie nationale du Rhône) and, in the alternative, for annulment or reduction of the amount of the fine imposed on the applicant by that decision,

THE GENERAL COURT (Third Chamber),

composed of O. Czúcz (Rapporteur), President, I. Labucka and D. Gratsias, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 30 November 2011,

gives the following

Judgment

Facts of the case

- 1 The applicant, Electrabel, is a company governed by Belgian law and active, essentially, in production, sale, trading and operational management of networks in the electricity and natural gas sectors. At the material time it was part of the Suez group, an industrial group active in the management of public

* Language of the case: French.

utility services as a partner of local authorities, undertakings and individuals in the electricity, gas, energy services, water and public health sectors. Since 22 July 2008 it has formed part of the GDF Suez group, which came about as a result of the merger of the Gaz de France group with the Suez group. It carries out its activities in France through its subsidiary Electrabel France.

- 2 Compagnie nationale du Rhône (CNR) is a French public undertaking with the task of developing and managing the Rhône Valley under a concession granted by the French State and with a specific legal framework, as is apparent, in particular, from French Law No 80-3 of 4 January 1980 on CNR (JORF, 5 January 1980, p. 41). CNR produces and markets electricity. It also provides river engineering services in France and in 20 or so other countries. It is stated in its articles of association that it is a general-interest limited company controlled by the State under the same conditions as national public undertakings. It has a supervisory board and a management board.
- 3 French Law No 2001-1168 of 11 December 2001 establishing urgent measures for economic and financial reforms (JORF, 12 December 2001, p. 19703; 'the Murcef Law') provides in Article 21 that CNR is a limited company, the majority of whose capital and voting shares must be held by local or regional authorities and also by other legal persons governed by public law or by undertakings belonging to the public sector. Until 2003 CNR's capital was held exclusively by public entities or public undertakings whose capital was at the time wholly owned by the State. Until that time CNR's two largest shareholders were Société nationale des chemins de fer français (SNCF) and Électricité de France (EDF).
- 4 Within the framework of a project for the acquisition of the German company Energie Baden-Württemberg AG ('EnBW'), EDF was required by the Commission of the European Communities to give a commitment to dispose of its shareholding in CNR, under the Commission Decision of 7 February 2001 declaring a concentration compatible with the common market and the EEA Agreement (Case COMP/M.1853 — EDF/EnBW) (OJ 2002 L 59, p. 1) ('the EDF/EnBW Decision').
- 5 On 24 June 2003 the applicant acquired shares in CNR representing 17.86% of the latter's capital and 16.88% of its voting rights.
- 6 On 27 June 2003 EDF and the applicant signed a promise to sell and to purchase shares, under which EDF transferred to the applicant its entire shareholding in CNR's capital.
- 7 On 24 July 2003 the applicant concluded with the Caisse des dépôts et consignations (CDC) a shareholders' agreement ('the Agreement') within the framework of CDC's acquisition of SNCF's shareholding in CNR's capital. Under that Agreement, in particular:
 - the applicant was granted an option to sell and to purchase CNR's shares in the event that the rule laid down in Article 21 of the Murcef Law should be repealed, giving the applicant a preferential right to acquire all or part of the shares of a public shareholder becoming available and also the shareholding of CDC;
 - CDC and the applicant were to vote in concert in the general meeting and on the supervisory board in order to appoint the shareholders' representatives on the supervisory board and the members of the management board of CNR;
 - the applicant and CDC each had the right to object if the other party envisaged entering into a voting agreement with one or more other shareholders.
- 8 On 23 December 2003 the applicant came into possession of the shares held until then by EDF and by the Chamber of Commerce and Industry of Villefranche and Beaujolais (France), thus increasing its shareholding to 49.95% of the capital and 47.92% of the voting rights of CNR.

- 9 On 9 August 2007 the applicant contacted the Commission in order to obtain its opinion on the applicant's acquisition of de facto sole control of CNR. A dialogue was initiated with the Commission's services in order to determine whether there was indeed such control and to specify the information necessary in order to lodge a form of notification under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1). On 26 March 2008 the formal notification form ('Form CO') was lodged, in which the applicant stated that it had acquired de facto sole control of CNR in the course of 2007. By decision of 29 April 2008 (Case COMP/M.4994 — Electrabel/Compagnie nationale du Rhône) ('the authorisation decision') the Commission stated that it did not oppose that concentration and declared it compatible with the common market on the basis of Article 6(1)(b) of Regulation No 139/2004, while leaving open the question of the precise date on which the applicant had acquired de facto sole control of CNR.
- 10 On 17 December 2008 the applicant received a statement of objections, in which it was stated that the Commission had reached the provisional conclusion that the concentration between the applicant and CNR had been put in place on 23 December 2003 before being notified to the Commission and before being declared compatible with the common market, which constituted an infringement of Article 7(1) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (corrected version 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).
- 11 On 13 February 2009 the applicant replied to the statement of objections.
- 12 On 11 March 2009 a hearing took place.
- 13 On 10 June 2009 the Commission adopted Decision C(2009) 4416 imposing a fine for putting into effect a concentration in breach of Article 7(1) of Regulation No 4064/89 (Case COMP/M.4994 — Electrabel/Compagnie nationale du Rhône) ('the contested decision').
- 14 The operative part of the contested decision is worded as follows:

'Article 1

By putting into effect a concentration with a Community dimension in the period 23 December 2003 to 9 August 2007, before it was notified and before it was declared compatible with the common market, [the applicant] has infringed Article 7(1) of [Regulation No 4064/89].

Article 2

A fine of EUR 20 000 000 is hereby imposed on [the applicant] for the infringement referred to in Article 1.

Article 3

The fine imposed in Article 2 shall be paid in euro within three months ...'

Procedure and forms of order sought

- 15 By application lodged at the Court Registry on 20 August 2009, the applicant brought the present action.
- 16 The applicant claims, in substance, that the Court should:
 - principally, annul the contested decision in its entirety;

- in the alternative, annul Articles 2 and 3 of the contested decision or, at least, reduce the amount of the fine imposed on the applicant in Article 2;
 - order the Commission to pay the costs.
- 17 The Commission contends that the Court should:
- dismiss the action;
 - order the applicant to pay the costs.
- 18 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure and, in the context of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure of the Court, put a number of written questions to the parties and requested the applicant to produce certain documents. The parties complied with those requests within the prescribed period.
- 19 The parties presented oral argument and answered the oral questions put to them by the Court at the hearing on 30 November 2011.

Law

- 20 In support of the action, the applicant formulates a number of principal claims and a number of alternative claims. In support of the principal claims, the applicant puts forward two pleas in law, whereby it seeks annulment of the contested decision in its entirety. The first plea alleges infringement of Article 7(1) of Regulation No 4064/89 and infringement of Article 253 EC in that the Commission did not correctly characterise the infringement and in that the contested decision contains a contradiction in the grounds. The second plea alleges infringement of Article 3(3) and Article 7(1) of Regulation No 4064/89 and breach of the principle that the Commission is required to comply with the rules which it has imposed on itself. In support of the alternative claims, the applicant puts forward two pleas whereby it seeks annulment of the fine or a reduction of the amount of the fine. The third plea alleges infringement of Article 1 of Council Regulation (EEC) No 2988/74 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1), in that the Commission's power to impose a penalty on the applicant was time-barred. The fourth plea alleges infringement of Article 14(2) of Regulation No 4064/89 and breach of the principles of proportionality, sound administration and legitimate expectations.

1. The principal claims, seeking annulment of the contested decision

- 21 The Court considers it appropriate to examine the second plea before considering the first plea.

Second plea, alleging infringement of Article 3(3) and Article 7(1) of Regulation No 4064/89 and breach of the principle that the Commission is required to comply with the rules which it has imposed on itself

- 22 The applicant claims, in essence, that the Commission made a number of errors in concluding that the applicant had acquired de facto sole control of CNR on 23 December 2003.
- 23 The Commission denies that its analysis is vitiated by errors.

- 24 It must be borne in mind that Article 3(1) of Regulation No 4064/89 defines a concentration as the merger of two or more previously independent undertakings or the acquisition of direct or indirect control, whether by purchase of securities or assets, by contract or by any other means, of the whole or parts of one or more undertakings by one or more persons already controlling at least one undertaking or by one or more undertakings. Further explanation of that provision is given in Article 3(3), which states that control arises from 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 the activity of an undertaking.
- 25 The applicant's complaints relate in particular to recitals 40 to 173 to the contested decision, where the Commission explains the circumstances of fact and of law which led it to take the view that the applicant had acquired sole control of CNR for the purposes of Article 3(3) of Regulation No 4064/89 with effect from 23 December 2003 and that, in particular, a stable change of control had taken place on that date. The Commission concludes at recital 174 to the contested decision that the applicant put into effect a concentration with a Community dimension from 23 December 2003, in breach of Article 7(1) of Regulation No 4064/89, which provides that a concentration which comes within the scope of that regulation is not to be put into effect either before it has been notified or before it has been declared compatible with the common market.
- 26 In the contested decision the Commission puts forward six factors on which it bases its findings:
- on 23 December 2003, when it acquired EDF's shareholding, the applicant became by far the main shareholder in CNR and was assured of having a de facto absolute majority at the general meeting of that undertaking, given, in particular, its 49.95% share of CNR's capital, representing 47.92% of the voting rights, the very dispersed nature of the shareholders other than CDC (which had 22% of the capital and 20% of the voting rights), made up of almost 200 local authorities and other local public entities, with 16.82% of the capital, and the shareholder attendance rates at CNR's general meetings in the three preceding years (recitals 41 to 77 to the contested decision);
 - since 2003 the applicant had held an absolute majority on CNR's management board and also had the means to keep that majority (recitals 78 to 86 to the contested decision);
 - the Murcef Law did not prevent the applicant from acquiring control over CNR (recitals 87 to 93 to the contested decision);
 - since 2003, having taken over the industrial role played by EDF within CNR, the applicant had been CNR's only industrial shareholder and had been playing a central role in the latter's operational management (recitals 94 to 126 to the contested decision);
 - since 2004 CNR had been regarded de facto as forming part of the Suez group both by the managers of CNR and by the managers of Suez (recitals 127 to 158 to the contested decision); and
 - the applicant had a preferential right to subscribe to CNR's other shares (recitals 159 to 164 to the contested decision).
- 27 The applicant's second plea is divided into three parts. In the first part, it claims that the Commission failed to take account of a fundamental characteristic of CNR. In the second part, it maintains that the Commission applied incompletely and incorrectly the test set out in its 'Guidelines' and made a number of errors affecting the assessment of the factor relating to the holding of a majority at the general meetings of CNR. Last, in the third part, the applicant refers to three errors affecting the other factors mentioned by the Commission in the contested decision, notably (i) the fact that the applicant had held a majority on CNR's management board since 2003; (ii) statements made by managers of CNR and the Suez group; and (iii) the existence of a preferential right of subscription to certain CNR shares.

- 28 The Commission observes, first of all, that the applicant's second plea is ineffective in that it is directed against the actual existence of the infringement. The applicant does not dispute the existence of an infringement, but at most its duration, which cannot justify the annulment of the contested decision in its entirety. The Commission refers to certain assertions made by the applicant in a draft Form CO of 17 January 2008 and also to the fact that, by having notified the concentration, the applicant acknowledges in any event that it acquired de facto sole control over CNR without having been authorised to do so. In the Commission's submission, contesting the duration of the infringement may possibly be relevant to the setting of the amount of the fine, but not to the characterisation of the facts constituting the infringement.
- 29 In that regard, the applicant asserts that, in notifying the concentration during 2007, it sought to comply with the obligation to notify the concentration arising under Article 4 of Regulation No 4064/89.
- 30 That article concerns the obligation to give prior notification of concentrations with a Community dimension. Article 4(1) states that concentrations with a Community dimension are to be notified to the Commission not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest. It must be held that the applicant is correct in asserting that the fact of having notified the concentration in accordance with that provision cannot be regarded, in infringement proceedings such as those at issue in the present case, as recognition on the applicant's part of the existence of an infringement of the obligation to suspend the concentration laid down in Article 7(1) of Regulation No 4064/89.
- 31 In the field of competition law, where there is a dispute as to the existence of an infringement, it is incumbent on the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement (see, by analogy, Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417, paragraph 58; Joined Cases C-2/01 P and C-3/01 P *BAI and Commission v Bayer* [2004] ECR I-23, paragraph 62; and Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, paragraph 688). In order to do so, it must produce sufficiently precise and coherent evidence to substantiate the firm conviction that the alleged infringement did take place (see, to that effect and by analogy, Joined Cases 29/83 and 30/83 *CRAM and Rheinzink v Commission* [1984] ECR 1679, paragraph 20; Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others v Commission* [1993] ECR I-1307, paragraph 127; and Joined Cases T-185/96, T-189/96 and T-190/96 *Riviera Auto Service and Others v Commission* [1999] ECR II-93, paragraph 47).
- 32 It was therefore incumbent on the Commission to produce in the contested decision sufficiently precise and coherent evidence to establish that there had been an infringement of Article 7(1) of Regulation No 4064/89.
- 33 Admittedly, the factors on which the Commission relies in support of its preliminary argument, such as the fact that the applicant notified the concentration or made assertions in a draft Form CO, and also the question whether the Commission can legitimately rely before the Court on the assertions made in such a draft form, may be examined, where appropriate, from the aspect of the sufficiency of the proof of the existence of an infringement. Indeed, proceedings before the Court are governed by the principle of the free taking of evidence, the only relevant criterion for assessing the evidence produced being its credibility (Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission* [2004] ECR II-2501, paragraph 273).
- 34 However, such arguments cannot be put forward in order to deny the applicant the opportunity to challenge the component elements of the infringement in respect of which the burden of proof is borne by the Commission, such as, in particular, its duration.

- 35 As regards, in particular, the Commission's reference to an assertion made by the applicant in a draft Form CO dated 17 January 2008, to the effect that sole control had appeared to exist since 2004, whereas in the definitive form the applicant claimed to have acquired control during 2007, first, it must be observed that, while an undertaking's express or implied acknowledgement of matters of fact or of law during the administrative procedure before the Commission may constitute additional evidence when determining whether an action is well founded, it cannot restrict the very exercise of a natural or legal person's right to bring proceedings before the Court under the fourth paragraph of Article 230 EC (see, to that effect, Case C-407/08 P *Knauf Gips v Commission* [2010] ECR I-6371, paragraph 90). Second, the reference by the Commission to the draft Form CO is made purely for the sake of completeness at recital 166 to the contested decision, after it has found at recital 165 that the infringement had existed since 23 December 2003. In those circumstances, the Commission's argument that the applicant's plea is ineffective, on the ground that it acknowledged the infringement in a draft Form CO, must be rejected and there is thus no need to rule on the applicant's argument that the Commission cannot rely before the Court on information in a draft Form CO since that document is lodged on a confidential basis.
- 36 Last, even though the applicant merely disputes the duration of the infringement, the acceptance of its arguments could lead to the partial annulment of Article 1 of the contested decision (see, to that effect and by analogy, Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407, paragraphs 211 to 213), as, moreover, the Commission acknowledges.
- 37 In those circumstances, the plea cannot be rejected as ineffective.
- 38 The Court considers it appropriate to examine first of all the arguments raised in the second part of the second plea, before analysing the first and third parts of that plea. Furthermore, the first part of the plea and the first complaint put forward in the context of the third part will be examined together, as the arguments on which they are based are closely connected.

Second part of the second plea, alleging incomplete and incorrect application of the test laid down by the Commission in its 'Guidelines', and errors affecting the assessment of the factor relating to the holding of a majority at CNR's general meetings

- 39 When it relies on errors of assessment in the application of the 'Guidelines', the applicant is referring to the application of the Commission notice on the concept of concentration under Regulation No 4064/89 (OJ 1998 C 66, p. 5; 'the Notice on the concept of concentration') and the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2008 C 95, p. 1; 'the Consolidated Jurisdictional Notice'). The applicant maintains, in essence, that the Commission applied incompletely and incorrectly the test relating to the acquisition of de facto sole control by a minority shareholder recommended in those notices and that it made a number of errors affecting the assessment of the factor relating to the holding of a majority in CNR's general meetings by applying the test in an essentially quantitative manner whereas those notices also make clear that, for the purpose of determining whether an operation constitutes a concentration, it is necessary to carry out a prospective and global analysis and to apply qualitative rather than quantitative criteria.
- 40 In that regard, it should be observed that, as stated at recital 53 to the contested decision, the applicant cannot rely on the Consolidated Jurisdictional Notice. It is true that point 2 of the Consolidated Jurisdictional Notice states that that notice replaces the Notice on the concept of concentration. However, although point 1 of the Consolidated Jurisdictional Notice states that '[t]he purpose of this Notice is to provide guidance as to jurisdiction issues under' Regulation No 139/2004, it follows from Article 26(2) of that regulation, which is referred to in the contested decision, that Regulation No 4064/89 is to continue to apply to any concentration which was the subject of an agreement or announcement or where control was acquired within the meaning of Article 4(1) of that regulation

before 1 May 2004. In the present case, the Commission, which meant to penalise the putting into effect of a concentration in breach of Article 7(1) of Regulation No 4064/89, considered, in fact, that the applicant had acquired de facto sole control of CNR on 23 December 2003. Since the purpose of the Notice on the concept of concentration is, in the words of point 1, to provide guidance as to how the Commission interprets the term ‘concentration’ used in Article 3 of Regulation No 4064/89, it must therefore be held that the applicant can rely in the present case only on the Notice on the concept of concentration. That observation, however, has no impact on the analysis to be undertaken in the context of the present part of the plea. As the parties acknowledge, the wording of the two notices is not really substantially different with respect to the test proposed for the purpose of establishing the existence of de facto sole control by a minority shareholder. Like the Consolidated Jurisdictional Notice, the Notice on the concept of concentration states that, in determining whether an operation constitutes a concentration, the Commission applies qualitative rather than quantitative criteria, focusing on the concept of control (point 4).

- 41 Furthermore, and clearly, as the applicant observes and the Commission does not dispute, the Commission is bound by notices which it adopts in the area of control of concentrations, provided that they do not depart from the rules of the Treaty and of Regulation No 4064/89 (see, by analogy, Case T-282/06 *Sun Chemical Group and Others v Commission* [2007] ECR II-2149, paragraph 55).
- 42 Last, it must be made clear, also as a preliminary point, that even though the applicant makes reference to manifest errors of assessment on the Commission’s part, the Commission’s analysis of the circumstances in which a concentration was put into effect is amenable to a full review by the Court. Indeed, the concept of concentration provides the basis for the Commission’s powers under Regulation No 4064/89 (see, by analogy, Case T-411/07 *Aer Lingus Group v Commission* [2010] ECR II-3691, paragraph 62). Nor does the Commission claim that it has a discretion in that respect.
- 43 The Court will examine in turn, in the light of those principles, the three alleged errors of assessment by the Commission when it considered that on 23 December 2003, when the applicant acquired EDF’s shareholding, the applicant became by far the main shareholder in CNR and that it was assured of having an absolute majority in CNR’s general meeting.
- 44 In the first place, the applicant claims that the voting structure at general meetings in the years preceding December 2003 is irrelevant. It maintains that the Commission failed to take account of the fact that the main shareholder at the time was EDF, a State-controlled company. The low rate of shareholder attendance at general meetings during the three years preceding the applicant’s purchase of EDF’s shares is explained by the trust which the other public shareholders placed in EDF to protect their interests. The applicant further notes that the fact that, since the EDF/EnBW Decision, EDF was no longer authorised to vote at CNR’s general meetings, and that it had appointed a trustee to vote on its behalf, has no effect on the small shareholders’ trust.
- 45 It must be observed that the analysis carried out by the Commission in the contested decision (recitals 41 to 77) is based on the presence and conduct of shareholders at general meetings held during the three years preceding 23 December 2003, which it considers to be the date on which the applicant took de facto control of CNR, and infers from those factors what the position would be at future general meetings of CNR.
- 46 In principle, that approach is consistent with the Notice on the concept of concentration and with Article 3(3) of Regulation No 4064/89. It serves to determine whether the applicant had the capacity to exercise decisive influence over CNR from the end of December 2003 and, as is apparent from the Notice on the concept of concentration, the presence of shareholders at general meetings of the target company is a major factor in that regard.

- 47 Indeed, point 14 of the Notice on the concept of concentration states that sole control may be acquired with a 'qualified minority', which may be established by the circumstances of law or of fact. As regards de facto sole control exercised by a minority shareholder, that notice states at point 14 that such a situation arises, for example, where the shareholder is highly likely to achieve a majority at the general meeting because the remaining shareholders are widely dispersed. It is then unlikely that all the smaller shareholders will be present or represented at the shareholders' meeting. The determination of whether or not sole control exists in a particular case is based on the evidence resulting from the presence of shareholders in previous years. Where, on the basis of the number of shareholders attending the shareholders' meeting, a minority shareholder has a stable majority of the votes at this meeting, then the minority shareholder in question is taken to have sole control of the undertaking.
- 48 The Notice on the concept of concentration therefore clearly recommends an analysis of the presence of shareholders at shareholders' meetings in preceding years in order to determine the future situation. That is precisely the approach which the Commission took in the contested decision. In that regard, the Commission correctly submits that the argument that it is necessary to observe the situation at general meetings for several years after an increase in capital which makes de facto sole control highly likely, in order to confirm that such control does in fact exist, is not based on a correct interpretation of that notice and would lead to a system of 'de facto control on a trial basis', contrary to the system of notification and prior authorisation introduced by Regulation No 4064/89.
- 49 It must be made clear, however, that the applicant's complaint as to the irrelevance of the voting structure at shareholders' meetings before December 2003 relates in reality not to the fact that the period 2000 to 2003 was taken into account but to the role played by EDF during that period. The applicant maintains, in essence, that it waited more than three years before notifying the operation because it could not be highly likely at the end of 2003 that it would have a majority in future at CNR's general meetings. In the applicant's submission, it was necessary to observe events for three years before a majority became highly likely.
- 50 As regards the determination of the starting date of the breach of the obligation to suspend the operation in the present case, the applicant correctly maintains that there was no concentration and therefore no infringement of Article 7(1) of Regulation No 4064/89 if it was not highly likely in December 2003 that the applicant would obtain control at future general meetings. Nor, in such circumstances, would there be any obligation to notify.
- 51 As regards that high likelihood, the Commission found in the contested decision that the applicant's assurance of being able to obtain an absolute majority at general meetings was achieved on 23 December 2003, the date on which it acquired EDF's shareholding (representing 22.22% of the capital and 20% of the voting rights), increasing its shareholding from 17.86% of the capital to 49.95% and thus becoming CNR's main shareholder and representing 47.92% of the voting rights. That assurance came, in particular, from the very dispersed nature of the shareholders other than CDC (which held 22% of the capital and 20% of the voting rights), since almost 200 local authorities and other local public entities then held 16.82% of the capital (recital 41). At recital 45 to the contested decision the Commission gave a projection of the proportion of voting rights at general meetings which a shareholder with a stake of 47.92% of the voting rights on 23 December 2003 would hold, taking into account the attendance rates of shareholders observed at general meetings in the four years preceding the acquisition of EDF's shareholding. The voting rights held by such a shareholder would always have been greater than 60%.
- 52 In response to the arguments which the applicant put forward in its reply to the statement of objections, disputing the voting structure at general meetings during the period 2000 to 2003, the Commission further stated at recitals 57 and 58 to the contested decision that in order for the applicant to have an absolute majority at general meetings the rate of shareholder attendance had to

be below 95.84% and that, in view of the rate of attendance during those years, which was well below that threshold (fluctuating between 43% and 76.6%), it was highly improbable that the applicant would not have an absolute majority at the general meetings of CNR after 23 December 2003.

- 53 The applicant objects to that analysis, relying, first, on the trust which the small shareholders placed in EDF during that period, which explained the low attendance rate at general meetings, so that the Commission could not draw any consequences for the future from those attendance rates, and, second, on the error of analysis on the Commission's part as to the role of the trustee exercising EDF's votes in finding in the contested decision that EDF had no longer exercised its prerogatives as a shareholder since 1 April 2001.
- 54 As for the first of those elements, the Commission is correct to maintain at recital 61 to the contested decision and before the Court that there is no evidence that the small shareholders placed such trust in the main shareholder at the time, EDF, a company controlled by the French State, which, in the applicant's submission, explains the low shareholder attendance rates at general meetings during the three years that preceded the transfer of EDF's shares to the applicant. That argument cannot therefore call into question the relevance of the attendance rates between 2000 and 2003 to the Commission's analysis.
- 55 As for the second element, relating to an alleged error of analysis on the Commission's part as to the role of the trustee exercising EDF's voting rights following the EDF/EnBW Decision, the Commission found at recital 61 to the contested decision that EDF had not exercised its shareholder's rights at the general meetings and on the management board since 1 April 2001. Contrary to the applicant's contention, that analysis is not incorrect. It is based on the fact that the commitments given in the context of the EDF/EnBW Decision provided for the exercise of EDF's voting rights at CNR's general meetings and meetings of the management board by a trustee acting in complete independence of the parties from 1 April 2001.
- 56 Those commitments provide in Part A, concerning relations with CNR, that, '[g]iven that EDF will no longer be involved in CNR's commercial policy and market conduct, it undertakes to renounce the exercise of its voting rights in CNR and to withdraw its representative from the CNR management board by 31 March 2001'. It is also stated that '[a] trustee will act as caretaker of EDF's shares in CNR'. In addition, it is stated at the end of Part C of those commitments that the trustee will act as an independent unrelated third party. In those circumstances, the applicant's argument that the small shareholders could continue to consider during that period that EDF's shares remained in the public sector is unconvincing, as the trustee's independence meant that it could not be assumed that only the interests of the public sector would be represented.
- 57 The first complaint must therefore be rejected.
- 58 In the second place, the applicant claims that the Commission erred in considering that on 23 December 2003 the applicant had the mathematical certainty of obtaining an absolute majority in CNR's general meetings on the sole ground that it would have taken a shareholder attendance rate of 95.84% to defeat its proposals. In support of that assertion, the applicant relies, in particular, on a consistent 10% increase in the shareholder attendance rate at the general meetings preceding the transaction and the Commission Decision of 20 December 2006 of non-opposition to a notified concentration (Case COMP/M/4336 — MAN/Scania ('the MAN/Scania Decision')). The applicant observes that in that case the Commission considered, on the question whether Volkswagen controlled MAN, that an increase in the shareholder attendance rate at general meetings in the order of 20% was possible owing to the increased vigilance of the other minority shareholders vis-à-vis Volkswagen after it had increased its shareholding in MAN's capital.

- 59 As for the fluctuation in shareholder attendance rates at CNR's general meetings in the period 2000 to 2003, the applicant claims that the attendance rate grew consistently by around 10% at each new general meeting and that an increase of 20% (from 76.6% in November 2002 to 95.84% after December 2003) was therefore not unlikely.
- 60 It must be held that that analysis is based on a selective presentation of the facts. As the Commission contends, the applicant fails to take into account the general meetings at which shareholder attendance fell. It follows from Table 2 in and footnote 31 to the contested decision that shareholder attendance rates at CNR's ordinary, extraordinary or combined general meetings during the period 2000 to 2003 were 72.2% (27 June 2000), 43% (21 December 2000), 55.2% (28 June 2001), 62.9% (21 June 2002), 76.6% (ordinary meeting of 28 November 2002), 72.6% (extraordinary meeting of 28 November 2002), 67% (ordinary meeting of 25 June 2003) and 68.5% (extraordinary meeting of 25 June 2003). The Commission's assertion before the Court that, notwithstanding a heavy decline followed by a partial recovery, the shareholder attendance rate remained stable overall, with a fall of 3.7% during the period 2000 to 2003, is therefore not incorrect.
- 61 Table 2 in the contested decision also shows that even when shareholder attendance at the general meetings was at its highest (76.6% at the general meeting of 28 November 2002), a shareholder, such as the applicant after the end of December 2003, who held 47.92% of the voting rights was assured of having the majority of the voting rights of shareholders present or represented.
- 62 Likewise, the applicant's argument that the shareholder attendance rate might increase by 20% after 2004 is unconvincing, since the increase found during the period 2000 to 2003 was not consistent, as evidenced by, for example, the drop in shareholder attendance at the general meeting in June 2003, owing to the absence of SNCF. For the sake of completeness, it should be noted that even if data relating to attendance at the general meetings held after 2003 are not appropriate to establish that the applicant was highly likely to be able to impose its decisions from 23 December 2003, they confirm a distinct increase in attendance after that date. None the less, as the Commission states, that increase may be explained by the presence of CDC, which acquired SNCF's 20% shareholding. In any event, as Table 3 in the contested decision shows, even with the highest attendance rate at the general meeting in June 2006, the applicant still had a majority of votes on its own.
- 63 As regards the MAN/Scania Decision, cited at paragraph 58 above, moreover, it must be borne in mind that neither the Commission nor, a fortiori, the Court is bound in the present case by the findings of fact and the assessments contained in a previous decision of the Commission (see, to that effect, Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, paragraphs 118 to 120, and *Sun Chemical Group and Others v Commission*, paragraph 41 above, paragraph 88 and the case-law cited).
- 64 Furthermore, the Commission is correct to distinguish the situation of Volkswagen, at issue in the MAN/Scania Decision, from that of the applicant in the present case. The applicant relies on the MAN/Scania Decision as an example of a case in which the Commission found that shareholder attendance at the general meetings was likely to increase by 20%. In that case, Volkswagen held 21.6% of the voting rights in MAN and the Commission had considered it appropriate to examine whether that shareholding gave rise to de facto control. It accepted MAN's argument that a 20% rise in the attendance rate at its general meetings, increasing that rate from 40% to 60%, was likely, thus precluding control by Volkswagen.
- 65 In the present case, however, at the end of 2003 the applicant held 47.92% of the voting rights, more than twice the amount held by Volkswagen. In order to achieve a 95.84% attendance at a general meeting and thus to defeat the applicant's proposals, it would have been necessary to have an increase in shareholder attendance rate at CNR's general meetings of more than 20%, even by comparison with the highest attendance rates recorded between 2000 and 2003. As the Commission emphasises, moreover, a shareholder attendance rate of 95.84% is very high, whereas the shareholder attendance rate necessary to potentially block Volkswagen was not even 60%.

- 66 The second complaint must therefore also be rejected, since the Commission was entitled to consider, at recital 58 to the contested decision, that the applicant could expect to obtain an absolute majority at future general meetings, with 47.92% of the voting rights since 23 December 2003, as a shareholder attendance rate equal to or above 95.84% was highly improbable.
- 67 In the third place, the applicant maintains that the Commission's assessment denying the existence of structural and strategic links between CNR's public shareholders is flawed.
- 68 This criticism concerns the fact that the Commission took into account the widely dispersed nature of the remaining shareholders, as is apparent from, in particular, recitals 45 and 57 to the contested decision.
- 69 In the applicant's submission, the Commission ought to have taken a less categorical approach and to have recognised that blockage could potentially materialise within CNR. That potential blockage could have been the consequence of a conflict between CNR's general-interest mission and its commercial objective, from a public shareholding which was dispersed but sought to ensure that a balance was struck between the general-interest objectives and CNR's strategy, and from a risk of the absence of a majority in general meetings in the light of the structure of the votes cast. The Commission ought also to have assessed the existence of control retrospectively and on the basis of events which had occurred after 2003.
- 70 As regards the alleged existence of structural and strategic links between CNR's public shareholders, the table showing changes in the participation of shareholders with more than 2% of the capital of CNR and their share of voting rights at general meetings since 2001, at recital 22 to the contested decision, shows that from the end of 2003, apart from CDC, which held 29.80% of the voting rights at that time, only three public shareholders had more than 2% of voting rights, with a joint holding of 15.98% of the voting rights held by those three. Given that low rate and the wide dispersion of the remaining part of the voting rights within CNR (footnote 23 to the contested decision), it is scarcely credible that a sudden increase in participation in general meetings by public shareholders concerned about the representation of their interests could have had a real impact on a majority vote.
- 71 Indeed, it seems, rather, that only a 'coalition' organised by CDC and including, moreover, 18.12% of the votes dispersed among the minority public shareholders could have defeated the applicant in votes in the general meeting after 23 December 2003.
- 72 The Commission relies in that regard, and correctly, on the role of the Agreement. As stated at paragraph 7 above, the applicant had entered into the Agreement in order to be assured of a majority within CNR's management board. It must be noted that, from August 2003, CDC held 29.80% of the voting rights, so that a total of 77.72% of the voting rights at general meetings was held by the applicant and CDC.
- 73 The Agreement stipulates that 'if one of the parties envisages concluding a voting agreement with one or more other shareholders it shall obtain the prior consent of the other party on the scope of that agreement and the identity of the other shareholder(s) with whom it envisages concluding such an agreement' (Article 10), so long as the applicant did not hold the majority on the management board.
- 74 In answer to a written question from the Court, the applicant submitted a copy of the Agreement and also further explanations of the interpretation of Article 10. It must be concluded that the scope of that provision is unclear. The parties are agreed, however, that it related only to a voting arrangement concerning specific decisions adopted at general meetings, namely decisions appointing members of the management board and the supervisory board. Even if the Agreement related only to a voting agreement limited in that way, however, it seems unlikely that CDC would have objected to the applicant's proposals during the general meetings of CNR following the conclusion of the Agreement on 24 July 2003.

- 75 That analysis confirms that it was unlikely that the applicant could be afraid of not obtaining a majority at CNR's general meetings after December 2003. Such a situation could have arisen only if the shareholder attendance had been equal to or greater than 95.84% at the general meetings and if the public shareholders, including CDC, had adopted a common position against the applicant.
- 76 It is therefore only in the unlikely situation, which was rejected at recital 72 to the contested decision, that such conduct on CDC's part might be considered to have been foreseeable by the applicant on 23 December 2003 that it is relevant to examine the structural and strategic links between CNR's public shareholders.
- 77 In that regard, the argument which the applicant bases on the de facto existence of common interests between those shareholders owing to the inclusion of a general-interest mission in CNR's articles of association is unconvincing. It is necessary to examine the actual existence of such common interests. However, the applicant puts forward no firm evidence to substantiate its argument.
- 78 If reference is made to the content of the minutes of the extraordinary general meeting held on 25 June 2003, on which the applicant relies, it appears that, if the local authorities desired that CNR's strategy should take the general interest into account, that would not necessarily prefigure an agreement on the definition of the actual methods of that strategy. Thus, as regards the election of the members of the supervisory board, the representative of a local authority asserts that, under the 'plan of representation of local authorities on the management board' proposed by the French Government, 'CNR will be represented only by local authorities south of Montélimar, a geographic representation which completely ignores the important interests of local authorities in the north'. The minutes also record the existence of a shareholders' agreement between some local authorities and a consultative committee consisting of other local authorities. The vice-president of the general council of Haute-Savoie (France) states, moreover, that 'the decision to be taken does not bode well for the functioning of the public shareholders' agreement'.
- 79 On the basis of the evidence in the file, it is therefore difficult to show the definite existence in December 2003 of strong and unfailing links between the public shareholders, just as it is impossible to show the complete absence of such links. As a result, those arguments are not sufficiently substantiated.
- 80 Last, the Commission devotes several recitals (recital 65 et seq.) to refuting the applicant's argument that the expectation of a significant reaction by the other public shareholders to the increase in the applicant's proportion of CNR's capital was all the more plausible in view of their links and their common strategic interests. In the context of that discussion, both parties rely on circumstances after 2003 to support their viewpoints. However, the obligation to suspend the concentration would arise only if a lasting change of control did in fact take place on 23 December 2003. The existence of a concentration subject to Regulation No 4064/89 must be examined on the basis of data existing in December 2003. Even if it cannot be precluded that data relating to the period after December 2003 might be relevant for the purpose of confirming the reality of the infringement with respect to its duration, they must be disregarded at this stage of the analysis, where the issue is whether it was highly likely at the end of 2003 that the applicant would be able to impose its decisions on CNR in the future.
- 81 In conclusion, also taking account of the elements set out in the contested decision concerning the structure of CNR's shareholders and relating to the Agreement, it must be concluded that the applicant has failed to adduce any evidence to call into question the first factor mentioned at paragraph 26 above, according to which on 23 December 2003 it was highly likely that the applicant would obtain a majority at general meetings, even without holding the majority of the voting rights. The second part of the second plea must therefore be rejected.

First part of the second plea, alleging omission of a fundamental characteristic of CNR, and first complaint in the third part of the second plea, alleging an error affecting the factor relating to the holding of a majority by the applicant within CNR's management board

82 The applicant claims that the Commission made an error of assessment in failing to take into consideration in the contested decision all the elements of fact relating to the special legislative framework, in derogation from the rules applicable to limited companies, which applies to CNR. In that regard, the applicant relies, in essence, in the first part of the second plea, on a number of circumstances relating to the fact that CNR is, according to Article 7 of Law No 80-3, subject to the control of the French State under the same conditions as national public companies, matters which the Commission did not sufficiently take into account. In the third part of the second plea, the applicant maintains, first, that its power to define the composition of CNR's management board was more limited than was found in the contested decision, as the fact that since 8 July 2003 two of the three members of the management board were appointed by the applicant was more a consequence of the influence of the State, and, second, that it had only 3 representatives out of 13 on the supervisory board. In the context of the first part of the second plea, the applicant adds that the Commission did not take sufficient account of the significance of the Murcef Law.

83 The Commission disputes the applicant's analysis and questions the admissibility of certain arguments and factual elements submitted by the applicant for the first time before the Court even though the applicant was aware of them at the stage of the administrative procedure.

84 Those complaints concern the second and third factors identified by the Commission (paragraph 26 above), relating, respectively, to the fact that in 2003 the applicant had an absolute majority on the management board and the means to keep that majority and the fact that the Murcef Law did not prevent the applicant from acquiring control of CNR. They relate rather to qualitative aspects of the acquisition of control to which the Notice on the concept of concentration refers in point 4 as constituting relevant factors for the purpose of determining whether a transaction constitutes a concentration, as was observed at paragraph 40 above.

85 The applicant's arguments relate, first, to the French State's influence on the governance of CNR (the composition and role of the management board and the supervisory board, Government commissioners, State controller) and, second, to the impact of the Murcef Law.

– The French State's influence on the governance of CNR (composition and role of the management board and the supervisory board, Government commissioners, State controller)

86 At recitals 78 to 86 to the contested decision the Commission considered that one of the factors indicating the acquisition of sole control in December 2003 was that the applicant had had an absolute majority on CNR's management board since 2003 and also the means to keep that majority. In support of that argument, first, the Commission observed that the rules on the appointment of members of the management board guaranteed the presence of two representatives of the applicant out of the three persons comprising that essential body, which managed CNR's activities and determined its commercial policy, since CDC and the applicant had a blocking minority on the supervisory board, the body that decided the appointment of members of the management board (recitals 78 and 83). In that regard, the Commission also relies on the fact that, from 8 July 2003, and without interruption thereafter, of the three members comprising the management board, two effectively represented the applicant, which the applicant did not dispute either in its reply to the statement of objections or at the hearing (recital 83). Second, the Commission considered that the fact that the supervisory board had to approve certain decisions proposed by the management board was irrelevant, since the measures concerned were not such as to enable the supervisory board to exercise decisive influence on CNR's strategy (recitals 79 and 80). In relation to the latter factor, the

Commission added, for the sake of completeness, at recital 81 that in the event of a conflict between those two bodies the dispute would be resolved by the general meeting, in which the applicant was in a position to ensure that its views would prevail.

87 The applicant puts forward a number of arguments to challenge that analysis.

88 In the first place, the applicant disputes the Commission's analysis with respect to the situation of control within the management board. It claims, in particular, that the appointment of its two representatives as members of the management board on 8 July 2003 was made on the recommendation of the Government commissioners and not as a result of the expected implementation of the Agreement after that date. In the applicant's submission, that factor, far from demonstrating that it had de facto sole control of CNR since 23 December 2003, tends rather to show that during 2003 CNR was always controlled by the French public authorities by virtue of their supervisory power.

89 In that regard, first of all, the Court must reject the Commission's argument that this is an element of fact raised for the first time in the application. As the applicant correctly submits, the information relating to the appointment, on the recommendation of the Government commissioners, of the members of the management board in July 2003 was brought to the Commission's knowledge in a supplementary reply from the applicant dated 30 July 2008 to a request for information from the Commission dated 17 July 2008.

90 It is important to observe, however, that the applicant altered its statement, at least in part. In Form CO, it stated that, 'in practice, while remaining voluntarily in the minority on the supervisory board, in 2003 [the applicant] and CDC elected or secured the election of ... [two of the applicant's] representatives to the management board'.

91 Furthermore, as the Commission observes, the Government commissioners attend management board meetings in a purely advisory capacity. Such a circumstance could not in any event indicate a situation of control within the meaning of EU law on concentrations.

92 Nor does the element of fact on which the applicant relies show that at the time the Government commissioners had any influence that could not have been overcome by the applicant (and CDC) as regards the election of the members of the management board.

93 Last, the applicant's argument does not call into question the factual element to which the Commission refers at recital 83 to the contested decision, according to which even before 23 December 2003 two of the three members of the management board were representatives of the applicant. Nor does the applicant's argument that the president of the management board is appointed by the president of the French Republic have any impact in that regard.

94 Likewise, those arguments do not contradict the fact, set out at recital 78 to the contested decision, concerning the possibility for the applicant to determine the management board in the future on the basis of the Agreement. Indeed, as already stated above, under Article 10 of the Agreement the applicant and CDC 'will do everything in their power, in particular by exercising their voting right in the general meeting and asking the members of the supervisory board appointed on their proposal to exercise their voting right in the supervisory board, in order that CNR's management board should be composed of three members, consisting of a president and two other members, appointed on a proposal [by the applicant]'. Taking into account also the fact that, as stated at recital 78 et seq. to the contested decision, CDC and the applicant held 6 of the 13 seats on the supervisory board, that the appointment of the members of the management board required a majority of two thirds and that under the Agreement the applicant had the right to object if CDC envisaged entering into a voting agreement with one or more other shareholders, it cannot be denied that the applicant was certain to control the management board in the future.

- 95 In the second place, the applicant questions the importance which the contested decision places on the management board's role in the governance of CNR.
- 96 In that regard, it must be noted that the applicant does not dispute the factual elements set out at recitals 38, 80 and 83 to the contested decision, according to which it is the management board that determines CNR's business policy, notably because it determines CNR's budget and also its business plan and the appointment of senior management, without those decisions being submitted for approval by the supervisory board. Nor does the applicant dispute that the decisions on which the supervisory board must give its approval, a list of which is set out in footnote 19 to the contested decision, do not enable the supervisory board to exercise control over CNR.
- 97 As the Commission states in footnote 20 to the contested decision, the Notice on the concept of concentration states at point 21 et seq. that decisions relating to the budget, the business plan and the appointment of senior management are essential in that they determine an undertaking's business strategy. They therefore constitute typical indicators of the exercise of control. Furthermore, as stated at point 14 of that notice, sole control may also be exercised by a minority shareholder who has the right to manage an undertaking's activities and to determine its business policy.
- 98 That evidence is therefore not irrelevant for the purpose of determining whether a situation of control exists.
- 99 Nor is the Commission's assertion at recital 81 to the contested decision that in the event of a conflict between the management board and the supervisory board the conflict is resolved by the general meeting, by a majority of votes of the shareholders present or represented, and that decision-making power ultimately resides in the general meeting, called into question. Article 18-1(3) of CNR's articles of association states that 'in the event of the supervisory board's refusal to authorise one of those operations [acts and contracts of any nature or in any form engaging the company which, owing to their amount or duration, must be submitted for approval by the supervisory board], the management board may convene an extraordinary general meeting which may grant the authorisation in question and draw any consequences from the dispute between the managing bodies'. Consequently, if, as was found in the context of the second part of the second plea, the applicant was effectively assured at the end of December 2003 of obtaining a majority of votes in the general meeting, it must be considered that the applicant was also assured of being successful in the event of a dispute between the management board and the supervisory board.
- 100 The applicant none the less claims that in a public undertaking the view of a private operator cannot be imposed on the basis of a majority presence on the management board. As it submitted at the hearing, the private operator would first have to take the trouble to discuss the matter with the State authorities. Furthermore, in the applicant's submission, given CNR's governing structure, namely a limited company with a management board and a supervisory board, the supervisory board remained the authority in control of the management board. In support of its argument, the applicant relies on the existence of administrative supervision and also of economic and financial supervision of CNR as a national undertaking and also of the *ex post* checks carried out by the French Cour des comptes (Court of Auditors) and the French parliamentary committees. The administrative supervision concerned, in particular, the power of the Government commissioners sitting on the CNR's supervisory board to seek a stay of execution of decisions adopted within the supervisory board so that the matter could be referred to the minister responsible for supervision for confirmation of the French Government's opposition to the measures in question. As regards the economic and financial supervision, it follows from the role of the State controller, who attends meetings of the supervisory board, gives his opinion to the French Minister for Finance on CNR's projects and submits an annual report to that minister.

- 101 As regards, first of all, the *ex post* checks carried out by the Court of Auditors and the parliamentary committees, it must be held that the applicant has adduced no specific evidence to explain how that type of intervention could call into question the existence of de facto control held by a minority shareholder.
- 102 As regards the respective roles of the Government commissioners and the State controller, the Commission claims that these are new matters of which the applicant was aware and which it therefore ought to have communicated during the administrative procedure. The applicant contends that they are matters which the Commission ought to have taken into account in its analysis.
- 103 It should be noted that the applicant mentioned the presence of the Government commissioners on the supervisory board in Form CO, where they are referred to as ‘two representatives of the State appointed by decree’, but made no mention of their power to seek a stay of execution of decisions of the management board where they are opposed by the Government. Further information about the Government commissioners is also included in the annexes to Form CO, either in the company’s articles of association or in the Murcef Law itself. Furthermore, the applicant emphasises the fact that it referred to the public nature of CNR during the hearing and requested the Commission to take that factor into account in its analysis. In that regard, it is apparent from the minutes of the hearing that the applicant mentioned the Government commissioners at the hearing, but provided no details of their powers, and that no mention was made of the role of the State controller.
- 104 The applicant claims, however, in essence, that it is apparent from the Commission’s allegations relating to the novel nature of those elements of fact that the Commission carried out an incomplete examination of the case. In the applicant’s submission, even on the assumption that it did not sufficiently point to the public nature of CNR, the Commission was none the less under an obligation to take all the relevant elements of fact into account in the analysis of the case.
- 105 The applicant relies in that regard on the case-law on the extent of the powers of review of the European Union (‘EU’) Courts in the event of decisions for which an institution has a discretion. In that context, the Court of Justice has observed that the EU Courts must ascertain whether the institution in question examined carefully and impartially all the relevant elements of the individual case which substantiate the conclusions drawn from them (see Case C-525/04 P *Spain v Commission* [2007] ECR I-9947, paragraph 57 and the case-law cited).
- 106 However, in a case such as this, which concerns the imposition by the Commission of a fine for an infringement of competition law, the Commission’s obligation, compliance with which is amenable to review by the General Court, is the one referred to at paragraph 31 above, namely to produce sufficiently precise and coherent evidence to establish that the alleged infringement took place. Indeed, the existence of an infringement must be assessed by reference solely to the evidence gathered by the Commission in the decision finding the infringement and the only relevant question is therefore whether, in substance, proof of the infringement has or has not been adduced on that evidence (see, by analogy, Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others v Commission* [2000] ECR II-491, paragraph 726). If the Court reaches the conclusion that that standard of proof has been met, the question whether additional evidence was taken into account is irrelevant unless the evidence in question undermines the firm conviction that the infringement took place. Indeed, the applicant is correct to observe that any existence of doubt in the mind of the Court must operate to the advantage of the addressees of the decision (*Groupe Danone v Commission*, paragraph 36 above, paragraph 215).
- 107 As regards the novel nature of the elements of fact relating to the powers of the Government commissioners and the role of the State controller, the Commission is correct to observe that it cannot be criticised for having developed in greater or lesser detail certain arguments in the contested decision by reference to the arguments which a defendant has claimed in a more or less salient manner

in the administrative procedure. The fact none the less remains that an addressee of a statement of objections is not required to challenge the various elements of fact or law set out therein during the administrative stage if it is not to be barred from doing so later at the stage of the judicial proceedings (*Knauf Gips v Commission*, paragraph 35 above, paragraph 89).

- 108 It follows that the disputed factual elements concerning the powers of the Government commissioners and the role of the State controller are admissible. It is for that reason, moreover, that the Court requested the applicant to provide additional explanations concerning the role of those persons.
- 109 In that regard, it should be observed that the probative force of the applicant's argument is limited by the fact that, as the powers of the Government commissioners and the role of the State controller did not change between 2003 and 2007, the supervisory authorities still existed in 2007 when the applicant contacted the Commission in order to notify it of the acquisition of de facto control of CNR.
- 110 Furthermore, as regards the specific role of the Government commissioners, it must be stated that their powers are limited. It follows, in particular, from Article 14 of CNR's articles of association and Article 11 of French Decree No 59-771 of 26 June 1959 (JORF, 28 June 1959, p. 6460), as amended by Article 2 of French Decree No 2003-512 of 16 June 2003 (JORF, 17 June 2003, p. 10102), to which Article 14 of the articles of association refer, that two Government commissioners are appointed to CNR, one by decree of the French Minister for Energy and the other by decree of the French Minister for Transport. Their task consists in ensuring that CNR complies with the general-interest mission in the context of the concession granted by the French State. As the Commission correctly claims, the Government commissioners' task therefore concerns only CNR's general-interest mission and not its business activities. Furthermore, as regards the specific role of those Government commissioners within the supervisory board and at CNR's general meetings, they are present in a purely advisory capacity and have only the same right to obtain information as the other members of the supervisory board. As for their power to request, within 8 days following the adoption of a decision by the supervisory board which relates to the implementation of the concession, a new deliberation and also, within 15 days following that new deliberation, suspension of its implementation, and to refer the matter to the minister, who then has 15 days within which to make his objection known, where appropriate, the applicant acknowledged in answer to a written question from the Court that, in practice, the Government commissioners did not have occasion to use their powers to request suspension of implementation of a decision or to object to a project submitted during the periods 2000 to 2003 and 2004 to 2007 in the framework of meetings of CNR's organs.
- 111 It must therefore be held that, whether under the relevant provisions or in practice, the Government commissioners do not or cannot prevent the exercise of de facto control by a minority shareholder with a position of strength in the management board and in particular in the general meeting such as that held by the applicant from 23 December 2003. The extracts from the deliberations of CNR's organs on which the applicant relies do not call such a conclusion into question. At most, there emerges consideration by the private shareholders of the opinion of the French State with respect to strategic projects coming within CNR's general-interest mission. Thus, for example, the references to the expectation of obtaining the agreement of the supervising ministers concerning a five-year plan for the implementation of CNR's general-interest missions referred to in the minutes of CNR's supervisory board of 31 March 2004 provide no information as to whether the applicant could or could not have such a plan implemented by CNR without that agreement, still less as to the fact that it would be prevented from imposing its point of view with respect to CNR's business strategy.
- 112 A similar analysis must be made as regards the role of the State controller. It is apparent on reading Article 5 of Decree No 59-771 in conjunction with the relevant provisions of French Decree No 55-733 of 26 May 1955 (JORF, 1 June 1955, p. 5547), in the version in force on 23 December 2003, that the State controller attends sessions of the supervisory board, in an advisory capacity, and exercises control relating to the economic activities and financial management of the persons controlled, ensuring that the financial interests of the French State are preserved. For that purpose, he

has unlimited powers of investigation and a right to obtain information and he may also attend general meetings. His task is to report to the ministers responsible for the French economy and budget on the draft decisions submitted for their approval and to draw up an annual report on the economic and financial situation of the undertakings controlled. Furthermore, French Decree No 53-707 of 9 August 1953 on State control of national public undertakings and certain bodies having an economic or social object (JORE, 10 August 1953, p. 705), to which the applicant refers in answer to the written questions from the Court, refers to prior control relating in particular to the budget and to transfers, acquisitions or extension of financial participations.

- 113 In that regard, it must be held that the applicant refers to no specific decision of CNR that would be subject to the joint prior approval of the French Minister for Finance and the French Minister for Energy and on which the State controller would therefore have to issue a preliminary opinion. In answer to the question from the Court whereby the applicant was asked to explain what action would be taken, where necessary, in response to any negative assessments on the part of the State controller in his opinions and reports, the applicant merely claimed that these were internal documents of the administration that were not accessible to the undertakings concerned or a fortiori to their private shareholders. In those circumstances, regard being had to the advisory role of the State controller within CNR's organs and in the absence of any specific factors that would enable his contacts with the supervising ministers to be linked with CNR's actual decisions, it has not been established that the State controller plays a role that would call the Commission's analysis into question.
- 114 It follows, rather, that, as in the case of the Government commissioners, and as the Commission correctly claims, the 'control' exercised by the French State through the State controller does not correspond to the concept of control within the meaning of Regulation No 4064/89.
- 115 As regards, last, the applicant's argument that it was not seeking to establish that the State exercised such control, but merely that there was a body of indicia that prevented the applicant from considering it highly likely that it would have de facto sole control, in any event, the factors which it mentions do not prevent such control over CNR's operational management and business strategy being exercised by the applicant. As already stated at paragraph 109 above, the force of its argument is undermined by the fact that those supervisory authorities still existed in 2007, when the applicant contacted the Commission in order to notify it that it had acquired de facto sole control of CNR.
- 116 For the sake of completeness, it must be made clear that the applicant's argument amounts to requiring that the Commission establish the absence of any doubt on the applicant's part that it might be able to manage CNR's activities from 23 December 2003. However, by placing such emphasis on the concept of 'high likelihood' referred to at point 14 of the Notice on the concept of concentration, the applicant distorts the concept of de facto sole control.
- 117 In those circumstances, the complaints alleging that the Commission made errors of assessment by disregarding the influence of the State on the governance of CNR, notably through the role of the supervisory board, the Government commissioners and the State controller, must be rejected.

– The impact of the Murcef Law

- 118 At recitals 87 to 93 to the contested decision the Commission considers, in essence, that the existence of the Murcef Law does not alter its previous analysis concerning the applicant's foreseeable holding of an absolute majority at CNR's future general meetings. As observed at recital 87, the purpose of that law is to prevent any private operator from holding more than 50% of CNR's capital or voting rights. The Commission observes at recital 89 that the French legislature's desire to keep the majority of shares in public ownership is a question separate from that of the acquisition of control within the meaning of EU law.

- 119 The applicant claims that it has never maintained that the Murcef Law constituted a legal obstacle to its acquisition of sole control of CNR within the meaning of EU law. However, the Commission failed to take the existence of that law into account as an element of fact in the body of indicia affecting the high likelihood of obtaining control that the applicant could have perceived in December 2003.
- 120 It must be held that, where the Commission asserts at recital 89 to the contested decision that '[t]he French legislature's desire to keep the majority of the shares in CNR in public ownership is a question separate from that of the acquisition of control under Community merger control law', it properly distinguished a situation of legal control of CNR, which is actually impossible in the light of the Murcef Law, and the fact that that legal obstacle does not prevent a private shareholder from being the largest shareholder in CNR and from being able, although a minority shareholder, to exercise de facto control over that undertaking. Furthermore, in so far as the applicant seeks to establish that the existence of the Murcef Law affected the high likelihood that it would have been able to exercise de facto control over CNR from December 2003, it must be observed that such an argument denies that objective factors characterising the applicant's situation existed on 23 December 2003. That cannot be the way in which Article 3 of Regulation No 4064/89 or point 14 of the Notice on the concept of concentration are to be understood.
- 121 The argument alleging that the Commission did not take sufficiently into account the existence of the Murcef Law as an element of fact affecting the assessment of the criterion linked with the high likelihood that the applicant would exercise de facto control over CNR must therefore be rejected.
- 122 In that regard, the applicant also relies on Commission Decision 1999/594/EC of 18 February 1998 imposing fines for failing to notify and for putting into effect a concentration in breach of Article 4(1) and Article 7(1) of Regulation No 4064/89 (Case IV/M.920 — Samsung/AST) (OJ 1999 L 225, p. 12). In the applicant's submission, in the present case the facts are comparable with the facts of Decision 1999/594, since in that case great importance was attributed to a temporary contractual provision preventing the acquisition of a majority of the capital of AST.
- 123 However, it is necessary to bear in mind the case-law referred to at paragraph 63 above, from which it follows that neither the Commission nor, a fortiori, the Court is bound in the present case by the findings of fact and the assessments contained in a previous Commission decision. Furthermore, the Commission rejected that argument of the applicant at recitals 90 and 91 to the contested decision. Its analysis must be confirmed. Contrary to the applicant's contention, the Commission considered in Decision 1999/594 that Samsung had acquired de facto sole control of AST in January 1996, although a clause in the amendment to the agreement between shareholders, which provided that Samsung could not acquire more than 49.9% of the shares in AST, was still applicable until December 1998. The Commission considered, in particular, that de facto control was acquired when Samsung had appointed the majority of the management board (recital 7 to Decision 1999/594). Consequently, the contractual limit, fixed at 49.9%, of acquisition of participation in the capital was not the decisive element in the assessments of Samsung's ability to acquire de facto sole control of AST. Accordingly, when similar reasoning is applied in the present case, de facto sole control of CNR by the applicant was indeed capable of arising even though the Murcef Law was still in force. That, moreover, as the Commission correctly observes, is what the applicant considered in summer 2007 when it contacted the Commission concerning the transaction at issue in the present case.
- 124 Last, the case-law referred to at paragraph 63 above also applies with respect to the argument relating to the Commission Decision of 12 March 2004 declaring a concentration compatible with the common market (Case COMP/M.3330 — RTL/M6) ('the RTL/M6 Decision'), to which the Commission refers at recital 92 to the contested decision and the relevance of which the applicant disputes in so far as it never called into question the fact that the mere existence of the Murcef Law was not an obstacle to the acquisition of de facto sole control of CNR.

125 Furthermore, as the Commission explains at recital 92 to the contested decision, what was at issue in the RTL/M6 Decision was a French law which prohibited any single natural or legal person from holding more than 49% of the capital or the voting rights of a national television channel. Although RTL held only 48.8% of the capital and 34% of the voting rights of M6, the Commission concluded that it exercised de facto sole control in the light in particular of the dispersion of the remaining shareholdings and of the prospective analysis carried out. Contrary to the applicant's contention, the reference to that case in the contested decision as an example of a precedent showing that a law prohibiting an operator from holding an absolute majority of the voting rights is not incompatible with the acquisition of de facto control of that company is relevant. In any event, the applicant's argument alleging, in essence, that that reference was 'superfluous' is not such as to call into question the Commission's analysis in relation to the consequences to be drawn from the Murcef Law.

126 The complaint relating to the impact of the Murcef Law must therefore be rejected as well.

The other complaints in the third part of the second plea, relating to errors affecting the other factors identified in the contested decision

127 The applicant raises errors concerning, first, the respective industrial and commercial roles of it and EDF within CNR during the period 2004 to 2006; second, the statements of the managers of CNR, the applicant and Suez; and, third, the existence of a preferential right in the applicant's favour.

– The complaint alleging an error of assessment with respect to the factor based on the respective industrial and commercial roles of the applicant and EDF within CNR during the period 2004 to 2006

128 This complaint concerns the fourth factor identified by the Commission in order to establish that there was a lasting change of control over CNR in favour of the applicant on 23 December 2003 (paragraph 26 above).

129 At recitals 94 to 126 to the contested decision the Commission considered that, in assuming the industrial role played by EDF within CNR, the applicant had become CNR's sole industrial shareholder since 2003 and had a central role in its operational management. That analysis consists of two parts, which relate, first, to EDF's withdrawal from CNR's operational management and, second, to the applicant's assumption of EDF's industrial role and operational management.

130 As regards the first part, relating to EDF's withdrawal (recitals 95 to 102 to the contested decision), the Commission refers in particular to EDF's withdrawal from CNR's operational management following the commitments given in 2001 in the context of the EDF/EnBW Decision, cited at paragraph 4 above. By those commitments, EDF undertook, first, not to exercise its voting rights in CNR's general meetings or to have a representative on CNR's management board in the future and, second, to purchase between April 2001 and April 2006 part of CNR's electricity production at the latter's request in order to enable it gradually to enter the electricity market.

131 Against that analysis, the applicant maintains that EDF retained, after 2003 and until 2006, a significant operational and commercial role in CNR. In the applicant's submission, the height of EDF's powers was achieved during the period 2004 to 2006.

132 The Commission disputes the applicant's arguments and claims that the fact that the applicant became CNR's sole industrial shareholder in 2003 is a relevant factor.

133 In the first place, as regards the global exploitation agreement and the agreement guaranteeing that CNR's electricity would be purchased by EDF, both of which were concluded in 2001 for a period of five years, the applicant claims, in particular, that EDF played a sufficiently significant role in the events for the Commission to be unable to conclude that the applicant had wholly assumed on

23 December 2003 the operational and commercial role historically assigned to EDF. The fact that the Commission may have considered in the EDF/EnBW Decision that those agreements guaranteeing the purchase of electricity constituted a commitment necessary in order to 'enable CNR to enter the electricity markets' shows that EDF played a role of essential business partner in order to enable that entry into the market.

- 134 That argument cannot succeed. As the Commission states at recital 100 to the contested decision, the existence of agreements between EDF and CNR is not in contradiction to the fact that CNR is able to define its industrial and commercial policy independently of EDF. In that regard, the Commission was entitled to rely on the positions taken by the applicant during the procedure for the notification of the concentration at issue in the present case. Recital 100 to the contested decision refers on that point to the applicant's reply of 7 April 2008 to the request for information of 26 March 2008, in which it asserted that 'EDF [had lost] control over CNR in 2001, when the Gentot Committee ... [had] laid down the conditions for the review of the protocols governing industrial and commercial relations between the two companies, so that CNR could gradually become an independent producer of electricity in its own right'. That reply shows that the applicant itself considered that CNR had been freed of EDF's decisive influence in 2001.
- 135 Contrary to the applicant's contention, that analysis at recital 100 to the contested decision does not mean that the Commission incorrectly considered the question whether EDF had control over CNR between 2001 and 2006 instead of ascertaining whether the applicant could be regarded as having assumed the operational role historically assigned to EDF. That argument is the consequence of a misreading of the contested decision, in which the Commission identified as one of the relevant factors for the purpose of establishing that the applicant had taken control of CNR at the end of 2003 only the fact that it was at that time the only industrial shareholder of CNR.
- 136 Furthermore, in support of its argument, the Commission also correctly relies on paragraph 90 of Form CO, cited in footnote 51 to the contested decision. That paragraph contains a reference to a joint declaration by CNR and EDF in 2001 in which it was stated that CNR had responsibility for making major choices on its industrial management.
- 137 In the second place, as regards purchases of CNR's electricity by EDF, the Commission correctly refers to the commitments given in the context of the EDF/EnBW Decision. Indeed, as stated at recital 102 to the contested decision, this was a guarantee that EDF would purchase a certain amount of electricity produced by CNR in order to enable the latter to enter the electricity market as an independent supplier. Nor does the applicant supply any detailed figures to support its argument relating to the importance of that ongoing commercial partnership with EDF, or indeed of a certain degree of dependency resulting therefrom. Last, if the applicant maintains that the Commission did not deal in the same way with the commercial contract between the applicant and CNR, which also concerned voluntary sales, but which was none the less taken into account as a factor indicating the applicant's predominant role, that argument cannot succeed, as it does not call into question the Commission's analysis that the existence of a possibility, and not an obligation, for CNR to have a proportion of its electricity purchased by EDF was not in contradiction to the finding that CNR already determined its industrial and commercial policy independently of EDF in 2003.
- 138 In the third place, as the Commission observes, the applicant does not challenge the fact that the Suez group's annual report for 2003, the relevance of which it does not dispute, mentioned that it had taken over operational control of CNR and included CNR's power stations in the applicant's electricity generating capacities, as stated at recital 101 to the contested decision.
- 139 It follows from paragraphs 134 to 138 above that it has not been established that the Commission erred in taking EDF's withdrawal from the operational management of CNR as a factual element in support of the fourth factor mentioned in the contested decision in order to establish that the applicant acquired control of CNR on 23 December 2003.

- 140 As regards the second part, relating to the applicant's assumption of EDF's industrial role and the applicant's central role in the operational management of CNR, the Commission states at recitals 103 to 126 to the contested decision that the acquisition of EDF's shareholding on 23 December 2003 and the factors relating to EDF's withdrawal examined in the context of the first part were part of a cooperation between the applicant and CNR initiated in 2000.
- 141 In that regard, the Commission refers to a framework agreement concluded between CNR and the applicant at that time, the purpose of which was, in particular, to set up a joint subsidiary, Énergie du Rhône (EDR). At recitals 106 to 110 to the contested decision the Commission describes the essential role played by EDR in CNR's commercial activity and also the procedures for the management of that joint subsidiary. In spite of the fact that CNR held 51% of the capital and an absolute majority in meetings of EDR's management board, decisive influence is attributed to the applicant on the ground that certain types of decisions required a unanimous vote. At recital 111 to the contested decision the Commission states that, apart from the agreement on the setting-up of EDR, the applicant and CNR signed a series of technical and commercial partnership agreements between 2001 and 2004. At recital 112 the Commission refers to a statement made by CNR's chairman at an ordinary general meeting held on 25 June 2003, according to which 'CNR started to give consideration to bringing together a commercial and an industrial partnership once it knew that [the applicant] would acquire a shareholding. [The applicant] thus became our main commercial partner with close on 35% of sales and the rapid expansion of [EDR]'.
- 142 The applicant raises against that analysis the objection that the Commission relied on agreements between CNR and the applicant, half of which were concluded after 2003. Nor does the Commission explain how the setting-up of EDR could have conferred greater influence on CNR. The setting-up of EDR was notified to the Commission and approved as the establishment of a 'cooperative' and not as a 'concentrative' joint venture in 2002. The Commission granted an individual exemption under Article 81(3) EC 'for a duration equal to the period of gradual withdrawal of EDF from CNR, that is to say, until 2006'. In the applicant's submission, the Commission ought therefore to have concluded that the applicant's role as the reference industrial shareholder had not commenced until during 2006.
- 143 The Commission disputes the applicant's arguments and maintains that the factors identified in the contested decision as indicating that the applicant had assumed a leading industrial and operational role before 23 December 2003 are not called into question.
- 144 In the first place, as regards the applicant's argument that the contracts between CNR and the applicant referred to, in particular, at recital 111 and in footnote 55 to the contested decision concern in part agreements concluded after 2003, although that is indeed the case for three of the six agreements mentioned, the fact none the less remains that three agreements date from 2001, namely a framework contract for purchasing options on forward contracts for buying electricity, a supply and guarantee contract and an off-take contract, and that they can serve to demonstrate the strengthening of the partnership between CNR and the applicant at technical and commercial levels well before December 2003.
- 145 In the second place, concerning the scope of the exemption granted by the Commission in an administrative letter of 29 November 2002 closing the notification procedure in EDR's case, the Commission correctly claims that the fact that it had considered that the joint venture EDR could be exempted until during 2006 did not prevent the applicant from exercising de facto control of CNR from December 2003. Although the Commission might have stated in that letter that it granted an individual exemption to EDR under Article 81(3) EC 'for a duration equal to the period of gradual withdrawal of EDF from CNR, that is to say, until 2006', the transfer of EDF's shares to the applicant had not yet taken place. It is when those elements are read together that it is possible to determine the existence of de facto sole control at the end of 2003.

- ¹⁴⁶ In the third place, it should be noted that the applicant does not call into question the Commission's reference at recital 112 to the contested decision to a statement made by CNR's chairman on 25 June 2003, and therefore well before December 2003, referring to the applicant's role as 'main commercial partner with close on 35% of sales'. Furthermore, that same statement refers to a rapid expansion of EDR connected with the applicant's strengthened role within CNR. Although some of the figures given at recital 112 relate to data after 2003 and cannot therefore serve to establish how the applicant must have envisaged its position in CNR on 23 December 2003, the statement in question was made before that date.
- ¹⁴⁷ In the fourth place, it is appropriate to examine the applicant's argument that the Commission unlawfully reversed the burden of proof in finding in the contested decision, without having demonstrated it in the authorisation decision, that the concentration took place during December 2003. The applicant maintains that it is thus required to prove that the concentration did not take place until sometime during 2007. The applicant relies, in particular, on the fact that the Commission rejected its argument relating to the fact that the applicant and CNR had created a common brand during 2007, being of the view that that element did not suffice to demonstrate that *de facto* sole control had been acquired in 2007 and not during 2003, without stating its reasons for adopting that position.
- ¹⁴⁸ That argument cannot succeed. Although the Commission refers at recital 121 *et seq.* to the contested decision to arguments which the applicant put forward at the hearing with the aim of showing that it did not acquire control of CNR until sometime during 2007, and then rejected them on the ground that the applicant had not proved that the acquisition of control had taken place in 2007, that circumstance does not constitute an unlawful reversal of the burden of proof. On the contrary, the Commission, aware that it bore the burden of proof, put forward a number of substantial and detailed factors in the contested decision in order to establish that the infringement existed and the date on which it began.
- ¹⁴⁹ Last, in order to reject the argument put forward by the applicant during the administrative stage concerning the setting-up of a common brand during 2007, the Commission asserted at recital 126 to the contested decision that the applicant had not explained why the launch of that brand should constitute an event triggering the acquisition of control in 2007 and added that it might even be argued that that launch might have been made possible by the applicant's prior control of CNR. The elements thus put forward by the Commission, in a relatively summary manner, but sufficiently in the light of the other factors taken into account, cannot in themselves be regarded as constituting a reversal of the burden of proof.
- ¹⁵⁰ It follows from the foregoing that the applicant has also failed to establish that the Commission had erred in taking into account the applicant's acquisition of EDF's industrial role and its central role in the operational management of CNR.
- ¹⁵¹ The complaint alleging an error of assessment with respect to the factor based on the respective industrial and commercial roles of the applicant and EDF in CNR during the period 2004 to 2006 must therefore be rejected in its entirety.
- The complaint alleging an error of assessment with respect to the factor based on the statements of the managers of CNR, the applicant and Suez
- ¹⁵² This complaint concerns the fifth factor identified by the Commission in order to establish that there was a lasting change of control over CNR in favour of the applicant in December 2003 (paragraph 26 above).

- 153 At recitals 127 to 158 to the contested decision, the Commission mentions, under the heading '[s]ince 2004 CNR has been regarded de facto as forming part of the Suez group both by the managers of CNR and by the managers of Suez', several internal CNR and Suez group documents, including minutes of the management board and the supervisory board, which reveal that as early as 2004 CNR was part of the group so far as Suez was concerned. Also mentioned are certain references to CNR in the Suez group's annual reports, beginning in 2003.
- 154 The applicant disputes the value of those statements as factors establishing that it acquired de facto control of CNR on 23 December 2003, claiming, in particular, that most of the statements in question were made after 2003.
- 155 The Commission contends, first, that while most of the statements cited date from 2006 and 2007, the first statement dates from the beginning of 2004 and, second, that those statements reflect the fact that the applicant had already held de facto control of CNR since the end of 2003.
- 156 It should be made clear, first of all, that, in so far as examination of the other complaints raised in the context of the second plea confirms to the requisite legal standard the Commission's finding that the applicant acquired de facto sole control of CNR on 23 December 2003 (paragraphs 22 to 151 above), this complaint is ineffective.
- 157 Next, the fact that the Commission relies in the contested decision on statements made after 23 December 2003 is not in itself problematic. The Commission correctly observes, moreover, that the applicant does not call into question as such the statements on which the Commission relies in the contested decision. While such statements do not suffice to establish that it was highly likely at the end of 2003 that the applicant would be in a situation of de facto control, they are none the less capable of confirming the date of the beginning of the infringement as revealed by matters pre-dating or contemporaneous with the infringement. Furthermore, subsequent events may be indicative of the continuous nature of the infringement. In that regard, it is because the applicant notified the concentration to it only during 2007 that the Commission was in a position to mention events after the end of 2003.
- 158 It is true that the applicant is correct to observe that none of the statements on which the Commission relies in the contested decision mentions, even implicitly, an acquisition of de facto control between 2003 and 2007.
- 159 However, the Commission correctly observes that the mention in 2004, in the context of a meeting of CNR's management board on 19 March 2004, of the 'group point of view' or of 'a subsidiary of a large industrial group' does not correspond to the situation of companies having merely an 'ongoing commercial partnership'.
- 160 The fact none the less remains that, apart from that example, most of the examples to which the Commission refers date from 2006 and 2007 and that the statement of the Government commissioner at a meeting of the supervisory board on 13 December 2007, mentioning that 'responsibilities are [to be] clarified within the configuration constituted by Suez/Electrabel on one side and CNR on the other, so that CNR's role in the future would be clearly defined', mentioned at recital 152 to the contested decision, might support the applicant's argument that control was acquired only from 2007.
- 161 Consequently, given a certain ambiguity in the words used, those statements can serve only as a secondary factor to show that the acquisition of de facto sole control came about in December 2003 rather than in 2007.

- 162 It must be observed, however, that the evidence on which the applicant relies does not contradict the Commission's argument either. Thus, as the Commission correctly asserts, the phrase stating that CNR 'will henceforth occupy an exemplary place within Suez', made by the chairman of CNR's supervisory board at the general meeting held on 28 June 2007, may mean that CNR had only recently become part of the Suez group or, on the contrary, that it had done so at an earlier stage.
- 163 As regards the statement made by the Government commissioner at the meeting of the supervisory board on 13 December 2007, a date which the applicant incorrectly gave as 5 July 2007 in the administrative procedure and which is mentioned at paragraph 160 above, the Commission correctly states at recital 154 to the contested decision that that statement may be read as referring to a clarification of responsibilities, which does not allow any conclusions to be drawn concerning the date on which the applicant acquired de facto control over CNR.
- 164 Nor, last, does the applicant call into question certain references to CNR noted by the Commission in the annual reports of the Suez group and mentioned at recitals 155 to 158 to the contested decision, although it had disputed the relevance of those references during the administrative procedure.
- 165 In those circumstances, the complaint alleging errors affecting the factor based on the statements of the managers of CNR, the applicant and Suez must be rejected.
- The complaint alleging an error of assessment with respect to the factor based on the existence of a preferential right in favour of the applicant
- 166 This complaint relates to the sixth factor identified by the Commission in order to establish that there was a lasting change of control over CNR in favour of the applicant on 23 December 2003 (paragraph 26 above).
- 167 At recitals 159 to 164 to the contested decision the Commission mentions the fact that the applicant had already acquired in 2003, under the Agreement (paragraph 7 above), a right of preferential subscription to CNR's other shares in the event that the provision of the Murcef Law requiring that public entities hold more than 50% of CNR's capital should be repealed. It is stated at recital 163 that, in such a case, the Agreement allows the applicant to prevent another private shareholder from being able to acquire sole control of CNR on a durable basis. The applicant is thus assured of having such control, either de facto, in the context of the Murcef Law, or de lege should that law be repealed. The Commission maintains at recital 164 that this is an element of assessment which, taken with other considerations, may lead to the conclusion that there is sole control, in accordance with the Notice on the concept of concentration.
- 168 The applicant maintains that, under the Consolidated Jurisdictional Notice, a purchase option can never in itself confer sole control, but may only in exceptional circumstances constitute an element to be taken with other elements in order to establish the existence of control, and emphasises that in the present case the existence of a preferential right of subscription cannot be taken into consideration in the light of the definition of exceptional circumstances in the Commission Decision of 7 March 1994 declaring a concentration to be compatible with the common market (Case IV/M.397 — Ford/Hertz) ('the Ford/Hertz Decision').
- 169 The Commission contends that it has never claimed that in the present case the preferential right in itself conferred control. As that element is to be taken with other elements, it is not appropriate to dispute the fact that it was taken into consideration.

170 As already observed at paragraph 40 above, if it is accepted that the acquisition of de facto sole control occurred on 23 December 2003, the regulation applicable in the present case is Regulation No 4064/89, the application of which formed the subject-matter of the Notice on the concept of concentration, and not Regulation No 139/2004, to which the Consolidated Jurisdictional Notice applies. Point 15 of the Notice on the concept of concentration reads as follows:

‘An option to purchase or convert shares cannot in itself confer sole control unless the option will be exercised in the near future according to legally binding agreements. However, the likely exercise of such an option can be taken into account as an additional element which, together with other elements, may lead to the conclusion that there is sole control.’

171 Even if, unlike in point 60 of the Consolidated Jurisdictional Notice, those provisions do not expressly use the words ‘in exceptional circumstances’, the Commission concedes at recital 162 to the contested decision that the rule is substantially the same in the two notices.

172 It should be noted, first of all, that the applicant does not dispute the rules applicable to the right of subscription which is granted to it under the Agreement, as described in the contested decision.

173 Furthermore, as the Commission correctly maintains, the argument which the applicant derives from the Ford/Hertz Decision cannot succeed. Apart from the fact that, in accordance with the case-law referred to at paragraph 63 above, neither the Commission nor, a fortiori, the Court is bound in this case by the findings of fact and the assessments contained in a previous decision of the Commission, that case is different from the facts of the present case. In the case giving rise to the Ford/Hertz Decision, the Commission found that the fact that Ford held 49% of the voting rights and a minority representation on Hertz’s management board did not confer on it a situation of control, as it was granted no right of veto in relation to essential decisions. It considered, however, that the fact that Ford had a preferential right of subscription which could be exercised at its discretion alone, without any precondition and at any time, thus giving it at very short notice the possibility of taking control of Hertz’s management board, was a circumstance which conferred de facto control on Ford. The preferential right of subscription was therefore a major factor in that case on which the existence of de facto sole control could be concluded.

174 In the present case, the applicant is correct to point out that its preferential right is subject, in particular, to the amendment of the Murcef Law. However, the Commission did not infer de facto sole control from the preferential right, but only took that right into account as an additional factor. That is clear from recital 163 to the contested decision, where the Commission states that the applicant was assured of having sole control of CNR on a lasting basis ‘either de facto in the context of the Murcef Law or de lege if that law [were] repealed’. The existence of the preferential right, the exercise of which depends on the Murcef Law being repealed, therefore constitutes a secondary factor in the Commission’s reasoning, as the existence of de facto sole control was inferred from other circumstances.

175 The Commission’s approach is, moreover, consistent with the Notice on the concept of concentration, from which it follows that de facto sole control by a minority shareholder may be inferred from the structure of voting rights or the right to manage the activities of the company in question and to determine its business policy (point 14), while the existence of a preferential right of subscription is not a necessary additional condition, but may constitute an additional element, like any other element of fact (point 15). Furthermore, it may be observed, for the sake of completeness, that the fact that the applicant held 47.92% of the voting rights, the composition of the remaining shareholders and the applicant’s position of strength on the management board may be regarded as exceptional circumstances that justify the existence of a preferential right to subscription being taken into account. In any event, the absence of the factor based on the existence of a preferential right of

subscription in favour of the applicant would not be of such a kind as to alter the conclusion that there was de facto control based, in particular, on the structure of the voting rights in general meeting and the applicant's position of strength on that body and also on the management board.

176 The complaint must therefore be rejected, as must the second plea in its entirety.

First plea, alleging infringement of Article 7(1) of Regulation No 4064/89 and infringement of Article 253 EC in that the Commission did not correctly characterise the infringement and in that the contested decision contains a contradiction in the grounds

177 The applicant maintains that the contested decision is vitiated by a contradiction between the grounds and the operative part, resulting in failure to state reasons, as required by Article 253 EC. The applicant claims, in essence, that the grounds of the contested decision do not substantiate the finding in the operative part that there was an infringement of Article 7(1) of Regulation No 4064/89 but permit a finding of an infringement of Article 4(1) of that regulation.

178 The Commission disputes the applicant's arguments. It contends, in essence, that the contested decision contains no contradiction.

179 It should be borne in mind that the obligation to state reasons laid down in Article 253 EC is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure (Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67; Case C-17/99 *France v Commission* [2001] ECR I-2481, paragraph 35; and Case C-521/09 P *Elf Aquitaine v Commission* [2011] ECR I-8947, paragraph 146).

180 It also follows from the case-law that the statement of reasons required under Article 253 EC must be appropriate to the measure in question and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to carry out its review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see *Commission v Sytraval and Brink's France*, paragraph 179 above, paragraph 63 and the case-law cited, and Case T-304/02 *Hoek Loos v Commission* [2006] ECR II-1887, paragraph 58).

181 Furthermore, the obligation to state reasons laid down in Article 253 EC requires that the reasons on which a decision is based be clear and unequivocal. Thus the reasoning on which a measure is based must be logical and contain no internal inconsistency that would prevent a proper understanding of the reasons underlying the measure (*Elf Aquitaine v Commission*, paragraph 179 above, paragraph 151).

182 In the present case, as the Commission correctly claims, the infringement which the applicant is found to have committed is characterised without ambiguity, in various parts of the contested decision, in particular, apart from in Article 1 of the operative part, at recitals 40 to 173, 174 to 179, 191, 192, 205, 206, 211, 212 and 223, as consisting in the premature putting into effect of a concentration, in breach of Article 7(1) of Regulation No 4064/89.

183 It follows from the examination of the second plea above that the Commission explained, especially at recitals 40 to 173 to the contested decision, both the legal principles and the factual considerations on which it based the finding that the applicant had implemented a concentration on 23 December 2003 without having notified it to the Commission and without having obtained authorisation and that, as regards the substance, its analysis in that regard must be upheld.

184 In the first place, in order to establish alleged contradictions in the contested decision, the applicant refers to recital 59, which states that:

‘... [the applicant] should have brought the matter to the Commission’s attention by December 2003 at the latest, when it acquired further shares from EDF that brought its total share to 49.95% of CNR’s capital and to 47.92% of the voting rights; it might have done so by consultation, as it did in 2007. As in 2007, the Commission would then have applied the established decision-making practice to confirm that [the applicant] was acquiring sole control of CNR and was thus obliged to notify the transaction.’

185 In the applicant’s submission, that recital clearly reveals that the Commission takes issue with it for failure to notify or, at least, for being late in notifying the transaction, in contradiction to Article 1 of the operative part, which refers to the infringement consisting in putting into effect a concentration before it was notified. As the Commission correctly submits, however, the fact that it stated at that recital to the contested decision that the applicant ought to have contacted it earlier does not mean that the breach of the obligation to notify the concentration is at the basis of the infringement found, for which a fine was imposed, since a breach of the obligation to suspend the concentration may exist, as is apparent from the words of Article 7(1) of Regulation No 4064/89, whether or not the concentration was notified.

186 In the second place, the applicant claims that certain elements of assessment in the contested decision relating to the duration of the infringement confirm its contradictory nature. Thus, in characterising the infringement as having begun on the date on which the applicant acquired the shares held by EDF, 23 December 2003, and as having continued until the date of pre-notification, 9 August 2007, the Commission defined an infringement of Article 4(1) of Regulation No 4064/89, which concerns failure to notify. In the applicant’s submission, if the Commission had wished to characterise an infringement of Article 7(1) of that regulation, on the putting into effect of a concentration before its notification, it ought to have taken into account the existence of an infringement as from the actual exercise of the voting rights, that is to say, at the general meeting held on 29 June 2004, until the date on which the transaction was authorised by the Commission, that is to say, 29 April 2008. The dates of 23 December 2003 and 9 August 2007 are irrelevant for the purpose of the characterisation of the putting into effect of a concentration before it has been notified. The Commission implicitly acknowledged that fact when it asserted that the limitation period ran only from the date on which the infringement came to an end, namely 29 April 2008.

187 In that regard, as the Commission observes, as the obligation to notify laid down in Article 4 of Regulation No 4064/89 arises at a particular time, the fact that it sought in the contested decision to establish the duration of the infringement implies that it was not attempting to establish, or in any event not solely to establish, a failure to notify.

188 As for the applicant’s argument that the Commission could not place the beginning of the infringement at the end of December 2003, as the putting into effect of a concentration before it has been notified can take place only when the voting rights are effectively exercised, which did not occur until the general meeting of 29 June 2004, Article 7(1) of Regulation No 4064/89 refers to the prohibition on putting a concentration into effect before it has been notified or approved.

189 Article 3(1) and (3) of Regulation No 4064/89 (paragraph 24 above) define a concentration as a change of control conferring the possibility of exercising decisive influence on the activity of the undertaking concerned and therefore the acquisition of control in the formal sense and not the effective exercise

of such control. That is confirmed, moreover, in the second paragraph of point 9 of the Notice on the concept of concentration. Indeed, according to the second sentence of that provision, Regulation No 4064/89 ‘clearly defines control as having “the possibility of exercising decisive influence” rather than the actual exercise of such influence’. The applicant’s argument cannot therefore succeed. As to whether, as the Commission claims, failure to notify was established on a date before 23 December 2003, it is of no relevance to the examination of this plea.

- 190 As for the end of the infringement period, in respect of which the applicant asserts that the fact that it was fixed at the date of pre-notification, that is to say, 9 August 2007, implies that the infringement in question was indeed failure to notify, it should be observed that the Commission set out the reasons for its approach at recital 211 et seq. to the contested decision, where it explains that once a concentration has been implemented, and for so long as it continues to be implemented, a breach of Article 7 of Regulation No 4064/89 can end only when the Commission authorises the concentration or, as the case may be, when it grants exemption from the obligation to suspend the concentration. After stating at recitals 212 to 214 that a long time had elapsed between the date on which sole control was found to have been acquired, namely 23 December 2003, and the authorisation decision, the Commission states, at recital 215, that, in the exercise of its discretion and without prejudice to its general position of principle, it will not take account of the period covering the discussions and examination of the concentration following its pre-notification on 9 August 2007, the date which it therefore took as the end of the infringement.
- 191 It is clear from the considerations set out in the preceding paragraph that it cannot be inferred from the fact that the Commission set the date of the end of the infringement at the date on which the concentration was pre-notified that the Commission was thus characterising a breach of the obligation to notify. The argument cannot therefore succeed.
- 192 In the third place, while the applicant claims that, once the Commission was contacted about the case in the summer of 2007, it did not request that the applicant suspend the effects of the putting into effect of the transaction before it had been notified, which confirms that the Commission did not find an infringement of Article 7(1) of Regulation No 4064/89, the Court accepts the Commission’s analysis, according to which that circumstance has no impact on the legal characterisation of the infringement.
- 193 Indeed, although the applicant claims that the Commission has erred in law in asserting that such an approach is not provided for in Regulation No 4064/89, since, in the summer of 2007, Regulation No 139/2004 was already applicable — which, moreover, is apparent from the authorisation decision, which states that that decision is ‘taken on the basis of Article 6(1)(b) of Regulation No 139/2004’ — as the Commission emphasises, the regulation applicable in the present case had not yet been determined when it had authorised the concentration, since the question of the date on which de facto sole control had been acquired remained open. It is true that the authorisation decision declared the concentration compatible with the common market on the basis of Regulation No 139/2004, but the Commission made explicitly clear at recital 18 that, for the purposes of the authorisation decision, the question of the exact date of acquisition of sole control could remain open in so far as it had no impact on the competitive analysis of the transaction. Such an approach must be upheld, since, as observed at paragraph 40 above, it follows from Article 26(2) of Regulation No 139/2004 that Regulation No 4064/89 was to continue to apply to any concentration which had been the subject of an agreement or announcement or where control had been acquired within the meaning of Article 4(1) of that regulation before 1 May 2004.
- 194 Furthermore, as the Commission observes, only Regulation No 139/2004 expressly provides in Article 8(5) that the Commission may take appropriate provisional measures. Regulation No 4064/89 did not provide for such possibilities. In any event, even in the context of Regulation No 139/2004, the Commission merely has an option to order such a measure. In those circumstances, no

conclusion can be drawn in the present case, so far as the question of the characterisation of the infringement is concerned, from the fact that the Commission did not request that the transaction in question be suspended.

195 In the fourth place, the applicant maintains that the inconsistency in the Commission's reasoning was already apparent in the statement of objections; that the applicant referred to a problem in the characterisation of the infringement in its reply to that statement of objections; and that the Commission did not explain in the contested decision why it had rejected the applicant's arguments. However, it does not appear from the reply to the statement of objections that the applicant raised such arguments.

196 It is true that the applicant's reply to the statement of objections contains a section on the 'lack of a legal characterisation of the infringement and the failure to prove an infringement in this instance', in which the applicant emphasises that the statement of objections does not show the main element of the infringement which the Commission claims to find in the applicant's case, namely the existence of a concentration within the meaning of Regulation No 4064/89 on 23 December 2003. However, although the applicant thus disputes the lack of legal characterisation of the facts by reference to Article 7(1) of Regulation No 4064/89, it does not assert that the facts found by the Commission constituted an infringement of Article 4(1) of that regulation. Accordingly, in that document, contrary to the applicant's contention, the applicant does not emphasise that the Commission characterised a different infringement from that which it claimed to find. In any event, the applicant qualifies its argument in the reply, stating that it denied having committed any infringement at all. Thus, it maintains that it cannot have asserted in its reply to the statement of objections that it considered that an infringement was established under Article 4 of Regulation No 4064/89 without contradicting itself, since it has always maintained that it was not guilty of any infringement. The applicant's complaint that it raised in its reply to the statement of objections a problem in the characterisation of the infringement which the Commission failed to examine in the contested decision is therefore unfounded.

197 It follows that the contested decision set out to the requisite legal standard the reasons on which the applicant was found to have committed an infringement of Article 7(1) of Regulation No 4064/89 and that it is not vitiated on that point by any contradiction in the grounds.

198 The first plea must therefore be rejected, as must the principal claims, seeking annulment of the contested decision.

2. The alternative claims, seeking annulment of the fine or a reduction of the amount of the fine

Third plea, alleging infringement of Article 1 of Regulation No 2988/74, in that the Commission's power to impose a penalty on the applicant was time-barred

199 In the context of this plea, the applicant claims that the Commission's power to impose a penalty on it was time-barred, since the infringement was of a procedural nature and it was an instantaneous infringement. In the applicant's submission, the limitation period of three years applicable in the present case in accordance with Article 1(1)(a) of Regulation No 2988/74 had elapsed, since the beginning of the infringement had been established as 23 December 2003 and the first act capable of effectively interrupting the running of time occurred on 17 June 2008, or five years after the infringement began.

200 The Commission denies that its power to impose a penalty was time-barred.

- 201 It is apparent from recitals 179 to 183 to the contested decision that the Commission considered that under Article 1(1) of Regulation No 2988/74 the limitation period for an infringement such as that at issue in the present case, relating to the implementation of a concentration in breach of Article 7(1) of Regulation No 4064/89, which concerned not a simple failure to notify but conduct which gave rise to a structural change in the conditions of competition, was five years. The Commission also observes that the first request for information sent to the applicant on 17 June 2008, for the purpose of the investigation of the infringement, and then the statement of objections of 17 December 2008 interrupted the limitation period, in accordance with Article 2 of Regulation No 2988/74.
- 202 The plea concerns, in essence, the Commission's application of Article 1 of Regulation No 2988/74. That provision reads as follows:
- '1. The power of the Commission to impose fines or penalties for infringements of the rules of the European Economic Community relating to transport or competition shall be subject to the following limitation periods:
- (a) three years in the case of infringements of provisions concerning applications or notifications of undertakings or associations of undertakings, requests for information, or the carrying-out of investigations;
- (b) five years in the case of all other infringements.
2. Time shall begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.'
- 203 It must be observed that the applicant's arguments are identical in part to those put forward in the context of the first plea, in that that plea alleged that the infringement ought to have been characterised as a failure to notify contrary to Article 4 of Regulation No 4064/89 rather than as a breach of the obligation to suspend the concentration laid down in Article 7(1) of that regulation. It follows from the examination of the first and second pleas, however, that the Commission, without contradicting itself, correctly characterised the infringement as an infringement of Article 7(1) of that regulation which commenced on 23 December 2003.
- 204 In the first place, the applicant claims, however, that even if the infringement were an infringement of Article 7(1) of Regulation No 4064/89, it would none the less be necessary to apply a limitation period of three years, in accordance with Article 1(1)(a) of Regulation No 2988/74, since the essential criterion that determines the unlawful nature of the implementation of a concentration depends primarily on whether the transaction was notified in advance. The contested decision contains a number of references to the lack of notification, showing that the Commission takes issue with the applicant for having implemented a concentration not only before it was authorised but also before it was notified.
- 205 That analysis must be rejected. As the Commission correctly asserts, and as observed in the context of the examination of the first plea, it follows from Article 7(1) of Regulation No 4064/89 that there is an infringement of that provision if a concentration having a Community dimension is put into effect before being notified or before having been declared compatible with the common market; notification as such is not decisive for the establishment of the reality of the concentration or sufficient to put an end to it.
- 206 In that regard, the Commission is correct to recall that the distinction which gives rise to two different limitation periods in Regulation No 2988/74 also relates to the nature of the infringement, a short period of three years being provided for in Article 1(1)(a) of that regulation for infringements relating to applications or notifications of undertakings or associations of undertakings, requests for information, or the carrying-out of investigations, and a longer period of five years being provided for

in Article 1(1)(b) for other infringements. It is clear that the first category of infringements, referred to in Article 1(1)(a), concerns infringements of a formal or procedural nature. However, the implementation of a concentration before it has been notified, in breach of Article 7(1) of Regulation No 4064/89, constitutes an infringement which cannot be characterised as purely formal or procedural, since it is capable of giving rise to substantial changes of the conditions of competition, as stated at recital 182 to the contested decision.

207 As regards the applicant's argument that the infringement relates to failure to observe the Commission's exclusive power to carry out an *ex ante* control of concentrations and therefore constitutes a breach of a rule of competence, it must be observed that, even if the issue were one of competence, it none the less concerns an infringement other than those referred to in Article 1(1)(a) of Regulation No 2988/74.

208 As regards the applicant's arguments relating to the duration of the infringement, and in particular to the date taken as the end of the infringement, as observed at paragraph 191 above in the context of the examination of the first plea, they do not in themselves constitute a relevant factor.

209 It follows that the Commission was correct to apply in the present case Article 1(1)(b) of Regulation No 2988/74 in order to take a limitation period of five years.

210 In the second place, the applicant maintains that the infringement found is an instantaneous infringement, since it was committed in a single act, the putting into effect of the concentration, and that only the result of the infringement continues. Such an analysis means that the limitation period should be calculated from 23 December 2003. In support of its argument, the applicant relies, in particular, on a distinction drawn, notably in French competition law, between permanent continuous infringements and successive continuous infringements. In the applicant's submission, infringements in the first category are committed in a single act, even though their effects and their result are prolonged in time, so that the rules applicable to instantaneous infringement apply. The infringement at issue in the present case falls within that first category, since it was found that the infringement was committed negligently and since such a characteristic cannot apply to the second category, which presumes a repetition of the unlawful intention over a period of time. Furthermore, the applicant maintains that a different conclusion would mean that infringements of Article 7(1) of Regulation No 4064/89 would last virtually forever, as the limitation period could never elapse.

211 That argument, which concerns the application of Article 1(2) of Regulation No 2988/74, according to which time runs as from the day on which the infringement was committed, other than in the case of continuing or repeated infringements, for which time begins to run on the day on which the infringement ceases, cannot succeed.

212 Indeed, the ability to exercise decisive influence over the activity of the controlled undertaking necessarily exists in the period beginning on the date of acquisition of control and lasting until the end of control. As the Commission correctly claimed in answer to a written question from the Court requesting it to explain its argument relating to the continuous nature of the infringement, the entity which has acquired control of the undertaking continues to exercise such control in breach of the obligation to suspend the concentration arising under Article 7(1) of Regulation No 4064/89 until the time when it puts an end to the infringement by obtaining the Commission's authorisation or by giving up control. Accordingly, the infringement lasts for so long as the control acquired in breach of Article 7(1) remains and the concentration has not been authorised by the Commission. The Commission was therefore correct to characterise the infringement as having been continuous until the date of authorisation of the concentration or, as the case may be, until such earlier date that might be taken into account in the light of the circumstances of the case. For the remainder, the Commission is right to assert that the distinction between continuous infringements and successive continuous infringements to which the applicant refers is not to be applied in EU competition law and there is no need to examine it further.

213 As for the applicant's argument that, in those circumstances, the limitation period might run 'forever', it should be observed that the characterisation of an infringement such as that at issue in the present case as instantaneous cannot be defended from the aspect of enforcement policy, since in the absence of appreciable effects on the market it would be quite easy for the power to impose a penalty for such an infringement to become time-barred.

214 Last, and in any event, even if the infringement were an instantaneous infringement, meaning that the starting point of the limitation period was 23 December 2003, the limitation period, fixed at five years, as is apparent from paragraph 209 above, would have been interrupted by the request for information of 17 June 2008 and by the statement of objections of 17 December 2008, in accordance with Article 2 of Regulation No 2988/74, which provides that the limitation period in proceedings is to be interrupted by any action taken by the Commission for the purpose of the preliminary investigation or proceedings, as stated, moreover, at recital 180 to the contested decision.

215 It follows from the foregoing that the Commission's power to impose a penalty for the infringement of Article 7(1) of Regulation No 4064/89 was not time-barred on the date of the contested decision.

216 The third plea must therefore be rejected.

Fourth plea, alleging infringement of Article 14(2) of Regulation No 4064/89 and breach of the principles of proportionality, sound administration and legitimate expectations

217 In the context of the present plea, the applicant develops two parts in support of its alternative claim for annulment or reduction of the fine. In the first part, the applicant alleges a number of manifest errors of assessment and the disproportionate nature of the amount of the fine by reference to the objective of penalising the individual infringement. In the second part, the applicant claims that the fine is disproportionate by reference to the objective of deterrence and that the Commission's competition policy lacks coherence.

First part of the fourth plea, alleging manifest errors of assessment and the disproportionate nature of the amount of the fine by reference to the objective of penalising the individual infringement

218 The applicant maintains that the imposition of a fine of EUR 20 million is wholly disproportionate and unfair. Furthermore, in the first place, the applicant claims that the alleged infringement cannot be a serious infringement capable of attracting such a high fine. In the second place, the applicant maintains that the Commission's assessment of the duration of the infringement contains manifest errors. In the third place, the applicant calls into question the Commission's assessment of the mitigating circumstances.

219 The Commission contends that the applicant's arguments should be rejected. It observes that the applicant does not dispute certain significant aspects of the Commission's assessment, that it confuses the nature and the gravity of the infringement and that the grounds of the contested decision relating to the duration of the infringement and the mitigating circumstances to be taken into account are not vitiated by errors, still less by manifest errors.

220 The Commission's analysis is to be found at recitals 184 to 227 to the contested decision. The Commission states at recital 184 to the contested decision that it took account of the nature and gravity of the infringement, in accordance with Article 14(3) of Regulation No 4064/89, and also of the duration of the infringement and of any aggravating or mitigating circumstances.

221 It should be observed at the outset that, under Article 16 of Regulation No 4064/89, the Court of Justice is to have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment

imposed. That jurisdiction empowers the Courts of the European Union, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or periodic penalty payment imposed (see, to that effect and by analogy, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375, paragraph 692).

- 222 It must, however, be pointed out that the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion, and that proceedings before the Courts of the European Union are *inter partes*. With the exception of pleas involving matters of public policy, which the Courts are required to raise of their own motion, such as the failure to state reasons for the contested decision, it is for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas.
- 223 Before examining the applicant's arguments concerning the factors which the Commission took into account when setting the fine, it is appropriate to analyse, first, the Commission's preliminary arguments, whereby it alleges that its analysis of the applicant's global resources in the contested decision has not been challenged before the Court and, second, the applicant's reference to certain methods or principles applied in setting fines in cartel cases.
- 224 As regards the applicant's global resources, they are mentioned at recitals 196, 197 and 225 to the contested decision. At recitals 196 and 197 reference is made to both its size and its 'sufficient legal resources'. Recital 197 contains, *inter alia*, a list of the Community concentrations in which the applicant or the Suez group has been involved. At recital 225, moreover, the Commission states that it takes into account the need that fines be a deterrent and that in the case of an undertaking of the size of the applicant the fine must be sufficient in order to have a deterrent effect.
- 225 The assessments set out in the preceding paragraph are not disputed by the applicant in its action, or in any event not directly. The Commission states that those considerations played a significant role in the setting of the amount of the fine, notably in order to ensure that it was deterrent. The Commission claims, without being challenged by the applicant on that point, that the amount of EUR 20 million imposed represents only 0.42% of the legal maximum and 0.04% of the turnover achieved by Suez in 2007 (namely EUR 47.5 billion).
- 226 It must be noted that the amount of the fine is significantly below the legal maximum of 10% provided for in Article 14(2)(b) of Regulation No 4064/89, which provides that the Commission may impose on undertakings fines not exceeding 10% of the aggregate turnover of the undertakings concerned where, either intentionally or negligently, they put into effect a concentration in breach of Article 7(1) of that regulation. That is also true if the applicant's turnover alone is taken into account, which was EUR 15.2 billion in 2007 and EUR 14.6 billion in 2008, including CNR.
- 227 As regards the applicant's reference to certain principles or certain methods for the calculation of fines set out in the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2; 'the new Guidelines') and also in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) CS (OJ 1998 C 9, p. 3; 'the former Guidelines'), in particular with respect to the treatment of the duration of the infringement and the mitigating circumstances, the Commission correctly asserts that those measures apply only in the context of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87) and Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1) and that they therefore do not apply to fines imposed under Regulation No 4064/89. The applicant's argument that the measures in question apply because they define the 'general method for determining fines by the Commission in competition matters' cannot therefore succeed.

228 Although parallels may no doubt be drawn with respect, in particular, to the application of the case-law on certain general principles in the field of competition law, the Commission cannot be criticised for not having followed any particular method set out in the former Guidelines or the new Guidelines when setting the amount of the fine in the present case. The framework of its analysis must be that set out in Article 14(3) of Regulation No 4064/89, which provides that, in setting the amount of a fine, regard is to be had to the nature and gravity of the infringement. Indeed, in the case of that provision, the Commission has not adopted guidelines setting out the method of calculation which it must follow when setting fines under that provision. However, it is required to reveal clearly and unequivocally in the contested decision the elements which it took into account in setting the amount of the fine.

– The gravity of the infringement

229 The applicant puts forward, in essence, three arguments relating to the gravity of the infringement.

230 In that regard, it must be borne in mind at the outset that, according to settled case-law, the gravity of the infringement must be assessed in the light of numerous factors, in respect of which the Commission has a margin of discretion (see, by analogy, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paragraphs 240 to 242, and Case C-328/05 P *SGL Carbon v Commission* [2007] ECR I-3921, paragraph 43).

231 The applicant's first argument relates to the fact that the infringement was committed negligently and that negligence cannot in any event be taken as a factor that aggravates the gravity of the infringement. The applicant claims that the Commission contradicts itself on that point in the contested decision, in such a way that the entire assessment of gravity is flawed. In the applicant's submission, in taking the view that any infringement of Article 7(1) of Regulation No 4064/89 is by nature a serious infringement, the Commission failed to have regard, in particular, to Article 14(2) of that regulation, which distinguishes infringements committed 'intentionally' from those committed 'negligently'.

232 It is clear from recitals 186 to 191 to the contested decision that the Commission regards the infringement as a serious infringement in that it undermines the effectiveness of provisions on the Community control of concentrations. The Commission states that an undertaking implementing a concentration with a Community dimension without having obtained authorisation unilaterally eludes the mandatory control for which the legislature gave the Commission sole competence and thus weakens the EU legal order. Any infringement of Article 7(1) of Regulation No 4064/89 is thus by nature, in the Commission's view, a serious infringement.

233 The Commission claims before the Court that that approach is consistent with what the case-law teaches in respect of other prohibitions on implementation linked with prior notification and authorisation mechanisms. It refers, in particular, to State aid and to the rules on the notification of technical standards established by Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8). The Commission further submits that, given the very logic of a system of prior notification, a breach of that obligation is serious, irrespective of whether it was committed intentionally or negligently and independently of the consequences which it might have for competition.

234 In that regard, even if the rules on the notification of State aid or relating to technical standards cannot in themselves justify the reasoning set out in the contested decision, in so far as, as the applicant observes, those rules do not provide for the imposition of fines, the Commission correctly states at recital 193 to the contested decision that the fact that Regulation No 4064/89 makes provision for such heavy penalties — up to 10% of the turnover of the undertakings concerned — shows that the

legislature wished to protect the system of notification and authorisation prior to the implementation of a concentration of a Community dimension. It should be noted, moreover, that Regulation No 139/2004, in Article 14(2), maintained that level of fine for infringements relating to the implementation of a concentration in breach of the obligation to suspend the concentration and, in addition, extended that heavy system of penalties to failure to notify, which under Regulation No 4064/89 had been penalised only by fines of between EUR 1 000 and EUR 50 000.

- 235 The Commission was therefore correct to state at recital 187 to the contested decision that, '[b]y making concentrations with a Community dimension conditional upon notification and prior authorisation, the Community legislature wanted to ensure that such concentrations were subject to effective control by the Commission, allowing the Commission where appropriate to prevent such concentrations from being carried out before it takes a final decision, thereby avoiding irreparable and permanent damage to competition'. The Commission was therefore able, without making an error, to characterise the infringement as serious, in view of its nature.
- 236 As regards the role played by negligence, it is clear from recitals 195 to 206 to the contested decision that the Commission characterised the infringement as serious and referred, moreover, to the fact that the applicant had acted negligently. In the applicant's submission, however, an infringement committed negligently cannot be characterised as serious.
- 237 In that regard, it should be noted that Article 14(2) of Regulation No 4064/89 does not draw a distinction according to whether the infringement was committed intentionally or negligently, but mentions those two conditions for the imposition of a fine as alternatives (see, by analogy, with respect to Article 15(2) of Regulation No 17, order in Case C-137/95 P *SPO and Others v Commission* [1996] ECR I-1611, paragraph 56). Furthermore, infringements committed negligently are not, from the point of view of their effects on competition, less serious than those committed intentionally (see, by analogy, order in *SPO and Others v Commission*, paragraph 55).
- 238 Consequently, the Commission was entitled to consider that the infringement was serious by nature, and there is no requirement that such an infringement has to be an intentional infringement.
- 239 Furthermore, the fact that both the former and the new Guidelines mention negligence as a mitigating circumstance in relation to fines for infringements of Article 81 EC or Article 82 EC is irrelevant, first, in the light of the considerations set out at paragraph 227 above and, second, because the question whether the Commission ought to have taken negligence into account as a mitigating circumstance is distinct from the question whether it correctly characterised the infringement in the light of its nature and gravity.
- 240 Last, it must be observed that it follows from the context of the contested decision and from the grounds set out at recitals 196 to 206 to the contested decision, put forward in support of the characterisation of the applicant's conduct as being negligent, that the Commission considers that the conduct in question was far removed from excusable error and inappropriate in the light of the circumstances, as, moreover, it submitted before the Court.
- 241 The Court therefore rejects the applicant's argument that the Commission has infringed Article 14 of Regulation No 4064/89 and contradicted itself in the contested decision by characterising the infringement as serious while taking the view that the infringement was committed negligently.
- 242 The second argument whereby the applicant challenges the characterisation of the infringement as serious concerns the fact, acknowledged by the Commission, that there was no adverse effect on competition. The applicant observes that even infringements of Articles 81 EC and 82 EC, which by definition are those capable of causing the most serious damage to competition, are not automatically regarded as serious. As the ultimate aim of the prior control of concentrations is to prevent irreparable and permanent damage to competition, and as the Commission itself acknowledges at recital 194 to

the contested decision that the actual effect on competition is a relevant criterion, its reasoning is inconsistent in that it characterises the infringement at issue as being serious when it had neither the object nor the effect of causing damage to competition.

243 That argument concerns recitals 192 to 194 to the contested decision, on the gravity of the infringement, where the Commission found that the fact that the infringement did not raise competition concerns did not affect its seriousness.

244 In that regard, the comparison of the infringement at issue with infringements of Article 81 EC or Article 82 EC must be qualified, as must the argument based on the significance, in the applicant's submission, of the absence of effects on competition of the infringement which it is found to have committed.

245 Admittedly, the objective of the EU rules on the control of concentrations is the prevention of irreparable and permanent damage to competition, as the Commission itself acknowledges at recital 187 to the contested decision. Indeed, the first recital in the preamble to Regulation No 4064/89 refers to the objective of undistorted competition in the common market. Ultimately, the legal asset thus protected is the safeguarding of free competition within the common market, which constitutes a fundamental objective of the EU under Article 3(1)(g) EC, as is the case, moreover, for the Commission's powers to conduct investigations and to impose sanctions with respect to infringements of Articles 81 EC and 82 EC (see, to that effect, Case C-308/04 P *SGL Carbon v Commission* [2006] ECR I-5977, paragraph 31).

246 It also follows from Regulation No 4064/89, however, that the system for the control of concentrations which it establishes is designed to allow the Commission to exercise effective control of all concentrations from the point of view of their effect on the structure of competition (seventh recital) and that the effectiveness of that system is ensured by the introduction of *ex ante* control of the effects of concentrations with a Community dimension. It follows from the 17th recital to and also from Article 4 and Article 7(1) of Regulation No 4064/89 that the effectiveness of that control rests on a duty for undertakings to notify such concentrations in advance and to suspend their implementation until the Commission has adopted a decision declaring them compatible with the common market. Furthermore, the limitations on the possibility of granting a derogation from the obligation to suspend the concentration laid down in Article 7 and the severity of the penalties provided for in Article 14(2)(b) of Regulation No 4064/89 in the event of a breach of that obligation confirm the fundamental importance which the legislature placed on the obligation to suspend the concentration in the context of the control of concentrations, an approach which is justified in so far as the implementation of a concentration affects the structure of the market and may render more difficult the decisions whereby the Commission seeks, where necessary, to restore effective competition. In the light of that context, the Commission is correct to maintain that the *ex post* analysis of the lack of effect of a concentration on the market cannot reasonably be a decisive factor for the characterisation of the gravity of the breach of the system of *ex ante* control.

247 That, however, does not prevent the absence of effects on the market being taken into account as a relevant factor in determining the amount of the fine, as the Commission acknowledges at recital 194 to the contested decision. The Commission is also correct to claim at the same recital that the presence of damage to competition would render the infringement even more serious. Last, it should be observed that, even though the Commission does not analyse it further, it states in the conclusion, at recital 225 to the contested decision, that it has taken account of the absence of damage to competition caused by the concentration.

248 The third argument whereby the applicant disputes the serious nature of the infringement is based on the fact that the question of *de facto* sole control would have required a complex factual and legal analysis in 2003. In the applicant's submission, the Commission could therefore not invoke the allegedly foreseeable nature of such control, especially since the precedents cited in the contested

decision, in particular Decision 1999/594 (paragraph 122 above) and Commission Decision 1999/459/EC of 10 February 1999 imposing fines for failing to notify and for putting into effect three concentrations in breach of Article 4 and Article 7(1) of Regulation No 4064/89 (Case IV/M.969 — A.P. Møller) (OJ 1999 L 183, p. 29), could not have been used against it.

- 249 The argument relates to recitals 195 to 206 to the contested decision, where the Commission found, in the context of its assessment of the gravity of the infringement, that the applicant had been negligent, on the basis of three factors, namely, first, the fact that the applicant was a large undertaking with substantial legal resources at its disposal and had been faced with EU law on concentrations on several occasions, second, the fact that the acquisition of control was foreseeable, and, third, the existence of precedents.
- 250 It must be emphasised at the outset, however, that, as stated at paragraphs 224 and 225 above, the applicant does not dispute the first of the three factors to which the Commission refers as the basis for its finding that the applicant has acted negligently, namely the fact that the applicant is a large undertaking with substantial legal resources at its disposal and that it has been faced with EU law on concentrations on several occasions.
- 251 As regards the second factor applied by the Commission, namely the foreseeability of the acquisition of control, the applicant maintains, in essence, that the question of the existence of *de facto* sole control in its favour during 2003 required a complex factual and legal analysis. The applicant also refers to the special nature of CNR as a general-interest limited company.
- 252 The Commission sets out at recital 198 *et seq.* to the contested decision a number of factors to substantiate its argument that, as the acquisition of control was foreseeable, the applicant committed an infringement negligently. It must be held that they are relevant factors that, in any event in conjunction with the applicant's experience in the field of concentrations and in notification procedures, render unconvincing its argument that it cannot be criticised for negligence.
- 253 In particular, it was following the commitments given by EDF in the context of the authorisation of a different concentration by the Commission that the applicant entered into an agreement with EDF in June 2003 to acquire its shares in CNR. The applicant thus obtained a part of the capital and the voting rights in CNR that was almost 50%, in the context of a dispersed shareholding and of the conclusion of an agreement with CDC. Furthermore, the applicant already had two representatives out of three within the management board. In the light of its own size in terms of turnover, of the size of CNR and of the factors relating to the structure of the governance, it is wholly appropriate for the Commission to consider that the applicant was negligent in not contacting the Commission in December 2003 at the latest in order to determine whether a concentration within the meaning of competition law was actually involved. The fact that the applicant placed a different interpretation on the applicable legislative framework does not mean that that legislative framework was unclear or that the applicant could not foresee that it was taking a risk by not discussing its interpretation with the Commission in good time.
- 254 Admittedly, in order to commit the infringement which the applicant is found to have committed and to be penalised for having done so, it is not sufficient to have been negligent. The Commission must prove that a concentration has actually taken place, a fact which determines its competence and, where appropriate, the beginning of any breach of the obligation to suspend the concentration. However, it follows from the examination of the second plea above that the Commission established those circumstances to the requisite legal standard.
- 255 Furthermore, the Commission also claims, correctly, that even if the establishment of control was particularly complex, the appropriate course of conduct for the applicant, which the Commission was reasonably entitled to expect, was to contact the Commission.

256 Last, the fact that the Commission itself took a long time to determine the starting date of the infringement is irrelevant, as the length of the procedure was determined at least in part by the applicant's failure to act promptly.

257 It follows that the argument which the applicant bases on the unforeseeable nature of the concentration must be rejected.

258 As regards the third factor applied in order to establish that the applicant acted negligently, namely the precedents referred to at recital 205 to the contested decision, in particular Decision 1999/594 (paragraph 122 above) and Decision 1999/459 (paragraph 248 above), namely the first Commission decisions imposing fines for breach of Article 4 and Article 7(1) of Regulation No 4064/89, and contrary to the applicant's assertion, the fact that they were old decisions at the time when the infringement began reinforces the Commission's conclusion that the applicant acted negligently. Indeed, in the light of those decisions, the applicant could not rely on the absence of decision-making practice in this field.

259 Last, as regards Commission Decision 2003/625/EC of 3 July 2001 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case COMP/JV.55 — Hutchison/RCPM/ECT) (OJ 2003 L 223, p. 1), on which the applicant relies, in which the Commission decided not to impose a fine for failure to notify a concentrative joint venture, notably on account of the particularly complex analysis of the elements of fact and of law inherent in that type of concentration, it is sufficient to observe that the circumstances of that case were different from those of the present case. That decision concerned the problem of a cooperation agreement initially notified to the Commission as a cooperative joint venture falling within the scope of Regulation No 17, which the Commission none the less subsequently characterised as a concentrative joint venture. The decision not to impose a fine in that case was therefore taken in a wholly special context. Furthermore, the Commission correctly observes that in any event its previous practice in taking decisions does not serve as a legal framework for the fines imposed in competition matters (see, by analogy, Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, paragraph 292).

260 It follows that the three arguments which the applicant puts forward in order to dispute the gravity of the infringement must be rejected.

– The duration of the infringement

261 At recitals 207 to 217 to the contested decision the Commission found that the period to be taken into consideration for the purpose of setting the fine ran from 23 December 2003 until 9 August 2007, or 3 years, 7 months and 17 days, which was described as a 'very long' time.

262 In the applicant's submission, in taking the view that a period of 3 years, 7 months and 17 days is considerable having regard to the shorter period found in Decision 1999/459 (paragraph 248 above), the Commission does not comply with its own practice of regarding much more serious infringements of longer duration as being of average duration. Nor does it comply with the former Guidelines, according to which infringements of between one and five years are of average duration. Furthermore, in observing at recital 217 to the contested decision that the risk of prejudice to the consumer increases with the duration of the infringement, the Commission also erred, since it expressly acknowledged that the infringement established had caused no damage to competition or to consumers.

263 The Commission disputes the applicant's arguments.

- 264 First, it must be observed that the argument which the applicant puts forward in the context of this part of the plea does not refer to the calculation of the duration of the infringement as such but is limited to challenging the characterisation of the duration established by the Commission as being 'very long' and also to disputing the relevance of taking the duration of the infringement into account in the present case.
- 265 Second, as already stated at paragraph 227 above, the Commission is correct to dispute the relevance of the former Guidelines in the present case. It also rightly observes that an infringement consisting in the implementation of a concentration before it has been notified is likely to last for a shorter period than a secret cartel, so that parallels between the assessment of the duration of infringements by reference to those different types of infringements seem to be of little relevance in any event.
- 266 Third, the applicant does not deny that the duration of the infringement in the present case was much longer than that established in Decision 1999/459 (paragraph 248 above). The Commission was therefore entitled to cite that decision at recital 217 to the contested decision in support of the characterisation of duration in the present case.
- 267 Fourth, the general assertion at recital 217 to the contested decision that the risk of prejudice to the consumer increases with the duration of the infringement is not contradictory. As the Commission correctly states, it thus merely recalled that the risk of damage to competition increased when an improper situation was prolonged and that, in the case of a breach of the obligation to suspend a concentration, in the light of what was set out at paragraph 246 above, that risk had to be assessed initially without consideration of the effects of the transaction in the future. Contrary to the applicant's contention, the duration of the infringement is relevant in the present case. As the Commission correctly claimed in answer to a written question put by the Court, where an infringement was defined as the implementation of an unlawful act or activity, it was lawful to take account of the scope of the act or activity in question, and also of the duration during which the activity was pursued even though those circumstances related to the period after the time when the infringement was committed.
- 268 In those circumstances, the applicant has not established that the Commission's assessment of the duration of the infringement was flawed.

– Mitigating circumstances

- 269 As may be seen from recitals 218 to 224 to the contested decision, the Commission took into account as mitigating circumstances the fact that the applicant contacted the Commission on its own initiative, also noting that it had done so only three and a half years after it had acquired EDF's shareholding, and also the applicant's cooperation throughout the notification procedure and afterwards, while none the less pointing out that the pre-notification period had been long. As regards the non-concealment of the shareholding in CNR during the period 2004 to 2007, the Commission considers that that cannot constitute a mitigating circumstance and that the fact that it did not investigate that aspect did not create a presumption of legality in the applicant's favour. At most, non-concealment might mean that the applicant believed in good faith that it was not required to notify the transaction. The Commission found no aggravating circumstances.
- 270 The applicant observes that both the former Guidelines and the new Guidelines stipulate that the Commission must take mitigating circumstances into account when determining the amount of the fine. Apart from the failure to take negligence into account as a mitigating circumstance, it calls into question the fact that the Commission refused to regard non-concealment as such a circumstance on the ground that it had not investigated that aspect. In so doing, the Commission made an error of law by confusing the concepts of mitigating circumstance and presumption of legality.

- 271 The Commission disputes the applicant's arguments.
- 272 It must be stated that the Commission observes, again rightly, that the approach set out in the former Guidelines and the new Guidelines is not decisive, for the reasons stated at paragraph 227 above. Furthermore, the Commission has a margin of discretion as to whether or not to take certain factors, such as non-concealment of the acquisition or negligence, into account as mitigating circumstances.
- 273 As regards, in particular, the fact that negligence was not taken into account as a mitigating circumstance, it has already been considered above that the Commission had not erred in taking negligence into account in characterising the infringement as serious. Furthermore, as the Commission again emphasised at the hearing, the infringement consisting in the implementation of a concentration before it has been notified is an example of an infringement where intent is difficult to prove.
- 274 As regards the fact that negligence was taken to be a mitigating circumstance in Decision 1999/594 (paragraph 122 above), but not in the present case, it must be borne in mind that the fact that in certain cases the Commission has taken into consideration, in its previous practice in taking decisions, certain measures as mitigating circumstances does not mean that it is under an obligation to do likewise in the present case, even though the Commission is required to observe the principle of equal treatment, which is a general principle of law under which it cannot treat comparable situations differently or different situations in the same way, unless such treatment is objectively justified (see, by analogy, judgment of 12 September 2007 in Case T-30/05 *Prym and Prym Consumer v Commission*, not published in the ECR, paragraph 205 and the case-law cited). One factor that clearly distinguishes Decision 1999/594 from the present case is that that decision was the first to be adopted by the Commission under Article 14 of Regulation No 4064/89. In any event, the Commission cannot therefore be required to take the same approach in the present case.
- 275 Furthermore, as discussed at paragraphs 240 and 248 to 259 above, the Commission puts forward a number of arguments in the contested decision from which it is apparent that the negligence on the applicant's part was conduct that was far removed from excusable error and was inappropriate in the circumstances.
- 276 The Commission could therefore legitimately and lawfully consider that the fact that the infringement had been committed negligently should not be reflected in a reduction of the amount of the fine.
- 277 Furthermore, if the Commission refused to take into account as a mitigating circumstance the applicant's non-concealment of its shareholding in CNR, on the ground, in essence, that, as it had not investigated that aspect, it could not 'create a presumption of legality' in the applicant's favour, such an analysis must be confirmed. Indeed, the Commission thus correctly claimed that concealment would constitute an element of intent which could have justified an increase of the amount of the fine. The fact that the Commission considered in Decision 2003/625 that non-concealment of the infringement could lead to the non-imposition of a fine is irrelevant, since, as already stated at paragraph 259 above, the factual circumstances of the case in which that decision was adopted were different. The Commission correctly observes that that case concerned a transaction which had initially been notified to it for the purposes of obtaining an exemption, as a cooperation agreement, but which it had subsequently characterised as a concentrative joint venture.
- 278 It follows that the applicant has not established that the Commission exceeded its discretion in its treatment of the mitigating circumstances.

– The proportionate nature of the fine

- 279 The principle of proportionality requires that measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case C-180/96 *United Kingdom v Commission* [1998] ECR I-2265, paragraph 96, and *Prym and Prym Consumer v Commission*, paragraph 274 above, paragraph 223). It follows that fines must not be disproportionate to the aims pursued, that is to say, to compliance with the competition rules, and that the amount of the fine imposed on an undertaking for an infringement of competition law must be proportionate to the infringement, viewed as a whole, account being taken, in particular, of the gravity of the infringement (see *Prym and Prym Consumer v Commission*, paragraph 274 above, paragraph 224 and the case-law cited).
- 280 In that regard, it must be borne in mind that, independently of the question whether the infringement penalised was committed negligently and had no effect on competition, it was a serious infringement, jeopardising the effectiveness of the Commission's control of concentrations of a Community dimension, and of very long duration.
- 281 Furthermore, the negligence on the applicant's part constituted conduct far removed from excusable error and was inappropriate when the circumstances were taken into account.
- 282 Moreover, in determining the amounts of fines, the Commission is entitled to take into account the need to ensure that fines have a sufficient deterrent effect (see, to that effect and by analogy, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others v Commission* [1983] ECR 1825, paragraph 108, and Case T-304/94 *Europa Carton v Commission* [1998] ECR II-869, paragraph 89). Furthermore, the link between, on the one hand, undertakings' size and global resources and, on the other, the need to ensure that a fine has a deterrent effect cannot be denied. Accordingly, when the Commission calculates the amount of the fine it may take into consideration, inter alia, the size and the economic power of the undertaking concerned (see, to that effect and by analogy, Case C-413/08 P *Lafarge v Commission* [2010] ECR I-5361, paragraph 112 and the case-law cited). As stated at paragraphs 225 and 226 above, the amount of EUR 20 million corresponds to only around 0.04% of the Suez group's turnover in 2007 (EUR 47.5 billion), that group being the undertaking concerned by the concentration within the meaning of Article 14(2) of Regulation No 4064/89, because it acquired, through the applicant, de facto sole control of CNR, and to around 0.13% of the applicant's consolidated turnover in 2007 (EUR 15.2 billion in 2007 and EUR 14.6 billion in 2008, including CNR's turnover).
- 283 In the light of all those circumstances and, in particular, of the fact that the amount of the fine, EUR 20 million, albeit high, is quite clearly at the lower end of the scale of the amounts that might have been imposed given the upper limit of 10% of the turnover of the undertaking concerned provided for in Article 14(2) of Regulation No 4064/89, that amount does not seem disproportionate to the aim pursued, namely to protect the system of prior notification and approval of the putting into effect of a concentration of a Community dimension, and is proportionate to the infringement assessed as a whole.
- 284 The applicant claims, however, that the disproportionate nature of the fine is established, notably by reference to the substantially lower fines imposed in Decisions 1999/594 (paragraph 122 above) and 1999/459 (paragraph 248 above), or indeed the absence of a fine in Decision 2003/625 or in Commission Decision 2003/754/EC of 26 June 2002 declaring a merger to be compatible with the common market and the EEA Agreement (Case COMP/M.2650 — *Haniel/Cementbouw/JV*) (OJ 2003 L 282, p. 1). As regards the decision in this last case, as that taken in the case in which Decision 2003/625, already referred to at paragraph 259 above, was adopted, the factual circumstances involved were significantly different from those of the present case. Indeed, whereas the parties concerned had

initially relied on the assessment of the Netherlands competition authority, which considered that the transaction in question was not a concentration, the Commission subsequently considered that it was a concentration of a Community dimension which ought to have been notified to it.

285 As regards the fines imposed in the cases in which Decisions 1999/594 (paragraph 122 above) and 1999/459 (paragraph 248 above) were adopted, which were EUR 33 000 and EUR 219 000 respectively, there is indeed a very wide gap between those amounts and the amount of EUR 20 million imposed in the present case. However, the Commission rightly claims that those precedents date from a much earlier stage in the application of Article 14 of Regulation No 4064/89, a fact which, moreover, is mentioned in those decisions. In addition, both decisions imposed part of the fine for failure to notify and a larger part for infringement of the obligation to suspend the concentration, making clear that those amounts took account of the specific circumstances of the cases and were without prejudice to subsequent cases involving the application of Article 14.

286 In any event, as already recalled above, the Commission's previous practice in taking decisions does not serve as a legal framework for fines imposed in competition matters (see, by analogy, *Michelin v Commission*, paragraph 259 above, paragraph 292). Furthermore, the fact that in the past the Commission has applied fines of a particular level for certain types of infringements does not mean that it is precluded from raising that level within the limits indicated in Regulation No 4064/89 if that is necessary to ensure the implementation of EU competition policy. Indeed, the proper application of the EU competition rules requires that the Commission be able at any time to adjust the level of fines to the needs of that policy (see, by analogy, *Dansk Rørindustri and Others v Commission*, paragraph 230 above, paragraph 169 and the case-law cited).

287 The first part of the fourth plea must therefore be rejected.

Second part of the fourth plea, alleging that the fine is disproportionate by reference to the objective of deterrence and that the Commission's competition policy lacks coherence

288 The applicant alleges, first, a disproportionate and incoherent nature of the fine imposed by reference to the rules applicable in cartel cases and, second, incoherence of the amount imposed by reference to the Commission's practice in taking decisions and to the objectives of the control of concentrations.

289 The Commission disputes the applicant's arguments.

290 In the first place, as regards the disproportionate and incoherent nature of the fine imposed by reference to the rules applicable in cartel cases, the applicant claims, in essence, that, in the light of the leniency policy applicable in cartel cases, under which an undertaking which has participated in a cartel and which reports the existence of the cartel to the Commission may obtain total immunity from any fines, the applicant ought to have been granted such immunity. The applicant also observes that the Commission has provided itself with other legal tools which enable it to bring infringements to an end by alternative means, namely decisions making commitments binding in the context of Regulation No 1/2003 and compromises, which are based on the principle of the reduction or cancellation of the financial penalty for an undertaking which cooperates. The applicant also refers to the existence of a fine of a comparable amount in a Commission decision, contemporaneous with the contested decision, imposed on an undertaking which had participated for around 13 years in a secret cartel involving price fixing and the allocation of geographic markets, and it submits a summary table of amounts of fines imposed in certain other cartel cases.

291 It must be observed that, as regards the comparison with the leniency policy in cartel cases, the Commission rightly contends that it is ineffective. That policy corresponds to specific problems in detecting cartels, which by nature are secret infringements. The leniency programme and compromises are specific instruments linked to that context and any application by analogy in the

context of the rules on concentrations of a Community dimension, which is based on a duty to notify and to comply with the Commission's sole power to give prior authorisation, must be rejected. Likewise, as regards the Commission's power under Regulation No 1/2003 to make commitments offered by undertakings binding and to find that there is no need to investigate an infringement, such decisions are designed to eliminate the negative effects on the market of the agreements or practices concerned. As the concentration at issue in the present case was approved, any analogy with that mechanism is irrelevant.

292 It is still necessary to examine the argument which the applicant derives from the fact that a fine of a comparable amount to that imposed on the applicant, namely EUR 19.8 million, was imposed on the Spanish company Repsol in Commission Decision C(2008) 5476 final of 1 October 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/C.39181 — Candle Waxes), a summary of which is published in the *Official Journal of the European Union* of 4 December 2009 (OJ 2009 C 295, p. 17). The applicant observes that Repsol was penalised for its long-term participation in a secret cartel, whereas the Commission takes issue with the applicant only for an infringement committed negligently without having any effects on the market. The applicant also refers to the existence of other examples of comparable amounts of fines imposed in other cartel decisions. However, that comparison cannot succeed, for the same reason as that stated in the preceding paragraph. Decisions taken in the particular field of cartels, which correspond to the specific objectives and specific methodology of that field, linked with the secret nature of cartels, cannot usefully be invoked for the purpose of evaluating the proportionate nature of the fine imposed in the present case. Furthermore, as the Commission is able to develop over time its fining policy for a certain type of infringement, as observed at paragraph 286 above, there is no apparent reason why it should not develop a fining policy corresponding to a specific logic in the field of concentrations.

293 In the second place, as regards incoherence of the amount imposed by reference to the Commission's practice in taking decisions and to the objectives of the control of concentrations, the applicant maintains that, in imposing such a harsh penalty on an undertaking that contacted the Commission on its own initiative and in asserting that its own power to impose penalties was time-barred after five years, the Commission is sending a message that is contrary to the sound administration of its competition policy in the control of concentrations. In the applicant's submission, an approach more in keeping with the principles of proportionality and sound administration might have consisted in finding that there had been an infringement of Article 7(1) of Regulation No 4064/89 without that finding entailing the imposition of a fine. The applicant observes, moreover, that the Commission had clearly asserted in Decision 1999/594 (paragraph 122 above) that it would impose only modest fines on undertakings which through mere negligence had failed to notify a concentration and which contacted the Commission on their own initiative. The applicant maintains, therefore, that the Commission did not observe the principle of legitimate expectations.

294 The Commission disputes the applicant's arguments.

295 In that regard, as concerns the argument that the fine imposed in the present case is contrary to the sound administration of competition policy on the control of concentrations, the scenario predicted by the applicant, in which any parties guilty of a breach of the obligation to notify a concentration would find it to their advantage not to contact the Commission before the end of the five-year limitation period, especially if the transaction in question caused damage to competition, is in any event no more credible than that defended by the Commission, which states that it has every reason to believe that the imposition of significant fines for infringements of Article 7(1) of Regulation No 4064/89 will primarily have the effect of deterring undertakings from committing such infringements. It seems credible in fact that the mere announcement of the possible imposition of a fine of EUR 20 million, without the actual application of that fine, would clearly not have the same deterrent effect.

296 As regards the breach of the principle of legitimate expectations, the Court put a written question to the Commission about the scope of recital 18 to Decision 1999/594, paragraph 122 above, on which the applicant specifically relied in that respect and which is worded as follows:

‘... The Commission considers that, in the circumstances described by Samsung, that is negligent failure to file with no adverse competitive consequences and no complex situation with regard to the determination of control, an undertaking has every interest in informing the Commission and notifying the operation in question, as indeed Samsung did. The undertaking thereby runs the risk of having a relatively modest fine imposed on it by the Commission (depending on the circumstances of the case) but at the same time it will avoid the more serious consequences of a decision by the Commission under Article 14 of [Regulation No 4064/89] where the undertaking is acting in bad faith, and is found to be so doing ...’

297 When asked, in particular, whether, in view of the general nature of those assertions and also of the absence of any guidelines on fines in this field, those assertions could be taken to be an indication of the method which it proposed to follow in applying Article 14 of Regulation No 4064/89, the Commission stated that that passage was intended to reject Samsung’s suggestion that the Commission should adopt an amnesty policy in cases of unintentional non-notification which had no unfavourable consequences for competition and where the parties spontaneously drew the Commission’s attention to their error and sought to correct it. The Commission thus wished to indicate that an amnesty policy was neither necessary nor appropriate, because undertakings may in any event have an interest in informing the Commission. It was in that context that the Commission referred to the risk that the undertaking would receive a relatively modest fine, while making clear that that would apply only by reference to the specific circumstances of the case.

298 It must be held that the Commission’s explanation is plausible, although the reference at the end of the passage to the fact that a penalty under Article 14 of Regulation No 4064/89 would be imposed only in the event of bad faith is the consequence of an incorrect interpretation of that provision, which permits fines to be imposed even in the absence of bad faith, namely in the event of negligence, as is apparent from the analysis of that provision carried out above.

299 Furthermore, the Commission observes, correctly, that the applicant cannot rely on a legitimate expectation that the level of fines imposed 10 years before, at an early stage of the application of Regulation No 4064/89, will be maintained. It has already been stated above that the case-law recognises the need for the Commission to be permitted to adjust the level of fines to the needs of competition policy, which means that operators cannot have a legitimate expectation that an existing situation will be maintained, especially since competition policy is characterised by a wide discretion on the part of the Commission, in particular as regards the determination of the amount of fines (*Dansk Rørindustri and Others v Commission*, paragraph 230 above, paragraphs 169 to 173). Clearly, such an analysis applies for even stronger reasons, in the absence of guidelines, to infringements penalised under Regulation No 4064/89. The passage in question could not therefore be taken to indicate the method which the Commission proposed to follow in applying Article 14 of Regulation No 4064/89 in the future.

300 Nor is the reference which the Commission made before the Court to Case T-99/04 *AC-Treuhand v Commission* [2008] ECR II-1501 irrelevant. In that case, the Court considered, at paragraph 164 of the judgment, that the Commission’s previous practice followed for more than 20 years, by which it merely did not censure or penalise consultancy firms yet did not preclude the notion that they might be held liable for the infringement, could not give rise to a legitimate expectation that the Commission would in future abstain from penalising consultancy firms when they participate in a cartel. The fact that the amount of the fine imposed in that case was very small is not decisive for the present case, for, as the Commission correctly claims, it was a question of penalising entities, in particular consultancy firms, whose possible involvement in cartel activities had previously not been penalised by the Commission.

- 301 Last, the decisions of national authorities to which the Commission refers because they also concern the imposition of not insignificant fines for breaches of the prohibition on implementing concentrations are not in any event relevant when it comes to assessing the proportionate nature of the fine, as factual differences between the cases cited by the Commission and the present case can easily be found.
- 302 Consequently, the second part of the fourth plea must be rejected, as must, accordingly, the fourth plea in its entirety.
- 303 As regards the alternative claims, in so far as they relate to a reduction of the amount of the fine, the Court, in the exercise of its unlimited jurisdiction, considers, in any event, that there is no reason to reduce the amount of the fine in application of that jurisdiction, since it considers that that amount, which is quite clearly at the lower end of the scale of the amounts which could in theory have been imposed, is appropriate to the circumstances of the case, in view of the gravity and duration of the infringement found by the Commission and likewise of the applicant's global resources.
- 304 In the light of all the foregoing, the action must be dismissed in its entirety.

Costs

- 305 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the Commission, in accordance with the form of order sought by the latter.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders Electrabel to pay the costs.**

Czúcz

Labucka

Gratsias

Delivered in open court in Luxembourg on 12 December 2012.

[Signatures]

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