

JUDGMENT OF THE COURT (First Chamber)

18 December 2007^{*}

In Case C-202/06 P,

APPEAL pursuant Article 56 of the Statue of the Court of Justice, brought on 3 May 2006,

Cementbouw Handel & Industrie BV, represented by W. Knibbeler, O. Brouwer and P. Kreijger, advocaten,

appellant,

the other party to the proceedings being:

Commission of the European Communities, represented by E. Gippini Fournier, A. Nijenhuis and A. Whelan, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

^{*} Language of the case: English.

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, A. Tizzano, A. Borg Barthet, M. Ilešič and E. Levits, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 March 2007,

after hearing the Opinion of the Advocate General at the sitting on 26 April 2007,

gives the following

Judgment

- ¹ By its appeal, Cementbouw Handel & Industrie BV asks the Court to set aside the judgment of the Court of First Instance of the European Communities of 23 February 2006 in Case T-282/02 *Cementbouw Handel & Industrie v Commission* [2006] ECR II-319 ('the judgment under appeal'), dismissing its application for the annulment of Commission Decision 2003/756/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 (CVK)) (OJ 2003 L 282, p. 1, and corrigendum OJ 2003 L 285, p. 52) ('the contested decision').

Legal context

- ² Article 1(1) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395 p. 1, and corrigendum 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), ('Regulation No 4064/89') defines its material scope as follows:

'... this Regulation shall apply to all concentrations with a Community dimension as defined in paragraphs 2 and 3.'

- ³ Article 3(1)(b) of Regulation No 4064/89 defines 'concentration' so as to include a situation where one or more undertakings acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.
- ⁴ In order for a concentration to have a Community dimension, the aggregate worldwide and Community-wide turnover of the undertakings concerned must exceed certain thresholds, expressed in terms of turnover, set out in Article 1(2) and (3) of Regulation No 4064/89. Article 5 of that regulation lays down the method for calculating those thresholds.
- ⁵ Concentrations with a Community dimension must be notified to the Commission of the European Communities. In that regard, Article 4(1) of Regulation No 4064/89

provides that that notification must be made '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'.

6 Article 7 of that Regulation provides that such concentrations are not to be put into effect either before their notification or until they have been declared compatible with the common market pursuant to a decision.

7 The first sentence of Article 6(1) of Regulation No 4064/89 states that 'the Commission shall examine the notification as soon as it is received'. In accordance with Article 6(1)(c), where the Commission finds that the concentration notified has a Community dimension and raises serious doubts as to its compatibility with the common market, it must decide to initiate formal control proceedings.

8 In that regard, Article 8(1) to (4) of Regulation No 4064/89 confers the following decision-making powers on the Commission:

'1. ...

2. Where the Commission finds that, following modification by the undertakings concerned if necessary, a notified concentration fulfils the criterion laid down in Article 2(2) ... it shall issue a decision declaring the concentration compatible with the common market.

It may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market. ...

3. ...

4. Where a concentration has already been implemented, the Commission may ... require the undertakings or assets brought together to be separated or the cessation of joint control or any other action that may be appropriate in order to restore conditions of effective competition.'

9 Article 10(1) of Regulation No 4064/89 provides that the decision to institute formal control proceedings must, subject to an exception which does not apply in the present case, be taken within one month at most, beginning on the day following the receipt of a notification. Article 10(2) and (3) states that decisions making a finding as to the compatibility or incompatibility of a concentration with the common market must, save in exceptional cases, be taken within not more than four months of the date on which the proceedings are initiated. By virtue of Article 10(6), where the Commission has not taken a decision within those periods, the concentration is to be deemed to be declared compatible with the common market.

10 The division of powers in relation to the control of concentrations is provided for in Article 21(1) and (2) of Regulation No 4064/89, in the following manner:

'1. Subject to review by the Court of Justice, the Commission shall have sole competence to take the decisions provided for in this Regulation.

2. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.'

- 11 Recital 29 in the preamble to Regulation No 4064/89 states that 'concentrations not referred to in this Regulation come, in principle, within the jurisdiction of the Member States'.

Background to the dispute

- 12 The findings of the Court of First Instance in paragraphs 1 to 15 and 295 to 298 of the judgment under appeal allow the background to the case to be summarised as set out below.
- 13 Before the putting into effect of the concentration which underlies the dispute, Coöperatieve Verkoop- en Produktievereniging van Kalkzandsteenproducenten ('CVK'), a cooperative established under Netherlands law, comprised 11 Dutch producers of sand-lime bricks. Of those 11 members of the undertaking, five were subsidiaries of the German undertaking Franz Haniel & Cie GmbH ('Haniel'), three were subsidiaries of the appellant and two were subsidiaries of the German undertaking RAG AG ('RAG'). The 11th of those undertakings was owned jointly by Haniel, the appellant and RAG (paragraph 5 of the judgment under appeal).
- 14 In 1998, the Nederlandse Mededingingsautoriteit (Netherlands competition authority) ('the NMa') was notified of a proposed concentration whereby CVK

was to acquire control of its member undertakings. Control was to be transferred by way of a pooling agreement and by amending CVK's articles of association. By decision of 20 October 1998, the NMa authorised the proposed concentration (paragraph 6 of the judgment under appeal).

- 15 Before that transaction was put into effect, RAG decided to sell its shares in the member undertakings of CVK to Haniel and the appellant. In March 1999, the parties informed the NMa of their intentions. By letter of 26 March 1999, the NMa informed the parties that the proposed transfer would not constitute a concentration within the meaning of the Netherlands legislation, provided that the transaction authorised by the decision of 20 October 1998 was completed no later than the time of the transfer (paragraph 7 of the judgment under appeal).
- 16 On 9 August 1999, CVK and its member undertakings concluded a number of transactions. First, they concluded the pooling agreement referred to in paragraph 14 of this judgment and CVK's articles of association were amended to take account of the provisions of that agreement ('the first group of transactions'). Secondly, RAG transferred its shares in three of the member undertakings of CVK to Haniel and the appellant, while Haniel and the appellant concluded a cooperation agreement governing their collaboration within CVK ('the second group of transactions') (paragraph 8 of the judgment under appeal).
- 17 The Commission became aware of the transactions concluded on 9 August 1999 when it examined two other concentrations notified by Haniel and, by letter of 22 October 2001, it informed the appellant and the other participating undertakings that the concentration had to be notified to it. On 24 January 2002, Haniel and the appellant notified the concentration pursuant to Article 4 of Regulation No 4064/89 (paragraphs 9 and 10 of the judgment under appeal).

- 18 On 25 February 2002, the Commission initiated the formal control proceedings referred to in Article 6(1)(c) of Regulation No 4064/89 (paragraph 11 of the judgment under appeal).
- 19 Once the Commission had sent the statement of objections and had heard the parties concerned, Haniel and the appellant submitted a first set of draft commitments on 28 May 2002. These provided that Haniel and the appellant would end their cooperation agreement and would sell the shares they had acquired from RAG in 1999 to an independent third party. The Commission took the view that that draft was insufficient to dispel the doubts about the competition on the market in question (paragraphs 12, 14 and 295 of the judgment under appeal).
- 20 Thereupon, on 5 June 2002 Haniel and the appellant offered final commitments, in which they also undertook to revoke the pooling agreement, to undo the amendment to CVK's articles of association and to dissolve CVK (paragraphs 14, 15 and 298 of the judgment under appeal).
- 21 On 26 June 2002, the Commission adopted the contested decision, whereby it considered that the notified concentration constituted by the first and second groups of transactions was compatible with the common market, subject to the condition that the commitments set out in that decision were complied with in full by Haniel and the appellant. Those commitments included, in particular, the dissolution of CVK (paragraph 15 of the judgment under appeal).

The proceedings before the Court of First Instance and the judgment under appeal

- 22 By application lodged at the Registry of the Court of First Instance on 11 September 2002, and registered under number T-282/02, the appellant brought an action seeking the annulment of the contested decision.

23 In support of its application, the appellant relied on three pleas in law.

24 The first plea alleged that the Commission was not competent to examine the transactions in question by virtue of Article 3 of Regulation No 4064/89. The Court of First Instance rejected that plea, holding in paragraph 109 of the judgment under appeal that ‘a concentration within the meaning of Article 3(1) of Regulation No 4064/89 may be deemed to arise even in the case of a number of formally distinct legal transactions, provided that those transactions are interdependent in such a way that none of them would be carried out without the others and that the result consists in conferring on one or more undertakings direct or indirect economic control over the activities of one or more other undertakings’.

25 The second plea alleged errors of assessment by the Commission relating to the creation of a dominant position by the concentration, in breach of Article 2 of Regulation No 4064/89. The Court of First Instance rejected that plea as unfounded.

26 The third plea alleged breach of Articles 3 and 8(2) of Regulation No 4064/89 and of the principle of proportionality. As regards that plea, the Court of First Instance held:

‘301 ... the applicant’s claims are once again based on an incorrect premiss, which was rejected by the Court In effect, there is only one concentration,

concluded on 9 August 1999, comprising the first and second groups of transactions, which comes within the competence of the Commission under Regulation No 4064/89. Consequently, contrary to the applicant's contention, the first draft commitments do not alter the concentration in such a way that it no longer exists.

...

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

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

...

307 ... in order to be accepted by the Commission with a view to the adoption of a decision under Article 8(2) of Regulation No 4064/89, the parties' commitments must not only be proportionate to the competition problem identified by the Commission in its decision but must eliminate it entirely; and that objective was clearly not achieved in the present case by the first draft commitments proposed by the notifying parties.'

27 The Court of First Instance rejected the third plea, and, accordingly, dismissed the action in its entirety.

The appeal

28 The appellant claims that the Court should set aside the judgment under appeal and, if appropriate, refer the case back to the Court of First Instance and order the Commission to pay the costs.

29 The Commission contends that the Court should dismiss the appeal and order the appellant to pay the costs.

30 In support of its claims, the appellant relies on two grounds of appeal.

The first ground of appeal, alleging the incorrect interpretation and incorrect application of Articles 1, 2 and 3(1) of Regulation No 4064/89

Arguments of the parties

- 31 The appellant submits that the competence of the Commission under Regulation No 4064/89 is not determined exclusively by the concentration in the form in which it is notified, but by the concentration in the form in which it is actually put into effect. That approach applies where changes are made to the concentration by the parties after notification; those changes may arise from commitments that are proposed. The fact that the concentration was implemented prior to notification, in the form in which it was notified, is irrelevant.
- 32 According to the appellant, the concentration at issue in the present case acquired a Community dimension only on the conclusion of the second group of transactions, by which the appellant and Haniel acquired control of CVK. According to its reading of the judgment under appeal, the Court of First Instance acknowledged, in paragraph 304 of the judgment under appeal, that the first draft proposals would have resulted in the abandonment of joint control of CVK by the notifying parties. By contrast, the Court of First Instance failed to take into account the fact that that draft would also have had the result that the notified concentration ceased to exist, and only a concentration without a Community dimension would remain.
- 33 In reply to those arguments, the Commission argues that, by virtue of Regulation No 4064/89, its competence in relation to a concentration fell to be determined at the time at which that concentration should have been notified to it. Emphasising that it must accept or reject competence at the latest at the end of the first

examination of the notified concentration, it adds that, in the interest of sound administration, it is not possible for the Community dimension of a concentration to be under constant review throughout the course of the proceedings.

- 34 According to the Commission, the appellant misconstrues the function and the nature of the commitments which the parties can adopt. Those commitments could not deprive the Commission of the competence conferred on it by Regulation No 4064/89, but are intended to enable it to exercise its power to authorise, subject to conditions, the implementation of the notified concentration.

Findings of the Court

- 35 As is clear from recital 29 in its preamble and Article 21(1), Regulation No 4064/89 is based on the principle of a clear division of powers between the national and Community supervisory authorities in relation to concentrations (Case C-170/02 P *Schlüsselverlag J.S. Moser and Others v Commission* [2003] ECR I-9889, paragraph 32, and Case C-42/01 *Portugal v Commission* [2004] ECR I-6079, paragraph 50).
- 36 The regulation also contains provisions, including in particular Article 10(1) and (2), the purpose of which is to restrict, for reasons of legal certainty and in the interest of the undertakings concerned, the length of the proceedings for investigating transactions which are the responsibility of the Commission (*Schlüsselverlag J.S. Moser and Others*, paragraph 33, and *Portugal v Commission*, paragraph 51).

- 37 That demonstrates that the Community legislature intended to make a clear allocation between the interventions to be made by the national and by the Community authorities, and that it wished to ensure a control of mergers within deadlines compatible with both the requirements of sound administration and the requirements of the business world (*Schlüsselverlag J.S. Moser and Others*, paragraph 34, and *Portugal v Commission*, paragraph 53).
- 38 That concern for legal certainty implies that the authority having competence to examine a concentration must be able to be identified in a way which is foreseeable. That is the reason for which the Community legislature laid down, in Articles 1(2) and (3) and 5 of Regulation No 4064/89, precise and objective criteria which allow it to be determined whether a concentration has the economic size necessary for it to have a 'Community dimension' and, accordingly, to fall within the exclusive competence of the Commission.
- 39 The need for speed, which characterises the general scheme of Regulation No 4064/89 and which requires the Commission to comply with strict time-limits for the adoption of the final decision, failing which the operation is deemed compatible with the common market, also means that where the Commission has established, in relation to a particular concentration, its competence in the light of the criteria laid down under Articles 1(2) and (3) and 5 of the regulation, that competence cannot be challenged at any time or be in a state of constant flux.
- 40 As the Advocate General stated in point 48 of her Opinion, it goes without saying that the Commission loses its competence to examine a concentration where the undertakings concerned completely abandon the proposed concentration.

41 However, the position is otherwise where the parties do no more than propose partial amendments to the draft. Proposals of that kind could not have the effect of requiring the Commission to re-examine its competence, without allowing the undertakings concerned significantly to disturb the course of the proceedings and the effectiveness of the control which the legislature sought to put in place, by obliging the Commission to verify its competence on a regular basis to the detriment of the examination of the substance of the case.

42 That interpretation is supported by the wording of the second subparagraph of Article 8(2) of Regulation No 4064/89, which provides that '[the Commission] may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market'. As the Advocate General stated at point 52 of her Opinion, that wording clearly shows that the commitments proposed or adopted by undertakings are not only matters which the Commission must take into account in its examination of the substantive question, that is to say, that of the compatibility or incompatibility of the concentration with the common market, but also, conversely, that those commitments cannot strip the Commission of its competence, since that is a matter which will have been determined in the first phase of the proceedings.

43 It follows that the competence of the Commission to make findings in relation to a concentration must be established, as regards the whole of the proceedings, at a fixed time. Having regard to the importance of the obligation of notification in the system of control put in place by the Community legislature, that time must necessarily be closely related to the notification of the concentration.

44 In the present appeal, the appellant does not challenge the Commission's analysis, confirmed by the judgment under appeal, that there is only one concentration, comprising the first and second groups of transactions. Nor does it deny that, both on the date of conclusion of the two groups of transactions and on the date of the notification made at the Commission's request, that concentration had a Community dimension. Consequently, without it being necessary to give a ruling on the question whether the time to be taken for the purposes of determining the Commission's competence is the time at which the obligation to notify arose or the time at which the notification should have been made or even the time at which it was actually made, it is not a matter of dispute in the present case that the Commission had acquired competence to give a ruling on the concentration in question.

45 As regards the question whether, as the appellant claims, the first draft commitments which it submitted with Haniel could have an effect on the competence acquired in that manner, it must be pointed out first of all that the concentration had, in the present case, already been implemented. It should next be pointed out that, as is clear from the findings of the Court of First Instance at paragraph 295 of the contested judgment, which are unchallenged by the appellant, that draft provided that the cooperation agreement concluded between the appellant and Haniel was to be ended and that the shares they had acquired in three of the member undertakings of CVK were to be sold to an independent third party, that is to say, that the second group of transactions would not proceed. However, that draft provided that the pooling agreement and the amendment of CVK's articles of association, which formed the subject-matter of the first group of transactions, would be maintained. It follows that, for the purposes of the concentration which was the subject of the control proceedings initiated by the Commission, the draft in question comprised separate measures.

46 Accordingly, the Court of First Instance did not commit an error of law in holding, in paragraph 301 of the judgment under appeal, that the first draft commitments proposed by the appellant and Haniel did not change the concentration in such a way that it no longer existed.

47 Nor did the Court of First Instance commit an error of law in holding, in paragraphs 305 and 306 of that judgment, that in exercising the powers that were vested in it the Commission was entitled to take the view that the first draft commitments were not sufficient to resolve the competition problem which it had established.

48 The first ground of appeal must therefore be rejected as unfounded.

The second ground of appeal, alleging the incorrect interpretation and application of Article 8(2) of Regulation No 4064/89 and of the principle of proportionality

Arguments of the parties

49 The appellant argues that, in taking the view that the first draft commitments were insufficient, the Commission took no account of the fact that those commitments reduced the transaction to a concentration without a Community dimension which was no longer within its competence. It adds that, in holding that the Commission was not required to accept the first draft commitments, the Court of First Instance infringed the principle of proportionality. It also objects that the Court of First Instance failed to explain the reason for which the Commission could have come to a diametrically opposite conclusion from that of the Netherlands national competition authority, the NMa, as regards the anti-competitive effects of the first group of transactions.

- 50 The Commission states that these arguments are essentially no more than a reformulation of those put forward in support of the first ground. It denies that it acted disproportionately and submits that, in the absence of further precision, the argument relating to the differing assessments made by it and the NMa is inadmissible.

Findings of the Court

- 51 As regards, in the first place, the argument alleging a lack of competence on the Commission's part, it must be held that it represents a repetition of the arguments put forward under the first ground of appeal. Like the latter, it must accordingly be rejected as unfounded.
- 52 As regards, in the second place, the alleged infringement of the principle of proportionality, it is necessary to acknowledge that decisions taken by the Commission in proceedings for the control of concentrations must satisfy the requirements of the principle of proportionality, which is one of the general principles of Community law (see, inter alia, Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573, paragraph 144).
- 53 However, it must be pointed out that the substantive rules of Regulation No 4064/89, in particular Article 2, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature, and that, consequently, review by the Community judicature of the exercise of that discretion,

which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations (Joined Cases C-68/94 and C-30/95 *France and Others v Commission* [1998] ECR I-1375, paragraphs 223 and 224, and Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, paragraph 38).

54 In particular, as the Advocate General stated at point 73 of her Opinion, and contrary to what the appellant submits, it is necessary, when reviewing the proportionality of conditions or obligations which the Commission may, by virtue of Article 8(2) of Regulation No 4064/89, impose on the parties to a concentration, not to determine whether the concentration still has a Community dimension after those conditions or obligations have been complied with, but to be satisfied that those conditions and those obligations are proportionate to and would entirely eliminate the competition problem that has been identified.

55 Consequently, the Court of First Instance did not commit an error of law in holding, in paragraphs 304 and 305 of the judgment under appeal, that the Commission was not required to accept the first draft commitments since it considered that they were insufficient to resolve the competition problem it had identified.

56 As regards, in the third place, the differences between the assessment made by the NMa, on the one hand, and the Commission, on the other, of an allegedly identical situation, it must first of all be held that, having regard to the clear division of powers on which Regulation No 4064/89 is based, decisions taken by the national authorities cannot bind the Commission in proceedings for the control of concentrations.

57 It must also be pointed out that the NMa and the Commission gave their decisions, in their respective fields of competence, in the light of different criteria. While the NMa analysed the first group of transactions by having regard to the situation on the national market, the Commission assessed its compatibility with the common market. Accordingly, while the Court of First Instance had jurisdiction to review, within the limits noted in paragraph 53 of this judgment, the Commission's assessment, it was not under a duty to explain why the Commission reached a result that was different from that of the NMa.

58 It follows from the above considerations that the second ground of appeal must also be rejected as unfounded.

59 It follows that the appeal must be dismissed in its entirety.

Costs

60 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 118 of those Rules, 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 appellant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought to that effect by the Commission.

On those grounds, the Court (First Chamber) hereby:

- 1. Dismisses the appeal;**
- 2. Orders Cementbouw Handel & Industrie BV to pay the costs.**

[Signatures]