JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

4 February 2009 *

In Case T-145/06,

Omya AG, established in Oftringen (Switzerland), represented by C. Ahlborn, C. Berg, Solicitors, C. Pinto Correia, lawyer, and J. Flynn, QC,

applicant,

v

Commission of the European Communities, represented initially by V. Di Bucci, X. Lewis, R. Sauer, A. Whelan and F. Amato, and subsequently by V. Di Bucci, X Lewis, R. Sauer and A. Whelan, acting as Agents,

defendant,

concerning an application for the annulment of the Commission's decision of 8 March 2006, adopted pursuant to Article 11(3) of Council Regulation (EC) No 139/2004 of

* Language of the case: English.

20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1), and requesting the correction of the information communicated in the context of the examination of Case COMP/M.3796 (Omya/J.M. Huber PCC),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of I. Pelikánová (Rapporteur), President, K. Jürimäe and S. Soldevila Fragoso, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 22 April 2008,

gives the following

Judgment

Background to the dispute

1 On 18 January 2005, the applicant, Omya AG, a company which operates, in particular, on the markets supplying precipitated calcium carbonate ('PCC') and ground calcium

carbonate ('GCC'), which is used in particular to fill and coat paper, signed a contract under which it was to acquire certain PCC European production sites from J.M. Huber Corp. ('the notified concentration'). The transaction was notified to the Finnish competition authority, which on 4 April 2005 asked the Commission to examine it under Article 22(1) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1).

2 The Commission accepted jurisdiction and initiated the procedure for examining the notified concentration on 23 September 2005. In particular, it built up a database of PCC and GCC shipments made by the European Economic Area's main suppliers between 2002 and 2004 ('the shipment database'), which was to be used, in particular, to draw up an econometric study of the patterns of substitution between filler calcium carbonates ('the econometric study'). In that connection, the Commission asked the applicant on several occasions to provide it with certain information. On 1 December 2005, for example, by a request under Article 11(2) of Regulation No 139/2004, the Commission asked the applicant for clarification concerning its bidding and shipment data and the potential outlets for PCC. When the applicant failed to meet the request within the deadline stipulated, on 9 December 2005, pursuant to Article 11(3) of that regulation, the Commission adopted a decision relating to that information and suspending the assessment timetable pursuant to Article 10(4) thereof.

3 The applicant responded to the decision of 9 December 2005 by communications of 9 and 13 December 2005 and 3 January 2006 (together, 'the January data'). On receipt of those data, the Commission confirmed, by letter sent to the applicant on 12 January 2006, that the January data were complete and stated that the assessment timetable had been resumed from 4 January 2006 and would expire on 31 March 2006.

4 On 13 January 2006, the Commission informed the applicant that it intended to authorise the concentration without issuing a statement of objections. It also prepared a draft decision to that effect ('the draft clearance decision'), which it circulated within the Advisory Committee on concentrations between undertakings made up of representatives of the Member States ('the Advisory Committee'). At the same time, however, certain Member States, as well as some of the applicant's competitors, expressed to the Commission their concerns about the effects of the notified concentration on competition. As a result inter alia of those concerns, when the Advisory Committee met on 22 February 2006, the representatives of some Member States challenged the Commission's assessment.

5 By emails of 22 and 24 February and 2 March 2006, the Commission alerted the applicant to certain inconsistencies in the January data and asked for clarification of those data. On 3 March 2006, during a telephone conversation, it proposed to the applicant that the assessment timetable should be extended, by mutual agreement, by 20 working days pursuant to Article 10(3) of Regulation No 139/2004, and indicated that, if the applicant refused, the Commission could adopt a new decision under Article 11(3) of that regulation, suspending the assessment timetable.

6 By letter of 6 March 2006, the applicant refused to agree to an extension of the timetable.

7 By decision of 8 March 2006 adopted pursuant to Article 11(3) of Regulation No 139/2004 ('the contested decision'), the Commission stated that the information communicated on 3 January 2006 in response to the decision of 9 December 2005 was, at least in part, incorrect and that, consequently, the assessment timetable was suspended as of 8 December 2005 until it received the requisite complete and correct information. In that connection, the Commission asked the applicant to answer 4 general and 119 specific questions.

8 The applicant responded to the contested decision on 21 March 2006, submitting what was essentially a revised version of the shipment database ('the March data'). By letter of 30 March 2006, the Commission informed the applicant that the March data were complete, that it was in the process of verifying that they were correct and that the assessment timetable had been resumed. By letter of 10 May 2006, the Commission confirmed that the March data were correct.

9 In the meantime, on 2 May 2006, the Commission issued to the applicant a statement of objections in which it provisionally concluded that the notified concentration was incompatible with the common market.

10 Finally, by decision of 19 July 2006 ('the decision on the concentration'), the Commission declared the notified concentration compatible with the common market, subject to certain conditions and obligations.

Procedure and forms of order sought by the parties

11 By application lodged at the Registry of the Court of First Instance on 18 May 2006, the applicant brought the present action.

12 By separate document lodged at the Court Registry on the same date, the applicant requested that the case be dealt with under the expedited procedure, pursuant to Article 76a of the Rules of Procedure of the Court of First Instance. That request was refused by decision of the Fifth Chamber of the Court of First Instance of 19 June 2006.

13 The defence was lodged on 8 August 2006, the reply on 31 October 2006 and the rejoinder on 12 February 2007.

14 By document lodged at the Court Registry on 31 August 2006, Imerys SA sought leave to intervene in these proceedings in support of the Commission.

15 By decision of the President of the Court of First Instance of 27 October 2006, the case was reassigned to the Second Chamber of the Court of First Instance.

16 By order of 22 March 2007, the President of the Second Chamber of the Court of First Instance granted Imerys leave to intervene. However, by letter lodged at the Court Registry on 23 April 2007, Imerys informed the Court that it was withdrawing its intervention. Consequently, by order of 12 July 2007, the President of the Second Chamber of the Court of First Instance removed Imerys from the register as an intervener.

17 On 29 January 2008, the Second Chamber of the Court of First Instance decided to open the oral procedure without any prior measures of inquiry. It also decided to ask the Commission to provide certain documents and to request the applicant to submit its observations on those documents and to reply to a question. The parties replied within the periods stipulated by the Court, the Commission moreover having submitted additional observations on the applicant's observations following a request from the Court of First Instance to that effect.

18 The parties submitted oral arguments and gave their answers to the questions put by the Court at the hearing of 22 April 2008.

19 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs;

— adjudicate on the effects of the annulment of the contested decision.

20 The Commission contends that the Court should:

— declare the action manifestly inadmissible in so far as it seeks a declaration concerning the effects of any annulment of the contested decision;

— dismiss the application as to the remainder;

— order the applicant to pay the costs.

Law

21 The applicant relies on four pleas in law: (i) failure to comply with the conditions for adopting a decision under Article 11(3) of Regulation No 139/2004 as well as infringement of the principle of proportionality, (ii) infringement of the principle of the need to act within a reasonable time, (iii) misuse of powers and (iv) infringement of the principle of legitimate expectation. The applicant also requests that certain measures of organisation of procedure be ordered.

22 The Commission contends that the request that the Court of First Instance adjudicate on the effects of any annulment of the contested decision is inadmissible. It also takes the view that the pleas relied on by the applicant are not well founded and disputes the need for the measures of organisation of procedure requested.

Admissibility of the request concerning the effects of any annulment of the contested decision

23 It must be observed that, as the Commission asserts, by requesting the Court of First Instance to adjudicate on the effects of the annulment of the contested decision, the applicant seeks to obtain a declaration concerning the effects of this judgment, which would also amount to a direction issued to the Commission as regards the enforcement of that judgment. Since the Court of First Instance has no jurisdiction when exercising

judicial review of legality under Article 230 EC to issue declaratory judgments (see, to that effect, the order in Case C-224/03 *Italy* v *Commission* [2003] ECR I-14751, paragraphs 20 to 22) or directions, even where they concern the manner in which its judgments are to be complied with (order of the President of the Court in Joined Cases C-199/94 P and C-200/94 P *Pevasa and Inpesca* v *Commission* [1995] ECR I-3709, paragraph 24), the applicant's request must be declared manifestly inadmissible.

The first plea: infringement of Article 11 of Regulation No 139/2004

24 Under the first plea, the parties deal, by way of a preliminary point, with the conditions required for the Commission to be entitled to request, by a decision adopted under Article 11(3) of Regulation No 139/2004, the correction of information communicated by a notifying party which proves to be incorrect. The applicant then submits that those conditions were not fulfilled in the present case, given that the corrections requested in the contested decision were not necessary for the assessment of the concentration (first part) and that the January data were materially correct (second part).

Initial observations on the need for information and its correction

— Arguments of the parties

25 According to the applicant, the Commission may ask for errors identified in the information provided by a party to a concentration to be corrected to the extent that

both the information to be corrected and its correction are necessary. The applicant states in that connection, first, that it is not sufficient that the information concerned is merely potentially useful and, second, that correction is necessary only if the errors in question are material, that is to say if there is an appreciable risk/likelihood that they will have a significant effect on the appraisal of the concentration concerned.

26 Given the consequences of a suspension of the assessment timetable and the requirement for speed which characterises the procedure laid down in Regulation No 139/2004, the abovementioned conditions must also be interpreted narrowly. Lastly, the applicant maintains that, whilst in principle it is for the Commission to determine what information is necessary, according essentially to the circumstances of the individual case, the Commission is none the less subject to the principle of proportionality, which requires that the longer the suspension, the more material the reasons giving rise to that suspension must be.

27 The Commission submits first of all that it may adopt a decision under Article 11(3) of Regulation No 139/2004 as soon as it considers that it does not have all the information needed to decide on the compatibility of the concentration in question with the common market. That is the case in particular if there is a risk that the errors identified in the information provided by a party could have an impact on the Commission's assessment. Next, it claims that the question whether the information requested is necessary is an objective factor, in respect of which the Commission enjoys wide discretion and which must be assessed according to the circumstances of the case and the potential usefulness of the information in question. Lastly, it is also necessary to take account of the fact that the Commission must carry out its examination with great care and rely on complete and correct information.

— Findings of the Court

28 It follows from the case-law that the Commission may exercise the powers conferred on it by Article 11 of Regulation No 139/2004 only to the extent that it considers that it is not in possession of all the information necessary to enable it to decide on the compatibility of the concentration concerned with the common market (see, regarding the analogous provisions of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1), Case T-290/94 *Kaysersberg* v *Commission* [1997] ECR II-2137, paragraph 145).

29 In that connection, it must be recalled that, for the purposes of adopting a decision on a concentration, the Commission must examine, pursuant in particular to Article 2 of Regulation No 139/2004, the effects of the concentration concerned on all the markets for which there is a risk that effective competition would be significantly impeded in the common market or in a substantial part of it.

30 In addition, the fact that the requirement that information must be necessary is to be interpreted by reference to the decision on the compatibility of the concentration with the common market implies that the need for the information covered by a request under Article 11 of Regulation No 139/2004 must be assessed by reference to the view that the Commission could reasonably have held, at the time the request in question was made, of the extent of the information necessary to examine the concentration. Accordingly, that assessment cannot be based on the actual need for the information in the subsequent procedure before the Commission; that need is dependent on many factors and cannot therefore be determined with certainty at the time the request for information is made.

31 As regards the specific case of the need to correct information already communicated which proves to be incorrect, the Court considers that the criterion of the material nature of the errors identified, on which the parties moreover agree, is appropriate in the light of the wording and scheme of Regulation No 139/2004 and in particular Articles 2 and 11 thereof. Accordingly, it must be held that the Commission is entitled to request the correction of information communicated by a party which is identified as erroneous if there is a risk that the errors identified could have a significant impact on its assessment of whether the concentration at issue is compatible with the common market.

32 As regards the review of the application of the abovementioned criteria, it must be stated, first, that their application involves complex economic assessments. Accordingly, the Commission has a discretion in this respect and any review by the Community judicature is necessarily limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers. However, that does not mean that the Community judicature must refrain from reviewing the Commission's interpretation of information of an economic nature (Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraphs 38 and 39) and, in particular, its assessment of the need for the information requested pursuant to Article 11 of Regulation No 139/2004 and the material nature of the errors by which that information is allegedly affected.

33 Second, contrary to what the applicant submits, it is not necessary to interpret the abovementioned criteria strictly. The requirement for speed which characterises the general scheme of Regulation No 139/2004 (see, as regards Regulation No 4064/89, Case T-221/95 *Endemol* v *Commission* [1999] ECR II-1299, paragraph 84) must be reconciled with the objective of effective review of the compatibility of concentrations with the common market, which the Commission must carry out with great care (*Commission* v *Tetra Laval*, paragraph 42) and which requires that it obtains complete and correct information.

34 Lastly, it is true that the exercise by the Commission of the powers conferred on it by Article 11 of Regulation No 139/2004 is subject to compliance with the principle of proportionality, which requires measures adopted by Community institutions not to exceed the limits of what is appropriate and necessary in order to attain the objectives pursued (Case T-177/04 *easyJet* v *Commission* [2006] ECR II-1931, paragraph 133). In particular, it is necessary that an obligation imposed on an undertaking to supply an item of information should not constitute a burden on that undertaking which is disproportionate to the requirements of the inquiry (see, by analogy, Case T-39/90 *SEP* v *Commission* [1991] ECR II-1497, paragraph 51). However, since the period of the suspension of the time-limits set in Article 10 of Regulation No 139/2004 resulting from the adoption of a decision under Article 11 of that regulation depends on the date on which the necessary information is communicated, the Commission does not infringe the principle of proportionality by suspending the procedure until such information has been communicated to it.

The first part: the information whose correction was requested was not necessary

— Arguments of the parties

35 The applicant claims first that the information whose correction was requested by the contested decision was not necessary, when that decision was adopted, to enable the Commission to decide whether the notified concentration was compatible with the common market, since it was irrelevant for the purposes relied on by the Commission.

36 Thus, given that the econometric study related to the filler products and was based solely on the data for 2004, the data on the coating products and the data pertaining to 2002 and 2003 were irrelevant. Accordingly, the fact that the Commission asked that the data concerning the years 2002 and 2003 be corrected was an act of bad faith which calls into question the necessity of the contested decision with regard to the other data whose correction was requested. That fact also raises the question as to whether the March data were actually used to rerun the econometric study in due time. On account of the procedural rules provided for by Regulation No 139/2004, any consequences of the communication of the March data on the assessment of the concentration could have been raised at the latest in the statement of objections. The Commission only established that those data had been used to rerun the econometric study after the statement of objections had been issued, which confirms that the March data were not necessary for its analysis.

37 Next, the applicant notes that the statement of objections, the drafting of which commenced at the time the contested decision was adopted and which is therefore particularly relevant for identifying the information that the Commission considered necessary at that time for its examination, related to coating products only. When the decision of 9 December 2005 was adopted, the Commission's examination did not focus on the coating products sector, but instead on the filler products sector. Accordingly, the information referred to in the contested decision, a decision based on the failure to comply with the decision of 9 December 2005, was not relevant to the coating products sector and, thus, to the statement of objections. According to the applicant, that fact is borne out by the very limited and, in any event, unnecessary use of the shipment database in the statement of objections.

38 The applicant also disputes that the information referred to in the contested decision was used to define the relevant product markets and geographical markets.

39 The applicant submits lastly that the documents submitted by the Commission, relating to the actual use to which the March data was put, do not prove that the information referred to in the contested decision was necessary for the adoption of the decision on the concentration. First, it is apparent from those documents that those data were of no use as regards the assessment of price levels. Second, the documents at issue are not conclusive as regards the necessity of the information concerned for calculating market shares. Third, the Commission has not established that it carried out, either before or after the adoption of the contested decision, an appraisal of the need for the information whose correction it requested.

40 The Commission observes that it used the shipment database not only to conduct the econometric study but also to define the relevant markets and, more generally, to assess the concentration in terms of the impact on competition. It states that the econometric study was in fact rerun on the basis of the March data, which is supported by the documents provided at the Court's request. It accepts that it focused on the coating products sector from the second half of February 2006, although the principal reason for that change was the fact that it learnt at that time that J.M. Huber Corp. was in the process of developing a product which would have enabled it to penetrate that market. That does not however mean that it had totally abandoned the inquiry concerning filler products.

— Findings of the Court

41 As a preliminary point, it should be observed that a significant part of the applicant's arguments is based on the claim that, when the contested decision was adopted, the Commission had completed, or had not embarked on, the examination of certain questions, had adopted certain preliminary conclusions or had focused its attention on certain areas. As was stated at paragraph 30 above, such circumstances are irrelevant,

since the need for the information referred to in the contested decision must be assessed by reference to the view that the Commission could reasonably have held, at the time that that decision was adopted, of the extent of the information necessary for the purposes of adopting the decision on the concentration.

42 Next, it must be noted that the shipment database concerned deliveries on the markets of filler and coating calcium carbonates. It is not disputed by the applicant that those markets were affected or could be affected by the notified concentration. Accordingly, it follows from paragraph 29 above that the information whose correction was requested in the contested decision, which was part of the shipment database, could in principle be considered necessary for the purposes of adopting the decision on the concentration.

43 Similarly, it should be recalled that the shipment database contained, for each of the deliveries concerned, data such as the ex-works departure point, the identity and location of the client, the distance and mode of transport, the type of product delivered, its quantity and its price. Such data are relevant for examining whether a concentration is compatible with the common market, since they enable the Commission to define the relevant markets and to analyse the competitive situation on each of them.

44 However, the applicant also criticises the Commission for having requested that data concerning 2002 and 2003 be corrected, even though the econometric study was based solely on data concerning 2004 and the other uses of the data referred to by the Commission are not linked to any specific period of time. It must none the less be observed in that connection that, contrary to what the applicant claims, factors relevant

to the definition of the geographic and product markets such as, for example, the location of suppliers and clients, modes of transport or the range of available products, have a tendency to evolve over time. Accordingly, and in the absence of more specific information showing that a shorter reference period would have been sufficient, it does not appear that the Commission was wrong to take the view that the data relating to 2002 and 2003 were necessary for the purposes of adopting the decision on the concentration.

45 Regarding the claims based on the statement of objections and on the documents relating to the actual use of the March data submitted by the Commission, it must be noted that those elements postdate the contested decision. In that connection, it must be observed at the outset that, as the Commission rightly asserts, whilst the fact that information covered by a request under Article 11 of Regulation No 139/2004 was subsequently used may indicate that it was necessary, the fact that it was not used does not amount to evidence to the contrary, for the reason set out in paragraph 30 above.

46 Concerning the statement of objections, it must moreover be observed that, contrary to what the applicant submits, that statement does not make it possible to determine exhaustively the information that the Commission considered to be necessary when the contested decision was adopted. First, even if the drafting of the statement of objections apparently started at the time that the contested decision was adopted, the fact remains that nearly two months elapsed before that statement was issued. Second, the statement of objections records only the Commission's assessments which led it to identify potential competition problems and thus omits, in principle, the markets on which no risk was identified. Accordingly, its subject-matter is considerably more limited than that of the examination carried out an earlier stage by the Commission.

47 Regarding the other arguments based on the documents relating to the actual use of the March data, it must be observed that the applicant merely pleads that the Commission has not proved that the information referred to in the contested decision was necessary for the adoption of the decision on the concentration. Since the applicant has the burden of proving the merits of the pleas on which it relies and, accordingly, the lack of need for the information concerned, those arguments must be rejected as unsubstantiated.

48 Lastly, as regards the question whether the econometric study was rerun before the statement of objections was issued, the Commission submitted to the Court a screenshot showing that the various computer files relevant to the assessment of the concentration were modified during the period April to August 2006. It is true, as the applicant asserts, that most of the files display a modification date subsequent to the date that the statement of objections was issued. However, the Court finds that, as the Commission claimed, the dates in question are the dates on which the relevant files were last used, and that those files had been worked on regularly during the examination of the notified concentration and in particular before the statement of objections was issued. The applicant, which bears the burden of proof, as was just observed, has adduced no evidence to rebut that claim.

49 In view of the foregoing, it must be held that it has not been established that the information whose correction was requested in the contested decision could not be considered by the Commission, when the request for information was made, to be necessary within the meaning of Article 11 of Regulation No 139/2004. The first part of the first plea must therefore be rejected.

50 As regards the applicant's claim that the Commission acted in bad faith by requesting that data concerning 2002 and 2003 be corrected, that claim relates to the reasons why

the Commission adopted the contested decision and is therefore in fact indissociable from the applicant's plea alleging misuse of powers. It is not therefore relevant in the context of this plea.

The second part: the January data were materially correct

— Arguments of the parties

51 The applicant claims that the January data were materially correct and it was not, therefore, necessary to ask for them to be corrected.

52 In order to substantiate its claim, it first submits a series of arguments based on the statistical analysis of the January data. It observes that, while the January data contained a number of errors, that is something that happens in the field of statistics, and the March data are probably not entirely correct either. It is neither possible, necessary nor common to eliminate all errors affecting statistical data, given that there are methods which make it possible both to filter out discrepant data from a set of data or to predict their impact and to verify the reliability of the relevant set of data. The applicant submits that, in the present case, the Commission used such methods as soon as it received the January data, despite its claims that it had merely proceeded on the assumption that those data were correct.

53 In order to assess the impact of the errors to which the contested decision refers, the applicant asked LECG Consulting to submit the January data to statistical tests of the kind which the Commission would have conducted on receipt of those data. According to a first report, annexed to the application ('the first LECG report'), the number of incorrect data was not unusually high and a comparison between the January data and the January data with the potentially inconsistent or incorrect values identified by the Commission filtered out ('the amended data') does not reveal material differences as regards the variables which the Commission used when drafting the statement of objections and in the general analysis of the relevant markets. Similarly, it is unlikely that the errors concerned had a significant influence on the results of the econometric study.

54 According to another LECG Consulting report, which was drawn up in response to the defence and annexed to the reply ('the second LECG report'), the hypothetical prices calculated in the context of the econometric study did not differ materially in the January data, the amended data and the March data. Accordingly, in the applicant's submission, the January data were materially correct and the Commission could and should have realised that.

55 Moreover, in its observations on the documents provided by the Commission, the applicant refers to the calculations carried out by LECG Consulting according to which the January data were materially correct in respect of the determination of the maximum reasonable delivery distance.

56 Second, the applicant relies on certain circumstances which show in its view that the Commission did indeed know, at the time it adopted the contested decision, that the January data were materially correct. The applicant submits in this respect, first, that the Commission's argument that it did not discover the errors referred to in the contested decision until the second half of February is highly implausible, given in

particular that, in January 2006, the Commission concluded that the concentration did not pose any concerns in terms of competition and was prepared to authorise it unconditionally. Such a conclusion could in fact have been reached only after verifying the January data, in the course of which errors would have been identified and their impact assessed. Moreover, the relatively limited number of the applicant's shipments taken into account in the econometric study and the fact that a member of the Commission team responsible for the case-file confirmed that he had removed discrepant values imply that such verifications had taken place and that, consequently, as early as January, the Commission was apprised of a large number of errors which it claims not to have uncovered until later.

57 The applicant further observes, first, that the issues which, according to the Commission, justified a further review of the accuracy of the January data had already been considered by the Commission previously. Second, it is apparent from the first and second LECG reports that when the contested decision was adopted, the Commission was, in any event, in a position to check whether the errors identified had an impact on its analysis. Third, the Commission has failed to establish that it had carried out such checks before it adopted the contested decision, which implies that it was not in fact concerned about the impact of the errors identified on the examination of the notified concentration. Fourth, the fact that the Commission was aware of the accuracy of the January data is demonstrated by the position which it adopted in the statement of objections and by the fact that it had neither rerun the econometric study nor completed the procedure for verifying the accuracy of the March data before issuing that statement. The applicant observes, fifth and lastly, that, in its submission, the Commission ought to have known that it would use the data for 2004 exclusively.

58 The applicant submits lastly that, bearing in mind the negligible use made of the shipment database in the statement of objections and the length of the suspension that resulted from the contested decision, that suspension was manifestly disproportionate.

59 The Commission contends that it could not rule out, when it adopted the contested decision, that the errors in the January data might affect its analysis of the notified concentration and, consequently, that those data were not materially correct. It observes that the applicant's first set of arguments fails to take account of the different purposes of the shipment database and that the two LECG reports are not capable of demonstrating that the errors identified had no impact. As regards the second set of arguments, the Commission explains that, following the communication of the January data, it carried out certain standard checks, whose extent was however limited. Consequently, the errors referred to in the contested decision were not identified until the additional checks were carried out following the meeting of the Advisory Committee of 22 February 2006, during which some Member States expressed doubts concerning the reliability of the econometric study. The Commission adds that, at the beginning of May, it completed several operations at once, including the verification of the March data and the drafting of the statement of objections, which explains why it only confirmed the accuracy of those data some days after that statement had been issued.

— Findings of the Court

60 As regards the arguments based on the statistical analysis of the January data, it must be recalled, as a preliminary point, that, for the reasons set out in paragraphs 30 and 31 above, the need for the corrections requested in the contested decision must be assessed by reference to the view that the Commission could reasonably have held, at the time that decision was adopted, of the material nature of the errors identified in the January data. Accordingly, the analyses produced by the applicant can only be taken into consideration to the extent that the Commission could have carried them out at the time it adopted the contested decision. That means in particular that the comparisons carried out in relation to the March data are irrelevant, since those data did not exist at the time the contested decision was adopted.

61 Next, it is necessary to verify, in accordance with the criterion of material correctness set out in paragraph 31 above, whether the various analyses provided by the applicant make it possible to show that the errors identified by the Commission were not capable of having a significant impact on its assessment of whether the notified concentration is compatible with the common market.

62 In that connection, it must be observed that, although the first LECG report concludes that the relevant average values calculated from the January data and the cropped data are not materially different, table 2 of that report indicates appreciable differences between those two sets of data as regards the upper value of the ratio of transport costs to ex works prices (a difference of 10 percentage points), the average distance shipped by truck (a difference of 13%) and the average distance shipped by sea vessel (a difference of 28%). Even if, in accordance with the explanations given by the LECG Consulting representative at the hearing, those differences are not relevant, from an economic point of view, to the findings in the statement of objections, as table 3 of that report suggests, it should nevertheless be noted that no comparable analysis showing that they were not relevant was submitted so far as concerns the econometric study, even though LECG Consulting observes in its first report that prices, shipment costs and delivery distances are, in its opinion, the key variables of that study. In the absence of such an analysis, it is impossible to determine whether the errors identified by the Commission were or were not capable of significantly affecting the results of the econometric study and, therefore, the Commission's examination of the notified concentration.

63 It should be added, in respect of the first LECG report, that, as the Commission asserts, the conclusion that the errors identified have no impact on the essential variables of the econometric study is based on the analysis of the average values, calculated from the aggregated data. The Commission claims, without being contradicted on that point by the applicant, that the abovementioned study was undertaken relative to the various production sites, which implies that an analysis of the aggregated data does not make it possible to determine the possible impact of the errors identified.

64 The second LECG report, which attempts to rebut that latter argument, in particular by conducting a more detailed examination of the data, does not however contain an analysis of the relevance of the appreciable differences observed between the prices, which are in the range of 3% to 4% in respect of the average prices and exceed 10% for certain production sites and certain products. Although, at the hearing, the LECG representative claimed that the difference between the average prices was irrelevant in view of the level of the shipment costs of the products at issue, the fact remains that no specific explanation has been given regarding the more significant differences observed in respect of certain production sites. Accordingly, the second LECG report does not establish that the errors identified in the January data were not capable of having a significant influence on the prices set out in the econometric study and, therefore, on the assessment of whether the notified concentration was compatible with the common market.

65 So far as concerns the arguments submitted in the observations on the documents provided by the Commission, the Court observes that the applicant refers merely to the analysis of the maximum reasonable delivery distance for each mode of transport, which is a theoretical distance calculated on the basis of all the deliveries effected by the relevant mode of transport. Although that distance was used at the stage when the relevant geographical markets were determined, it is however apparent from the information in the case-file that it was subsequently compared with the actual maximum delivery distances from each of the production sites concerned, those distances being adopted for the sites for which they were higher. Accordingly, an analysis of the aggregated data which does not differentiate between the various sites is insufficient in order to examine whether the errors identified were capable of having a significant influence on the definition of the geographical markets and, therefore, on the assessment of the notified concentration.

66 It is apparent from the foregoing that the analyses submitted by the applicant do not lead to the conclusion that the January data were materially correct. It is therefore necessary to examine the second set of arguments, according to which the Commission did indeed know that that was the case.

67 In that connection, the Court notes that the applicant's line of argument is essentially based on the alleged implausibility of the Commission's claim that the errors referred to in the contested decision were not identified on receipt of the January data, but only in the second half of February, following the meeting of the Advisory Committee of 22 February 2006. The Court will therefore examine first the evidence submitted by the Commission to support that claim.

68 As regards in that respect, first, the verifications carried out on receipt of the January data, it should be observed that, as the Commission's examination must be conducted within relatively strict time-limits and the parties to the concentration are required to communicate to the Commission correct and complete information, the merger control procedure is necessarily based on trust to a large extent, since the Commission cannot be required to verify immediately and in detail the accuracy of all the information conveyed by those parties.

69 In this respect, the internal email sent on 6 March 2006 by one of the members of the Commission team responsible for the case-file, which was submitted by the Commission in annex to its response at the Court's request, states, concerning the errors referred to in the contested decision, that '[t]he tests applied before on the [shipment] database [were] more global … and not focusing at the production plant-paper mill pair'. He continues by stating that this 'explains why all these points have not been pointed out before'.

70 That item of evidence, whose relevance was not challenged by the applicant, establishes to the requisite legal standard that the verifications carried out by the Commission following the communication of the January data were limited and did not therefore make it possible to identify the errors referred to in the contested decision. In that respect, it should further be observed that the fact that only limited verifications were carried out means that the claim that those errors could have been identified by standardised statistical verification tools is irrelevant.

71 Second, as regards the conduct and the consequences of the meeting of the Advisory Committee of 22 February 2006, it is apparent from the statements made by the participants at that meeting, which were submitted in annex to the Commission's response at the Court's request, that both the reliability of the econometric study and the data used in its compilation were discussed on that occasion. Even if it appears that the accuracy of the data concerned was not considered in detail by the various interveners, as the applicant maintains, it is none the less logical that such a discussion would lead the Commission to verify the reliability of the study and of the data used, given in particular its intention to submit a new draft decision to that committee in order to obtain approval.

72 It should be further noted in this respect that the Commission's internal email sent on 22 February 2006 concerning the allocation of tasks in the preparation of the modifications to the draft clearance decision following the meeting of the Advisory Committee, which is annexed to the abovementioned response of the Commission, states, regarding the econometric study: 'Robustness check + sensitivity analysis'. The Court considers that that reference must be interpreted as indicating that an additional verification of the econometric study and the data used in its compilation had to be carried out, rather than, as the applicant suggested at the hearing, as seeking merely that the verifications carried out previously be described in more detail in the draft clearance decision. The email in question does not merely describe specific modifications, but also seeks to define new tasks to be completed in the context of the examination.

73 Thus, the documents communicated by the Commission also support its claims that the results of the meeting of the Advisory Committee of 22 February 2006 prompted it to verify once more the accuracy of the January data. Accordingly, the Court finds that the Commission's argument that the errors referred to in the contested decision were discovered at the time of those in-depth verifications, and not at an earlier stage, is established to the requisite legal standard.

74 Further, the circumstances relied on by the applicant are not capable of rebutting that finding. Thus, first, the applicant itself conceded at the hearing that, even if the issues raised at the meeting of the Advisory Committee of 22 February 2006, and in particular the specific situation on the Finnish market, had been considered previously, they had been considered more superficially, which implies that the more detailed additional verifications carried out after the abovementioned meeting could lead to the discovery of the errors concerned.

75 Second, since it was held at paragraph 66 above that the applicant has not demonstrated that the January data were materially correct, there is no factual basis for the argument that the Commission could have verified at the time that it adopted the contested decision that the errors identified in those data were not material.

76 Third, the email of 5 March 2006, submitted by the Commission in annex to its response at the Court's request, mentions that 'serious inconsistencies' were identified in the January data, which implies that the Commission had carried out an analysis of the potential impact of the errors on its examination. Accordingly, the applicant's claim to the contrary, which is not substantiated by any factual evidence, must be rejected.

77 Fourth, for the reasons explained in paragraphs 45 and 46 above, the statement of objections is not a decisive factor in the assessment of the Commission's position as regards the accuracy of the information used in its examination of the notified concentration. Similarly, the Court found in paragraph 48 above that the applicant has not rebutted the Commission's claim that the econometric study had been rerun before the statement of objections was issued. As regards the fact that the accuracy of the March data was confirmed only after that document had been issued, the Commission's argument based on the simultaneous completion of several tasks during the relevant period has not been called into question by the applicant.

78 Fifth, since it has been concluded in paragraph 44 above that the Commission could reasonably request that data spanning several years be communicated, the argument that it knew that only the data concerning 2004 were pertinent is irrelevant.

79 Lastly, it must be stated that, in view of the observations set out in paragraph 34 above, the argument alleging infringement of the principle of proportionality cannot succeed.

80 In view of all the foregoing, the Court finds that it has not been established that the Commission infringed Article 11 of Regulation No 139/2004 in considering that the January data were not materially correct and in requesting that they be corrected. The second part must therefore be rejected, as must the first plea in its entirety.

The second plea: the Commission infringed the principle of the need to act within a reasonable time

Arguments of the parties

81 The applicant submits that the contested decision was not adopted within a reasonable time, given that the Commission was aware of the errors in question from the time of the first verifications carried out during the first half of January 2006. Accordingly, the Commission caused the applicant significant financial harm and affected the exercise of its rights of defence. In addition, the late adoption of the contested decision indicates

the real motive of the Commission, which was to gain time in order to be able to continue its examination, even though the time-limit provided for to that end had expired.

82 First, the Commission submits that any infringement of the principle of the need to act within reasonable time would not justify the annulment of the contested decision, since the applicant has failed to establish an infringement of its rights of defence stemming from that decision. Second, the Commission maintains that, in the circumstances of the present case, it acted without undue delay.

Findings of the Court

83 The argument based on the harm caused to the applicant is misplaced in the context of this case, which concerns exclusively the annulment of the contested decision and thus only the review of its lawfulness.

84 Similarly, although compliance with a reasonable time-limit in the conduct of administrative procedures relating to competition policy constitutes a general principle of Community law whose observance the Community judicature ensures, its infringement can, however, justify the annulment of a decision only in so far as it also constituted an infringement of the rights of defence of the undertaking concerned (Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* (‘*PVC II*’) [1999] ECR II-931, paragraphs 120 to 122). In the present case, the applicant merely submits a brief allegation to that effect without adducing any specific evidence to substantiate it.

85 The relevance of the period after which the contested decision was adopted as evidence of a misuse of powers will be examined in the context of the third plea.

86 Accordingly, the present plea must be rejected.

The third plea: misuse of powers

Arguments of the parties

87 By way of preliminary point, the applicant submits that, contrary to what the Commission claims, this plea does not become irrelevant as a result of the rejection of the first plea.

88 As regards the substance, the applicant argues that the Commission has misused its powers in so far as it adopted the contested decision not in order to pursue the objective under Regulation No 139/2004 but in order to secure an extension of the assessment timetable laid down by that regulation to enable it to consider the additional issues raised both by certain Member States and some of the applicant's competitors in February and March 2006. Indeed, the original assessment timetable, which was due to expire on 31 March 2006, would not have allowed the Commission to complete its analysis and, possibly, to issue a statement of objections.

89 First, the applicant claims that it is for that reason that the Commission stated, during the telephone conversation on 3 March 2006, that a number of additional matters of concern had to be dealt with and proposed a voluntary extension of the assessment timetable of 20 working days. In response to the doubts voiced by the applicant's lawyers, the Commission then mentioned, by way of threat, the possibility of adopting a decision under Article 11(3) of Regulation No 139/2004 in relation to the January data, if it proved impossible to reach consensual solution. In that respect, the emails sent by the Commission's services on 22, 24 February and 2 March 2006, raising a number of issues regarding the accuracy of the January data, were sent solely to prepare the ground for the contested decision.

90 The applicant states in this respect that, contrary to what the Commission claims, such an approach cannot be described as consensual, given in particular that (i) it is apparent from the internal email of 5 March 2006, produced in annex to the Commission's response at the Court's request, that the offer of an alternative to the applicant was motivated by the desire to reduce the risk of legal action, and not by the desire to limit the impact of the discovery of the errors on the assessment timetable and (ii) when it adopted decisions under Article 11(3) of Regulation No 139/2004 on 11 October, 9, 23 November and 9 December 2005, the Commission never offered the applicant an alternative.

91 Second, the fact that the Commission called into question the accuracy of the January data is explained by the fact that its investigation was taking a new direction, given that it had expressed no doubts concerning those data prior to the intervention of certain Member States and certain undertakings. Initially, namely until the second half of February 2006, the Commission focused on the filler calcium carbonates market and the econometric study was an essential element of the analysis of that market, contrary to the Commission's claims that it is only an additional tool. By contrast, subsequently, following the meeting of the Advisory Committee of 22 February 2006, the Commission focused on examining the arguments raised by certain Member States and the applicant's competitors relating to the situation on the coating product markets, in particular as regards the Finnish market.

92 Third, the applicant adds that review of the notified concentration in the light of the corrected information was not necessary, given that the Commission's examination was taking a new direction, and that such review was not indeed carried out. At the time the statement of objections was issued, the Commission had not completed its checks on the March data, and it has not been established that the Commission used those data to rerun the econometric study in due time. The applicant goes on to state that, had the corrections to the January data been capable of affecting the results of the Commission's analysis, it would have stated this in the statement of objections.

93 Fourth, the applicant reiterates that, in its submission, the January data were materially correct, and adds in this respect that the insignificant nature of some of the questions raised in the contested decision and their lack of relevance show that the adoption of that decision was motivated by the concern to obtain an extension of the assessment timetable. In addition, the Commission was aware of the accuracy of the January data, as is clear from the letter of 12 January 2006 — because it intended to authorise the concentration unconditionally in January 2006 — and from the preparation and circulation of the draft clearance decision.

94 Fifth, it is apparent from the internal email of 6 March 2006, produced in annex to the Commission's response at the Court's request, that one of the members of the Commission team responsible for the case-file systematically looked for the largest number of errors possible in the January data, with a view to the adoption of a decision under Article 11(3) of Regulation No 139/2004, without considering their potential impact. The applicant reiterates in that respect the argument that the Commission has failed to establish that it had analysed the significance of the errors identified before the contested decision was adopted. On the contrary, it is apparent from the email of 5 March 2006 that the Commission had begun to draft the contested decision before such an analysis had been carried out. Those circumstances demonstrate that the Commission was not actually concerned about the impact of the errors identified.

95 Sixth, the Commission did not challenge the content of the applicant's letter of 6 March 2006, in which it stated that it was facing an unlawful choice between an extension by mutual agreement of the assessment timetable and a decision suspending it.

96 Seventh, the similar decisions taken by the Commission when assessing the notified concentration had been made a few days following receipt of the information in question, whereas two months elapsed between the receipt of the January data and the contested decision.

97 The Commission states that this plea is based on the assumption that the information requested by the contested decision was not necessary for the purpose of adopting the decision on the concentration. Consequently, rejection of the first plea would entail rejection of the second. As regards the substance, the Commission maintains that the applicant has failed to submit objective, relevant and consistent evidence to support its allegation of a misuse of power but merely put forward inferences incorrectly drawn from a number of circumstances.

Findings of the Court

98 As a preliminary point, it must be observed that the rejection of the first plea of this action results from the fact that the applicant has failed to establish to the requisite legal standard that the information requested by the contested decision was not necessary within the meaning of Article 11 of Regulation No 139/2004. However, the absence of proof that the rules in force were infringed does not affect the possibility of a misuse of powers by the administrative authority. Accordingly, it is still necessary to examine this plea, even though the first plea has been rejected.

99 It must be borne in mind, next, that the concept of misuse of powers refers to cases where an administrative authority has used its powers for a purpose other than that for which they were conferred on it. A decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken for such a purpose. Where more than one aim is pursued, even if the grounds of a decision include, in addition to proper grounds, an improper one, that would not make the decision invalid for misuse of powers, since it does not nullify the main aim (see Case T-87/05 *EDP* v *Commission* [2005] ECR II-3745, paragraph 87, and the case-law cited).

100 It is therefore necessary to ascertain whether the factors relied on by the applicant amount to objective, relevant and consistent factors which show that the contested decision was adopted by the Commission in order to obtain a suspension of the timetable for assessing the concentration, rather than the correction of the information necessary for that assessment.

101 First, concerning the telephone conversation of 3 March 2006, it is apparent from the transcript of that conversation, compiled by the applicant's lawyers, that the Commission referred to the adoption of a decision under Article 11(3) of Regulation No 139/2004 only after the applicant had called into question the usefulness of a voluntary extension. However, also according to that transcript, the existence of substantial inconsistencies in the January data was referred to by the Commission right from the beginning of the conversation, before steps to remedy those inconsistencies were contemplated. Similarly, the applicant does not dispute that the existence of certain errors in the January data had been pointed out by the Commission by means of several emails, from 22 February 2006 onwards. Accordingly, that transcript does not lead to the conclusion that the Commission's reference to the possible adoption of a decision under Article 11(3) of Regulation No 139/2004 amounted to a threat designed to persuade the applicant to agree to a voluntary extension of the assessment timetable.

102 Furthermore, as regards the fact that the Commission offered the applicant the alternative of a voluntary extension, it should be observed that, since one and the same action may be undertaken for several concomitant reasons, the fact that the evidence submitted by the Commission shows that it was concerned about the risk of possible legal action does not preclude that it was at the same time seeking to limit the impact of the discovery of the errors on the assessment timetable. Moreover, the analogy drawn by the applicant with the earlier decisions is not convincing, since, as the Commission argues, the contested decision concerned a considerably longer period and, moreover, its effects were in part retroactive, given that the start of the resultant suspension preceded the date of its adoption.

103 Second, it is apparent from paragraph 73 above that the Commission had discovered the errors referred to in the contested decision following the discussions at the meeting of the Advisory Committee of 22 February 2006 concerning the econometric study and the data used in its compilation. Similarly, it is clear from paragraph 66 above that it has not been established that the Commission could rule out a significant impact of those errors on its examination of the concentration. Lastly, it must be noted that, in the internal email of 5 March 2006, submitted in annex to the Commission's response at the Court's request, one of the members of the Commission team responsible for the case-file states that the Commission 'found serious inconsistencies in the data', that 'this data need[s] to be corrected' and that the Commission '[is going to] assess how much the corrected data (to be obtained in a couple of days) changes [its] assessment of the transaction'. Accordingly, the Court considers that the adoption of the contested decision was motivated by the Commission's desire to rerun the entire assessment of the notified concentration on the basis of correct information, rather than by the fact that it had changed the direction of its examination following the intervention of the Member States and competing undertakings and was therefore seeking to obtain a suspension of the timetables for assessing the notified operation.

104 Third, contrary to what the applicant submits, the obligation for the Commission to examine the effects of the concentration on all the markets in respect of which there

was a risk that effective competition would be significantly impeded, referred to in paragraph 29 above, implies that, irrespective of the direction which its examination was taking, the Commission was required to examine the notified concentration both in relation to the coating products sector and the filler products sector. Those two sectors were potentially affected by that concentration, and had even been examined by the Commission before the contested decision was adopted. As regards the claims that the Commission neither verified the accuracy of the March data nor reran the econometric study before the statement of objections was issued and the claims based on the content of that document, it must be recalled that they have already been dealt with in paragraphs 45 to 48 above.

105 Fourth, it is apparent from the examination of the first plea that it has not been established either that the January data were materially correct or that the Commission considered that that was the case. Accordingly, the fact that some of the issues referred to by the contested decision concerned only a priori minor errors is irrelevant, since it could not be excluded, at the time that decision was adopted, that such errors could influence the examination of the notified concentration. As regards the applicant's reliance on the letter of 12 January 2006 and the position adopted by the Commission the following day, it must be observed that those elements are also irrelevant, given that they predate the discovery of the errors referred to in the contested decision, as is clear from paragraph 73 above.

106 Fifth, whilst it is true that one of the members of the Commission team responsible for the case-file systematically looked, during the additional verifications of the accuracy of the January data, for errors in those data, that is not indicative of a misuse of powers. It is normal, when a set of data is verified, that the objective pursued is to discover as many inaccuracies as possible, whilst leaving aside the elements which appear to be correct. As regards the argument that, once the errors had been detected, the Commission did not assess their impact, it is necessary to refer to paragraph 76 above. Lastly, even if the

drafting of the contested decision had begun before the impact of the errors on the Commission's assessment was appraised by the latter, that would not constitute evidence of a misuse of powers either. In the light of the requirement for speed which characterises the merger control procedure, it is logical for the Commission simultaneously to complete several stages of the procedure which it knows will probably be necessary when examining a concentration.

107 Sixth, the fact that the Commission did not reply to the applicant's letter of 6 March 2006 challenging the need for the corrections required by the contested decision is irrelevant, given (i) that the Commission was not required to reply to it and (ii) that, in any event, its silence cannot be regarded as showing that it was pursuing purposes other than those cited.

108 Seventh, and lastly, since it has been found at paragraph 73 above that the errors referred to in the contested decision were discovered in the second half of February, the period between that time and the date of the adoption of the contested decision does not appear to be exceptionally long in comparison with the earlier decisions adopted in the context of the examination of the notified concentration, given also (i) the fact that certain problems identified in the shipment database had been notified to the applicant as of 22 February 2006, (ii) the size of that database and (iii) the fact that, unlike the earlier decisions, the contested decision was based on the inaccuracy rather than the incomplete nature of the information in question.

109 It is therefore apparent from the examination of the elements relied on by the applicant that they amount either to circumstances which have not been established or which are irrelevant, or to claims which are unsubstantiated or for which there is a plausible

alternative explanation. Accordingly, even taken as a whole, those elements do not support the conclusion that there has been a misuse of powers.

110 For the sake of completeness, it should be noted that, in order to be able to complete its examination of this plea, the Court requested the Commission to provide it with evidence establishing that it had in fact used the March data. The documents provided in response to that request show that those data were indeed used in the examination of the notified concentration, in particular to rerun the econometric study, to assess prices and to analyse delivery distances. Those elements therefore tend to bear out the conclusion set out in the previous paragraph.

111 In the light of all the foregoing, it is necessary to conclude that it has not been established that the Commission committed a misuse of powers in adopting the contested decision and, therefore, to reject the third plea.

Fourth plea: infringement of the principle of the protection of legitimate expectations

Arguments of the parties

112 The applicant contends that the letter of 12 January 2006, by which the Commission confirmed that the information requested in its decision of 9 December 2005 had been

provided in full, in conjunction with the Commission's conduct, gave rise to a legitimate expectation on its part which was thwarted by the contested decision.

113 It thus states, first, that, by adopting the contested decision, the Commission revoked its letter of 12 January 2006, since it replaced the assessment which that letter contained with a new conclusion as to the inaccuracy of the January data. According to the applicant, to the extent that that letter, on the one hand, was sent pursuant to the powers conferred upon the Commission and, on the other hand, contained assurances as regards the fact that the Commission considered that the January data were complete and correct, it constituted a legal measure conferring rights upon the applicant. Consequently, the Commission ought to have taken account of the fact that the applicant might have been led to rely on the lawfulness of the measure, particularly since that letter gave no indication that its content was conditional or subject to more detailed examination.

114 The applicant submits that, in those circumstances, notwithstanding the possibility for the Commission to modify its position following the communication of more detailed information and its right to respond to evidence of all kinds, under the principle of the protection of legitimate expectations the Commission could no longer renege on its position in order to request verification of or improvements in the relevant information, unless it was able to demonstrate that the measures requested were relevant in the light of the new evidence available to it. In this case, however, no material change has been alleged in this respect.

115 Second, as regards the Commission's conduct, its general and consistent practice has been swiftly to point out any incomplete information. In this case, however, the Commission did not complain that the information provided was incorrect for nearly two months and did not approach the applicant until the investigation had taken a new direction.

116 The Commission contends that the applicant cannot rely on legitimate expectation in relation to the accuracy of the January data, since the letter of 12 January 2006 did not contain precise, unconditional and consistent prior assurances to that effect and since it could not in any event be regarded as conferring definitive rights upon the addressee.

Findings of the Court

117 According to the case-law, three conditions must be satisfied in order to claim entitlement to the protection of legitimate expectations. First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the Community authorities. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules (Case T-282/02 *Cementbouw Handel & Industrie* v *Commission* [2006] ECR II-319, paragraph 77, and the case-law cited).

118 The applicant claims that the legitimate expectation on which it relies is based, on the one hand, on the letter of 12 January 2006 and, on the Commission's conduct on the other. First, even if the abovementioned letter contained assurances that the Commission regarded the January data as materially correct, such assurances were not such as to give rise to a legitimate expectation on the part of the applicant as regards the fact that the Commission would not reverse its assessment.

119 It is apparent from paragraphs 29, 30, 31 and 33 above that, in the interest of effective review of concentrations under Regulation No 139/2004 and in the light of the

Commission's obligation to examine with great care the effects of the concentration concerned on all the markets potentially affected, the Commission must retain the possibility to request the correction of materially incorrect information communicated by the parties which is necessary for its examination, the reasons which prompted it to verify once more its accuracy being irrelevant in this respect.

120 That conclusion is supported by the fact that, as was observed at paragraph 68 above, the Commission cannot be required to verify immediately and in detail the accuracy of all the information conveyed by the parties to the concentration concerned, since it is the parties who are the best placed to ensure that the information communicated is reliable and who are required to provide complete and correct information. Accordingly, the verifications carried out by the Commission on receipt of certain information are not necessarily capable of revealing all the material inaccuracies which might affect that information and the applicant cannot plead legitimate expectation in order to avoid the consequences of infringing the obligation to provide complete and correct information on the sole ground that that infringement was not identified by the Commission in the course of those verifications.

121 Second, regarding the Commission's practice relied on by the applicant, it must be observed as a preliminary point that, to the extent that the applicant complains about the allegedly unusual delay between the discovery of the errors referred to in the contested decision and their notification to the applicant, its argument is based on the premiss that those errors were identified as early as the initial verifications carried out during the first half of January. As the Court found in paragraph 73 above that that was not the case, that premiss lacks any factual basis.

122 Further, the Court considers that the mere fact that in the past the Commission has reacted to the communication of information within a few days does not constitute a sufficiently precise assurance that the Commission will not respond to a future communication of information after a longer period of time.

123 Lastly, as the Commission submits, since the earlier decisions adopted in the context of the examination of the notified concentration concerned the issue whether the information communicated was complete, the practice with respect to those decisions could not in any event be relied upon in the case of a decision concerning the accuracy of information, such as the contested decision, and was not therefore such as to create a legitimate expectation.

124 In the light of the foregoing, the fourth plea must be rejected.

The measures of organisation of procedure and of inquiry

125 The applicant asks the Court to order the Commission to provide some of its internal documents relating, in particular, to the correspondence with the Advisory Committee, the draft clearance decision, the econometric study, the use to which the information provided by the applicant was put, the completeness and correctness of that information, the checks carried out by the Commission in that respect, as well as the reasons which led the Commission to request an extension of the assessment timetable on 3 March 2006.

126 The Court asked the Commission to provide certain documents relating to the conduct and consequences of the meeting of the Advisory Committee of 22 February 2006 and to the use to which the March data were put. Since the Court was able to examine all the applicant's pleas on the basis of those documents and the other documents in the case-file and given that, during the proceedings before the Community judicature internal Commission documents are not to be communicated to the applicants, unless the

exceptional circumstances of the case so require (Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 40), it is necessary to reject the applicant's application as to the remainder.

127 It follows from all the foregoing that the action must be dismissed in its entirety.

Costs

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

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the action;

2. Orders Omya AG to pay the costs.

Pelikánová Jürimäe Soldevila Fragoso

Delivered in open court in Luxembourg on 4 February 2009.

[Signatures]

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