Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

5 October 2020*

(Competition – Concentrations – Market for grey cement in Croatia – Decision declaring the concentration incompatible with the internal market and the EEA Agreement – Undertakings concerned – Relevant market – Substantial part of the internal market – Assessment of the effects of the transaction on competition – Commitments – Rights of the defence – Partial referral to the national authorities)

In Case T-380/17,

HeidelbergCement AG, established in Heidelberg (Germany),

Schwenk Zement KG, established in Ulm (Germany),

represented by U. Denzel, C. von Köckritz, P. Pichler, U. Soltész, M. Raible and G. Wecker, lawyers,

applicants,

supported by

Duna-Dráva Cement Kft., established in Vác (Hungary), represented by C. Bán and Á. Papp, lawyers,

intervener,

v

European Commission, represented by A. Dawes, H. Leupold and T. Vecchi, acting as Agents,

defendant,

APPLICATION based on Article 263 TFEU seeking annulment of Commission decision C(2017) 1650 final of 5 April 2017 declaring a concentration incompatible with the internal market and the EEA Agreement (Case M.7878 – HeidelbergCement/Schwenk/Cemex Hungary/Cemex Croatia),

THE GENERAL COURT (Eighth Chamber),

composed of A.M. Collins, President, R. Barents (Rapporteur) and J. Passer, Judges,

Registrar: E. Artemiou, Administrator,

having regard to the written part of the procedure and further to the hearing on 17 October 2019,

gives the following

* Language of the case: English.

Judgment [1]

…

III. Law

…

B. The first plea, alleging errors in law and manifest errors of assessment as regards the definition of the Community dimension of the merger

…

2. The substance of the case

95 By their first plea in law, the applicants claim, in essence, that the Commission is not competent to review the transaction since that transaction does not have a Community dimension within the meaning of Article 1(2) of Regulation No 139/2004. That provision requires in particular that at least two undertakings concerned have, individually, a turnover in the European Union of more than EUR 250 million. On conclusion of the transaction, DDC would acquire its direct competitors, Cemex Croatia and Cemex Hungary. Therefore, the undertakings concerned are those two undertakings, as target companies, and DDC as the acquiring company. The turnover of HeidelbergCement and Schwenk therefore should not have been considered separately by the Commission, but should have been attributed to DDC. Since the turnover of the target companies was too low to meet the turnover thresholds stipulated in Regulation No 139/2004, only DDC reached the individual threshold and the transaction had no Community dimension.

…

(a) The first part, concerning the concept of undertakings concerned

97 In the first part of the first plea, the applicants claim, in essence, that the interpretation made in the Commission Consolidated Jurisdictional Notice under Regulation No 139/2004 (OJ 2008 C 95, p. 1, and corrigendum OJ 2009 C 43, p. 10; 'the Consolidated Jurisdictional Notice'), to the extent that it relates to the identification of the undertakings concerned in the context of acquisitions of control by a joint venture, is incorrect. The applicants, supported by DDC, put forward five complaints in support of that claim.

98 Before addressing the merits of those complaints, it is appropriate to reject the applicants' argument that a full-function joint venture, such as DDC, should be regarded as an 'undertaking concerned' for the purposes of Article 1(2) of Regulation No 139/2004, in so far as the concept of undertaking in the context of competition law refers to an autonomous economic entity.

99 The principles of the legal and economic autonomy of companies cannot, in any event, mean that a company jointly owned and controlled by two other companies necessarily acts independently on the market merely because it has its own legal personality or its own economic means. Such an assumption would completely disregard the numerous possibilities which exist in practice for a parent company to influence the conduct of its subsidiary, whether formally or informally (see, to that effect, judgment of 17 May 2011, *Elf Aquitaine* v *Commission*, T-299/08, EU:T:2011:217, paragraph 70).

1 Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

(1) Consideration of the economic reality for the purpose of identifying the undertakings concerned

100 The applicants claim that paragraphs 145 to 147 of the Consolidated Jurisdictional Notice, which concern acquisitions by a joint venture, do not allow the Commission to identify the undertakings concerned on a case-by-case basis by examining the economic reality in order to establish who are the real players behind the proposed concentration. Thus, the identification of the undertakings concerned cannot be the result of complex factual assessments made on a case-by-case basis. An exception is possible only where it is obvious for all the entities in question that the full-function joint venture is not an undertaking concerned. The Commission may look at the economic reality only in two cases. First, where an acquiring undertaking uses a 'shell company', that is to say a company set up specifically for acquisition purposes and, second, in obvious circumvention scenarios where a full-function joint venture company is used as a mere vehicle for a transaction which is of no relevance to it and if this is obvious for all players involved.

101 The applicants add that it is clear from the wording of paragraph 147 of the Consolidated Jurisdictional Notice that significant involvement by the parent companies in the transaction may serve as an indication that they are using a joint venture as a mere vehicle for acquisition, but is not sufficient in itself for classifying the parent companies as the undertakings concerned.

102 Moreover, involvement by parent companies can be considered to be an indication of the use of a joint venture as a mere vehicle for acquisition only if together they were involved in the initiation, organisation and financing of the transaction and if all – or at least several – parent companies show such involvement.

103 Furthermore, the applicants claim that a full-function joint venture cannot be classified as a mere vehicle if it has its own strategic interest in the merger, even though the parent companies may also have a broader strategic interest of their own in that transaction. It is only where the acquisition does not concern the economic activity of the full-function joint venture, but serves only the interests of the parent companies, that the latter may be concerned by the transaction. DDC's interest is established, in the present case, in particular by DDC's earlier proposed acquisitions, by the fact that DDC is long established, by the fact that the transaction would indirectly strengthen its presence on the market, by the fact that DDC was the direct acquirer of Cemex Croatia and by the fact that DDC was participating in a transaction which directly concerned it.

104 According to DDC, the concept of undertakings concerned serves to identify the undertakings to be taken into account in order to assess whether or not a transaction is notifiable under Regulation No 139/2004. As such, the notion should be interpreted strictly and predictably. That is why it can depend neither on the way in which the acquisition process is initiated, organised or evolves, nor on the Commission's assessment as to the alleged economic reality. Exceptions may be possible only if there is clear evidence that the target company's conduct and competitive strategy will not be determined by the acquiring company after the transaction or where the transaction exclusively benefits a company other than the direct acquirer.

105 In that regard, it must be pointed out that Article 1(2) of Regulation No 139/2004 does not provide any definition of the concept of undertakings concerned. However, the interpretation of that concept in transactions where a joint venture acquires control of another company is covered by paragraphs 145 to 147 of the Consolidated Jurisdictional Notice.

106 Under paragraph 145 of the Consolidated Jurisdictional Notice, whereas, in principle, the undertaking concerned is the joint venture as the direct participant in the acquisition of control, there may be circumstances where companies set up 'shell companies' and the parent companies will individually be considered as undertakings concerned. In this type of situation, the Commission will look at the economic reality of the transaction to determine which are the undertakings concerned.

107 Against that background, paragraph 146 of the Consolidated Jurisdictional Notice states that, where the acquisition is carried out by a full-function joint venture, with the features set out above, and already operates on the same market, the Commission will normally consider the joint venture itself and the target undertaking to be the undertakings concerned (and not the joint venture's parent companies).

108 Under paragraph 147 of the Consolidated Jurisdictional Notice:

'Conversely, where the joint venture can be regarded as a mere vehicle for an acquisition by the parent companies, the Commission will consider each of the parent companies themselves to be the undertakings concerned, rather than the joint venture, together with the target company. This is the case in particular where the joint venture is set up especially for the purpose of acquiring the target company or has not yet started to operate, where an existing joint venture has no full-function character as referred to above or where the joint venture is an association of undertakings. The same applies where there are elements which demonstrate that the parent companies are in fact the real players behind the [transaction]. These elements may include a significant involvement by the parent companies themselves in the initiation, organisation and financing of the [transaction]. In those cases, the parent companies are regarded as undertakings concerned.'

109 It is in the light of those considerations that DDC's and the applicants' arguments must be assessed.

110 First, the interpretation proposed by the applicants and DDC, which denies the Commission the possibility of taking into consideration the economic reality except in the scenarios they identify, must be rejected.

111 To begin with, those interpretations amount to nothing more than a complete denial of the relevance, as regards the application of Regulation No 139/2004, of the links that may exist between a full-function joint venture and its parent companies, with the exception of the situations identified by the applicants and DDC. This cannot be the case.

112 Indeed, it must be recalled that it has been held that the fact that a joint venture is fully functioning and, therefore, from an operational point of view, economically autonomous, does not mean that it enjoys autonomy as regards the adoption of its strategic decisions. The opposite conclusion would lead to a situation in which there would never be joint control of a 'joint venture' as soon as it was economically autonomous (see, by analogy, judgment of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission*, T-282/02, EU:T:2006:64, paragraph 62).

113 Therefore, the crucial question that arises under paragraph 145 of the Consolidated Jurisdictional Notice, relating to determining in what circumstances a joint venture should be regarded as the undertaking concerned, cannot be reduced to the situations referred to by the applicants and DDC.

114 Next, DDC and the applicants' interpretation also amounts to denying that indirect links between the parent companies and the joint venture can affect the competitive behaviour of the companies thus linked in certain markets.

115 In exercising joint control over a joint venture, the parent companies of that joint venture will necessarily have to agree on the commercial management of the venture and, to some extent, on their own positions in relation to the joint venture in certain markets. It follows that the existence of such financial and structural indirect links is a factor which must be taken into account in the assessment of a concentration under the merger regulation (judgment of 8 July 2003, *Verband der freien Rohrwerke and Others* v *Commission*, T-374/00, EU:T:2003:188, paragraphs 173 and 174).

116 It follows from the foregoing that, in order to ensure the effectiveness of merger control, it is necessary to take into account the economic reality of the real players behind a concentration in accordance with the circumstances of fact and law specific to each case. Therefore, the identification of the undertakings concerned is necessarily connected to the way in which the acquisition process was initiated, organised and financed in each individual case.

117 Second, the interpretation of paragraph 147 of the Consolidated Jurisdictional Notice put forward by the applicants and DDC must also be rejected.

118 In the first place, it is clear from the wording of that paragraph that the use of a full-function joint venture as a mere vehicle for acquisition is not the only situation in which parent companies may be regarded as undertakings concerned.

119 Indeed, the second sentence of that paragraph cites various examples of situations in which a full-function joint venture can be considered a mere vehicle for acquisition. That is clear from the wording 'this is the case in particular'. By contrast, the situation in which 'there are elements which demonstrate that the parent companies are in fact the real players behind the [transaction]' is cited separately in the following sentence. That latter case is therefore to be distinguished from situations in which a full-function joint venture can be considered a mere vehicle for acquisition.

120 Moreover, the English version of the last sentence of paragraph 147 of the Consolidated Jurisdictional Notice uses the phrase 'in those cases' in the plural, and not in the singular, to refer to the scenarios in which parent companies may be regarded as 'undertakings concerned' instead of their full-function joint venture. This confirms that there are several scenarios in which parent companies are regarded as 'undertakings concerned'.

121 In the second place, it is clear from the wording of that provision that the 'elements' which 'demonstrate' that 'the parent companies are in fact the real players behind the [transaction]' and are listed as such, namely 'a significant involvement by the parent companies themselves in the initiation, organisation and financing of the [transaction]', do not constitute an exhaustive list of scenarios. This is apparent inter alia from the use of the expression '*on citera ainsi*' in the French-language version of the notice, the expression 'these elements may include' in the English-language version and the expression '*kan een factor zijn*' in the Dutch-language version.

122 Indeed, for the purposes of taking into account the economic reality, it is appropriate to take into consideration all the relevant elements which enable the real players behind the transaction to be determined. Thus, the significant involvement of the parent companies in the transaction may be deduced from a consistent body of evidence, even if none of that evidence, taken in isolation, is sufficient to reveal the reality of the transaction.

123 In other words, paragraph 147 of the Consolidated Jurisdictional Notice refers to two situations, namely the situation where the joint venture is used as a mere vehicle and the alternative situation where the parent companies are the real players behind the transaction. In that regard, that provision cites various non-exhaustive examples relating to each of those two situations.

124 Therefore, contrary to what the applicants and DDC claim, it is not only when the parent companies use a 'shell company' for the acquisition or in circumvention scenarios that it may be necessary to consider the parent companies to be the undertakings concerned, but also when they are the real players behind the transaction. It should be clarified that, in the present case, the Commission found that the transaction came within the second scenario, and not within the first, as the applicants seem to suggest at times in their written submissions.

125 Third, the argument that a full-function joint venture cannot be classified as a mere vehicle when it has its own interest in the transaction must be rejected as ineffective since, as has been noted in paragraph 124 above, the Commission found that the present transaction came within the second scenario set out in paragraph 147 of the Consolidated Jurisdictional Notice. In any event, the fact that a full-function joint venture may have its own strategic interest in a merger cannot prevent the parent companies being classified as undertakings concerned on account of being the real actors behind the transaction, in the light in particular of their significant involvement in the initiation, organisation and financing of the transaction.

126 The arguments of the applicants and of DDC must therefore be rejected.

(2) The principle of legal certainty

127 The applicants claim that the Commission's approach of taking into account the economic reality on a case-by-case basis infringes the principle of legal certainty. In their view, the notion of undertakings concerned has an immediate impact on the applicability of the obligation to suspend the concentration and on the risk of potential fines in the event of infringement of that obligation. Yet, on the acquiring side, a parent company of a full-function joint venture may not necessarily know about the extent of the involvement of the other parent company. Similarly, the target company and the vendor will generally not be able to identify the undertakings concerned, on the acquiring side, in so far as they may not necessarily be aware of the degree of involvement of the parent companies and of the full-function joint venture in the organisation and financing of the concentration. Even if they are, the undertakings in question cannot assess upfront whether that degree of participation is significant enough to conclude that the parent companies are undertakings concerned. The uncertainty created by that situation is unacceptable.

128 According to the applicants, the undertakings in question would have to consult the Commission before notification of every proposed concentration in order to obtain the latter's point of view. However, even such a consultation does not offer legal certainty since DG Competition's replies to consultation requests are not binding and since, in recent cases, the Commission has even refused to provide a written reply.

129 The complaint alleging infringement of the principle of legal certainty put forward by the applicants must be rejected.

130 The principle of legal certainty – which is one of the general principles of EU law – requires that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by EU law (judgment of 8 December 2011, *France Télécom* v *Commission*, C-81/10 P, EU:C:2011:811, paragraph 100). However, where a degree of uncertainty regarding the meaning and scope of a rule of law is inherent in the rule, it is necessary to examine whether the rule of law at issue displays such ambiguity as to prevent individuals from resolving with sufficient certainty any doubts as to the scope or meaning of that rule (see, to that effect, judgment of 14 April 2005, *Belgium* v *Commission*, C-110/03, EU:C:2005:223, paragraphs 30 and 31). In that respect, those requirements cannot be regarded as requiring a norm that uses an abstract legal notion to refer to the various specific hypotheses in which it applies, given that all those hypotheses could not be determined in advance by the legislature (judgment of 20 July 2017, *Marco Tronchetti Provera and Others*, C-206/16, EU:C:2017:572, paragraph 42).

131 In the present case, it is not possible to establish whether, by their claim that the Consolidated Jurisdictional Notice does not allow the Commission to 'look at the economic reality' whenever it so pleases and to 'determine who the real players behind a [transaction] are' in each and every individual case, the applicants seek to argue that paragraphs 145 to 147 of that notice lack clarity, precision or predictability, or that its application by the Commission in the present case lacks those characteristics.

Therefore, it must be assessed whether the Consolidated Jurisdictional Notice itself or its implementation by the Commission has resulted in ambiguity that is contrary to the principle of legal certainty.

132 It is clear from paragraphs 1 and 4 thereof that the Consolidated Jurisdictional Notice was adopted with a view to ensuring that the action taken by the Commission is transparent, foreseeable and consistent with legal certainty (see, by analogy, judgments of 30 May 2013, *Commission* v *Sweden*, C-270/11, EU:C:2013:339, paragraph 41, and of 12 February 2014, *Beco* v *Commission*, T-81/12, EU:T:2014:71, paragraph 70).

133 Paragraphs 145 to 147 of the Consolidated Jurisdictional Notice were therefore adopted with the aim in particular of ensuring legal certainty. Furthermore, those provisions do not send out conflicting signals regarding the approach used by the Commission to determine the undertakings concerned by a concentration. They allow both the parent companies of a full-function joint venture and the vendor and target company to identify the undertakings concerned since, as the Commission maintains, those companies will necessarily be aware, from the negotiations surrounding the concentration, of the degree of involvement of the joint venture's parent companies. In case of doubt, the parties to the concentration may always request information from the relevant company regarding its degree of involvement in the transaction.

134 In addition, as diligent economic operators and, in particular, as professionals who are used to having to proceed with a high degree of caution when pursuing their occupation, the parties to a concentration may also, if required, take expert advice to assess the consequences which may result from the application of paragraphs 145 to 147 of the Consolidated Jurisdictional Notice.

135 Moreover, the parties to the concentration may at any time contact the Commission services in order to obtain informal guidance on the undertakings concerned by the transaction. In that regard, the applicants do not specify in which recent cases the Commission refused, according to their statements, to provide such a reply.

136 The facts of the present case also contradict the applicants' allegations since DDC requested, on 20 August 2015, and obtained, on 13 November 2015, such a reply, as is apparent from paragraphs 14 and 16 above. In addition, DG Competition's position, set out in its letter dated 13 November 2015 identifying the applicants as undertakings concerned, is identical to the position ultimately adopted in the contested decision. Although that letter states that it does not constitute a Commission decision, the applicants have not established that consulting the Commission would have prevented them, as diligent economic operators, from removing any doubts they might have had as regards the notification obligation in the present case.

…

(3) Extension of the Commission's powers

…

140 It must be stated that the applicants' reasoning, whereby the Commission's interpretation allows it to include within its jurisdiction concentrations which impact a small part of a Member State and which have no relevance for cross-border trade in the internal market, is based on a misconceived premiss. Under the last clause of Article 1(2) of Regulation No 139/2004, a concentration does not have a Community dimension, even where the turnover thresholds are met, where each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State. Moreover, the applicants seem to conflate the economic size of a concentration with

its impact on a substantial part of the market, since whether the transaction significantly impedes effective competition in a substantial part of the market is a matter for the substantive competitive assessment (see paragraph 359 et seq. below).

141 Accordingly, the applicants' argument must be rejected.

(4) The intention of the parent companies

142 The applicants claim that the view put forward by the Commission in the contested decision concerning the Consolidated Jurisdictional Notice makes the applicability of Regulation No 139/2004 dependent on subjective elements, which runs counter to the Court's case-law.

143 The applicants' argument must be rejected.

144 In that regard, the applicants cannot derive any useful argument from paragraph 129 of the judgment of 21 September 2005, *EDP* v *Commission* (T-87/05, EU:T:2005:333). While that paragraph does state that the applicability of the former merger regulation could not depend on the intention of the parties to a concentration, it does not pertain to the identification of the undertakings concerned, but merely establishes that the fact that the parties have notified a concentration does not in itself mean that the merger regulation should apply.

(5) The aims and structure of Regulation No 139/2004

145 DDC claims that, although Regulation No 139/2004 does not define the notion of undertakings concerned, its aims as well as the structure of Article 5(4) thereof provide indications as to how the notion should be interpreted.

146 In the first place, in its view, it follows, in essence, from the objective assigned to the regulation by recital 8 thereof, that the undertakings concerned are the undertakings directly involved in the concentration. In order properly to assess the effects of a concentration, it must therefore be established which company will control the activities of the target companies, decide their competitive strategy and bear the economic consequences. It is, as a general rule, necessary for the undertakings concerned to stand on different sides of the transaction; otherwise, the Commission would have to assess every minor acquisition of target companies by joint ventures of large multinationals. Exceptions may be possible only where the target company's conduct and competitive strategy are not determined by the acquiring company or where the transaction exclusively benefits a company other than the acquirer. The degree of involvement of the parent company of the acquirer in the initiation, organisation and financing of the transaction is irrelevant.

147 In the second place, it follows from the distinction made by Article 5(4)(a) and (c) of Regulation No 139/2004 between the undertaking concerned, on the one hand, and the undertakings that control an undertaking concerned, on the other hand, that that regulation does not envisage that the controlling shareholders of a company might be regarded as the undertakings concerned. Exceptions may be possible if there is clear evidence that a transaction does not directly concern the acquiring company. Otherwise, Article 5(4)(c) of that regulation would be superfluous.

148 DDC's reasoning must be rejected.

149 In the first place, as the Commission correctly states, it is not necessary that the undertakings concerned whose turnover exceeds the thresholds provided stand on different sides of the transaction, since Article 1 of Regulation No 139/2004 does not refer to 'the acquirer and the target company', but to 'at least two of the undertakings concerned'.

150 Furthermore, it should be recalled that, similarly, under paragraph 140 of the Consolidated Jurisdictional Notice, where two undertakings acquire joint control of a pre-existing undertaking, the undertakings concerned are each of the undertakings acquiring joint control and the target company.

151 In the second place, Article 5(4)(c) of Regulation No 139/2004 provides only that the aggregate turnover of an undertaking concerned must include the turnover of those undertakings which have in the undertaking concerned certain rights or powers, without preventing, in certain cases, the undertakings controlling other undertakings from being regarded as the undertakings concerned themselves.

152 It follows from all the foregoing that the first part of the first plea must be rejected.

…

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders HeidelbergCement AG and Schwenk Zement KG to bear their own costs and to pay those incurred by the European Commission;**

3. **Orders Duna-Dráva Cement Kft. to bear its own costs relating to the application to intervene.**

Collins Barents Passer

Delivered in open court in Luxembourg on 5 October 2020.

[Signatures]