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Concentrations

Where once the Official Journal was full of notifications and reports of cases under Article 85 of the EC Treaty, it now carries long lists of notified proposals for mergers, acquisitions and joint ventures. This reflects a substantial shift in the volume of cases handled by the Commission in the three main areas of competition law: cartels and monopolies, concentrations and state aids. The first category has shrunk, partly because of the system of block exemptions, which obviates the need even to notify a large (but unknown) number of cases of the kind which used to flood the Official Journal. The second and third categories are growing, though the state aid category may be expected either to decline or at least to slow down its growth when a block exemption regulation on state aids becomes law.

In the meantime, the growth of the category of concentrations means that it is perfectly possible to devote a single issue of this newsletter to mergers, acquisitions and joint ventures. The present issue, though a case in point, is not typical, since it is largely concerned with the implications of a single case. Hitherto cases before the Court of Justice on the interpretation of the Merger Regulation have been rare and, for the most part, relatively narrow in scope. But the *Glencor* case, reported in this issue, is wide, interesting and important. Many of the points of interest are discussed in the editorial note preceding the text of the report. There is, however, a point of general interest which has a bearing on comments which we have made from time to time in this column in the past: that is, how far the authorities of the European Union can control the activities of corporations operating mainly outside the Union's territory.

In the *Glencor* case, the Court discusses the question of territoriality; and this is covered in our note on page 82. But it also discusses the compatibility of European action with the principles of public international law. This was a new angle, introduced by the South African parties to the case. The Court's view was that the application of the Regulation on the control of Concentrations was "justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect within the Community" (paragraph 90 of the judgment); and the Court considered with some care the meaning, in the circumstances of this case, of the words, "immediate", "substantial" and "foreseeable". Having done so, it concluded that the application of the Regulation to the proposed concentration was consistent with public international law.

As for the argument that applying the Regulation to what was essentially a matter for the South African authorities amounted to a form of interference resulting in a conflict of jurisdictions, the Court said that, even if such a principle were known in international law, the argument must be rejected. The Court had received a letter from the South African government; but the letter, far from calling into question the Community's jurisdiction to rule on the concentration at issue, merely expressed a general preference for intervention in specific cases of collusion when they arose. The concentration did not appear likely to have dire consequences for South Africa: this did not mean that it could not have serious implications for the Community. If it did, then the Community authorities had, on the face of it, the requisite jurisdiction to put matters right. □

ACQUISITIONS (INSURANCE): THE AXA / GRE CASE

Subject: Acquisitions
Undertakings (by parties)

Industry: Insurance

Parties: AXA
Guardian Royal Exchange

Source: Commission Statement IP/99/218, dated 9th April 1999

(Note. The Commission's statement does not quantify the market shares involved in this acquisition but points to the problems which, but for the parties' undertakings, would have been created in Luxembourg.)

The Commission has given its approval to a concentration by which the French insurer AXA acquires control over the United Kingdom insurance company Guardian Royal Exchange (GRE). The concentration concerns life and non-life insurance and will have a limited impact on the markets concerned (mainly, United Kingdom, France and Germany), except in Luxembourg where doubts, reinforced by subsequent investigation, arose over the pre-existing direct links between GRE and the leading non-life insurer (Le Foyer Assurances). To avoid any risk of the creation of a dominant position, AXA offered, during the first phase of the Commission's investigation, commitments which clearly resolve the Commission's competition concerns. The French AXA group is one of the leading insurers in Europe. GRE is a British insurance company active in life and non-life insurance. The parties have overlapping activities in United-Kingdom, where AXA's subsidiary (Sun Life and Provincial Holdings, which launched the take-over bid for GRE) is present in life and non-life insurance, and in Germany, where the parties are both active in life and non-life insurance. However, the concentration will not confer on AXA a dominant position on those markets. In France where AXA is an important insurer, GRE's market shares are limited, in particular in construction insurance. Accordingly, the operation will not substantially change the structure of the markets concerned.

In Luxembourg, the concentration will create a significant structural link between the first and third largest companies in non-life insurance. Taken together, the market shares of the two parties reach a critical level on several markets in the non-life insurance sector, which is distinguished by a small number of competitors, each with a significant market share (essentially Le Foyer, la Luxembourgeoise and AXA). On the basis originally notified, it could not be excluded that the operation would create or strengthen a dominant position in Luxembourg. To remove this risk, the parties have undertaken to modify the structural links between AXA and Le Foyer, or to take suitable disinvestment measures, such that the same number of major firm remain offering effective competition as independent suppliers on the non-life insurance markets. The Commission accordingly decided to authorise the operation. □

ACQUISITIONS (STEEL): THE SMS / MANNESMANN DEMAG CASE

Subject: Acquisitions

Industry: Steel

Parties: Schloemann-Siemag AG
Mannesmann Demag

Source: Commission Statement IP/99/222, dated 9th April 1999

(Note. One of the factors which persuaded the Commission to approve this acquisition was "the increasing number of potential non-European competitors". This factor is explicitly covered by Article 2(1)(a) of the Merger Regulation)

The Commission has approved the intended acquisition of the control of the project engineering business of Mannesmann Demag (MDM) for the iron and steel industry by the Schloemann-Siemag AG (SMS). The concentration concerns mainly the area of hut and rolling mill technology. The Commission has decided, after careful examination of the potential impacts of this concentration, that this operation does not threaten to create or to strengthen a dominant position, because of the sufficient number of alternative suppliers, the strong buying power of steel producers and the increasing number of potential non-European competitors. In the case of the notified concentration the business activities of SMS and MDM are merged into a newly founded company, from which SMS will hold a majority and MDM a minority participation. The group of SMS controlled by the MAN company is active in project engineering for the fields of steel, non-ferrous metals and synthetic materials. MDM comprises the division plant and mechanical engineering for the steel and metallurgical industry of the Mannesmann company. The notified concentration has to be seen in the context of the increasing concentrations of the European steel industry, a similar development can be noticed in the upstream sector of the plant construction and engineering. This notified concentration combines the two largest suppliers of plant construction and engineering in the area of the iron making and rolling mill technology in Western Europe. In particular, steel production technology, continuous casting installations and hot rolling mills (in particular as far as expensive large-scale projects are concerned) are affected by this concentration. However, the Commission's investigations lead to the conclusion that the concentration does not raise serious doubts concerning its competitive effects. The total market is characterised by the strong purchasing power of steel producers. They assign their orders according to tender procedures, which ensure competition, as long as there is a sufficient number of potential suppliers on the market. The investigations carried out by the Commission confirm that, after the concentration, a sufficient number of alternative suppliers will exist in the European market as well as in the world market. In addition to four large European suppliers, the competitive pressure from non-European suppliers in plant and mechanical engineering must be taken into account. Many west-European projects have gone to Japanese companies in the past. □

ACQUISITIONS (STEEL): THE MANNESMANN / THYSSEN CASE

Subject: Acquisitions

Industry: Steel

Parties: Mannesmann Handel AG
Thyssen Handelsunion AG

Source: Commission Statement IP/99/219, dated 9 April 1999

(Note. This is a case in which the Merger Regulation and the competition rules under the ECSC Treaty intersect, as products covered by the Treaty and products not covered by the Treaty are both involved.)

The Commission has approved the acquisition of Mannesmann Handel AG, a company engaged in the distribution of, and trading in, steel products of Thyssen Handelsunion AG, part of the Thyssen group. This concentration will neither create nor strengthen a dominant position, nor will it allow the parties to evade the ECSC competition rules. Both the companies involved in the transaction are based in Germany and are primarily engaged in distributing and trading rolled steel products and steel tubes and other materials.

Thyssen Handelsunion AG and Mannesmann Handel AG sell products which fall under the ECSC and products which are not covered by this Treaty and which therefore fall to be examined under the Merger Regulation. With regard to the market for the distribution of rolled steel products, which are ECSC products, Mannesmann Handel AG has only a small market share. Therefore its incorporation within the Thyssen group will not lead to any substantial change. The new group will not be able to determine prices, control or restrict distribution or effective competition, within the meaning of Article 66(2) of the ECSC Treaty. In relation to the products examined under the Merger Regulation, the investigations carried out by the Commission showed that the parties' activities in the distribution of various categories of tubes were unlikely to lead to any significant anti-competitive effects in the European Economic Area (EEA). Consequently, the Commission decided not to oppose to the proposed operation and to authorise it under Article 66 of the ECSC Treaty and declare it compatible with the common market under the Merger Regulation. □

The Court case reported in this issue is taken from the web-site of the Court of Justice of the European Communities. The text is not definitive and may be subject to linguistic and other amendments. In common with other texts on the web-site, it is freely available for public use.

Concentrations in brief

The Eaton / Aeroquip-Vickers Case

The Commission has approved the operation, whereby Eaton Corporation acquires Aeroquip-Vickers Inc. Eaton is active in the manufacture of electrical and electronic distribution and control equipment, engine components, hydraulic products and defence systems equipment for the aerospace, automotive and other industries on a global scale. Aeroquip-Vickers is engaged in the manufacture and distribution of engineered components for the automotive, industrial and aerospace industries. Both companies are US-based. The Commission has concluded that the activities of the parties are largely complementary and that their overlaps in hydraulic piston pumps do not give raise to the creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded in the European Economic Area (EEA) or any substantial part of that area. Source: Commission Statement IP/99/214, dated 7 April 1999.

The Thomas Cook Holdings Case

The Commission has cleared the formation of a joint venture in the British leisure travel sector combining the activities of the Thomas Cook Group and the Carlson Leisure Group. The new company, Thomas Cook Holdings Ltd, will be under the joint control of the German credit institution, Westdeutsche Landesbank, the German conglomerate, Preussag, and a privately owned American company, Carlson. It will supply foreign package holiday services to British customers. The Commission considers that the new joint venture's share of the tour operator, travel agency and charter airline markets in the United Kingdom will not give rise to any competition concerns. Source: Commission Statement IP/99/162, dated 9 March 1999.

The Lucent / Ascend Case

The Commission has authorised the acquisition of Ascend Communications Inc by Lucent Technologies Inc. Lucent and Ascend are both USA-based companies active in the field of equipment for communication networks, with Lucent being mainly active in systems for telecommunication networks and Ascend in solutions for data networks, and especially Wide Area Networks (WAN). The Commission concludes that the operation does not create or strengthen a dominant position on any relevant product or geographic market. The operation is essentially of a complementary nature, and gives rise to few overlaps. The main overlap takes place in the field of Remote Access concentrators, which are call-aggregation devices designed for dial-in applications, and primarily Internet Access. Given the presence of strong competitors (such as Cisco), and in view of the rapid technological evolution of the market, the Commission has concluded that the operation would not create or strengthen a dominant position in this sector. The conglomerate aspects did not appear to raise concerns either. Source: Commission Statement IP/99/221, dated 9th April 1999. □

ACQUISITIONS (MINERALS): THE GENCOR CASE

Subject: Acquisitions
Concentrations
Collective dominant position
Territorial jurisdiction
Undertakings (by parties)
Admissibility
Annulment

Industry: Minerals and metals
(Implications for all industries)

Parties: Gencor Ltd (South Africa)
Impala Platinum Holdings Ltd
Lonrho plc (UK)
Eastern Platinum Ltd
Western Platinum Ltd
Lonrho Management Services Ltd (South Africa)
Commission of the European Communities
Federal Republic of Germany

Source: Judgment of the Court of First Instance of the European Communities in Case T-102/96, *Gencor Ltd v Commission of the European Communities*, dated 25 March 1999

(Note. This unusually long judgment, which runs to no fewer than 332 paragraphs, has many points of interest, most of which are reflected in the heavily abbreviated report below. But by far the most important points are the following:

- *the territorial scope of the Merger Regulation,*
- *the concept of the collective dominant position,*
- *the assessment of market share,*
- *the question of structural links between undertakings having collective dominance and*
- *the acceptance of commitments by parties to the concentration.*

On the territorial scope of the Regulation, the Court considered how far the Regulation applied to the activities of corporations where most of those activities were carried out outside the territory of the European Union. The applicants, from South Africa, argued that there was a distinction between production and sales activities and called in aid the Woodpulp decision. On both counts the Court disagreed. The fact that the Regulation was based on the criterion of turnover tended, if anything, to place more emphasis on sales; and the Woodpulp decision, far from supporting the applicants' case, actually counters it, since "according to Woodpulp, the criterion as to the implementation of an agreement is satisfied by mere sale within the Community, irrespective of the location of the sources of supply and the production plant": paragraph 87 of the judgment.

On the concept of a collective dominant position, the judgment discusses in detail the

manner in which the principles set out by the Court of Justice in France et al v Commission in 1998 should be applied in practice, both generally and in relation to the present case. The Court rejected the applicants' argument that the reference to a 25% market share in the fifteenth recital to the Regulation precluded the concept of a collective dominant position: "since oligopolistic markets in which one of the jointly dominant undertakings has a market share of less than 25% are relatively rare, that reference cannot remove cases of joint dominance from the scope of the Regulation": paragraph 134 of the judgment.

On the assessment of the market share, the applicants had compared their market share with that of the parties in the Nestle / Perrier and Kali + Salz cases, amounting to 82% and 98% respectively. However, for the not entirely convincing reasons set out in paragraphs 209 and 210 of the judgment, the Court held that the comparisons were "incorrect". Nevertheless, the Court's reasoning is important for parties in other cases.

On the question of structural links between the parties having collective dominance of the market, the applicant claimed, first, that the case-law required evidence of structural links in allegations of collective dominance and, second, that no such evidence had been produced in the present case. The Court reviewed the Flat Glass case and concluded that the reference to structural links in that case was "only by way of example and did not lay down that such links must exist in order for a finding of collective dominance to be made": paragraph 273.

On the acceptance of commitments or undertakings by the parties to the concentration, an important distinction was made between commitments on the structure of the concentration, which may be accepted by the Commission in accordance with Article 8(2) of the Regulation, and commitments on subsequent behaviour, which can be controlled only under Articles 85 and 86 of the EC Treaty. A pledge not to abuse a dominant position is not an acceptable commitment in the context of the process envisaged under the Merger Regulation: see paragraph 316 of the judgment.

It should just be added that, in giving its judgment on these specific issues, the Court made a number of observations on the "general purpose of the Regulation": see, for example, paragraphs 149 and 317 of the judgment. Considering how little case-law there has been so far on the implementation of the Regulation, these observations are helpful.

The facts of the case have an interest of their own and are therefore set out more or less in full below.)

Facts

1 Gencor Ltd ('Gencor') is a company incorporated under South African law. It is the parent company of a group operating mainly in the mineral resources and metals industries.

2 Impala Platinum Holdings Ltd ('Implats') is a company incorporated under South African law bringing together Gencor's activities in the platinum group metal ('PGM') sector. Held as to 46.5% by Gencor and 53.5% by the public, it is controlled by Gencor for the purposes of Article 3(3) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of

concentrations between undertakings (OJ 1989 L 395, p. 1, corrigenda at OJ 1990 L 257, P. 13; 'the Regulation').

3 Lonrho Plc ('Lonrho') is a company incorporated under English law. It is the parent company of a diversified group with interests in mining and metals, hotels, agriculture and general trade.

4 Eastern Platinum Ltd ('Eastplats') and Western Platinum Ltd ('Westplats'), generally known under the name of Lonrho Platinum Division ('LPD'), are companies incorporated under South African law which bring together Lonrho's activities in the PGM sector. They are held as to 73% by Lonrho and as to 27% by Gencor through its subsidiary Implats. The latter stake is the subject of a shareholders' agreement ('the Principals' Agreement') entered into on 15 January 1990 by the Gencor and Lonrho groups. Under that agreement, an equal number of directors is to be appointed by each shareholder, those directors are to have equal voting rights and no director is to have a casting vote. The approval of the board of directors is required for certain decisions, in particular in relation to the following matters: diversification of the activities of LPD;

the level of dividend distribution;
the annual strategic plan and budget;
approval of the annual financial statements; and
changes in the rates of fees paid to shareholders.

Decisions concerning major investments and divestments require the approval of the shareholders. Pursuant to agreements signed by Eastplats and Westplats ('the Management Agreements'), the management of those companies is provided by Lonrho Management Services ('LMS'), a company incorporated under South African law and controlled by Lonrho.

The proposed concentration

5 Gencor and Lonrho proposed to acquire joint control of Implats and, through that undertaking, of Eastplats and Westplats (LPD), in a two-stage operation. In the first stage, Gencor and Lonrho were to acquire joint control of Implats. In the second stage, Implats was to be granted sole control of Eastplats and Westplats. In return for the transfer by it of its interest in Eastplats and Westplats, Lonrho was to increase its holding in Implats.

6 Following the transaction, Implats was to have sole control of Eastplats and Westplats. Implats was to be held as to 32% by Gencor, 32% by Lonrho and 36% by the public. In addition, an agreement concerning the appointment of directors and voting arrangements was to govern the conduct of the two main shareholders with regard to the most important issues in the running of Implats, thus giving them joint control of that company.

Administrative procedure

7 On 20 June 1995 Gencor and Lonrho announced that they had entered into heads of agreement to merge their respective PGM operations. On the same day they sent the Commission a copy of the press release announcing the transaction.

8 On 22 August 1995 the South African Competition Board informed the parties that, having regard to the documents which they had sent to it on 14 August 1995, the transaction did not give rise to any concerns under South African competition law.

9 On 10 November 1995 Gencor and Lonrho signed a series of agreements relating to the concentration. These included the purchase agreement, completion of which was subject to the fulfilment of a number of conditions precedent including clearance of the concentration by the Commission by 30 June 1996 or, if the parties so agreed, by no later than 30 September 1996, as provided in clauses 3.1.8 and 3.3 of the purchase agreement.

10 On 17 November 1995 Gencor and Lonrho jointly notified the Commission of those agreements, together with the annexures thereto, by means of Form CO, in accordance with article 4(1) of the Regulation.

11 By decision of 8 December 1995 the Commission ordered the suspension of the concentration, pursuant to Article 7(2) and Article 18(2) of the Regulation until it took a final decision.

12 By decision of 20 December 1995 the Commission found that the concentration raised serious doubts as to its compatibility with the common market and therefore initiated the proceedings provided for by the Regulation, in accordance with Article 6(1)(c) thereof.

13 On 13 March 1996 Anglo American Corporation of South Africa Ltd ('AAC') acquired a 6% stake in Lonrho, with a right of first refusal over a further 18%. Through its associated company, Amplats, which is the leading supplier worldwide, AAC is the main competitor of Gencor and Lonrho in the PGM sector.

14 Following a meeting held by the Commission on 13 March 1996, Gencor and Lonrho initiated discussions with the Commission to explore the scope for offering commitments under Article 8(2) of the Regulation.

15 On 27 March 1996 the Commission informed Gencor and Lonrho that one of its main concerns with regard to the concentration was that it might result in a restriction of output leading to upward pressure on prices. It pointed out in that connection that behavioural undertakings were not normally accepted by it.

16 On I April 1996, following a series of meetings and proposals in that regard, Gencor and Lonrho submitted the final version of the commitments offered by them. Those commitments concerned, in particular, the level of output at a particular site.

17 By letter of 2 April 1996, the Commission criticised those proposed commitments on the ground that they did not meet its concerns. In particular, it noted the difficulties which would be involved in monitoring them and the problems in setting the transaction aside if they were infringed. It added that they failed to take account of foreseeable growth in demand.

18 On 9 April 1996 the Advisory Committee on Concentrations ('the Advisory Committee') gave its opinion on the concentration and on the commitments offered by Gencor and Lonrho. It stated that it agreed with the Commission's draft decision as regards the nature of the concentration, its Community dimension, the relevant product and geographical markets and the inadequacy of the commitments offered. A majority of the Advisory Committee agreed with the Commission's analysis that the concentration would lead to the creation of a situation of oligopolistic dominance in the markets concerned, and with its conclusion that the concentration would be incompatible with the common market and the functioning of the Agreement on the European Economic Area ('the EEA Agreement'). A minority expressed doubts as to whether the Regulation could be applied to situations of oligopolistic dominance, and for that reason abstained on the question as to whether or not the transaction was incompatible with the common market and the functioning of the EEA Agreement.

19 On 19 April 1996 the South African Deputy Minister of Foreign Affairs officially submitted to the Commission his Government's observations on the proposed concentration. In that letter, he limited himself to stating that he did not intend to contest the policy position adopted by the Community in the field of concentrations and collusive practices but, having regard to the importance of mineral resources to the South African economy, he favoured action in actual cases of collusion when they arose. With regard to the case at issue, the South African Government considered that, in certain situations, two equally matched competitors were preferable to the situation prevailing at that time, where a single mining enterprise was dominant in the sector. In the South African Govemment's view, although the bulk of platinum reserves were located in its country, those located abroad could theoretically satisfy demand for 20 years, excluding the significant potential resources of Zimbabwe. Finally, the South African Government expressed its desire to explore those issues with the Commission and asked for the decision to be postponed until such discussions had been held.

20 By Decision 97/26/EC of 24 April 1996 (OJ 1997 L.11, ('the contested decision'), the Commission declared, pursuant to Article 8(3) of the Regulation, that the concentration was incompatible with the common market and the functioning of the EEA Agreement, because it would have led to the creation of a dominant duopoly position between Amplats and Implats/LPD in the world platinum and rhodium market as a result of which effective competition would have been significantly impeded in the common market.

21 By letter of 21 May 1996 Lonrho informed Gencor that it did not intend to extend from 30 June 1996 to 30 September 1996 the deadline set by the purchase agreement for fulfilment of the conditions precedent if the condition set out in clause 3.1.8 of that agreement, requiring clearance of the concentration to be obtained from the Commission, was not satisfied within the period laid down.

Procedure before the Court

22 On 28 June 1996 the applicant brought this action for the annulment of

the contested decision.

23 On 3 December 1996 it made an application under Articles 49, 64 and 65 of the Rules of Procedure for measures of Organisation of procedure or of inquiry, with a view to establishing precisely the legal status and meaning of the official letters from the South African competition authorities, the scope of South African competition law and the conditions for its application.

24 On 18 December 1996, 24 January 1997 and 30 July 1997, the Commission submitted its observations on that application.

25 On 25 November 1996 and 3 December 1996 the Federal Republic of Germany and the United Kingdom of Great Britain and Northern Ireland submitted applications for leave to intervene in support of the form of order sought by the Commission.

26 On 11 December 1996 and 3 January 1997, the applicant requested that confidential treatment be given to certain documents in the case, *vis-a-vis*, respectively, the Federal Republic of Germany and the United Kingdom.

27 On 19 February 1997 the Court invited the applicant and Lonrho to reply to a number of questions concerning the admissibility of the action and to produce certain documents. On I April 1997 and 10 March 1997 respectively, the applicant and Lonrho replied to the questions put by the Court. The applicant lodged the documents requested, including the Management Agreements entered into by Eastplats and Westplats with LMS on 15 January 1990 and the agreement known as the Principals' Agreement, concerning the control of LPD, which the applicant and Lonrho had concluded on the same date.

28 By order of 3 June 1997 the President of the Fifth Chamber, Extended Composition, granted the Federal Republic of Germany and the United Kingdom leave to intervene and allowed in part the application for confidential treatment.

29 On 27 June 1997 the applicant submitted a further application for confidential treatment concerning certain data in the file.

30 By order of 16 July 1997 the President of the Fifth Chamber, Extended Composition, granted that application.

31 On 22 September 1997 the United Kingdom withdrew its intervention. On 26 September 1997 the Federal Republic of Germany lodged its statement in intervention.

32 Upon hearing the Report of the Judge-Rapporteur, the Court decided to open the oral procedure and, by way of measures of Organisation of procedure under Article 64 of the Rules of Procedure, the applicant and the Commission were requested to produce the full text of the commitments offered during the administrative procedure by the parties to the concentration. They produced the document requested, on 6 and 12 February 1998 respectively.

33 The main parties presented oral argument and answered oral questions put to them by the Court at the hearing on 18 February 1998.

34 By letter of 17 July 1998 the Court asked the applicant whether, in view of the judgment delivered by the Court of Justice on 31 March 1998 in Joined Cases C-68/94 and C-30/95 *France and Others v Commission*, it wished to withdraw its plea to the effect that concentrations creating joint dominance fell outside the scope of the Regulation. The applicant replied to the Court's question by letter of 29 July 1998.

Forms of order sought

35 The applicant claims that the Court should:

- annul the contested decision;

- order the Commission to pay the costs.

36 The Commission contends that the Court should:

- dismiss the action as inadmissible;

- in the alternative, dismiss it as unfounded;

- order the applicant to pay the costs.

37 The Federal Republic of Germany claims that the Court should dismiss the action.

Admissibility

38 The Commission pleads that the action is inadmissible on the ground that the applicant no longer has any legal interest in bringing proceedings. The applicant's legal position would not be altered by a decision of the Court in its favour, since the notified transaction can no longer be implemented ...

40 An action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the contested measure being annulled (Case T-46/92 *Scottish Football Association v Commission*, paragraph 14). Such an interest exists only if the annulment of the measure is of itself capable of having legal consequences (Case 53/85 *Akzo Chemie v Commission*, paragraph 21).

41 In that regard, it should be noted that under Article 176 of the EC Treaty the institution whose act has been declared void is required to take the necessary measures to comply with the judgment. Those measures do not relate to the elimination of the act from the Community legal order, because the very annulment by the Court has that effect. They are concerned in particular with eradicating the consequences of the act in question which are affected by the illegalities found to have been committed. The annulment of an act which has already been carried out or which, in the meantime, has been repealed from a

given date is still capable of having legal consequences. The act could have produced legal effects during the period when it was in force and those effects are not necessarily eradicated by its repeal. An action for annulment is also admissible if it allows future repetition of the alleged illegality to be avoided. For those reasons, a judgment annulling an act is the basis upon which the institution concerned may be led to restore the applicant sufficiently to his original position or avoid the adoption of an identical act (see Case 92/78 *Simmenthal v Commission*, paragraph 32, *Akzo Chemie v Commission*, cited above, paragraph 21, and Case 207/86 *Apesco v Commission*, paragraph 16) ...

Territoriality

78 The Regulation, in accordance with Article I thereof, applies to all concentrations with a Community dimension, that is to say to all concentrations between undertakings which do not each achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State, where the combined aggregate worldwide turnover of those undertakings is more than ECU 5 000 million and the aggregate Community-wide turnover of at least two of them is more than ECU 250 million.

79 Article I does not require that, in order for a concentration to be regarded as having a Community dimension, the undertakings in question must be established in the Community or that the production activities covered by the concentration must be carried out within Community territory.

80 With regard to the criterion of turnover, it must be stated that, as set out in paragraph 13 of the contested decision, the concentration at issue has a Community dimension within the meaning of Article 1(2) of the Regulation. The undertakings concerned have an aggregate worldwide turnover of more than ECU 10 000 million, above the ECU 5 000 million threshold laid down by the Regulation. Gencor and Lonrho each had a Community-wide turnover of more than ECU 250 million in the latest financial year. Finally, they do not each achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State.

81 The applicant's arguments to the effect that the legal bases for the Regulation and the wording of its preamble and substantive provisions preclude its application to the concentration at issue cannot be accepted.

82 The legal bases for the Regulation, namely Articles 87 and 235 of the Treaty, and more particularly the provisions to which they are intended to give effect, that is to say Articles 3(g) and 85 and 86 of the Treaty, as well as the first to fifth, ninth and eleventh recitals in the preamble to the Regulation, merely point to the need to ensure that competition is not distorted in the common market, in particular by concentrations which result in the creation or strengthening of a dominant position. They in no way exclude from the Regulation's field of application concentrations which, while relating to mining and/or production activities outside the Community, have the effect of creating or strengthening a dominant position as a result of which effective competition in the common market is significantly impeded.

83 In particular, the applicant's view cannot be founded on the closing words of the 11th recital in the preamble to the Regulation.

84 That recital states that 'a concentration with a Community dimension exists ... where the concentrations are effected by undertakings which do not have their principal fields of activities in the Community but which have substantial operations there'.

85 By that reference, in general terms, to the concept of substantial operations, the Regulation does not, for the purpose of defining its territorial scope, ascribe greater importance to production operations than to sales operations. On the contrary, by setting quantitative thresholds in Article I which are, based on the worldwide and Community turnover of the undertakings concerned, it rather ascribes greater importance to sales operations within the common market as a factor linking the concentration to the Community. It is common ground that Gencor and Lonrho each carry out significant sales in the Community (valued in excess of ECU 250 million).

86 Nor is it borne out by either the 30th recital in the preamble to the Regulation or Article 24 thereof that the criterion based on the location of production activities is well founded. Far from laying down a criterion for defining the territorial scope of the Regulation, Article 24 merely regulates the procedures to be followed in order to deal with situations in which non-member countries do not grant Community undertakings treatment comparable to that accorded by the Community to undertakings from those non-member countries in relation to the control of concentrations.

87 The applicant cannot, by reference to the judgment in *Woodpulp*, rely on the criterion as to the implementation of an agreement to support its interpretation of the territorial scope of the Regulation. Far from supporting the applicant's view, that criterion for assessing the link between an agreement and Community territory in fact precludes it. According to *Woodpulp*, the criterion as to the implementation of an agreement is satisfied by mere sale within the Community, irrespective of the location of the sources of supply and the production plant. It is not disputed that Gencor and Lonrho carried out sales in the Community before the concentration and would have continued to do so thereafter ...

88 Accordingly, the Commission did not err in its assessment of the territorial scope of the Regulation by applying it in this case to a proposed concentration notified by undertakings whose registered offices and mining and production operations are outside the Community ...

[Public International Law]

Collective dominant position

123 Article 2(3) of the Regulation provides:

> A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in

the common market or in a substantial part of it shall be declared incompatible with the common market.

124 The question thus arises as to whether the words 'which creates or strengthens a dominant position' cover only the creation or strengthening of an individual dominant position or whether they also refer to the creation or strengthening of a collective dominant position, that is to say one held by two or more undertakings.

125 It cannot be deduced from the wording of Article 2 of the Regulation that only concentrations which create or strengthen an individual dominant position, that is to say a dominant position held by the parties to the concentration, come within the scope of the Regulation. Article 2, in referring to 'a concentration which creates or strengthens a dominant position', does not in itself exclude the possibility of applying the Regulation to cases where concentrations lead to the creation or strengthening of a collective dominant position, that is to say a dominant position held by the parties to the concentration together with one or more undertakings not party thereto (*France and Others v Commission*, cited above, paragraph 166).

126 The applicant is not correct in its submission that, since other, national, systems contained specific provisions for the control of concentrations resulting in the creation or strengthening of collective dominant positions at the time when the Regulation was adopted, the deliberate choice of the Council not to enact such a provision in that regulation necessarily means that it does not cover situations of collective dominance. The choice of neutral wording of the kind found in Article 2(3) of the Regulation does not automatically exclude from its field of application the creation or strengthening of a collective dominant position.

127 Finally, it should be noted that, however specific they may be, the national laws which were applicable to the creation or strengthening of a collective dominant position before the Regulation entered into force can no longer be applied to such concentrations, in accordance with Article 21(2) of the Regulation. If the applicant's argument were followed, it would thus be necessary to accept that all the Member States whose systems for the control of concentrations applied to the creation or strengthening of collective dominant positions, that is to say France, Germany and the United Kingdom amongst others, have abandoned that form of control so far as concerns concentrations with a Community dimension. In the absence of clear indications to that effect, it cannot be assumed that such was the will of the Member States.

128 As regards the applicant's arguments relating to the legislative history of the Regulation, it is necessary, when interpreting a legislative measure, to attach less importance to the position taken by one or other Member State when the measure was drawn up than to its wording and objectives.

129 The legislative history cannot itself be considered to express clearly the intention of the authors of the Regulation as to the scope of the term 'dominant position'. In those circumstances, it provides no assistance for the interpretation of the disputed concept (*France and Others v Commission*, paragraph 167, and

the judgment cited).

130 In any event, the fact that, after the adoption of the Regulation, certain Member States, in particular France, contested the view that it could apply to collective dominant positions cannot mean that it does not cover situations of that kind. Since the Member States are not bound by positions which they may have accepted at the time of the debate within the Council, the possibility cannot be ruled out that one of them may change its view after the adoption of a legislative measure or simply decide to raise the question of its legality before the Community judicature.

131 It is necessary, therefore, to interpret the Regulation, in particular Article 2 thereof, on the basis of its general scheme.

132 The applicant's argument that the scheme of the Regulation precludes its application to situations of collective dominance must be examined. The applicant maintains that such application would appear to be precluded by the reference to the 25% threshold in the 15th recital in the preamble to the Regulation.

133 That recital states:

> ... concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market; ... without prejudice to Articles 85 and 86 of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25% either in the common market or in a substantial part of it.

134 As the Commission rightly points out, the reference to a 25% threshold for market share cannot justify a restrictive interpretation of the Regulation. Since oligopolistic markets in which one of the jointly dominant undertakings has a market share of less than 25% are relatively rare, that reference cannot remove cases of joint dominance from the scope of the Regulation. It is more common to find oligopolistic markets in which the dominant undertakings hold market shares of more than 25%. Thus, the market structures which encourage oligopolistic conduct most are those in which two, three or four suppliers each hold approximately the same market share, for example two suppliers each holding 40% of the market, three suppliers each holding between 25% and 30% of the market, or four suppliers each holding approximately 25% of the market. All those structures are consistent with the 25% threshold set in the 15th recital in the preamble to the Regulation.

135 Furthermore, that threshold is given purely by way of guidance, as is indeed made clear by the 15th recital itself, and it is not incorporated in any way in the provisions of the Regulation (*France and Others v Commission*, cited above, paragraph 176).

136 Accordingly, the interpretation of Article 2(3) of the Regulation in the light of the 15th recital in its preamble cannot substantiate the applicant's view

that the Regulation is not applicable to collective dominant positions ...

Purpose of the Regulation

148 Since the interpretations of the Regulation, and in particular Article 2 thereof, based on their wording and the history and the scheme of the Regulation do not permit their precise scope to be assessed as regards the type of dominant position concerned, the legislation in question must be interpreted by reference to its purpose (see, to that effect, Case 11/76 *Netherlands v Commission*, paragraph 6, Joined Cases C-267/95 and C-268/95 *Merck and Others v Primecrown and Others* and *Beecham v Europharm*, paragraphs 19 to 25, and *France and Others v Commission*, cited above, paragraph 168).

149 As is apparent from the first five recitals in its preamble, the principal objective set for the Regulation, with a view to achieving the aims of the Treaty and especially of Article 3(f) thereof (Article 3(g) following the entry into force of the Treaty on European Union), is to ensure that the process of reorganising undertakings as a result in particular of the completion of the internal market does not inflict lasting damage on competition. The final part of the fifth recital accordingly states that 'Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it' (see, to that effect, *France and Others v Commission*, paragraph 169).

150 Furthermore, it follows from the sixth, seventh, tenth and eleventh recitals in the preamble to the Regulation that it, unlike Articles 85 and 86 of the Treaty, is intended to apply to all concentrations with a Community dimension in so far as, because of their effect on the structure of competition within the Community, they may prove incompatible with the system of undistorted competition envisaged by the Treaty (*France and Others v Commission*, paragraph 170).

151 A concentration which creates or strengthens a dominant position on the part of the parties to the concentration with an entity not involved in the concentration is liable to prove incompatible with the system of undistorted competition laid down by the Treaty. Consequently, if it were accepted that only concentrations creating or strengthening a dominant position on the part of the parties to the concentration were covered by the Regulation, its purpose as indicated by the abovementioned recitals would be partially frustrated. The Regulation would thus be deprived of a not insignificant aspect of its effectiveness, without that being necessary from the perspective of the general structure of the Community system of control of concentrations (*France and Others v Commission*, paragraph 171).

152 The arguments regarding, first, the fact that the Regulation is capable of being applied to concentrations between undertakings whose main place of business is not in the Community and, secondly, the possibility that the Commission could control the anti-competitive behaviour of members of an oligopoly by means of Article 86 of the Treaty, are not capable of calling into question the applicability of the Regulation to cases of collective dominance resulting from a concentration.

153 As regards the first of those arguments, the applicability of the Regulation to collective dominant positions cannot depend on its territorial scope.

154 So far as concerns the possibility of applying Article 86 of the Treaty, it cannot be inferred therefrom that the Regulation does not apply to collective dominance, given that the same reasoning would hold for cases of dominance by a single undertaking, which would lead to the conclusion that the Regulation is not necessary at all.

155 Furthermore, since only the strengthening of dominant positions and not their creation can be controlled under Article 86 of the Treaty (*Europemballage and Continental Can*, cited above, paragraph 26), the effect of the Regulation not applying to concentrations creating a dominant position would be to create a gap in the Community system for the control of concentrations which would be liable to undermine the proper fimctioning of the common market.

156 It follows from the foregoing that collective dominant positions do not fall outside the scope of the Regulation, as the Court of Justice indeed itself held, subsequent to the hearing of 18 February 1998, in *France and Others v Commission* (paragraph 178).

157 Accordingly, the Commission was not required to include in the contested decision any reasoning on the applicability of the Regulation to collective dominant positions, in particular as it had already expressed its view on that subject both in the annual reports on competition policy and in other concentration cases, including the Nestle-Perrier decision. Thus, the ground of challenge alleging infringement of the obligation to state reasons laid down by Article 190 of the Treaty is not founded ...

The market share criterion

199 The prohibition enacted in Article 2(3) of the Regulation reflects the general objective assigned by Article 3(g) of the Treaty, namely the establishment of a system ensuring that competition in the common market is not distorted (first and seventh recitals in the preamble to the Regulation). The prohibition relates to concentrations which create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it.

200 The dominant position referred to is concerned with a situation where one or more undertakings wield economic power which would enable them to prevent effective competition from being maintained in the relevant market by giving them the opportunity to act to a considerable extent independently of their competitors, their customers and, ultimately, of consumers.

201 The existence of a dominant position may derive from several factors which, taken separately, are not necessarily decisive. Among those factors, the existence of very large market shares is highly important. Nevertheless, a substantial market share as evidence of the existence of a dominant position is not a constant factor. Its importance varies from market to market according to

the structure of those markets, especially so far as production, supply and demand are concerned (*Hoffmann-La Roche*, cited above, paragraphs 39 and 40).

202 In addition, the relationship between the market shares of the undertakings involved in the concentration and their competitors, especially those of the next largest, is relevant evidence of the existence of a dominant position. That factor enables the competitive strength of the competitors of the undertaking in question to be assessed (*Hoffmann-La Roche*, paragraph 48).

203 Accordingly, the fact that the Commission has relied in other concentration cases on higher or lower market shares in support of its assessment as to whether a collective dominant position might be created or strengthened cannot bind it in its assessment of other cases concerning, in particular, markets in which the structure of supply and demand and the conditions of competition are different.

204 Thus, since there is no reliable evidence that the mineral water market and/or the potash market examined in the Nestle-Perrier case and the Kali und Salz case, on the one hand, and the platinum and rhodium market under consideration in this case, on the other, have fundamentally similar characteristics, the applicant cannot rely on any differences in the market shares held by the members of the oligopoly which were taken into account by the Commission in one or other of those two cases in order to call into question the market-share threshold adopted as indicative of a collective dominant position in this case.

205 Furthermore, although the importance of the market shares may vary from one market to another, the view may legitimately be taken that very large market shares are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position (Case C-62/86, *Akzo v Commission*, paragraph 60). An undertaking which has a very large market share and holds it for some time, by means of the volume of production and the scale of the supply which it stands for - without those having much smaller market shares being able rapidly to meet the demand from those who would like to break away from the undertaking which has the largest market share - is in a position of strength which makes it an unavoidable trading partner and which, already because of this, secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position (*Hoffmann-La Roche*, paragraph 41).

206 It is true that, in the context of an oligopoly, the fact that the parties to the oligopoly hold large market shares does not necessarily have the same significance, compared to the analysis of an individual dominant position, with regard to the opportunities for those parties, as a group, to act to a considerable extent independently of their competitors, their customers and, ultimately, of consumers. Nevertheless, particularly in the case of a duopoly, a large market share is, in the absence of evidence to the contrary, likewise a strong indication of the existence of a collective dominant position.

207 In the instant case, as the Commission stated in the contested decision (paragraphs 81 and 181), Implats/LPD and Amplats would, following the

concentration, each have had a market share of about 30% to 35%, that is to say a combined market share of approximately 60% to 70%, in the world PGM market and approximately 89% of the world PGM reserves. Russia had a 22% market share and about 10% of world reserves, the North American producers held a 5% market share and 1% of world reserves, and the recycling undertakings had a 6% market share. It was probable that, after Russia had disposed of its stocks, that is to say in all likelihood in the two years following the contested decision, Implats/LPD and Amplats would each have had a market share of about 40%, that is to say a combined market share of 80%, which would have constituted a very large market share.

208 Thus, having regard to the allocation of market share between the parties to the concentration and to the gap in market share which would open up following that concentration between, on the one hand, the entity arising from the merger and Amplats and, on the other, the remaining platinum producers, the Commission was entitled to conclude that the proposed concentration was liable to result in the creation of a dominant position for the South African undertakings.

209 The comparison drawn by the applicant between the market shares of the parties to the concentration and the aggregate market share of all the members of the oligopoly in the Nestle-Perrier case (82%) is incorrect. As the Commission has pointed out, it would be necessary to compare the 82% share with the aggregate market share of the parties to the concentration and Amplats after the virtual elimination of the Russian producer (Almaz) as a significant influence on the market, that is to say a total of approximately 80%. So far as concerns the Kali und Salz case, the applicant was likewise wrong in comparing the market shares of the parties to the concentration in the instant case with those of Kali und Salz and MdK (98%) in Germany, where collective dominance was not an issue. In the Kali und Salz case, the Commission found that a collective dominant position existed on the European market excluding Germany, where the undertaking resulting from the merger together with the other member of the duopoly held an aggregate market share of about 60%. The applicant thus should have made a comparison with the latter figure, which is markedly lower than the combined market share of Amplats and Implats/LPD following the concentration.

210 As regards the applicant's argument that the combined market share of Implats/LPD following the concentration would have amounted to only (...)% in the Community, it should be noted, first, that the geographical market at issue is a defined geographical area in which the conditions of competition are sufficiently homogeneous for all businesses. In that area, the undertaking or undertakings holding a dominant position would have had the potential to engage in abuses hindering effective competition (see, to that effect, Case 27/76 *United Brands v Commission*, paragraphs 11 and 44). Hence, the Commission was able to carry out a rational assessment of the effects of the concentration on competition in that area. Secondly, by reason of the characteristics of the PGM market set out in paragraphs 68 to 72 of the contested decision, the geographical market at issue in the instant case has a worldwide dimension, a fact which the parties do not contest.

211 It is accordingly not possible to refer to 'market shares' of the parties in the Community. In a world market, such as the platinum and rhodium market, the economic power of a group of the kind which Implats/LPD and Amplats would have formed following the concentration is the power attached to its share of the world market and not to its market share in part of the world.

212 The existence of regional differences in the market-share breakdown of the members of an oligopoly dominating the market in a fungible, readily transportable product which has its price set at world level merely reflects traditional business relationships which could either easily disappear if the undertakings in a dominant position decided to engage in predatory pricing in order to eliminate their competitors, or be difficult to break in the face of abusive pricing practices if the marginal sources of supply were not in a position comfortably to satisfy demand on the part of customers of the dominant undertakings which were engaging in such abusive pricing ...

Structural links

264 The applicant claims that the Commission did not take account of the case-law of the Court of First Instance (Joined Cases T-68/89, T-77/89 and T-78/89 *SIV and Others v Commission*, the *'Flat Glass'* case) which, in the context of Article 86 of the Treaty, requires for findings of collective dominance that there be structural links between the two undertakings, for example through a technological lead by agreements or licences, which give them the power to behave independently of their competitors, of their customers and, ultimately, of consumers. In the instant case, the Commission has failed to demonstrate the existence of structural links or to prove that the merged entity and Amplats intended to behave as if they constituted a single dominant entity. That failure also infringes the obligation to state reasons laid down in Article 190 of the Treaty.

265 The applicant notes that, in the contested decision, the Commission refers to the following structural links between the merged entity and Amplats (paragraphs 156 and 157):

- links in certain industries, including a joint venture in the steel industry;
- AAC's recent purchase of 6% of Lonrho with a right of first refusal over a further 18% ...

273 In its judgment in the *Flat Glass* case, the Court referred to links of a structural nature only by way of example and did not lay down that such links must exist in order for a finding of collective dominance to be made.

274 It merely stated (at paragraph 358 of the judgment) that there is nothing, in principle, to prevent two or more independent economic entities from being united by economic links in a specific market and, by virtue of that fact, from together holding a dominant position *vis-a-vis* the other operators on the same market. It added (in the same paragraph) that that could be the case, for example, where two or more independent undertakings jointly had, through agreements or licences, a technological lead affording them the power to behave to an appreciable extent independently of their competitors, their customers

and, ultimately, of consumers.

275 Nor can it be deduced from the same judgment that the Court has restricted the notion of economic links to the notion of structural links referred to by the applicant.

276 Furthermore, there is no reason whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly within which, in a market with the appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those parties are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximise their joint profits by restricting production with a view to increasing prices. In such a context, each trader is aware that highly competitive action on its part designed to increase its market share (for example a price cut) would provoke identical action by the others, so that it would derive no benefit from its initiative. All the traders would thus be affected by the reduction in price levels.

277 That conclusion is all the more pertinent with regard to the control of concentrations, whose objective is to prevent anti-competitive market structures from arising or being strengthened. Those structures may result from the existence of economic links in the strict sense argued by the applicant or from market structures of an oligopolistic kind where each undertaking may become aware of common interests and, in particular, cause prices to increase without having to enter into an agreement or resort to a concerted practice.

278 In the instant case, therefore, the applicant's ground of challenge alleging that the Commission failed to establish the existence of structural links is misplaced ...

Undertakings by the parties

299 The applicant asserts that the Commission erred in law by refusing to accept the commitments offered by the parties to the concentration, and that it also failed to justify the reasons for its refusal to the requisite legal standard, thereby infringing Article 190 of the Treaty.

300 It recalls that, according to paragraph 215 of the contested decision, the parties proposed to the Commission draft commitments which sought to allay the competition concerns raised by the transaction. Those commitments were submitted to the Member States and discussed at the meeting of the Advisory Committee on 9 April 1996.

301 There were three commitments:

(a) the development of an extra (...) ounces of capacity at the mine shaft;

(b) the maintenance of output at existing levels (...) ounces; and

(c) the creation of a new supplier in the market ...

313 It is necessary to consider first of all what type of commitment may be accepted under the Regulation and in particular whether the Commission's view that behavioural undertakings cannot be accepted is correct in law.

314 In the light of the seventh recital in its preamble, which states that 'a new legal instrument should therefore be created ... to permit effective monitoring of all concentrations from the point of view of their effect on the structure of competition in the Community', the principal objective of the Regulation is to monitor market structures, and not the behaviour of undertakings which is essentially to be controlled only under Articles 85 and 86 of the Treaty.

315 Article 8(2) of the Regulation provides:

> Where the Commission finds that, following modification by the undertakings concerned if necessary, a notified concentration fulfils the criterion laid down in Article 2(2), it shall issue a decision declaring the concentration compatible with the common market.
>
> It may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into *vis-a-vis* the Commission with a view to modifying the original concentration plan ...

316 It follows from those provisions and from Article 2(3) of the Regulation that where the Commission concludes that the concentration is such as to create or strengthen a dominant position, it is required to prohibit it, even if the undertakings concerned by the proposed concentration pledge themselves *vis-a-vis* the Commission not to abuse that position.

317 Since the purpose of the Regulation is to prevent the creation or strengthening of market structures which are liable to impede significantly effective competition in the common market, situations of that kind cannot be allowed to come about on the basis that the undertakings concerned enter into a commitment not to abuse their dominant position, even where it is easy to check whether those commitments have been complied with.

318 Consequently, under the Regulation the Commission has power to accept only such commitments as are capable of rendering the notified transaction compatible with the common market. In other words, the commitments offered by the undertakings concerned must enable the Commission to conclude that the concentration at issue would not create or strengthen a dominant position within the meaning of Article 2(2) and (3) of the Regulation.

319 The categorisation of a proposed commitment as behavioural or structural is therefore immaterial. It is true that commitments which are structural in nature, such as a commitment to reduce the market share of the entity arising from a concentration by the sale of a subsidiary, are, as a rule, preferable from the point of view of the Regulation's objective, inasmuch as they prevent once and for all, or at least for some time, the emergence or strengthening of the dominant position previously identified by the Commission and do not,

moreover, require medium or long-term monitoring measures. Nevertheless, the possibility cannot automatically be ruled out that commitments which *prima facie* are behavioural, for instance not to use a trademark for a certain period, or to make part of the production capacity of the entity arising from the concentration available to third-party competitors, or, more generally, to grant access to essential facilities on non-discriminatory terms, may themselves also be capable of preventing the emergence or strengthening of a dominant position.

320 It is thus necessary to examine on a case-by-case basis the commitments offered by the undertakings concerned.

321 In the instant case, while the applicant categorises the development of the project as a structural commitment, it does not deny, as the Commission states in the contested decision (paragraph 216), that that commitment, like the other commitments offered, namely to maintain output at a specified level and to create a new supplier, was incapable of solving the question of the oligopolistic market structure created by the concentration.

322 The first two commitments do not in any way alter the structure of the market in question as a duopolistic market, but merely bring the production policy of Implats/LPD within the framework of a simple obligation as to minimum output which, while it may reduce the potential for abuse of a dominant position in the future, depending on changes in demand, does not ensure either that there will be no abuse of any kind or, more importantly, that the dominant position will actually be eliminated.

323 Nor can the applicant maintain that the Commission was unable to refuse the commitment on the ground that, if Implats/LPD had maintained output at a constant level, that would have been known to Amplats, thus generating upward pressure on prices. The argument expounded, far from proving that the commitment offered was capable of eliminating the dominant duopoly created by the concentration, merely challenges the very existence of a dominant position. The applicant's arguments on that point have, however, already been rejected in connection with the plea for annulment alleging infringement of Article 2 of the Regulation and relating to the finding that there was a collective dominant position.

324 So far as concerns the applicant's arguments, first, that businesses are entitled to derive a reasonable return from their economic activities and, secondly, that any behaviour on the part of the merged entity and Amplats which resulted in such a return could have been dealt with by the South African authorities, suffice it to state that, whatever the merits of those arguments, they are irrelevant when it comes to assessing whether or not the commitment offered was capable of eliminating the impediment to the competitive structure created by the concentration.

325 As for the third commitment, namely the creation of a new supplier, it need merely be observed that the applicant does not dispute the Commission's analysis that it would have had a negligible impact on the amount of the future platinum supply to the ultimate consumer. The applicant merely states, thereby

acknowledging the ancillary nature of that commitment, that if it were right in its other criticisms of the Commission's approach to the commitments, that aspect of the contested decision could not be upheld.

326 Since, as held above, the Commission was justified in rejecting the first two commitments, it did not manifestly err in its assessment by considering that, irrespective of its nature, the third commitment could not be accepted in view of its negligible impact on the market.

327 In those circumstances, the applicant s arguments concerning the possibilities for monitoring the commitments offered are entirely irrelevant. Since the commitments as a whole were not capable of eliminating the impediment to effective competition caused by the concentration, the Commission was justified in rejecting them, even if there were no particular difficulties in verifying whether they had been carried out.

328 Accordingly, the Commission neither erred in law nor manifestly erred in its assessment by rejecting the commitments offered by Gencor and Lonrho with a view to eliminating the competition problems raised by the concentration.

329 In the light of the above findings, the reasoning in the decision concerning the rejection of the commitments is accordingly sufficient.

330 The pleas examined must therefore be rejected ...

Court's ruling

The Court:

1 Dismisses the application;

2 Orders the applicant to bear its own costs and those incurred by the Commission;

3 Orders the Federal Republic of Germany to bear its own costs. □

The Impact of Competition Laws on Intellectual Property Rights

The Internet Conference on this subject, held by the Franklin Pierce Law Center, Concord, New Hampshire, and moderated by Professor Bryan Harris, editor of this newsletter, was extended for a further month, in view of the interest shown in the formal papers, as well as in the participants' individual contributions to the discussion. The Conference web-site will remain open free of charge: it is

www.ipconference.com