ACQUISITIONS (AGGREGATES): THE ANGLO-AMERICAN / TARMAC CASE

Subject: Acquisitions
National laws

Industry Building materials; aggregates, concrete, asphalt

Parties Anglo-American plc
Tarmac plc

Source Commission Statement IP/00/32, dated 13 January 2000

(Note. Here is another case in which a Member State has requested referral.)

The Commission has decided to refer the proposed acquisition by Anglo-American plc of Tarmac plc (both of the UK) to the United Kingdom competition authorities for investigation. Both companies are active in the supply of aggregates - sand, gravel, etc - and related downstream products such as ready-mixed concrete and asphalt, in the UK. The UK requested that the case, which was being considered under EU merger control rules, be referred to it for investigation under national competition law because of the merger's possible effects on competition in various distinct markets within the UK. After appropriate consideration the Commission decided that the conditions for making such a reference were met and that the merger should be examined by the national competition authorities in the UK.

Under the EU Merger Regulation, the Commission has sole responsibility for examining all mergers above a certain size (on the basis of turnover) to assess their compatibility with the common market. However, the regulation recognises that, where a merger's effects on competition in the EU are likely to be confined to distinct markets within the territory of a Member State, it may be more appropriate for the case to be dealt with under the national competition law of the Member State concerned. Consequently, the regulation provides, in Article 9, that, on request from a Member State, the Commission can refer a merger to that Member State for investigation under national competition law if it threatens to lead to the creation or strengthening of a dominant position which would substantially reduce competition in a distinct market within the Member State's territory.

In the present case, the UK informed the Commission that it had identified a number of markets within the UK for various products in which the UK authorities considered that the conditions for such a reference were met. The Commission agreed, and considered that the UK competition authorities, with their extensive local knowledge and experience of the markets in question, were best placed to carry out the necessary further examination of the case. Accordingly the Commission decided to refer the whole of the case to the UK

authorities, which now have a maximum of four months in which to complete their own investigation. ■

MERGERS (ELECTRICITY): THE VEBA / VIAG CASE

Subject Mergers

Industry Electricity; chemicals

Parties VEBA AG
VIAG AG

Source Commission Statement IP/00/114, dated 4 February 2000

(Note. Here is another "second-phase" investigation under the Mergers Regulation, indicating the Commission's uncertainty about approving a merger which would result in an undertaking having a two-thirds share of the market in Germany for the supply of electricity. At first sight it was also a candidate, like the cases reported above, for consideration at national level. However, the Commission points out that other cases are being considered in the sector and that "these mergers are also likely to have significant consequences for the future structure of the whole European market". It is therefore continuing the investigation itself, but "in close liaison with [Germany's] Federal Cartel Office".)

The Commission has decided to undertake a full, second-phase investigation of the proposed merger between VEBA AG, of Düsseldorf and VIAG AG, of Munich. The Commission considers that the proposed merger raises serious doubts about its compatibility with the common market as regards, in particular, the strong positions of both parties in electricity generation and transmission, and also in the markets for certain chemicals.

VEBA is a diversified group with activities in many areas, including electricity and chemicals. It is present at all levels in the energy sector through its subsidiary PreussenElektra AG. Its traditional distribution area covers the northern Bundesländer Schleswig-Holstein and Lower Saxony together with large parts of Hesse. Its activities in chemicals are for the most part undertaken through its subsidiary Degussa-Hüls AG. VIAG is likewise a conglomerate, active in numerous sectors including electricity and chemicals. Its activities in the energy sector are concentrated in Bayernwerk AG. Bayernwerk also is present at all levels in the electricity sector. Its traditional distribution area covers most of the southern Bundesland of Bavaria. VIAG's activities in chemicals are brought together in SKW Trostberg AG and the latter's subsidiary Goldschmidt AG.

On the basis of the information available, the merger's primary effects will be on the generation and distribution of electricity in Germany. VEBA/VIAG would, together with the generator RWE, produce over two thirds of German energy consumption. The concern is that the merger would significantly reduce competition on the German market in particular. Grounds for this view are that VEBA/VIAG would have a number of joint ventures with RWE. Both VEBA

and VIAG also possess substantial generating capacity and transmission networks on which other suppliers are dependent for successful market entry. The Commission accordingly has serious doubts about the operation's compatibility with the common market, in as much as the merger could lead to joint dominance of the market in question by VEBA/VIAG and RWE. The Commission's enquiries also gave grounds for concern that the terms of 'Verbändevereinbarung II'- which lays down the conditions for non-discriminatory transmission across the existing network – could have the effect of dividing the German market into two separate zones. This could allow discrimination against other suppliers, especially those from other Member States of the European Union.

Serious doubts about compatibility were also found to arise from the merger of VEBA and VIAG's activities in certain chemicals. These are prussic acid derivatives, which are used among other things for the manufacture of herbicides, optical witheners and disinfectants. The concentration would produce significant overlaps in these sectors.

Every investigation under the Merger Regulation is carried out in accordance with a statutory timetable. The Commission has one month from the date on which the merger is notified to it in which to make a preliminary examination. If a Member State requests the reference of the notified concentration to its competent authorities, this period is increased to a total of six weeks. In the present case, the Federal Republic of Germany requested that such a reference be made, informing the Commission that the concentration would create or strengthen dominant positions in regional or national markets for electricity in Germany, which would significantly impede competition in those markets. In the view of the German authorities, the affected markets show all the characteristics of distinct markets.

In its decision on the request for reference, the Commission has taken account of the extent to which the affected markets are a substantial part of the common market. The fact that the main focus of the merging firms' activities in the electricity sector is in Germany, where they derive most of their turnover, supports the case for reference. Moreover, the Federal Cartel Office (the German national competition authority) is currently investigating the merger between RWE and VEW, which will substantially affect the structure of electricity markets in Germany. On the other hand, the Commission is also involved in examining, or expects to receive notification of, other proposed mergers in the German electricity sector. Because of the central importance of Germany in this area, these mergers are also likely to have significant consequences for the future structure of the whole European market. In this connection the Commission is currently undertaking a detailed examination of the provisions of 'Verbändevereinbarung II'. On the basis of its preliminary assessment, the Commission considers that certain provisions discriminate against, in particular, foreign suppliers and could lead to the foreclosure of national markets. Accordingly the Commission considers that there is an overriding Community interest in favour of an investigation at Community level. The Commission has accordingly decided to undertake a full investigation of the case. It has a further

four months from the date of that decision in which to make a final decision. It will carry out its investigation in close liaison with the Federal Cartel Office. ■

ACQUISITIONS (RETAIL CHAINS): THE KESKO CASE

Subject: Acquisitions
Trade between Member States
Admissibility

Industry: Retail chains
(Some implications for other industries)

Parties: Kesko Oy
Commission of the European Communities
Republic of Finland (intervener)
French Republic (intervener)

Source: Judgment of The Court of First Instance, dated 15 December 1999 in Case T-22/97, *Kesko Oy v Commission of the European Communities*, supported by the Republic of Finland and the French Republic

(Note. This case has a number of points of interest. Perhaps the most important is the problem of assessing how far a concentration, which is limited to industries within a Member State's national boundaries, can be said to affect trade between Member States. Up to a point, the answer may be largely theoretical. Thus, in the present case, the Court mainly based its findings on the propositions "that the concentration will result in foreign undertakings being denied entry to the Finnish daily consumer goods market, that a significant proportion of the products sold by Kesko and Tuko originates outside Finland, and that suppliers from other Member States will be obliged to approach Kesko in order to secure adequate distribution of their products in Finland". But this is a good rationale and it is given authority by the application to it of the case law cited in paragraphs 103 to 105 and in paragraph 108. The judgment is therefore a useful point of reference for any future cases in which at first sight the effects of the concentration do not obviously affect trade between the Member States.

An important aspect of the foregoing point is that it represents a kind of cumulative test to be applied by the Commission in the examination of a proposed concentration. The applicant to the Court had argued that there was a contradiction between the Commission's principal finding that the concentration would create or strengthen a dominant position on the Finnish market and the finding that the concentration would affect trade between Member States. The Court disagreed. "These are, in fact, two separate matters. In order to determine the effect on intra-Community trade, the Commission was necessarily required to assess it in the light of patterns of trade between Member States. By contrast, the question whether a given concentration creates or strengthens a dominant position, as a result of which effective competition would be significantly impeded within the territory of the Member State concerned, within the meaning of Article 22(3) of Regulation 4064/89, is concerned, by its very nature, with the effects of the concentration on the national market." (Paragraph 115.)

As to the admissibility of the action, the Court's review of the case law in paragraphs 57 to 59 are also a useful guide to parties who seek a judicial review of a decision by the Commission, even when the contractual situation giving rise to the decision has long passed. The Commission is inclined to scorn these actions; the Court is inclined to allow them. In practice, a challenge may have a bearing on the future plans of the party in question: this is a matter for commercial judgment.)

Legal background

[Paragraphs 1 and 2 set out the relevant provisions of the Mergers Regulation (Council Regulation (EEC) 4064/89); these are not reproduced here.]

Background to the dispute and procedure

3 The applicant, Kesko Oy ('Kesko'), is a limited company incorporated in Finland engaged in the retail sale of daily consumer goods and specialty goods. It also sells such goods in the wholesale and cash-and-carry sectors. Kesko's share capital is divided into preference shares ('exclusive shares') and ordinary shares. The exclusive shares are held, directly or indirectly, by Kesko's retailers ('the Kesko retailers'). By virtue of the additional voting rights attaching to the exclusive shares under the applicant's company charter, those shares confer on the Kesko retailers effective control over the majority of the voting rights exercisable by the shareholders in general meeting. According to Kesko's company charter, the members of its supervisory board, which nominates the other decision-making and executive organs of Kesko, must all be Kesko retailers.

4 Kesko's main object is to assist the Kesko retailers by making buying and promotion possible on a larger scale than is feasible for those retailers on an individual basis. Consequently, Kesko's activities include the negotiation of favourable purchase terms with suppliers, the supplying of its retailers and the provision of numerous additional services.

5 The Kesko retailers, who are legally independent undertakings, are contractually bound to Kesko. They operate in the retail sector relating to daily consumer goods and/or specialty goods, and have since 1995 been organised in five chains comprising stores having common characteristics, namely the 'Neighbourhood Stores', 'Kesko Super-markets', 'Kesko Superstores', 'Kesko Citymarkets' and 'Rimi' stores. The commercial premises are to a considerable extent owned by Kesko.

6 Tuko Oy ('Tuko') was another Finnish limited company specialising in the wholesale and retail sale of daily consumer goods and specialty goods. In addition to operating the sales outlets owned by it, Tuko had entered into cooperation agreements with a large number of legally independent retailers ('Tuko retailers'). The Tuko retailers comprised three groups, namely the Spar chain, the Anttila department stores and the Tarmo stores. Tuko was also active in the wholesale and cash-and-carry sectors relating to daily consumer goods.

7 On 27 May 1996 Kesko concluded various agreements for the acquisition of 56.3% of Tuko's share capital, representing 59.3% of the voting rights. Thereafter, Kesko increased its holding in Tuko to over 99% of that company's share capital. On 26 June 1996 the Finnish Office of Free Competition ('the OFC') requested the Commission to examine the acquisition of Tuko by Kesko in accordance with Article 22(3) of Regulation No 4064/89.

9 On 28 June 1996 Kesko brought an action before the Korkein Hallinto-Oikeus (Supreme Administrative Court, hereinafter 'the SAC') in which it contested the competence of the OFC to submit a request to the Commission under Article 22(3) of Regulation No 4064/89.

10 On 19 July 1996 the Finnish Ministry of Trade and Industry ('the MTI') sent the Commission a copy of the statement submitted by it in the proceedings brought by Kesko before the SAC, in which it maintained that the OFC was competent to make the above-mentioned request.

11 By decision of 26 July 1996, the Commission, taking the view that the concentration in question raised serious doubts as to its compatibility with the common market, decided to initiate the proceedings provided for by Article 6(1)(c) of Regulation No 4064/89 'pending the final ruling of the Finnish Administrative Supreme Court'.

12 On 17 September 1996 the Commission sent a statement of objections to the applicant pursuant to Article 18(1) of Regulation No 4064/89. The applicant replied on 2 October 1996.

13 The SAC delivered its judgment on 1 October 1996. It declined to adjudicate on the substance of the case, on the ground that the action was inadmissible.

14 By letter of 23 October 1996, the applicant submitted to the Commission certain proposals for undertakings designed to dispel the latter's doubts as to the compatibility of the concentration with the common market.

15 On 20 November 1996 the Commission adopted, pursuant, in particular, to Articles 8(3) and 22 of Regulation 4064/89, Decision 97/277/EC declaring a concentration to be incompatible with the common market (Case No IV/M.784-*Kesko/Tuko*), hereinafter 'the contested decision').

16 In the contested decision, the Commission made, inter alia, the following findings:

- that the concentration in question fell to be assessed not solely in terms of wholesale trade but also by reference to the retail sector, on account of the links existing between, on the one hand, Kesko and Tuko and, on the other, their respective retailers, as described in points 39 to 66;
- that the concentration between Kesko and Tuko would lead to the creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded in the Finnish retail market for the sale of daily consumer goods (see, in particular, points 93 to 138);

- that the concentration would create a dominant supply structure as a result of which effective competition would be significantly impeded in the Finnish cash-and-carry and wholesale market for the sale of daily consumer goods (points 139 to 145);
- that the dominant position created by the concentration in the Finnish retail and cash-and-carry markets would increase Kesko's purchasing power, thereby further strengthening its dominant position in those markets (points 146 to 153);
- that the concentration would strengthen the barriers impeding entry into the market and would make it extremely unlikely that any new competitor could establish itself on the markets in question (points 154 to 161);
- that the change in the structure of the Finnish retail and cash-and-carry markets for daily consumer goods would have an appreciable influence, directly or indirectly, actually or potentially, on the pattern of trade between Member States (points 10 to 13).

17 The Commission also rejected the proposals for undertakings submitted by Kesko in its letter of 23 October 1996, on the ground, inter alia, that they were clearly insufficient to remove the dominant position enjoyed by Kesko on the Finnish market for daily consumer goods (points 162 to 172 of the contested decision).

[Paragraphs 18 to 41 are concerned with attempts to reach agreement on divestiture, with actions taken before the Finnish OFT and SAC and with the proceedings leading to the present case.]

Forms of order sought by the parties

42 The applicant claims that the Court should:
- annul the contested decision;
- order the Commission to pay the costs.

43 The defendant contends that the Court should:
- dismiss the action as inadmissible;
- in the alternative, dismiss the action as devoid of purpose;
- in the further alternative, dismiss the action as unfounded;
- order the applicant to pay the costs.

44 The Republic of Finland contends that the Court should dismiss the action.

45 The French Republic contends that the Court should dismiss the action as unfounded.

The admissibility and object of the action

[Paragraphs 46 to 54 are concerned with the arguments of the parties. The following paragraphs set out the findings of the Court.]

55 As regards, first, the admissibility of the action, it must be recalled that, for the purposes of assessing a legal interest in bringing proceedings, the relevant date is

that on which the action is commenced (Case 14/63, *Forges de Clabecq v High Authority*, at 371).

56 On the date on which the action was brought, namely 31 January 1997, Kesko still controlled Tuko, which it had acquired by means of the concentration of 27 May 1996. Although it had submitted to the Commission on 30 January 1997 a draft proposal for the sale of Tuko's daily consumer goods business apart from the Anttila department stores, the agreements required to implement that transaction had not yet been entered into.

57 The fact that the contested decision was addressed to the applicant suffices to confer on it an interest in bringing proceedings and in having the legality of that decision examined by the Community judicature (judgment of 25 March 1999 in Case T-102/96, *Gencor v Commission*, paragraphs 40 to 42). It follows that, when the action was commenced, Kesko had, on any view, a vested, present interest in seeking annulment of the contested decision.

58 As to the question whether the applicant thereafter retained its interest in pursuing the proceedings (Case C-19/93 P, *Rendo and Others v Commission*, paragraph 13), the fact that the contractual basis for a concentration has disappeared cannot in itself exclude judicial review of the legality of a decision of the Commission declaring that concentration incompatible with the common market (*Gencor*, paragraph 45).

59 As regards the Commission's argument that the applicant voluntarily abandoned the concentration in issue after bringing the proceedings, it must be recalled that, where a company has merely complied with a Commission decision, as it was obliged to do, it cannot thereby be deprived of its interest in seeking annulment of that decision (Joined Cases 172/83 and 226/83, *Hoogovens Groep v Commission*, paragraph 19).

60 In the present case, it was not until 7 February 1997 - that is to say, after the adoption on 20 November 1996 of the contested decision, point 173 of which refers to the Commission's intention, in a separate decision based on Article 8(4) of Regulation 4064/89, to adopt appropriate measures in order to restore conditions of effective competition (see paragraphs 15 to 18 above) - that the applicant entered into the divestment agreement.

61 Thereafter, the divestment decision of 19 February 1997 specifically required the applicant to sell Tuko's daily consumer goods business, then under the control of a trustee, within six months or by 31 December 1997 at the latest.

62 On 3 March 1997 the Commission rejected the applicant's proposal that it be allowed to require the trustee to stipulate that the sale was to be completed only if the action for annulment of the contested decision were dismissed.

63 It was not until August 1997 that the unconditional sale of Tuko's business was finally completed in accordance with the trustee's proposals and with the Commission's agreement.

64 In those circumstances, contrary to the Commission's arguments, neither the divestment agreement of 7 February 1997 nor the subsequent transactions by which the applicant undertook to sell Tuko's daily consumer goods business can be regarded as constituting a 'voluntary abandonment' of the concentration. On the contrary, those transactions were a direct consequence of the contested decision and the subsequent divestment decision, and of the applicant's efforts to comply therewith.

65 It must therefore be concluded that the action is admissible and that the applicant has retained an interest in seeking annulment of the contested decision.

Substance

66 In its application, the applicant advances four pleas, alleging, first, that the Commission lacked competence to adopt the contested decision, second, that the Commission made a manifest error of assessment and/or of law in finding that the concentration in issue might have an effect on trade between Member States, third, that the Commission made a manifest error of assessment and/or of law in finding that the links between Kesko and the Kesko and Tuko retailers created a dominant position and, fourth, that there was a failure to provide an adequate statement of reasons. The latter plea will be considered in the context of the Court's examination of the first two pleas.

The first plea, alleging lack of competence of the Commission

[Paragraphs 67 to 80 set out the arguments of the parties. The following paragraphs set out the findings of the Court.]

81 It is not disputed in the present case that on 26 June 1996 the OFC requested the Commission to examine the acquisition of Tuko by Kesko on the basis of Article 22(3) of Regulation No 4064/89.

82 According to the case-law of the Court of Justice, it is not for the Commission to rule on the division of competences by the institutional rules proper to each Member State (*Germany v Commission*, cited above, paragraph 13).

83 It must also be recalled that, in an action brought under Article 173 of the EC Treaty (now, after amendment, Article 230 EC), the Community judicature has no jurisdiction to rule on the lawfulness of a measure adopted by a national authority (Case C-97/91, *Borelli v Commission*, paragraph 9).

84 In those circumstances, it was not for the Commission to determine, at the stage of the administrative procedure, the competence of the OFC under Finnish law to submit a request under Article 22(3) of Regulation No 4064/89; it was required only to verify whether the request referred to it was prima facie a request made by a Member State within the meaning of Article 22.

85 The Court's task is to examine whether the Commission discharged that duty of verification to the requisite legal standard.

86 In that regard, it should be noted, first, that the notion of a request by a 'Member State' within the meaning of Article 22(3) of Regulation 4064/89 is not limited to requests from a government or ministry; it also encompasses requests from national authorities such as the OFC.

87 Second, it must be recalled that, at the time of adoption of the contested decision, the information available to the Commission was as follows:
- the fact that the OFC is the Finnish authority normally having competence in matters concerning the application of competition law;
- the statement lodged by the MTI, the Finnish ministry responsible for competition matters, in the action brought by Kesko before the SAC, maintaining that the OFC was competent to submit the request under Article 22(3) of Regulation 4064/89 (see paragraph 10 above);
- the judgment of the SAC dismissing the applicant's action as inadmissible (see paragraph 13 above): the applicant was therefore not in a position to produce a decision of a Finnish court declaring that the OFC lacked competence to submit the request in question;
- the fact that the applicant did not comment on the question of the OFC's competence in its reply to the statement of objections of 2 October 1996 or disclose any new information following delivery of the judgment of the SAC.

88 Having regard to all those factors, it must be concluded that, at the time when the contested decision was adopted on 20 November 1996, the Commission had good grounds for considering that the OFC was prima facie competent to submit the request under Article 22(3) of Regulation No 4064/89. In those circumstances, there was no need for the Commission to request the Finnish authorities to provide it with further information on that issue.

89 Consequently, it has not been shown that the Commission made an error of law by deciding to initiate the procedure pursuant to Article 6(1)(c) of Regulation 4064/89. It follows that the plea alleging lack of competence on the part of the Commission is unfounded.

90 As to the statement of reasons in the contested decision regarding the competence of the Commission, it is apparent from the case-law of the Court of Justice that the statement of reasons on which a measure is based is not required to specify the various matters of fact and law dealt with in the measure, provided that the measure falls within the general scheme of the body of measures of which it forms part; moreover, the requirements to be satisfied by the statement of reasons depend on the circumstances of each case (Case C-48/96 P, *Windpark Groothusen v Commission*, paragraphs 34 and 35).

91 The Commission stated in its decision of 26 July 1996, adopted pursuant to Article 6(1)(c) of Regulation 4064/89:
"Kesko Oy has appealed the request of the Office of Free Competition (OFC) to the Finnish Administrative Supreme Court, arguing that the OFC lacked the power to make the request according to Article 22. The Commission has been informed by the Finnish Ministry of Trade and Industry that, in its view, the OFC request is valid. In the absence of any evidence to the contrary, the Commission

assumes itself to have competence in this case pending the final ruling of the Finnish Administrative Supreme Court."

92 As already noted, the applicant did not, following the dismissal on 1 October 1996 of its action before the SAC (see paragraph 91 above), adduce any fresh evidence concerning the OFC's competence to submit the request in issue. In those circumstances, the Commission was not bound to include in the contested decision any further statement of reasons regarding that point.

93 It follows that the first plea must be rejected.

The second plea, alleging a manifest error of assessment or of law concerning the effect of the concentration upon trade between Member States

[Paragraphs 94 to 102 set out the arguments of the parties. The following paragraphs set out the findings of the Court.]

103 It has been consistently held by the Court of Justice and the Court of First Instance with regard to the application of Articles 85 and 86 of the Treaty that, in order for an agreement between undertakings or, indeed, an abuse of a dominant position to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability and on the basis of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realisation of the aim of a single market in all the Member States (Case C-250/92, *DLG*, paragraph 54, and Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93, *Compagnie Maritime Belge Transports and Others v Commission* [1996] ECR, paragraph 201). Accordingly, it is not necessary that the conduct in question should in fact have substantially affected trade between Member States. It is sufficient to establish that the conduct in question is capable of having such an effect (see, as regards Article 86 of the Treaty, Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission*, paragraph 69, and, as regards Article 85, Case T-29/92 *SPO and Others v Commission*, paragraph 235).

104 It is also clear from the case-law of the Court of Justice and the Court of First Instance that trade between Member States is affected, in particular, by an agreement which hampers the operations on the national market of, or entry into that market by, producers or sellers from other Member States, or which prevents competitors from other Member States from establishing themselves on the market in question (Case C-56/65, *Société Technique Minière v Maschinenbau Ulm*, at 249, Case 8/72, *Cementhandelaren v Commission*, paragraphs 29 and 30, Case C-234/89, *Delimitis v Henninger Bräu*, paragraphs 12 to 14, Case T-9/93, *Schöller v Commission*, paragraphs 76 to 78, and Case T-77/94, *VGB and Others v Commission*, paragraphs 132 and 140).

105 As regards Article 86 of the Treaty, the Court of Justice and the Court of First Instance have also held that, where the holder of a dominant position obstructs access to the market by competitors, it makes no difference whether such conduct is confined to a single Member State as long as it is capable of

affecting patterns of trade and competition in the common market (Case 322/81, *Michelin v Commission*, paragraph 103; see also Case T-65/89, *BPB Industries and British Gypsum v Commission*, paragraphs 134-5.

106 That case-law must apply equally to the criterion of an effect on trade between Member States, as referred to in Article 22(3) of Regulation No 4064/89. As is apparent, in particular, from the first eight recitals in the preamble thereto, Regulation 4064/89, Articles 85 and 86 of the EC Treaty and the regulations implementing them form a composite whole constituting an integral part of the Community system designed to ensure, in accordance with Article 3(g) of the EC Treaty (now, after amendment, Article 3(g)), that competition in the internal market is not distorted. It is therefore necessary to apply to the criterion of an effect on trade between Member States, within the meaning of Article 22(3) of Regulation 4064/89, an interpretation which is consistent with that given to it in the context of Articles 85 and 86 of the Treaty.

107 That conclusion is not invalidated by the fact that the word 'may', appearing in Articles 85 and 86 of the Treaty, does not feature in Article 22(3) of Regulation 4064/89. It is apparent from the very nature of the control of concentrations established by Regulation 4064/89 that the Commission is required to carry out a prospective analysis of the effect of the concentration in question, and hence to consider, in the context of Article 22(3) of that regulation, its effect on trade between Member States in the future. It follows that the Commission is entitled, in that context, to take account of potential effects on trade between Member States, provided that they are sufficiently appreciable and foreseeable, without being required to establish that the concentration in question has actually affected intra-Community trade.

108 In the present case, the Commission found, in points 11 to 13 of the contested decision, that the concentration in issue would affect the structure of the Finnish retail and wholesale markets for daily consumer goods and would thus have an appreciable influence, directly or indirectly, actually or potentially, on the pattern of trade between Member States (see *Société Technique Minière v Maschinenbau Ulm*, cited above, at 249). In particular, the Commission made the following observations:
"11 ... The acquisition of Tuko by Kesko will create foreclosure effects for new entrants, including potential entrants from other Member States, in particular on the Finnish markets for daily consumer goods. In addition, a large amount (about 30%) of the products sold by both Kesko and Tuko originates outside Finland. The transaction will also affect trade between Member States in that suppliers from other Member States will, in effect, require access to Kesko's distribution channels to secure sufficient marketing of their products in Finland.
"12.Moreover, both companies are members of several international purchasing organisations, together with similar companies in other Member States. Since the spring of 1996, Kesko has also expanded its operations by opening retail outlets in Sweden."

109 Applying the case-law cited above (see paragraphs 103 to 105 and 108) to the present case, it is apparent that, viewed as a whole, the facts stated by the Commission in point 11 of the contested decision - namely that the concentration

will result in foreign undertakings being denied entry to the Finnish daily consumer goods market, that a significant proportion of the products sold by Kesko and Tuko originates outside Finland, and that suppliers from other Member States will be obliged to approach Kesko in order to secure adequate distribution of their products in Finland - are sufficient to establish that the concentration will affect trade between Member States within the meaning of *Article 22(3) of Regulation 4064/89.*

110 Moreover, the facts mentioned in point 12 of the contested decision, namely that Kesko and Tuko are both members of several international purchasing organisations and that Kesko is expanding its business in Sweden, likewise constitute further confirmation of the existence of the effect in question in the present case.

111 As to the argument that the Commission failed to produce any conclusive evidence of the alleged effect of the concentration on trade between Member States, it should be noted that the Finnish retail trade was characterised by the existence of just two voluntary chains of retailers, namely the 'Kesko block' and the 'Tuko block'. In the contested decision, the Commission found, in particular, that:

- on the retail market for daily consumer goods, Kesko and Tuko held a market share of at least 55%, whether assessed at local, regional or national level (point 106); that position was further strengthened by the fact that Kesko and Tuko held 69% of sales outlets covering more than 1,000m2, by the fact that they controlled a large number of business premises suitable for the retail sale of daily consumer goods, and by numerous other factors, such as the customer loyalty schemes, the importance of private-label products and the advantages resulting from increased buying power (see points 106 to 138);
- on the cash-and-carry and wholesale markets for daily consumer goods, the combined market share of Kesko and Tuko was between 50% and 100% in all regions of Finland and, measured at national level, it was around 80%; they operated 56 cash-and-carry outlets, whereas their three other competitors together operated only 11; throughout the northern part of Finland, consisting of nine regions, the applicant was thus the only cash-and-carry/wholesale operator (see points 139 to 146);
- the distribution channels other than those dominated by Kesko and Tuko did not constitute viable alternatives for the majority of suppliers, especially in the non-food sector (see points 146 to 153);
- the concentration will create a dominant position on the retail, wholesale and cash-and-carry markets, which will be further strengthened by the increased buying power of Kesko (see points 144 and 153);
- it is extremely unlikely, following completion of the concentration, that foreign undertakings would be able to establish themselves on the Finnish markets for the sale of daily consumer goods, whether retail, wholesale or cash-and-carry (see points 154 to 161).

112 Subject to the question whether the Commission made a manifest error of assessment regarding the links between Kesko and its retailers, it is clear that the factors referred to above substantiate the Commission's conclusion that the concentration would have resulted, in particular, in the closure of the Finnish

market to potential competitors from other Member States and would have meant that suppliers from other Member States would have had to use Kesko/Tuko's distribution channels in order to secure the distribution of their products in Finland.

113 Moreover, having regard to all those factors, the Commission did not make a manifest error of assessment by finding that the concentration would affect trade between Member States without carrying out an analysis of the market in respect of each product within the daily consumer goods sector.

114 Even if, as the applicant asserts, various obstacles to entry onto the Finnish market existed prior to the concentration in issue, it is also apparent from the factors referred to above that the concentration would significantly reinforce those obstacles, to the detriment, in particular, of suppliers from other Member States.

115 Contrary to the applicant's submission, there is no contradiction in the fact that, when analysing the effect of the concentration on trade between Member States, the Commission examined its impact on suppliers from other Member States whereas, for the purposes of assessing the effect of the concentration in terms of competition, it took account only of the Finnish markets. These are, in fact, two separate matters. In order to determine the effect on intra-Community trade, the Commission was necessarily required to assess it in the light of patterns of trade between Member States. By contrast, the question whether a given concentration creates or strengthens a dominant position, as a result of which effective competition would be significantly impeded within the territory of the Member State concerned, within the meaning of Article 22(3) of Regulation 4064/89, is concerned, by its very nature, with the effects of the concentration on the national market.

116 As to the argument based on the Commission's declaration on pages 265 to 268 of the Nineteenth Report on Competition Policy, it must be recalled that this is worded as follows:

"re Article 22

"(a) The Commission states that it does not normally intend to apply Articles 85 and 86 of the Treaty establishing the European Economic Community to concentrations as defined in Article 3 other than by means of this Regulation. However, it reserves the right to take action in accordance with the procedures laid down in Article 89 of the Treaty, for concentrations, as defined in Article 3, but which do not have a Community dimension within the meaning of Article 1, in cases not provided for by Article 22. In any event, it does not intend to take action in respect of concentrations with a worldwide turnover of less than ECU 2,000m or below a minimum Community turnover level of ECU 100m or which are not covered by the threshold of two-thirds provided for in the last part of the sentence in Article 1(2), on the grounds that below such levels a concentration would not normally significantly affect trade between Member States.

"(b) The Council and the Commission note that the Treaty establishing the European Economic Community contains no provisions making specific reference to the prior control of concentrations. [Acting] on a proposal from the Commission, the Council has therefore decided, in accordance with Article 235 of the Treaty, to set up a new mechanism for the control of concentrations. The

Council and the Commission consider, for pressing reasons of legal security, that this new Regulation will apply solely and exclusively to concentrations as defined in Article 3.
"(c) The Council and the Commission state that the provisions of Article 22(3) to (5) in no way prejudice the power of Member States other than that at whose request the Commission intervenes to apply their national laws within their respective territories."

117 It should be noted that the second subparagraph in paragraph (a) of those notes expressly refers to intervention by the Commission, in accordance with the procedures laid down in Article 89 of the Treaty, 'in cases not provided for by Article 22' of Regulation No 4064/89. It is thus apparent that the second and third subparagraphs in paragraph (a) of those notes are intended to specify the criteria governing intervention by the Commission in relation to concentrations falling outside the regulatory framework referred to. Consequently, the declaration made in the above-mentioned notes did not concern cases in which a request is made by a Member State under Article 22(3) of Regulation 4064/89.

118 In any event, such a declaration is not binding on the Commission where, in a case falling within the provisions of Article 22(3) of Regulation 4064/89, it is established that trade between Member States is significantly affected by the concentration despite the fact that more than two thirds of the turnover of each of the undertakings concerned is achieved within one and the same Member State, within the meaning of the last part of Article 1(2) of Regulation 4064/89. First, the above-mentioned declaration merely states the approach which the Commission would 'normally' adopt in the circumstances envisaged, and does not preclude the adoption by it of a different approach in a given case. Second, such a declaration cannot prevail over the Commission's obligation to interpret the criterion of the effect of the concentration on trade between Member States in accordance with the case-law of the Court of Justice and the Court of First Instance cited above (paragraphs 103 to 105 and 108).

119 Lastly, it follows from the foregoing that the Commission has not failed to comply with its obligation to state reasons under Article 190 of the Treaty as regards the effect of the concentration on trade between Member States.

120 The applicant's second plea must therefore be rejected.

The third plea, alleging a manifest error of assessment or of law as regards the existence of a dominant position

[Paragraphs 121 to 136 set out the arguments of the parties. The following paragraphs set out the findings of the Court.]

The first part of the plea

137 The applicant argues, in essence, that the Commission was not entitled to aggregate the market shares of the Kesko and Tuko retailers for the purposes of assessing the effects of the concentration in issue without establishing that Kesko and Tuko had 'control' over those retailers within the meaning of Article 3 of

Regulation 4064/89, and that, since the only 'concentration' within the meaning of Article 3 was that between Kesko and Tuko, the assessment of the effect of that concentration should necessarily have been limited to the market in which Kesko and Tuko operate, namely the wholesale market.

138 It must be stated in that regard that Article 3 of Regulation 4064/89 merely defines the criteria governing the existence of a 'concentration'. By contrast, where, in a proceeding under Article 22(3) of Regulation 4064/89, the Commission finds that an operation does indeed constitute a concentration within the meaning of Article 3, its assessment of the question whether that concentration creates or strengthens a dominant position as a result of which effective competition would be significantly impeded within the territory of the Member State concerned must take account of the conditions laid down by Article 2(1)(a) and (b) of Regulation 4064/89, in accordance with the first sentence of Article 22(4) of that regulation.

139 Thus, the Commission was not in any way bound, when assessing the effect of the concentration at issue on competition, to apply the control test referred to in Article 3 of Regulation 4064/89 in order to determine whether the market shares of Kesko and Tuko should be aggregated. Having established the existence of the concentration between Kesko and Tuko, the Commission was required to take into account all the facts of the present case, including, in particular, the links between, on the one hand, Kesko and Tuko and, on the other, their respective retailers, in order to assess whether that concentration created or strengthened a dominant position as a result of which effective competition would be significantly impeded on the relevant Finnish markets. By the same token, the Commission was under no obligation to limit its appraisal solely to the wholesale market, since it had concluded that the concentration between Kesko and Tuko would also affect the retail market in daily consumer goods, having regard to the close links existing between, on the one hand, Kesko and Tuko and, on the other, their retailers.

140 It follows that the first part of the plea, alleging, in essence, an error of law in the form of a breach of Articles 2, 3 and 22(3) of Regulation No 4064/89, must be rejected.

The second part of the plea

141 As to the manifest error allegedly made by the Commission in its assessment of the links between Kesko and its retailers, it should be noted that the Commission is required, in the context of a request under Article 22(3) of Regulation 4064/89, to verify, by means of a prospective analysis of the markets concerned, whether the concentration referred to it will give rise to the creation or strengthening of a dominant position as a result of which effective competition will be significantly impeded within the territory of the Member State concerned.

142 In that connection, the basic provisions of the regulation, in particular Article 2 thereof, confer on the Commission a certain power of appraisal, especially with respect to assessments of an economic nature. Consequently, review by the Community judicature of the exercise of that power, which is

essential for defining the rules on concentrations, must take account of the discretionary margin of appraisal implicit in the provisions of an economic nature which form part of the rules on concentrations (see, to that effect, Joined Cases C-68/94 and C-30/95, *France and Others v Commission,* paragraphs 221 to 224, and *Gencor v Commission*, cited above, paragraphs 164 and 165).

143 In the present case, the Commission cites, in points 39 to 66 of the contested decision, numerous factors in support of its conclusion that the Kesko and Tuko blocks constitute 'centrally-planned, structural features of the Finnish retail market', with the result that the concentration at issue must be assessed at retail level and not solely in wholesale terms (points 15 and 66 of the contested decision). Moreover, in points 93 to 135 and 146 to 161 of the contested decision, the Commission mentions numerous factors in support of its finding that, following the concentration, Kesko held a dominant position on the Finnish retail market (points 136 to 138, 153 and 161 of the contested decision).

144 Thus, the Commission puts forward the following factors in the contested decision: the contracts binding the retailers to Kesko (points 40 and 44); the fact that the retailers are required to use the Kesko logotypes and the support services provided by Kesko (point 45); the bonuses and rebates providing an incentive for retailers to remain loyal to the Kesko group strategy (point 46); the control mechanisms by which Kesko ensures that each retailer adheres to the common objectives (point 41); the fact that the Kesko retailers hold the majority of the voting rights within the body of Kesko shareholders and are all members of the Kesko supervisory board, which nominates all the members of the other decision-making organs (points 4 and 43); the organisation of Kesko into five voluntary chains the purchasing and commercial policies of which are centrally coordinated, in particular by means of a common logotype for each chain, and which are equipped with modern computer systems which continue to be owned by Kesko (points 47 to 50, 54 to 57 and 67 to 72); the fact that the suppliers perceived Kesko and its retailers as an integrated entity, on account, in particular, of Kesko's invoicing system (points 51 to 53 and 148); Kesko's strategy regarding ownership of the premises in which the retailing activities are carried on (points 58 to 61 and 116 to 118); and the retailers' financial commitments to Kesko (point 62).

145 The Commission has also pointed out that most of the above analysis is equally applicable to the relationship between Tuko and its retailers and that, in any event, following completion of the concentration, Kesko will be able to organise the Tuko retailers in the same way as the Kesko retailers (point 65).

146 As to the question whether, in those circumstances, the concentration would create or strengthen a dominant position as a result of which effective competition would be significantly impeded on the Finnish market for the retail sale of daily consumer goods, the Commission draws particular attention in the contested decision to the following: the importance of the role played by voluntary retail chains in Finland, qualified by the fact that the Kesko and Tuko blocks are the only operators in the daily consumer goods sector (point 39); the fact that, following the concentration, the Kesko block accounted for at least 55% of all sales of such goods in Finland, representing a market share nearly three

times as large as that of its main competitor (points 93 to 98 and 106); the strong position enjoyed by Kesko and Tuko in the large retail outlets sector in Finland (points 107 to 115); the large number of premises suited for retail sales of daily consumer goods (points 116 to 118); the customer loyalty scheme involving the K-advantage card (points 119 to 125); the importance of the sales by Kesko and Tuko of private-label products and the competitive advantages arising from such sales (points 126 to 130); the distribution systems operated by Kesko and Tuko, particularly in the field of frozen products (points 131 and 132); the increased purchasing power of Kesko following the acquisition of Tuko (points 133 to 135 and 146 to 153); and the fact that it is extremely unlikely that a foreign undertaking would attempt to establish itself on the Finnish retail market for daily consumer goods (points 154 to 161).

147 Having regard to the above-mentioned factors, the applicant's allegations are not such as to call in question the Commission's conclusions regarding the need to assess the impact of the concentration at retail level (points 39 to 66 of the contested decision) and to aggregate the market shares of all the retailers in the Kesko and Tuko blocks in such a way as to attribute them to Kesko (points 93 to 105), or its findings concerning the question whether the concentration would create or strengthen a dominant position as a result of which effective competition would be significantly impeded on the Finnish market for daily consumer goods (points 106 to 161). The applicant has merely asserted that the Commission should have carried out a different analysis, without adducing any specific evidence invalidating the economic analysis of the effects of the concentration contained in points 39 to 161 of the contested decision.

148 As regards the applicant's first argument, alleging that the Commission overestimated the influence exerted by Kesko on its retailers by means of its ownership of the premises and assets operated by them, it should be noted that over 60% of the total turnover of the Kesko retailers is achieved in stores owned by Kesko (point 59 of the contested decision). Similarly, it is apparent from points 59 to 61 of that decision that the retailers operating on premises owned by the applicant have entered into collaboration agreements with Kesko which set out the principles governing the operation of the business premises and the method, based on the turnover or profit margin, of calculating the rent. Moreover, no retailer may transfer his business without Kesko's approval.

149 In those circumstances, the fact that Kesko owns a significant part of the business premises operated by the Kesko retailers must be regarded as an important factor ensuring the continuing loyalty of those retailers. Consequently, it has not in any way been shown that the Commission overestimated that factor in its assessment of the links between Kesko and its retailers.

150 It follows that the applicant's first argument must be rejected.

[Paragraphs 151 to 169 concern other, subsidiary pleas, which were also dismissed. The Court dismissed the action; ordered the applicant to bear its own costs and to pay the costs of the Commission; and ordered the Republic of Finland and the French Republic to bear their own costs.] ■