OPINION OF ADVOCATE GENERAL KOKOTT delivered on 26 April 2007 [1]

I — Introduction

1. The present case provides an opportunity to clarify the delimitation of jurisdiction between the Community and the Member States in merger control. [2] It is necessary to clarify the relevant time in a specific merger case for determining the competent competition authority. It must also be examined whether that authority can lose its jurisdiction as a result of subsequent events. These questions are of the greatest practical importance both for the economic players concerned and for the competition authorities at national and at Community level which are responsible for merger control.

2. The background to this case is a merger control proceeding relating to the markets for wall-building materials, including sand-lime bricks, in the Netherlands. In 1999 Cementbouw [3] and Haniel [4] acquired joint control of CVK [5] and its member undertakings. For that purpose two groups of transactions were concluded, which the Commission regarded as a *single concentration between undertakings.* The Commission's jurisdiction to examine the case could also be accepted only because those two groups of transactions were regarded as a whole and taken together exceeded the relevant turnover thresholds.

3. In the course of the merger control proceedings the Commission identified competition problems. In order to resolve those problems, however, in a first draft Haniel and

1 — Original language: German.

2 — Merger control generally means the control of concentrations between undertakings, whether mergers in the strict sense of the word or other forms of concentration between undertakings.

3 — Cementbouw Handel & Industrie BV (Cementbouw) is active in the Netherlands in the building materials market and, more generally, the construction, logistics and raw materials supply markets.

4 — The German company Franz Haniel & Cie GmbH (Haniel) is active in the building materials sector.

5 — Coöperatieve Verkoop- en Produktievereniging van Kalkzandsteenproducenten.

Cementbouw offered only commitments amounting to a relinquishment of the *second group of transactions*. The Commission rejected those commitments since they were not apt to resolve the competition problems and authorised the concentration only when further commitments were given, including a relinquishment of the *first group of transactions*.

4. Before the Court, Cementbouw now maintains that the Commission was not permitted to base its decision on those further-reaching commitments. According to Cementbouw, the relinquishment of the second group of transactions originally offered by the undertakings would have meant already that a substantial part of the concentration would have ceased to exist and that all in all the Commission would have lost its jurisdiction to decide the case because the turnover thresholds would no longer be reached.

II — Legal framework

5. The legal framework relevant to this case is Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings ('the Merger Regulation')[6] as amended by Council Regulation (EC) No 1310/97.[7]

6. The *material scope* of the Merger Regulation is summarised in Article 1(1):

'... this Regulation shall apply to all concentrations with a Community dimension ...'

In addition, the first half of Article 22(1) of the Merger Regulation provides:

'This Regulation alone shall apply to concentrations as defined in Article 3; ...'

6 — OJ 1989 L 395, p. 1, corrected version published in OJ 1990 L 257, p. 13.

7 — Regulation of 30 June 1997 amending Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ 1997 L 180, p. 1, with corrections in OJ 1998 L 3, p. 16, and OJ 1998 L 40, p. 17).

7. Article 3 of the Merger Regulation contains a definition of the term *concentration*, which includes the following provision:

'1. A concentration shall be deemed to arise where

(a) two or more previously independent undertakings merge, or

(b) — one or more persons already controlling at least one undertaking, or

— one or more undertakings acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.

...'

8. A concentration has *a Community dimension* if the aggregate worldwide and Community-wide turnover of the undertakings concerned exceeds certain thresholds laid down in Article 1(2) and (3) of the Merger Regulation. Article 1(2) of the Merger Regulation, which is relevant to the present case, reads as follows:

'For the purposes of this Regulation, a concentration has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 5 000 million, and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million;

unless each of the undertakings concerned achieves more than two thirds of its aggregate Community-wide turnover within one and the same Member State.'

9. Concentrations with a Community dimension are subject to a prohibition on implementation and must be notified to the Commission (Articles 4 and 7 of the Merger Regulation). They are appraised by the Commission with a view to establishing whether or not they are compatible with the common market (Article 2(1) of the Merger Regulation). Authorisation or prohibition of a concentration depends on whether it 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 (Article 2(2) and (3) of the Merger Regulation).

10. A prohibition always requires formal merger control proceedings ('Phase II'; see Article 6(1)(c) and Article 8(3) of the Merger Regulation). An authorisation can also first be preceded by formal proceedings of this kind, as occurred in the present case.[8] To eliminate any competition problems the authorisation may be made subject to conditions and obligations. For that purpose, Article 8(2) of the Merger Regulation confers the following decision-making powers on the Commission:

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

It may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market. ...'[9]

8 — Where a concentration does not raise serious doubts as to its compatibility with the common market, as is often the case in practice, an authorisation is given *without* formal merger control proceedings being initiated, following a simple preliminary examination ('Phase I'). Under Article 6(1)(b) of the Merger Regulation, in such cases the Commission is to *decide not to oppose it* and is to declare that the concentration is compatible with the common market.

9 — An authorisation decision adopted in the preliminary examination procedure can also be made subject to conditions and obligations in order to eliminate any competition problems (Article 6(2) of the Merger Regulation, as amended by Regulation No 1310/97).

11. In Article 21(1) and (2) of the Merger Regulation, jurisdiction for the control of concentrations between undertakings is defined as follows:

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

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

...'

12. In addition, the 29th recital in the preamble to the Merger Regulation makes clear:

'Whereas concentrations not referred to in this Regulation come, in principle, within the jurisdiction of the Member States. ...'

13. In 2004 the Merger Regulation was substantially amended. However, according to Article 26(1) of the *recast* EC Merger Regulation, [10] that regulation is applicable only from 1 May 2004 and is not therefore relevant to the present case; under Article 26(2), the former legal situation continues to apply to cases like the present one.

III — Facts and procedure

A — *Facts*

14. On the basis of the findings of the Court of First Instance, [11] the facts of the case may be summarised as follows.

15. CVK existed from 1947 and was initially responsible for selling the output of its member undertakings, the Netherlands producers of sand-lime bricks. In 1989 it was transformed into a Netherlands-law cooperative in order to improve cooperation between its members.

10 — Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ 2004 L 24, p. 1 ('the EC Merger Regulation' or 'Regulation No 139/2004').

11 — Judgment of the Court of First Instance of 23 February 2006 in Case T-282/02 *Cementbouw Handel & Industrie* v *Commission* [2006] ECR II-319, paragraphs 4 to 8 (the judgment under appeal).

16. Before the concentration which forms the basis of the present proceedings before the Court, 5 of the 11 member undertakings of CVK were subsidiaries of Haniel, 3 were subsidiaries of Cementbouw, 2 were subsidiaries of RAG [12] and 1 undertaking was owned jointly by Haniel, Cementbouw and RAG.

17. In 1998 the Netherlands competition authority, 'the NMa', [13] was notified of a proposal whereby CVK was to acquire control of its member undertakings. Control was to be transferred in the context of a 'pooling agreement' and by amending CVK's articles. By decision of 20 October 1998, the NMa authorised the proposed operation.

18. Before that operation was implemented, RAG decided to sell its shares in the member undertakings of CVK to Haniel and Cementbouw. In March 1999 the parties informed the NMa of their intentions. By letter of 26 March 1999 the NMa informed the parties that the proposed transfer would not constitute a concentration within the meaning of the applicable Netherlands rules, [14] provided that the concentration authorised by the decision of 20 October 1998 was completed no later than the time of the transfer that was now planned.

19. On 9 August 1999 a number of different transactions were performed between the parties, which may be summarised in two groups. First of all, CVK and its member undertakings concluded the pooling agreement referred to above; [15] CVK's articles were amended on the same date to take account of the provisions of the pooling agreement (*first group of transactions*). Secondly, also on 9 August 1999, RAG transferred its shares in three of the member undertakings of CVK to Haniel and Cementbouw, and Haniel and Cementbouw concluded a cooperation agreement governing their cooperation within CVK (*second group of transactions*).

B — *The procedure before the Commission, the commitments and the contested decision*

20. The Commission became aware of the transactions of 9 August 1999 when it

12 — RAG AG, Germany (formerly Ruhrkohle AG).

13 — Nederlandse Mededingingssautoriteit.

14 — Article 27 of the Law of 22 May 1997 laying down new rules on economic competition (Wet van 22 mei 1997 houdende nieuwe regels omtrent de economische mededinging — *Mededingingswet* —, Stb. 1997, No 242).

15 — See point 17 of this Opinion.

examined two other concentrations [16] notified by Haniel and, by letter of 22 October 2001, it informed Cementbouw and the other participating undertakings that the transaction must be notified to it. Haniel and Cementbouw then notified the concentration pursuant to Article 4 of the Merger Regulation on 24 January 2002.

21. On 25 February 2002 the Commission initiated the formal examination procedure under Article 6(1)(c) of the Merger Regulation because the notified concentration raised serious doubts as to its compatibility with the common market and with the EEA Agreement. [17]

22. After the Commission had issued the statement of objections and heard the parties concerned, on 28 May 2002 Haniel and Cementbouw submitted *draft commitments* including concessions with regard to the second group of transactions. Those commitments essentially provided that Haniel and Cementbouw would end their cooperation agreement and that their shares in CVK member undertakings, acquired from RAG in 1999, would be sold to an independent third party. On the other hand, both the pooling agreement and the change in CVK's articles (first group of transactions) were to be maintained. [18] In the Commission's view, those draft commitments were not sufficient to resolve the competition problems it had identified, which were connected in particular with the pooling agreement, that is to say, with the first group of transactions.

23. Thereupon, on 5 June 2002 the two undertakings submitted *final commitments*, in which they also undertook to revoke the pooling agreement within a certain period, to undo the amendment to CVK's articles and to dissolve CVK. [19]

24. On 26 June 2002 the Commission adopted the contested decision, [20] based on Article 8(2) of the Merger Regulation, whereby it considered that the notified concentration was compatible with the common market and the EEA Agreement, but it made that authorisation subject to full compliance with the final commitments given by Haniel and Cementbouw. In particular, the authorisation of the concentration was also subject to the condition *that CVK be dissolved* within a certain period in

16 — Cases COMP/M.2495 — Haniel/Fels and COMP/M.2568 — Haniel/Ytong.

17 — Agreement on the European Economic Area (OJ 1994 L 1, p. 3).

18 — Paragraph 295 of the judgment under appeal and recital 127 in the preamble to the contested decision.

19 — Paragraph 298 of the judgment under appeal and recital 129 in the preamble to the contested decision.

20 — Commission Decision 2003/756/EC of 26 June 2002 declaring a merger to be compatible with the common market and the EEA Agreement (Case COMP/M.2650 — Haniel/Cementbouw/JV (CVK)), notified under document No C(2003) 2315 (OJ 2003 L 282, p. 1, corrigendum published in OJ 2003 L 285, p. 52).

accordance with the final commitments given by Haniel and Cementbouw.

C — *The proceedings before the Court of First Instance*

25. On 11 September 2002 Cementbouw challenged the contested decision before the Court of First Instance, claiming that the Court should annul that decision and order the Commission to pay the costs. The Commission, on the other hand, contended that the Court should dismiss the application and order Cementbouw to pay the costs.

26. By judgment of 23 February 2006 (the judgment under appeal), [21] the Court of First Instance upheld the contested decision in its entirety. It dismissed the action brought by Cementbouw and ordered that undertaking to pay the costs.

27. By its appeal, lodged at the Registry of the Court of Justice on 4 May 2006, Cementbouw now claims that the Court should:

— set aside the judgment under appeal;

— if considered appropriate, refer the case back to the Court of First Instance for a fresh judgment; and

— order the Commission to pay the costs.

28. The Commission contends that the Court should:

— dismiss the appeal; and

— order Cementbouw to pay the costs.

29. Before the Court of Justice, first written submissions and then, on 22 March 2007, oral argument were presented.

IV — Assessment

A — *Introductory remarks*

30. The delimitation of the respective jurisdiction of the Community and of the

21 — Cited in footnote 11 above.

Member States is certainly not merely a 'constitutional' issue, as is repeatedly discussed in the context of primary law, most recently for example in connection with the Treaty establishing a Constitution for Europe. [22] Rather, this problem also arises in the day-to-day practice of the authorities at Community level and at national level. Merger control is a particularly striking example of this.

31. In principle the Merger Regulation gives a clear definition of jurisdiction according to the *principle of double exclusivity*: concentrations with a Community dimension are examined solely by the Commission, as the Community's competition authority, and they are assessed by the Commission solely with reference to the Merger Regulation (Article 21(1) and (2) and the first part of Article 22(1) of the Merger Regulation).

32. However, the present case clearly shows that in a specific case a dispute may none the less arise as to which competition authority in the Community has jurisdiction to examine and authorise a concentration between undertakings.

33. The Commission accepted jurisdiction in this case, [23] because it regarded the two groups of transactions concluded on 9 August 1999 [24] as parts of a single event [25] which, taken as a whole, fulfilled the criteria for a concentration with a Community dimension within the meaning of Article 3(1) in conjunction with Article 1(1) and (2) of the Merger Regulation and, in particular, exceeded the relevant turnover thresholds. The Commission maintained its jurisdiction in the subsequent stages of the proceedings, when the undertakings concerned had submitted to it their draft commitments of 28 May 2002 in which they were prepared to relinquish part of their concentration, the second group of transactions.

34. Cementbouw challenged the contested decision before the Court of First Instance on both points; it contested both the Commission's *initial jurisdiction* and also its *continuing jurisdiction* with regard to the acceptance of commitments which went further than those contained in the draft of 28 May 2002. However the Court of First

22 — Signed in Rome on 29 October 2004 (OJ 2004 C 310, p. 1).

23 — See, in particular, recitals 12 to 32 in the preamble to the contested decision.

24 — See point 9 of this Opinion.

25 — The following comment is made in the legal literature: '*Cette affaire est-elle un exemple de l'échec d'un mécano juridique trop subtil sous-estimant le pouvoir des autorités de la concurrence de s'attacher à la réalité économique plus qu'à la forme juridique d'une opération? Les montages les plus savants sont parfois fragiles ...*' (Cot, *Revue des droits de la concurrence* 2006, p. 108, 109).

Instance upheld the contested decision on both points. [26]

35. Cementbouw's appeal no longer addresses all the points that were the subject-matter of the proceedings at first instance. It only contests the observations of the Court of First Instance relating to the *Commission's continuing jurisdiction* following the draft commitments of 28 May 2002. On the other hand, Cementbouw in particular has not challenged in the present appeal the Commission's *initial jurisdiction*, which was based on the view that the two groups of transactions of 9 August 1999 together constituted a single event.

B — *The first plea in law*

36. By its first plea in law, Cementbouw maintains that the Court of First Instance erred in law in interpreting and applying Articles 1, 2 and 3(1) of the Merger Regulation. [27] It upheld the contested decision even though the concessions offered by the undertakings concerned in their draft commitments would already have resulted in the loss of the Commission's jurisdiction, had they been accepted. On the ground of lack of jurisdiction, the Commission could therefore no longer have based its authorisation of the concentration on the further-reaching final commitments given by Haniel and Cementbouw.

37. Cementbouw's argument is essentially as follows: the Commission's jurisdiction in respect of the concentration notified to it followed solely from the fact that both groups of transactions were viewed together; only if both were taken together would the turnover thresholds laid down in Article 1 of the Merger Regulation be exceeded and the concentration thus acquire a Community dimension. By their draft commitments, however, Haniel and Cementbouw had offered to relinquish the part of their concentration which was based on the second group of transactions. As thus reorganised, the concentration would have fallen below the turnover thresholds laid down in the Merger Regulation. The only remaining part would then have been the part relating to the first group of transactions, which would not in itself have had a Community dimension since the turnover thresholds would not have been met. The Commission's jurisdiction is based not only on the notified concentration, but also on the concentration that actually exists.

38. In order to verify the validity of these arguments, it is first necessary to ascertain what, in relation to merger control, is the relevant time for the purpose of determining

26 — Paragraphs 101 to 149 and 293 to 321 of the judgment under appeal.

27 — In so far as by its *second* plea in law Cementbouw also alleges infringement of Article 8(2) of the Merger Regulation on grounds of jurisdiction, the following arguments apply *mutatis mutandis*.

the Commission's jurisdiction (see section 1 below); it must then be considered whether and to what extent subsequent events may still have a bearing on the Commission's previously-acquired jurisdiction (see section 2 below).

1. The relevant time for the purpose of determining the Commission's jurisdiction

39. The Merger Regulation does not expressly define the relevant time for the purpose of determining the Commission's jurisdiction to conduct merger control proceedings. The regulation merely states that the Commission must examine and also take a decision on its own jurisdiction at an early stage (see Article 4(3) and Article 6(1) of the Merger Regulation), [28] but not what point in time — and thus what factual basis — should be used for its examination. That relevant time must therefore be ascertained in the light of the spirit and purpose of the rules on jurisdiction and their regulatory context.

40. As already mentioned, [29] the Merger Regulation is based on the *principle of a clear division of powers* between the supervisory authorities of the Member States and those of the Community, and the Commission has sole jurisdiction to take all the decisions relating to concentrations with a Community dimension. [30]

41. Furthermore, the system created by the Merger Regulation is characterised by a *need for speed*, which is realised by a finely balanced, comparatively strict system of time-limits and which seeks to limit the length of merger control proceedings. [31]

42. Both the division of powers and the speediness of proceedings serve to promote legal certainty and by and large reflect the aim of making the requirements of sound administration compatible with those of commercial life. [32] The control of concentrations between undertakings by the Commission, as the competition authority of the Community, is intended to be as efficient as possible.

28 — With regard to the Commission's duty to decide on its jurisdiction, see also Case C-170/02 P *Schlüsselverlag J.S. Moser and Others* v *Commission* [2003] ECR I-9889, paragraph 28.

29 — See above, point 31 of this Opinion.

30 — *Schlüsselverlag J.S. Moser and Others* v *Commission*, cited in footnote 28, paragraphs 32 and 34, and Case C-42/01 *Portugal* v *Commission* [2004] ECR I-6079, paragraphs 50 and 53.

31 — *Schlüsselverlag J.S. Moser and Others* v *Commission*, cited in footnote 28, paragraph 33, and *Portugal* v *Commission*, cited in footnote 30, paragraph 51; see also Case T-290/94 *Kaysersberg* v *Commission* [1997] ECR II-2137, paragraph 113.

32 — *Schlüsselverlag J.S. Moser and Others* v *Commission*, cited in footnote 28, paragraphs 33 and 34, and *Portugal* v *Commission*, cited in footnote 30, paragraphs 51 and 53.

43. Legal certainty and the efficiency of merger control under Community law are also enhanced by the duty to notify and the prohibition on implementation to which concentrations with a Community dimension are subject (Articles 4 and 7 of the Merger Regulation).

44. However, in order to ensure maximum legal certainty as well as sound and efficient administrative activity within brief periods, the competition authority competent to examine a particular case must be capable of being identified at the earliest possible moment.

45. It would be conceivable to regard the *date of notification* of a concentration to the Commission as the reference date for the purpose of determining the Commission's jurisdiction. On closer examination, however, that date cannot be decisive, otherwise the undertakings concerned could arbitrarily influence the division of powers by notifying the concentration at an earlier or later date. [33] Furthermore, from the point of view of diligent traders it must be objectively possible to ascertain before actually complying with any duty to notify whether their concentration falls within the scope of the Merger Regulation and thus within the jurisdiction of the Commission. Only then can those traders act lawfully and properly comply with their duty to notify and the prohibition on implementation, breach of either of which may incur fines. [34]

46. Only the factual situation as it stands at the time that any *duty to notify arises* is therefore decisive. In other words, the Commission's jurisdiction is to be determined by reference to the date *from which* a concentration *is to be notified* to it if necessary. [35] The relevant date is the date on which the undertakings concerned enter into a binding contractual arrangement [36] (see Article 4(1) of the Merger Regulation). [37] By that time it is objectively possible to

33 — As the present case shows, it is perfectly conceivable that despite the strict time-limit of one week within which the duty to notify must be complied with (Article 4(1) of the Merger Regulation), the actual notification is made only some time after the conclusion of the agreements governed by civil law. In the meantime the relevant turnover of the undertakings concerned could change, which could have significant effects on whether the thresholds under Article 1 of the Merger Regulation are exceeded or not reached. This could be the case *a fortiori* within the scope of the recast EC Merger Regulation, Article 4(1) of which no longer lays down any specific period within which to comply with the duty to notify a concentration.

34 — Article 14(1)(a) and (2)(b) of the Merger Regulation.

35 — In the present case it does not need to be clarified whether an even earlier point in time is relevant, for example the time at which the decision to conclude a merger agreement is taken (see the second subparagraph of Article 4(1) of Regulation No 139/2004). The possibility of *voluntarily bringing forward* the date of notification in this way exists only in the context of the recast EC Merger Regulation and is not provided for in Regulation No 4064/89, which is still applicable in the present case.

36 — See, to the same effect, Case T-310/00 *MCI* v *Commission* [2004] ECR II-3253, paragraph 89: 'Commission [jurisdiction] ... depends, as made clear by Article 4 of the regulation, on "the conclusion of the [merger] agreement"'. The Court of First Instance goes on to say that the Commission 'does *not* have the power to adopt a decision pursuant to Regulation No 4064/89 *before* such an agreement has been concluded' (emphasis added).

37 — The conclusion of an agreement has its equivalents in the announcement of a public bid or the acquisition of a controlling interest (Article 4(1) of the Merger Regulation).

ascertain whether or not a concentration with a Community dimension exists. The prohibition on implementation laid down in the Merger Regulation also begins at that time for the undertakings concerned (see Article 7(1) of the Merger Regulation).

2. The effects of subsequent events on the Commission's jurisdiction

47. It remains to be examined whether and to what extent subsequent events, in particular those occurring during the course of merger control proceedings, may still have a bearing on the Commission's previously-acquired jurisdiction.

48. It goes without saying that the Commission loses its jurisdiction to examine a concentration where the undertakings concerned *completely abandon* their — not yet implemented — concentration. [38] The merger control proceedings then become devoid of purpose. [39]

49. In contrast, such proceedings certainly do not become devoid of purpose where the undertakings concerned merely make certain *modifications* to their concentration without completely abandoning it. Even if such modifications are very extensive and, in the view of the undertakings concerned, affect the essence of their concentration, [40] that none the less leaves part of the concentration — in the present case the first group of transactions — which, according to the intention of the parties, will also continue to exist. Contrary to the view taken by Cementbouw, this represents a qualitative difference in relation to the complete abandonment of the concentration.

50. The proceedings cannot become devoid of purpose *a fortiori* where, as in this case, the undertakings concerned merely make commitments to the Commission to make certain modifications without immediately putting them into practice. Contrary to the view taken by Cementbouw, such mere *commitments* do not directly modify the reality of the concentration contractually agreed by the undertakings and its economic effects, especially where, as in the present case, the concentration has already been implemented.

51. In more general terms, the mere fact that undertakings make or even simply commit to make certain modifications to their concentration in the course of merger

38 — See also to that effect *MCI* v *Commission* (cited in footnote 36, in particular paragraphs 96 and 107).

39 — In the recast EC Merger Regulation this idea finds expression in the last half of Article 6(1)(c).

40 — In the present case, Cementbouw claims that the draft commitments of 28 May 2002 would have resulted in the 'essence' and the 'constitutive element' of the concentration ceasing to exist (see paragraphs 11, 13 and 17 of the appeal).

control proceedings may not have any bearing on the Commission's previously-acquired jurisdiction. If, as in the present case, it is still intended to create the concentration or to maintain the concentration already implemented, even accepting significant cuts to its original form, the examination of its compatibility with the common market is still justified.

52. This is also suggested by the aim for which such modifications to a concentration are made or committed during merger control proceedings: Article 8(2) of the Merger Regulation [41] makes clear that the modifications and concessions made (and thus the 'commitments') serve to confer on the concentration a form that is compatible with the common market. On closer examination they are therefore merely intended to allow the Commission to *exercise* its powers effectively in merger control proceedings, but not to take away its jurisdiction in a particular case.

53. The mere fact that modifications to a concentration are made or committed, without that concentration being completely abandoned, does not deprive the above-mentioned aim of ensuring maximum legal certainty and sound and efficient administrative activity in merger control of its significance. [42]

54. It would not be compatible either with the need for legal certainty or with the requirements of sound and efficient administrative activity within brief periods if the Commission's jurisdiction could be repeatedly challenged or were subject to constant changes in the course of merger control proceedings.

55. Otherwise, it would have to be feared that a case would move aimlessly to and fro between the Commission and one or more national competition authorities, which would make its examination for competition law purposes much slower and more onerous and would introduce many uncertainties, not only for the authorities concerned but also for the undertakings involved and for the markets. Furthermore, it could not be ruled out that the undertakings concerned might deliberately make modifications to their concentration in the course of merger control proceedings in order to exclude it from the jurisdiction of one competition authority and bring it within the jurisdiction of another, presumably more lenient, authority; this could therefore result in a kind of 'forum shopping'.

41 — The same applies to authorisations in the preliminary examination phase ('Phase I') under Article 6(2) of the Merger Regulation as amended by Regulation No 1310/97.

42 — See above, points 40 to 44 of this Opinion.

56. Consequently, the Merger Regulation does not at any point require the Commission to conduct a fresh examination of its jurisdiction if the undertakings concerned modify their concentration or even merely make commitments to do so. Instead, the Commission must establish whether the turnover thresholds laid down in Article 1 of the Merger Regulation have been exceeded even before formal proceedings ('Phase II') are initiated, during the 'preliminary examination phase' ('Phase I'). Pursuant to Article 6(1) of the Merger Regulation, this examination is based solely on the *concentration notified* to it. The taking into consideration, provided for in Article 8(2) of the Merger Regulation, of subsequent modifications to the notified concentration merely serves to establish whether the concentration is compatible with the common market. There is no express provision in Article 8(2) of the Merger Regulation, [43] unlike in Article 6(1) of that regulation, for the Commission to take a fresh decision on its jurisdiction. [44]

3. Interim conclusion

57. By way of interim conclusion, it must be stated that the only relevant date for determining the Commission's jurisdiction to conduct merger control proceedings is the date *from which* a concentration *is to be notified* to the Commission. Subsequent modifications to a concentration no longer have any bearing on the Commission's jurisdiction unless they result immediately in the complete abandonment of the concentration.

58. The set of draft commitments given by Haniel and Cementbouw on 28 May 2002, even if they had been put into practice, would have resulted only in a relinquishment of the second group of transactions, but would not in any event have affected the first group of transactions.

59. Against this background, the Court of First Instance was correct when it concluded that those draft commitments could not affect the existence of the concentration, [45] that the Commission was therefore still competent, [46] and that it was permitted to base its authorisation of the concentration on the final commitments given by Haniel and Cementbouw on 5 June 2002.

43 — An equivalent provision is made with regard to the preliminary examination phase in Article 6(2) of the Merger Regulation as amended by Regulation No 1310/97.

44 — In its appeal, Cementbouw relies, inter alia, on the judgment of the Court of First Instance in Case T-3/93 *Air France* v *Commission ('Dan Air')* [1994] ECR II-121, paragraph 102). However, that judgment is concerned with the Commission's jurisdiction at the time when the duty to notify arises. That judgment is of no assistance as regards any duty which the Commission might have to re-examine its jurisdiction as a consequence of subsequent events.

45 — Paragraph 301, last sentence of the judgment under appeal.

46 — Paragraph 302 of the judgment under appeal.

60. The first plea in law is therefore unfounded.

C — *The second plea in law*

61. By its second plea in law, Cementbouw maintains that the Court of First Instance erred in law in interpreting and applying Article 8(2) of the Merger Regulation and breached the principle of proportionality.

62. Cementbouw essentially makes the same arguments here as it put forward in the context of the first plea in law: The Court of First Instance failed to recognise that the Commission was required to accept the set of draft commitments given by Haniel and Cementbouw on 28 May 2002. In the view of Cementbouw, the implementation of that offer of commitments would have taken away the Community dimension of the concentration. Only the first group of transactions [47] would then have remained, and they could not in themselves have fallen within the jurisdiction of the Commission.

63. As I have already stated in connection with the first plea in law, [48] those arguments are not valid. I shall therefore restrict my remarks below to considering two additional arguments put forward by Cementbouw, which it submits specifically in connection with the second plea in law.

1. The alleged breach of the principle of proportionality

64. First of all, Cementbouw alleges that the Court of First Instance breached the principle of proportionality. It claims that the Court wrongly took the view that the Commission was not required to accept the draft commitments of 28 May 2002, but only the final commitments of 5 June 2002.

65. The principle of proportionality is one of the general principles of Community law. [49] According to consistent case-law, it requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous,

47 — In this connection, Cementbouw in particular stresses the pooling agreement.

48 — See above, in particular points 29 to 60 of this Opinion.

49 — See, inter alia, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 79.

and the disadvantages caused must not be disproportionate to the aims pursued. [50]

66. Decisions taken by the Commission in merger control proceedings must also satisfy the requirements of proportionality and are subject to judicial review in that respect. This applies not only to prohibition decisions pursuant to Article 8(3) of the Merger Regulation and demerger decisions pursuant to Article 8(4) of the Merger Regulation, but also to authorisation decisions pursuant to Article 8(2) of the Merger Regulation if they are made subject to conditions and obligations. The undertakings concerned may have a genuine interest in having elements of authorisation decisions that are detrimental to them judicially reviewed in order to obtain an authorisation that is free of conditions and obligations or at least an authorisation with less far-reaching conditions and obligations. [51]

67. However, the decision whether a concentration is compatible with the common market requires the Commission to assess complex economic situations for which it enjoys a margin of discretion. [52] That margin of discretion must also extend to the question whether the commitments offered to the Commission are apt to resolve a competition problem identified by it.

68. The Community Courts must establish whether the evidence relied on is factually accurate, reliable and consistent; they must also verify whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. [53] However, they are not competent to substitute their own assessment regarding the suitability of commitments for the Commission's assessment.

69. In connection with the judicial review of the proportionality of an authorisation decision to which conditions and obligations are attached it must also be taken into consideration that the conditions and obligations are based on *voluntary commitments* given by the undertakings concerned. There are therefore strong grounds to suppose that the undertakings themselves consider their

50 — See, specifically with regard to a decision, Case C-174/05 *Zuid-Hollandse Milieufederatie and Natuur en Milieu* [2006] ECR I-2443, paragraph 28.

51 — If the conditions and obligations — as is generally the case — are inseparably linked with the actual authorisation of the concentration, however, it is not possible to *challenge them in isolation* (see consistent case-law, inter alia, Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraphs 27 and 28). It is then possible only to challenge the authorisation decision to which the conditions and obligations are attached as a whole, with the aim of obtaining a complete reassessment of the concentration by the Commission, as provided for in Article 10(5) of the Merger Regulation.

52 — Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission, 'Kali & Salz'* [1998] ECR I-1375, paragraphs 223 and 224, and Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraphs 38 to 40.

53 — *Commission* v *Tetra Laval*, cited in footnote 52, paragraph 39.

commitments to be appropriate, necessary and reasonable for resolving a competition problem identified by the Commission, especially since in the view of the undertakings concerned a conditional authorisation generally represents a less onerous means by comparison with the prohibition of their concentration. Extraordinary circumstances would therefore have to exist before it could be accepted that a Commission decision based on voluntary commitments given by the undertakings concerned is not compatible with the principle of proportionality.

70. In the present case, Cementbouw seems to take the view that the Court of First Instance should have accepted such extraordinary circumstances because the concentration had already been implemented and its notification had been forced by the Commission 'under threat of fines'.[54] In particular, the Commission's power to order a demerger, if necessary, pursuant to Article 8(4) of the Merger Regulation allowed it to secure commitments from the undertakings concerned which it would not otherwise have obtained.

71. I am not convinced by these arguments.[55] The fact that a concentration is implemented, without an appropriate exemption from the prohibition on implementation, even before it is notified to the Commission is the sole responsibility of the undertakings concerned and certainly cannot give grounds for extraordinary circumstances. It follows from the Merger Regulation that the Commission may also impose fines and if necessary can order a demerger if a concentration is unlawfully implemented.[56] In so far as the Commission mentions its powers in this regard vis-à-vis the undertakings concerned during the proceedings, it is merely pointing out the legal situation and is certainly not taking an extraordinary step. Nor does this affect the voluntary nature of the commitments made by the undertakings.

72. Furthermore, in its appeal Cementbouw appears to seek to infer from the principle of proportionality that commitments given by the undertakings concerned are in any case sufficient and must be accepted by the Commission if they take away from a concentration its Community dimension and thus bring it below the turnover thresholds laid down in Article 1 of the Merger Regulation; the Commission was not entitled to base its decision on further-reaching commitments.

54 — Note does not apply to the English version.

55 — The arguments made by Cementbouw on this problem are admissible because they do not challenge the assessment of the facts and the evidence by the Court of First Instance, but focus on the *legal characterisation* of the circumstances of the present case *as extraordinary*. This is a point of law, for which the Court of Justice has jurisdiction in appeal proceedings: see, for example, Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraph 51, and also Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraph 69, and Case C-113/04 P *Technische Unie* v *Commission* [2006] ECR I-8831, paragraph 82.

56 — With regard to fines see Article 14(2)(b) of the Merger Regulation; with regard to demerger, see Article 8(4) of the Merger Regulation.

73. This argument, to which, incidentally, Cementbouw no longer adhered unreservedly in the oral procedure, is not valid either. The relevant factor in examining the proportionality of conditions or obligations is not whether the concentration still has a Community dimension after they have been complied with, but whether the commitments entered into by the undertakings concerned 'are proportional to and would entirely eliminate the competition problem'.[57] The legitimate aim pursued by the conditions and obligations is solely to ensure that competition in the common market is not distorted,[58] for which purpose concentrations must be rendered compatible with the common market.

74. It would be absurd if the Commission were required to accept commitments like those contained in the draft of 28 May 2002 for the sole reason that they deprive the concentration of its Community dimension, without there being any need to examine whether those commitments are apt to resolve the competition problem identified by the Commission.

75. The Court of First Instance therefore did not err in law when it held that the Commission had not breached the principle of proportionality.[59]

2. The significance of decisions of national competition authorities

76. Cementbouw also criticises the fact that the Court of First Instance 'does not explain' why the Commission could reach a conclusion in the contested decision that was diametrically opposed to that reached by the Netherlands national competition authority (NMa). In this regard, Cementbouw makes reference to the authorisation of the pooling agreement by the NMa.[60] It claims that the Court of First Instance was wrong to allow the Commission, without sufficient justification, to disregard the in-depth examination of the competitive situation relevant to the present case which had already been carried out by a national competition authority.

57 — See, in this respect, recital 8 in the preamble to Regulation No 1310/97. The same also applies within the scope of the recast EC Merger Regulation (recital 30 in the preamble to Regulation No 139/2004).

58 — Article 3(1)(g) EC and the first recital in the preamble to the Merger Regulation (or recital 2 in the preamble to the recast EC Merger Regulation).

59 — Paragraph 303 et seq. of the judgment under appeal.

60 — See above, point 17 of this Opinion.

77. However, as Cementbouw itself acknowledges, decisions of national competition authorities in merger control proceedings are not binding on the Commission. I would add that normally such a binding effect is not even conceivable in view of the clear division of jurisdiction [61] in the Merger Regulation. Both the Commission and the national authorities take decisions solely in their own spheres of jurisdiction, which do not overlap. [62]

78. However, a particular feature of the present case is that the first group of transactions played a role both in the proceedings before the NMa and in the subsequent proceedings before the Commission. From a formal point of view, the two proceedings did not have the same object, because the first group of transactions was examined by the NMa in isolation, whereas it was examined by the Commission as part of a global project which covered both the first and the second groups of transactions. Nevertheless, it is correct that both authorities assessed the first group of transactions from the aspect of competition law in their respective proceedings.

79. However, it does not follow that the Commission was *substantively* bound by the NMa's earlier assessment of the first group of transactions. Furthermore, contrary to the view taken by Cementbouw in the oral procedure, the mere existence of the earlier decision of the NMa does not limit the margin of discretion enjoyed by the Commission.

80. On the contrary, owing to the occurrence of the second group of transactions, jurisdiction for the assessment of the global project from the aspect of competition law passed exclusively to the Commission. In that connection the Commission is *substantively bound* only by the criteria that Article 2 of the Merger Regulation lays down for it for the examination of the compatibility of a concentration with the common market. On the basis of those criteria, the Commission must examine each case thoroughly and where appropriate consider the same facts and competition problems as the national authority did in a comparable situation. However, it does not follow from Article 2 of the Merger Regulation that it is necessary for the Commission's decision to be substantively in line with that of a national authority.

61 — See above, points 31 and 40 of this Opinion.

62 — The national competition authorities can put forward their position in the proceedings before the Commission only in the context of Article 19 of the Merger Regulation.

81. Against this background, the Court of First Instance was not required from the outset 'to explain' why in assessing the first group of transactions for the purposes of competition law the Commission *could reach a different conclusion* to the NMa. Rather, it is in the nature of things and needs no further explanation that different authorities can resolve comparable problems differently in their respective spheres of jurisdiction and within the bounds of their margin of discretion. [63]

82. Purely for the sake of completeness, it should be noted that Cementbouw could not legitimately rely on the competitive effects of the first group of transactions being assessed in the same way at Community level as they had been previously by the NMa. As the Commission rightly states, Cementbouw never implemented the first group of transactions in the form authorised by the NMa, but itself contributed to a situation where it was concluded and realised only together with a second group of transactions, that is to say, as part of a larger concentration.

63 — This phenomenon is also certainly not unknown in transatlantic circumstances: for example, in Case COMP/M.2220 — General Electric/Honeywell, the Commission comes to a markedly different conclusion from the US authorities.

83. In the light of the foregoing, it must be stated that the second plea in law is also unfounded in its entirety.

D — *Interim conclusion*

84. Since neither of the pleas in law raised by Cementbouw has any prospect of success, I consider that the appeal should be dismissed in its entirety.

V — Costs

85. Under Article 69(2) in conjunction with Article 118 and Article 122(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and Cementbouw has been unsuccessful, Cementbouw must be ordered to pay the costs.

VI — Conclusion

86. In the light of the above considerations, I propose that the Court should:

(1) dismiss the appeal;

(2) order Cementbouw Handel & Industrie BV to pay the costs.