JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

12 October 2011 *

In Case T-224/10,

Association belge des consommateurs test-achats ASBL, established in Brussels (Belgium), represented by A. Fratini and F. Filpo, lawyers,

applicant,

v

European Commission, represented by N. Khan, A. Antoniadis and R. Sauer, acting as Agents,

defendant,

supported by

Électricité de France (EDF), established in Paris (France), represented initially by C. Lazarus, A. Amsellem and A. Fontanille, and subsequently by C. Lazarus and A. Creus Carreras, lawyers,

intervener,

* Language of the case: English.

APPLICATION for annulment of Commission Decisions C(2009) 9059 and C(2009) 8954 of 12 November 2009, the former declaring a merger compatible with the common market (Case COMP/M.5549 — EDF/Segebel) under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1), and the latter rejecting a request from the Belgian competition authorities for partial referral of the case in accordance with Article 9 of that regulation,

THE GENERAL COURT (Sixth Chamber),

composed of E. Moavero Milanesi (Rapporteur), President, N. Wahl and S. Soldevila Fragoso, Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 11 May 2011,

gives the following

Judgment

Background to the dispute

1 The applicant — the Association belge des consommateurs Test-Achats ASBL — is a non-profit organisation which has as its main objective the protection of consumer interests and, in particular, of consumer interests in Belgium. It is independent

of the public authorities and is financed by its members by means of contributions. With some 350 000 individual members, it is the largest consumer association in Belgium.

2 In June 2009, the applicant learned that Électricité de France (EDF) had announced that it intended to acquire exclusive control of Segebel SA ('the merger at issue'), the latter being a holding company whose only asset was a 51 % shareholding stake in SPE SA, the second largest electricity operator in Belgium after the incumbent operator Electrabel SA, which is controlled by GDF Suez SA. At the material time, the French State held 84.6 % of the shares in EDF. The French State held a minority interest of 35.91 % in GDF Suez. Both shareholdings were managed by the Agence des participations de l'État (the French Government shareholding agency), but through two separate departments.

3 On 23 June 2009, the applicant sent a letter to the Commission of the European Communities expressing its concerns about the merger at issue ('the letter of 23 June 2009'). On that occasion, it asked the Commission to consider the negative consequences on competition which, it claimed, would be brought about as a result of the French State's shareholding in EDF and GDF Suez, particularly on the Belgian markets for gas and electricity. The applicant also stated that, since the merger at issue would have an impact on goods or services used by final consumers, it wished to exercise its right to be heard under Article 11(c) of Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2004 L 133, p. 1).

4 On 20 July 2009, the Commission replied to the applicant that its observations would be taken into account in the analysis of the merger at issue, should that transaction be regarded as constituting a merger with a Community dimension.

5 On 23 September 2009, EDF notified the merger at issue to the Commission pursuant to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1). On 30 September 2009, a notification notice ('the notification notice') was published in the *Official Journal of the European Union* (OJ 2009 C 235, p. 26), inviting interested third parties to submit their observations. The applicant did not react to that notification.

6 On 14 October 2009, in view of the situation on the Belgian electricity market, the Belgian competition authority lodged a request with the Commission for a partial referral of the merger at issue pursuant to Article 9(3)(b) of Regulation No 139/2004 ('the referral request').

7 The Commission undertook an analysis of the merger at issue by sending questionnaires to customers, competitors, suppliers and trade associations, and to the Commission de régulation de l'électricité et du gaz belge ('CREG'; the Belgian gas and electricity regulator). Furthermore, the commitments proposed by EDF on 23 October 2009 were market-tested through consultation with 20 different entities, including certain electricity generators and suppliers, the CREG and the Belgian competition authority.

8 On 12 November 2009, the Commission adopted Decision C(2009) 8954 (Case COMP/M.5549 — EDF/Segebel) ('the non-referral decision'), by which it rejected the request from the Belgian competition authorities for partial referral of the case, and Decision C(2009) 9059 (Case COMP/M.5549 — EDF/Segebel) ('the clearance decision'), by which it declared the merger at issue to be compatible with the common market. The clearance decision was taken on the basis of Article 6(1)(b) and 6(2) of Regulation No 139/2004: following the commitments proposed by EDF, as amended, the Commission concluded that the merger at issue no longer raised serious doubts as to its compatibility with the common market and could therefore be authorised in

the context of a merger control procedure under those provisions ('the Phase I procedure'), without there being any need to initiate the procedure under Article 6(1)(c) of Regulation No 139/2004 ('the Phase II procedure').

9 In the clearance decision, the Commission took the view that only certain markets for electricity and gas in Belgium, France and the Netherlands were concerned in connection with the merger at issue. The Belgian markets concerned were, first, the market for electricity generation, wholesale and trading (recitals 15 to 117); second, the market for balancing and ancillary services (recitals 118 to 130); and, third, the market for the retail supply to small and large industrial customers (recitals 131 to 152). Given that only SPE — but not EDF — was active on the market for the supply of electricity and gas to household customers, that market was not regarded as being concerned by the merger at issue (recitals 11 and 139).

10 As regards possible unilateral effects of the merger at issue, the clearance decision found that, prior to the notified transaction, EDF had initiated the development of two sites in Belgium for the construction of combined cycle gas turbine generation units, even though the related final investment decisions had not yet been taken, and had also tried to develop a number of other projects with the objective of obtaining access to generation capacity (recitals 43 to 45). Given that EDF had only limited operational capacity — which, moreover, was contracted until 2015 — there was therefore no significant overlap between the generation market and the wholesale market in terms of current generation capacity (recital 62). However, in view of the fact that SPE already had several development projects for generation capacity, the clearance decision found that there was serious cause for doubt concerning the post-merger entity's incentives to develop the two aforementioned sites further (recitals 63 and 116). Those concerns were remedied by the commitments offered by EDF, as amended (recitals 206 to 246).

11 As regards possible coordinated effects, the clearance decision took account of, inter alia, the argument raised by the Belgian competition authority that the shareholding of the French State in both EDF and GDF Suez would create a risk of coordination between GDF Suez and the post-merger entity. The clearance decision nevertheless concluded that EDF could be regarded as a company with independent decision-making power in relation to GDF Suez and thus as a real competitor of GDF Suez (recitals 89 to 99).

12 In the non-referral decision, the Commission found, on the basis of a competitive assessment analogous to that undertaken in the clearance decision, that the conditions for referral laid down in Article 9(2)(a) of Regulation No 139/2004 were satisfied. However, the Commission considered that it was itself the authority best placed to review the merger at issue, because it had developed over recent years significant expertise in the Belgian electricity markets and because competition concerns highlighted by the Belgian competition authority went beyond the Belgian national markets and thus required a cross-border analysis for which that authority had insufficient investigative means. Furthermore, under Belgian competition law, a referral would have entailed a risk that the merger at issue would have to be cleared automatically, without conditions being imposed (recitals 260 to 263).

Procedure and forms of order sought

13 By application lodged at the Registry of the General Court on 17 May 2010, the applicant brought the present action.

14 By document lodged at the Registry of the General Court on 10 September 2010, EDF sought leave to intervene in support of the form of order sought by the Commission. The application to intervene was served on the parties in accordance with Article 116(1) of the General Court's Rules of Procedure. The parties did not raise any objections.

15 By order of 17 November 2010, the President of the Sixth Chamber of the General Court granted the application to intervene.

16 On 6 January 2011, the intervener lodged its statement in intervention, on which the applicant submitted its written observations within the period allowed. The Commission did not submit observations on that statement in intervention.

17 On hearing the report of the Judge-Rapporteur, the General Court (Sixth Chamber) decided to open the oral procedure.

18 By letter of 25 March 2011, by way of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, the Court called on the Commission to lodge certain documents and put to it questions with a request for a response in writing. The Commission complied with those measures of organisation of procedure within the prescribed periods.

19 At the hearing held on 11 May 2011, the parties presented their oral arguments and answered questions put orally by the Court.

20 The applicant claims that the Court should:

— annul the clearance decision and the non-referral decision;

— order the Commission and the intervener to pay the costs.

21 The Commission and the intervener contend that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

22 In support of its action against the clearance decision, the applicant raises three pleas in law, alleging, first, breach of the duty to state reasons, breach of Article 6(2) of Regulation No 139/2004 and manifest error of assessment in the Commission's appraisal of the structural links between EDF and GDF Suez; second, breach of Article 6(2) of Regulation No 139/2004 through the denial of the applicant's right to participate in the procedure; and, third, breach of that provision and manifest error of assessment in the failure to initiate the Phase II procedure.

23 With regard to the non-referral decision, the applicant essentially relies on one plea alleging breach of Article 9(3) of Regulation No 139/2004.

24 Without raising any objection by separate document, on the basis of Article 114 of the Rules of Procedure, the Commission contends that the present action is inadmissible in so far as it seeks annulment both of the clearance decision and of the non-referral decision.

The application for annulment of the clearance decision

25 The Commission contends that the applicant lacks standing to bring an action against the clearance decision, which is not of direct or individual concern to it.

26 According to the Commission, the applicant, in addition to not satisfying the conditions governing admissibility laid down by the case-law resulting from the judgment of the Court of Justice in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, does not belong to the category of persons referred to in Article 18(4) of Regulation No 139/2004 who may be heard by the Commission and, indeed, must be heard if they so request. Thus, it argues, the applicant does not enjoy procedural rights which the Commission allegedly infringed by failing to initiate the Phase II procedure, which, in any event, does not entitle third parties to a greater degree of involvement than that provided for under Phase I.

Preliminary observations

27 It should be borne in mind that, according to the fourth paragraph of Article 263 TFEU, a natural or legal person may institute proceedings against a decision addressed to another person only if that decision is of direct and individual concern to the former. However, it follows from the case-law that, for decisions of the Commission relating to the compatibility of a merger with the common market, the locus standi of third parties concerned by a merger must be assessed differently depending on whether they, first, rely on defects affecting the substance of those decisions ('first category') or, second, submit that the Commission infringed procedural rights granted to them

by the acts of European Union ('EU') law governing the monitoring of mergers ('second category').

28 So far as concerns the first category, the mere fact that a decision may affect the legal position of an applicant does not suffice for that applicant to be regarded as having locus standi (Case T-96/92 *CCE de la Société générale des grandes sources and Others* v *Commission* [1995] ECR II-1213, paragraph 26, and Case T-12/93 *CCE de Vittel and Others* v *Commission* [1995] ECR II-1247, paragraph 36). With particular regard to individual concern, it is necessary, according to the formula laid down in the judgment in *Plaumann* ([1963] ECR, at p. 107), that the decision at issue should affect that applicant by reason of certain attributes which are peculiar to it or by reason of a factual situation which differentiates it from all other persons and thereby distinguishes it individually in the same way as the addressee.

29 Concerning the second category, as a general rule, where a regulation gives procedural rights to third parties, those parties must have a remedy available for the protection of their legitimate interests. With regard more particularly to actions brought by natural or legal persons, it must be stated, in particular, that the right of specified third parties to be properly heard, on application by them, during an administrative procedure before the Commission can in principle be given effect to by the EU Courts only at the stage of review of the lawfulness of the Commission's final decision. Thus, even where that decision, in its substance, is not of individual and/or direct concern to the applicant, the latter must nevertheless be recognised as being entitled to bring proceedings against that decision for the specific purpose of examining whether the procedural guarantees which it was entitled to assert have been infringed. Only if the Court were to identify a breach of those guarantees, such as to prejudice the applicant's right to make an effective statement of its position, if it had applied to do so, during the administrative procedure, would the Court be required to annul the decision on the ground of breach of essential procedural requirements. In the absence of such a substantial breach of the applicant's procedural rights, the mere fact that the applicant claims, before the EU Courts, that those rights have been infringed during the administrative procedure cannot render the application admissible in so far as it

is based on pleas alleging breach of substantive rules of law (see, to that effect and by analogy, *CCE de la Société générale des grandes sources and Others* v *Commission*, paragraph 46, and *CCE de Vittel and Others* v *Commission*, paragraph 59).

30 It follows that an action brought by an applicant not covered by the first category can be declared admissible only to the extent to which its purpose is to ensure protection of the procedural guarantees which that applicant is recognised as having during the administrative procedure. The Court must ascertain, on the substance, whether the decision, annulment of which is sought, fails to observe those guarantees (see, to that effect, *CCE de la Société générale des grandes sources and Others* v *Commission*, paragraph 47, and *CCE de Vittel and Others* v *Commission*, paragraph 60).

31 Furthermore, it should be noted that that distinction is not unlike that which is frequently applied in proceedings concerning the Treaty rules in the area of State aid, which is also covered by EU competition law and may therefore provide relevant examples in the case-law, without prejudice to any adjustments which may be necessary for the transposition of those examples to merger control disputes. According to settled case-law, where an applicant calls into question the merits of the decision by which the Commission has examined whether aid is compatible with the internal market, the mere fact that that applicant may be regarded as 'concerned' within the meaning of Article 108(2) TFEU, and therefore as being entitled to certain procedural rights, cannot suffice for the action to be considered admissible. That applicant must demonstrate that it enjoys a particular status within the meaning of the *Plaumann* judgment. By contrast, where the Commission finds, on the basis of Article 108(3) TFEU, that aid is compatible with the internal market, those concerned parties may secure compliance with their procedural guarantees only if they are able to challenge that decision before the EU Courts. For those reasons, an action for the annulment of such a decision brought by a person who is concerned, within the meaning of Article 108(2) TFEU, is declared to be admissible where that person seeks, by instituting proceedings, to safeguard the procedural rights available to it under the latter provision (see, to that effect, Case C-319/07 P *3F* v *Commission* [2009] ECR I-5963, paragraphs 30, 31 and 34 and the case-law there cited).

The admissibility of the action against the clearance decision in that it seeks to challenge the substance of that decision

32 In the present case, the applicant is not covered by the first category referred to in paragraph 27 above, on the ground that it does not fulfil the conditions laid down in the *Plaumann* judgment in respect of individual concern.

33 First, the persons represented by the applicant are affected by the clearance decision only by reason of their objective and abstract status as energy consumers, in so far as supply prices are liable to increase as a consequence of the concentration of supply arising from that decision, with the result that all electricity and gas consumers residing within the geographic market in question would be affected by it in the same way. Thus, the clearance decision does not affect those persons by reason of certain attributes which are particular to them or by reason of a factual situation which differentiates them from all other persons and thereby distinguishes them individually in the same way as in the case of the addressee of that act. Since those persons are not individually concerned by the clearance decision, such a status cannot be attributed to the applicant, which is an association set up to promote the collective interests of a category of persons who are not individually concerned, within the meaning of the fourth paragraph of Article 263 TFEU, by an act affecting the general interests of that category (see, to that effect, order of 18 September 2006 in Case T-350/03 *Wirtschaftskammer Kärnten and best connect Ampere Strompool* v *Commission*, not published in the ECR, paragraphs 29 to 31 and the case-law there cited).

34 Second, as regards the possibility that the applicant may be individually concerned by the clearance decision on the ground that that decision might affect its own interests as an association, it must be noted that those interests, in the context of a merger control procedure, consist in particular in being given an opportunity to comment during the procedure which leads to the adoption of a decision by the Commission concerning the compatibility of that merger with the internal market. Thus, such concern is

relevant only for the purposes of the question whether the applicant is covered by the second category referred to in paragraph 27 above.

35 Consequently, the action against the clearance decision is inadmissible in that it seeks to challenge the substance of that decision.

The admissibility of the action against the clearance decision in that it seeks to safeguard the procedural rights of the applicant

36 As regards the question whether the applicant is covered by the second category referred to in paragraph 27 above, it must be borne in mind that, under Article 11(c), second indent, of Regulation No 802/2004, consumer associations are entitled to the right to be heard, pursuant to Article 18 of Regulation No 139/2004, where the proposed concentration concerns products or services used by final consumers. The final sentence of Article 18(4) of Regulation No 139/2004 provides that natural or legal persons showing a sufficient interest are to be entitled, upon application, to be heard by the Commission. Similarly, Article 16(1) of Regulation No 802/2004 confers the right to make known their views on third persons who apply in writing to be heard pursuant to Article 18(4), second sentence, of Regulation No 139/2004.

37 It follows that the applicant, as a consumer association with the characteristics referred to in paragraph 1 above, is liable to be entitled to a procedural right, that is to say, the right to be heard, in the context of the administrative procedure before the Commission in respect of the merger investigation at issue, subject to compliance

with two conditions: first, that the merger concerns products or services used by final consumers; and, second, that an application to be heard by the Commission during the investigation procedure is made in writing.

38 Provided that those conditions are fulfilled, the applicant is entitled to challenge the clearance decision on the ground of infringement of that procedural right. In that regard, it must be observed that, in its written pleadings, the applicant referred to the fact that it had not been entitled to express its views during the procedure before the Commission and to take part in that procedure, since the clearance decision had been taken without initiating the Phase II procedure. Furthermore, in reply to questions put by the Court at the hearing, the applicant specifically stated that the pleas raised in its action relate to both the substance of the contested decisions and to the infringement of its procedural rights.

39 It is true that, as the Commission points out, the provisions applicable to merger control do not require that third parties such as the applicant be heard only during the Phase II procedure, such that the infringement of a potential right of the applicant to be heard does not result from the fact that the clearance decision was adopted at the end of the Phase I procedure. However, that objection by the Commission has no bearing on the admissibility of the application for annulment of the clearance decision on the ground of infringement of the applicant's procedural rights. Indeed, it is not disputed that the applicant was not given an opportunity to set out its views in any way, not even during the Phase I procedure. Thus, on the assumption that the applicant's procedural rights were identical in both phases of the procedure, it would, in any event, be entitled to bring an admissible action requesting the Court to examine whether those procedural rights had been infringed, irrespective of the stage in the procedure at the conclusion of which the clearance decision was adopted.

— The condition relating to final consumers

40 As regards the first condition referred to in paragraph 37 above, it should be noted that, while it provides that consumer associations are entitled to be heard only where

the proposed concentration concerns products or services used by final consumers, Article 11(c), second indent, of Regulation No 802/2004 none the less does not impose the obligation that the purpose of the proposed concentration must relate immediately to those products or services.

41 Furthermore, it must be observed that the letter of 23 June 2009 expressly referred to the fact that, in the applicant's view, the merger at issue affected consumer interests with respect to price and to service and that, in its reply to that letter, the Commission did not dispute that claim.

42 It does, admittedly, follow from the clearance decision that the Commission took the view that the merger at issue gave rise only to secondary effects on consumers. Indeed, in recital 139 of the clearance decision, the Commission found that, as regards the market for the retail supply of electricity, the merger at issue led to horizontal overlaps only so far as concerns large and small industrial and commercial customers with respect to the Belgian electricity market, without reference to the supply of electricity to Belgian household customers. By contrast, in recitals 151 and 152 of that decision, the Commission acknowledged that the merger at issue was likely to affect various Belgian retail markets, but took the view that this related to secondary effects that did not raise serious doubts as to the compatibility of the merger at issue with the common market. The existence of those secondary effects is also mentioned in recital 207 of the clearance decision.

43 However, the fact that those effects may be secondary in nature does not deprive the applicant of its right to be heard. The Commission cannot interpret Article 11(c), second indent, of Regulation No 802/2004 in restrictive terms which limit the application

of that provision, in essence, to cases in which a merger has direct effects on markets concerning ultimate consumers. That is, *a fortiori*, the case since, first, point (b) of the second subparagraph of Article 2(1) of Regulation No 139/2004 provides that, as regards appraisal of concentrations, the Commission must take into account, inter alia, the interests of the intermediate and ultimate consumers. Second, under Article 153(2) EC, which essentially has the same wording as Article 12 TFEU, consumer-protection requirements must be taken into account in defining and implementing other EU policies and activities. Furthermore, Article 38 of the Charter of Fundamental Rights of the European Union (OJ 2007 C 303, p. 1) provides that EU policies must ensure a high level of consumer protection.

44 Lastly, the Commission cannot reject the claim of a consumer association which seeks to be heard as a third party demonstrating a sufficient interest in a merger without providing that association with an opportunity to show in what respect consumers may be concerned by the merger at issue (see, to that effect and by analogy, Case T-256/97 *BEUC* v *Commission* [2000] ECR II-101, paragraph 77).

45 Therefore, it must be concluded that the applicant satisfies the first condition referred to in paragraph 37 above.

— The condition concerning the submission of a request to be heard

46 With regard to the second condition referred to in paragraph 37 above, it is necessary to establish whether the applicant submitted a valid application to be heard as provided for in Article 18(4) of Regulation No 139/2004 and in Article 16(1) of Regulation No 802/2004.

47 In that regard, it must be borne in mind, first, that, in the letter of 23 June 2009, the applicant stated that it wished to exercise its right to be heard in the context of the procedure for the control of the merger at issue, which it believed that it derived from Article 11(c) of Regulation No 802/2004. Furthermore, it is not disputed that the letter of 23 June 2009 predates the notification of the proposed merger and, *a fortiori*, the publication of the notification notice in the *Official Journal of the European Union*.

48 The Commission acknowledged receipt of that letter on 20 July 2009 and informed the applicant that its comments would be taken into account in the context of the analysis of the merger at issue, should that transaction be regarded as constituting a merger with a Community dimension.

49 Neither Regulation No 139/2004 nor Regulation No 802/2004, when they provide that certain third parties must be heard by the Commission, if they so request, specifies the period during which that request must be made. In particular, those regulations do not explicitly stipulate that that request must be made subsequent to the notification of the merger to which it refers or subsequent to the publication of the notification notice.

50 However, the fact that the EU legislation on mergers does not address that matter cannot be interpreted as meaning that a request to be heard imposes an obligation on the Commission to act upon it, provided that the other conditions in that regard are fulfilled, even if the request is made before the merger at issue is notified to the Commission. Indeed, under European legislation on merger control, the event which formally starts the investigation procedure by the Commission is, precisely, notification.

51 In that regard, it should be pointed out that, according to the first subparagraph of Article 4(1) of Regulation No 139/2004, all concentrations with a Community dimension must be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. The second subparagraph of that provision adds that notification may also be made where the undertakings concerned demonstrate to the Commission a good-faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension. The third subparagraph makes clear that, for the purposes of that regulation, the term 'notified concentration' is to be understood as also covering intended concentrations which have been notified pursuant to the second subparagraph.

52 Furthermore, it is clear from Article 6(1) and Article 10(1) and (4) of Regulation No 139/2004 that the Commission is required to examine the notification of a concentration as soon as it is received and that it must take a decision on the notified concentration within a period of 25 working days — which may be extended and/or suspended in cases expressly envisaged under those provisions — which runs from the working day following that of the receipt of the notification or, if the information to be supplied with the notification is incomplete, from the working day following that of the receipt of the complete information. Within that period, which delimits the Phase I procedure, the Commission must decide whether the notified concentration comes within the scope of Regulation No 139/2004 and, if so, whether it may be authorised during that phase on the ground that it does not raise serious doubts as to its compatibility with the internal market, or whether it is necessary to initiate the Phase II procedure in order to subject those doubts to more extensive investigation.

53 Since the Commission is to take a decision under Article 6 of Regulation No 139/2004 only with regard to 'notified concentrations', it is consistent with the logic of the EU legislation on merger control to take the view that the steps which third parties are required to undertake in order to be involved in the procedure must be taken following the formal notification of a concentration.

54 Furthermore, it must be taken into account that, very frequently, information relating to possible transactions liable to come within the scope of Regulation No 139/2004 is circulating within the sectors concerned, and even in the press, long before those transactions are at all notified to the Commission as mergers.

55 In that regard, first, the fact that a request to be heard under Article 18(4) of Regulation No 139/2004 and Article 16(1) of Regulation No 802/2004 must be made following notification of the transaction to which it relates makes it possible, in the interest of third parties, to avoid such requests being made by them without the Commission having determined the purpose of the merger control procedure, as that determination is made only at the time of notification of the transaction at issue. Second, this means that the Commission does not have to separate systematically, from amongst the requests received, those which concern transactions attributable only to abstract hypotheses, or even to mere hearsay, from those which concern transactions resulting in a notification.

56 The opposite scenario would lead to an unnecessarily heavier burden being placed on the Commission by the EU legislation on merger control. Indeed, the need for third parties wishing to exercise their right to be heard to make their request to that end following notification of the merger at issue is consistent with the need for speed which, according to the case-law, characterises the general scheme of the EU rules on merger control and which requires the Commission to comply with strict time-limits for the adoption of its final decision (see Case C-202/06 P *Cementbouw Handel & Industrie* v *Commission* [2007] ECR I-12129, paragraph 39, and Case C-413/06 P *Bertelsmann* and *Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraph 49). Consequently, in view of those strict time-limits, the Commission cannot be required to investigate, for each notified concentration, whether, prior to notification, third parties had already expressed an interest.

57 Third parties cannot claim to be unaware of the existence of a notification. On the contrary, they are expressly informed of its existence by the Commission itself, since, under Article 4(3) of Regulation No 139/2004, where it finds that a notified concentration comes within the scope of that regulation, the Commission is required to publish a notice in the *Official Journal of the European Union*, indicating the names of the undertakings concerned, their country of origin, the nature of the concentration and the economic sectors involved. Such publication ensures that information on the notification of a concentration is made available to everyone.

58 However, since the date of notification alone is relevant for the purpose of initiating the investigation procedure before the Commission, the latter may not ignore requests to be heard that it receives following notification, though prior to publication of that notification in accordance with the aforementioned provision.

59 In the present case, the applicant had informed the Commission, two months prior to the notification of the merger at issue, of its wish to be heard if that institution, following notification of that merger, should take the view that it constituted a concentration with a Community dimension. However, that fact cannot make up for the non-renewal of the application or for the lack of any initiative on the part of the applicant, once the economic transaction envisaged by EDF and Segebel, of which the applicant had had prior knowledge, had in fact become a duly notified concentration and thus set in motion the procedure under Regulation No 139/2004 in the context of which the applicant wished to be heard.

60 Furthermore, it must be observed that the applicant cannot invoke a legitimate expectation based on the Commission's response to the letter of 23 June 2009. Indeed, in that response, the Commission did not itself undertake to contact the applicant again, if appropriate, in order that the latter might submit follow-up observations to the Commission. The Commission simply undertook to take into account the contents of that letter if the merger at issue proved to be a concentration with a Community dimension. It is clear that, in recitals 89 to 99 of the clearance decision, the Commission shows that it addressed the question, raised in the letter of 23 June 2009,

as to whether EDF and GDF Suez could be considered to be two independent undertakings, notwithstanding the French State's significant shareholding in those undertakings, and concluded that that was the case. Therefore, whatever the merits of those recitals and the depth of analysis that they contain, it cannot be denied that the Commission acted in accordance with its response to that letter.

61 Furthermore, according to settled case-law, the right to rely on the principle of the protection of legitimate expectations extends, admittedly, to any person in a situation where an EU institution has caused him to entertain expectations which are justified by precise assurances provided to him. However, if a prudent and alert economic operator could have foreseen the adoption of an EU measure likely to affect his interests, he cannot plead that principle if that measure is adopted (see Case C-519/07 P *Commission* v *Koninklijke FrieslandCampina* [2009] ECR I-8495, paragraph 84 and the case-law there cited).

62 In the present case, at the latest by the time of publication of the notification notice, the applicant had available to it confirmation that the Commission had finally been notified of the merger at issue. Moreover, the applicant had access to information that the Commission, first, after a preliminary examination and without prejudice to its final decision on the point, had found that the merger at issue might come within the scope of Regulation No 139/2004 (paragraph 3 of the notification notice) and, second, had invited interested third parties to submit to it any observations which they might have on the merger at issue within 10 days of publication of that notice (paragraph 4 of the notification notice).

63 In those circumstances, the applicant would have had the opportunity to take, and therefore ought to have taken, the initiative to submit observations to the Commission or, at the very least, to confirm its request to be heard in the course of the procedure. Furthermore, in view of the timetable imposed on the Commission by Regulation No 139/2004, the applicant must have been aware that a decision on the merger at issue was likely to be taken at very short notice and that that decision could consist of a declaration that the merger at issue was compatible with the internal market right from the Phase I procedure.

64 It follows that the applicant does not satisfy the second of the conditions governing admissibility of its action challenging the contested decision on the ground that it breached the applicant's procedural rights.

— Conclusion on the admissibility of the action against the clearance decision

65 Since the applicant does not meet either the conditions governing admissibility laid down in the *Plaumann* judgment or those applicable to actions that seek to safeguard procedural rights, it must be concluded that the applicant lacks standing to bring an action against the clearance decision.

66 That conclusion cannot be called into question by the arguments of the applicant relating to its right to effective judicial protection, the importance of which is emphasised by the Lisbon Treaty, in particular by the binding force acquired by the Charter of Fundamental Rights of the European Union, and by certain developments in the legal systems of several Member States.

67 Indeed, suffice it to point out that, in accordance with settled case-law, the conditions for admissibility of an action for annulment cannot be set aside on the basis of the applicant's interpretation of the right to effective judicial protection (Case C-260/05 P *Sniace* v *Commission* [2007] ECR I-10005, paragraph 64, and order of 26 November 2009 in Case C-444/08 P *Região autónoma dos Açores* v *Council*, not published in the ECR, paragraph 70). Accordingly, an individual to whom a Commission decision is not of direct and individual concern, and whose interests are therefore unaffected by that measure, cannot invoke the right to judicial protection in relation to that decision (see order in Case C-483/07 P *Galileo Lebensmittel* v *Commission* [2009] ECR I-959, paragraph 60 and the case-law there cited).

68 It is clear from the foregoing that those conditions are not fulfilled in the present case and that, as regards the inadmissibility of the action in that it seeks to safeguard the procedural rights of the applicant, that outcome follows from the applicant's inaction following the notification to the Commission of the merger at issue. Consequently, the applicant is not justified in claiming that a declaration that the present action is inadmissible would adversely affect its right to effective judicial protection.

69 It follows from all of the foregoing considerations that the applicant's head of claim seeking annulment of the clearance decision must be rejected as being inadmissible.

The application for annulment of the non-referral decision

70 The Commission argues, first of all, that the claim for annulment of the non-referral decision is inadmissible because, contrary to Article 44(1)(c) of the Rules of Procedure, the application does not contain a summary of the pleas relied upon in support of that claim.

71 In that regard, it must be observed that, under the first paragraph of Article 21 of the Statute of the Court of Justice of the European Union, which is applicable to proceedings before the General Court by virtue of the first paragraph of Article 53 of the same statute, and under Article 44(1)(c) of the Rules of Procedure of the General Court, an application must, inter alia, state a summary of the pleas in law on which the application is based. It must, accordingly, specify the grounds on which the action is based, with the result that a mere abstract statement of the grounds is not sufficient to satisfy the requirements of the Statute of the Court of Justice and the Rules of Procedure. Moreover, the summary of the pleas in law — albeit concise — on which the application is based must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, if necessary, without any further information. In order to ensure legal certainty and the sound administration of justice, it is necessary — if an action or, more specifically, a plea in law is to be admissible — that the basic factual and legal particulars relied on be indicated coherently and intelligibly in the application itself (Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 36, and Case T-308/05 *Italy* v *Commission* [2007] ECR II-5089, paragraphs 71 and 72).

72 It must be held that the applicant has complied with the conditions mentioned above. Although it did not set out clearly the reasons why the circumstances of the case required the Commission to allow the referral request, the fact remains that the applicant criticised the Commission for not having examined the referral request in sufficient detail, which may imply improper use by the Commission of its discretion, and for failing to follow its previous decision-making practice in the matter.

73 It follows that the first plea of inadmissibility raised by the Commission must be rejected.

74 Second, the Commission contends that the non-referral decision does not directly or individually concern third parties such as the applicant, in contrast to the situation where a decision refers a merger investigation to a national authority, which was the issue that gave rise to the judgment in Case T-119/02 *Royal Philips Electronics* v *Commission* [2003] ECR II-1433.

75 It should be borne in mind that, according to settled case-law, a third party concerned by a merger is entitled to challenge, before the Court, the Commission's decision to allow the national competition authority's referral request ('the referral decision') (*Royal Philips Electronics* v *Commission*, paragraphs 299 and 300, and Joined Cases T-346/02 and T-347/02 *Cableuropa and Others* v *Commission* [2003] ECR II-4251, paragraphs 81 and 82).

76 In order to answer the question of whether the same finding must be made in respect of the non-referral decision, which, by contrast, precisely does not allow such a request, it is appropriate to examine the main stages in the Court's reasoning which led to the abovementioned finding.

77 As regards direct concern, the Court observed that the direct consequence of a referral decision is to subject a concentration in its entirety, or in part, to exclusive review by the national competition authority making the request and which rules under its national competition law. Thus, the referral decision, in so far as it affects the criteria for the assessment of the lawfulness of the concentration at issue and the procedure applicable to it, also affects the legal situation of third parties by depriving them of the opportunity to have the Commission review the lawfulness of the concentration from the point of view of EU law. In that regard, the Court stated that that finding was independent of whether national competition law, which becomes applicable following the referral decision, confers procedural rights on third parties which are similar to those to which they are entitled by virtue of EU law, as the effect of that decision is, in any event, to deprive third parties of the procedural rights conferred on them

by Article 18(4) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1990 L 257, p. 13), which has the same wording as Article 18(4) of Regulation No 139/2004. Furthermore, the Court considered that the referral decision prevented third parties from challenging before it the assessments made by the national authorities, whereas, in the absence of a referral, the assessments made by the Commission could have been so challenged (see, to that effect, *Royal Philips Electronics* v *Commission*, paragraphs 280 to 287, and *Cableuropa and Others* v *Commission*, paragraphs 57 to 65).

78 As regards individual concern, the Court, inter alia, examined whether, in the absence of a referral, third parties concerned by a merger would have had the right to be heard, in accordance with Article 18(4) of Regulation No 4064/89. Having found that that was the case, it concluded that the referral decision, which had the effect of depriving third parties of the opportunity to challenge before the Court assessments which they would have been entitled to challenge had the referral not been made, individually affected those third parties in the same way as they would have been affected by the merger approval decision had the referral not been made (see, to that effect, *Royal Philips Electronics* v *Commission*, paragraphs 295 and 297, and *Cableuropa and Others* v *Commission*, paragraphs 74, 76 and 79).

79 Therefore, it must be stated that, in order to hold that an action brought against the referral decision by third parties was admissible, the Court based its finding on two considerations, namely that EU law recognises that third parties are entitled to, first, procedural rights during the merger investigation by the Commission and, second, judicial protection to challenge any infringement of those rights.

80 However, those procedural rights and that judicial protection are not in any way jeopardised by the non-referral decision, which, quite to the contrary, ensures for third parties concerned by a concentration with a Community dimension, first, that that concentration will be assessed by the Commission in the light of EU law, and second, that the Court will be the judicial body having jurisdiction to deal with any action against the Commission's decision bringing the procedure to an end.

81 In those circumstances, the applicant's standing to bring an action cannot be derived from an application by analogy of the case-law cited in paragraph 75 above.

82 So far as concerns the applicant's argument that the non-referral decision modifies the conditions of assessment of the merger at issue, it must be borne in mind that Article 9(9) of Regulation No 139/2004 allows only the Member State concerned the possibility to appeal for the purpose of applying its national competition law. By contrast, there is nothing in the system for the control of concentrations with a Community dimension, as provided in that regulation, to indicate that the applicant is entitled to challenge the non-referral decision on the ground that that decision precludes the investigation of the merger at issue and the avenues of legal redress against the decision conducting that investigation from being determined by the law of a Member State, and not by EU law.

83 It should also be noted that the admissibility of an action against the non-referral decision cannot result from the fact that the national law in question may confer on the applicant more extensive procedural rights and/or judicial protection than provided for under EU law. Legal certainty precludes the admissibility of an action brought before the EU Courts from being dependent on whether the legal system of the Member State whose national competition authority unsuccessfully requested the referral of the merger investigation confers on interested third parties more extensive procedural rights and/or judicial protection than provided for under EU law. In that regard, it

must be noted that the scope of those procedural rights and of judicial protection depends on a range of factors which are, firstly, difficult to compare and, secondly, subject to developments in legislation and case-law that are difficult to monitor.

84 Furthermore, the very purpose of an action for annulment before the EU Courts is to ensure compliance with EU law, irrespective of the scope of the procedural rights and judicial protection that it confers, and not to claim the more extensive protection that may be provided for under national law.

85 In the light of the foregoing, it is necessary to declare inadmissible the applicant's head of claim seeking annulment of the non-referral decision and, therefore, to declare the action inadmissible in its entirety.

Costs

86 Under Article 87(2) 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. In addition, under the third subparagraph of Article 87(4) of the Rules of Procedure, the Court may order an intervener to bear his own costs.

87 Since the Commission has applied for costs and the applicant has been unsuccessful, the latter must be ordered to bear its own costs and to pay those incurred by the Commission. EDF must bear its own costs.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. **Dismisses the action as inadmissible;**

2. **Orders the Association belge des consommateurs test-achats ASBL to bear its own costs and to pay those incurred by the European Commission;**

3. **Orders Électricité de France (EDF) to bear its own costs.**

Moavero Milanesi Wahl Soldevila Fragoso

Delivered in open court in Luxembourg on 12 October 2011.

[Signatures]