JUDGMENT OF THE COURT (Full Court)

22 June 2004 *

In Case C-42/01,

Portuguese Republic, represented by L.I. Fernandes and L. Duarte, acting as Agents, assisted by M. Marques Mendes, lawyer, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by P. Oliver and M. França, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for the annulment of Commission Decision C(2000) 3543 final-PT of 22 November 2000 in relation to a proceeding under Article 21 of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (Case No COMP/M.2054 — Secil/Holderbank/Cimpor),

* Language of the case: Portuguese.

THE COURT (Full Court),

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, C. Gulmann, J.-P. Puissochet and J. N. Cunha Rodrigues, Presidents of Chambers, A. La Pergola, R. Schintgen, N. Colneric and S. von Bahr (Rapporteur), Judges,

Advocate General: A. Tizzano,
Registrar: M. Múgica Arzamendi, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 9 September 2003,

after hearing the Opinion of the Advocate General at the sitting on 22 January 2004,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 1 February 2001, the Portuguese Republic brought an action under the first paragraph of Article 230 EC for the annulment of Commission Decision C(2000) 3543 final-PT of 22 November

2000 in relation to a proceeding under Article 21 of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (Case No COMP/M.2054 – Secil/Holderbank/Cimpor, 'the contested decision').

Legal background

Community legislation

2 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1), as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1; 'the Merger Regulation'), provides in Article 4(1):

'Concentrations with a Community dimension as referred to by this Regulation shall be notified to the Commission not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest. That week shall begin when the first of those events occurs.'

3 Under Article 6(1) of the Merger Regulation, the Commission is to examine the notification as soon as it is received.

4 Under Article 10(1) of the Merger Regulation, the Commission has one month within which to decide whether or not to initiate the formal procedure for examining whether a merger is compatible with the common market. Under Article 10(3), a decision declaring the notified merger incompatible with the common market must be taken within not more than four months of the date on which the proceeding is initiated.

5 Article 21 of the Merger Regulation provides:

'1. Subject to review by the Court of Justice, the Commission shall have sole competence 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.

...

3. Notwithstanding paragraphs 1 and 2, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.

Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.

Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within one month of that communication.'

National legislation

6 The statutory system for privatisations in the Portuguese legal system comprises, so far as is relevant for the present proceedings, Law No 11/90 of 5 April 1990, the Framework Law on Privatisations (*Diário da República* I, Series A, No 80, of 5 April 1990, p. 1664), and Decree-Law No 380/93 of 15 November 1993 (*Diário da República* I, Series A, No 267, of 15 November 1993, p. 6362), which was enacted pursuant to that framework law. Decree-Law No 380/93 establishes and governs a special procedure for monitoring by the State of the development of the shareholding structures of undertakings which are in the course of privatisation. Under Article 1 of that Decree-Law, the acquisition with voting rights of more than 10 % of the company capital of undertakings not yet entirely privatised requires an authorisation from the Minister for Finance.

Background

7 On 15 June 2000, Secilpar SL ('Secilpar'), a Spanish company wholly controlled by Secil-Companhia Geral de Cal e Cimento, SA ('Secil'), a Portuguese company, published the preliminary announcement of a takeover bid for Cimpor-Cimentos de Portugal SGPS, SA ('Cimpor'), a Portuguese company. Cimpor is a former public undertaking, having been privatised at the beginning of 1994, in which the Portuguese State, having progressively sold its shares, held 12.7 % of the shares at the

time of the publication of the preliminary announcement, 10 % of such shares having special rights attached. The preliminary announcement indicated that Holderbank Financière Glaris SA ('Holderbank'), a Swiss company, was acting in concert with Secilpar and Secil.

8 According to that preliminary announcement, the conditions applicable to the takeover bid included:

— acceptance of the bid by shareholders holding at least 67 % of the whole of the shares in Cimpor,

— the cessation of the special rights enjoyed by the Portuguese State in its capacity as a shareholder in Cimpor,

— removal of the limitations on the exercise of the right to vote laid down in the company constitution of Cimpor.

9 On 16 June 2000, in accordance with Decree-Law No 380/93, Secilpar and Holderbank applied to the Portuguese Minister for Finance for authorisation to acquire, by means of a takeover bid, a holding of up to 100 % of the voting capital of Cimpor, on the terms and conditions stated chiefly in the preliminary announcement.

10 The application stated that the takeover bid envisaged, in its first phase, the acquisition of up to 100 % of the shares in Cimpor through the intermediary of Secilpar, specially constituted for that purpose. In the second phase, Secil and Holderbank were to share the assets of Cimpor, with the final result that Secil would acquire the business of Cimpor in Spain and Egypt and part of its business in Brazil, and that Holderbank would acquire the business of Cimpor in Portugal, Morocco, Tunisia and Mozambique and the other part of its business in Brazil.

11 On 4 July 2000, the Commission received notification, in accordance with Article 4 of the Merger Regulation, of the merger proposal whereby Holderbank and Secil were to acquire, for the purposes of Article 3(1)(b) of that regulation, joint control of Cimpor by the takeover bid announced on 15 June 2000 (see Prior notification of a concentration (OJ 2000 C 198, p. 5); 'the notification of 4 July 2000').

12 By a decision of 5 July 2000, the Minister for Finance rejected the application of 16 June 2000, indicating that the Portuguese State did not intend to renounce the special rights which it enjoyed in its capacity as a shareholder in Cimpor and that it was opposed to the removal of the limitations on the exercise of the right to vote contained in Cimpor's company constitution.

13 By letter of 7 July 2000, in reply to a letter the previous day, Secil informed the Comissão do Mercado de Valores Mobiliários (Securities Market Commission; 'the CMVM') of its intentions concerning the takeover bid. On the same day, Secilpar and Holderbank sent a fresh application to the Minister for Finance, seeking to acquire, in accordance with Decree-Law No 380/93, more than 10 % of Cimpor's shares, mainly on the market. In that application, they refrained, in particular, from making the takeover bid subject to the condition that the special rights of the Portuguese State, in its capacity as a shareholder in Cimpor, be removed.

14 On 20 July 2000, taking the view that the notification of 4 July 2000 was incomplete, the Commission set the parties a deadline of 28 August 2000 to complete it. That deadline was extended until 15 September 2000 at the parties' request. Since, however, the parties had not communicated the information requested to the Commission, the latter suspended its analysis of the merger.

15 By a decision of 11 August 2000, the Minister for Finance announced, first, that the shareholders' general meeting of Cimpor had rejected the proposal to remove the limitations on the exercise of the right to vote, with the result that the takeover bid appeared to have become devoid of purpose. Secondly, he rejected once again the application by Secilpar and Holderbank, stating that the objectives of the parties were, in general, contrary to the objectives of the reprivatisation. The decision of 11 August 2000 stated that the grounds for the rejection resided:

(i) in the fact that the acquisition would have entailed the withdrawal of Cimpor from the Portuguese capital market;

(ii) in the incompatibility of the applicants' industrial project with the Portuguese Government's strategies for the restructuring of the sector;

(iii) in the fact that the acquisition would have prevented the sale of the Portuguese State's shareholding in Cimpor on favourable economic and financial terms; and

(iv) in the fact that the acquisition would have involved an infringement of the principle of equal treatment in the context of the final phase of the process for privatising Cimpor.

16 Also on 11 August 2000, Secilpar sent the CMVM a number of amendments to the preliminary announcement of the takeover bid for Cimpor, designed to answer concerns expressed by the Portuguese authorities.

17 By a letter of the same day, taking into account the decision of 11 August 2000 and taking the view that the amendments to the preliminary announcement had become irrelevant, the CMVM informed Secilpar of its decision to order the withdrawal of the takeover bid previously announced by that company.

18 By a letter of 16 August 2000, the head of the private office of the Minister for Finance privately sent a copy of the decision of 11 August 2000 to the head of the private office of the Commissioner responsible for competition policy.

19 By a letter of 21 September 2000, the latter informed the Minister for Finance of the notification of 4 July 2000 and indicated that the first reaction of the Commission was that the Portuguese Republic had failed in its duty under the Community rules on merger control to give the Commission prior notification of its intention to disallow a concentration, and to inform the Commission of the interests which it was seeking to protect by that measure.

20 That letter further stated that the Portuguese Republic appeared to have failed to fulfil its obligations under Article 21(3) of the Merger Regulation by deciding to

reject the proposal by Secil and Holderbank to acquire Cimpor without informing the Commission of its reasons and without giving it the opportunity to assess the compatibility of reasons of public policy with Community legislation before adopting the measures in question. Should the Commission conclude that the reasons invoked by the Portuguese Republic did not meet any of the three conditions set out in Article 21(3) of the Merger Regulation, the Commission might take the measures required under that provision. The Portuguese Government was asked to send its observations on that question not later than 5 October 2000.

21 Finally, that letter of 21 September 2000 indicated that, should the Commission conclude that the decisions of the Minister for Finance were not justified by the need to protect other legitimate interests within the meaning of Article 21(3) of the Merger Regulation, the Commission would take appropriate measures. The Portuguese Republic was invited to submit its observations on that subject also not later than 5 October 2000.

22 By a letter of 3 October 2000, the Minister for Finance replied that he had not applied Portuguese competition law to the takeover bid by Secilpar and Holderbank but Decree-Law No 380/93. He also stated that the final phase of the reprivatisation would take place shortly, causing the Portuguese State's special rights as a shareholder in Cimpor to cease and the acquisition of shareholdings in Cimpor no longer to fall within the scope of Decree-Law No 380/93.

23 On 22 November 2000, the Commission adopted the contested decision.

24 On 11 January 2001, the notification of 4 July 2000 was withdrawn.

25 By its judgment in Case C-367/98 *Commission* v *Portugal* [2002] ECR I-4731, the Court upheld an action for failure to fulfil obligations brought by the Commission on 14 October 1998, in so far as it claimed that there had been an infringement of Article 73b of the EC Treaty (now Article 56 EC). The Court held that, by adopting and maintaining in force, in particular, Law No 11/90 and Decree-Law No 380/93, the Portuguese Republic had failed to fulfil its obligations under that article.

The contested decision

26 Paragraphs 1 and 2 of the grounds for the contested decision show that the decision concerns the compatibility of the decisions of 5 July and 11 August 2000 with Article 21 of the Merger Regulation.

27 In paragraph 11 of the grounds for the contested decision, the Commission notes that the notified operation consists in the acquisition of Cimpor by Secil and Holderbank with a view to immediate sharing of the assets acquired. The acquisition thus envisaged two concentrations, by means of which each undertaking would acquire a part of Cimpor.

28 Under the heading 'Compatibility of the measures adopted by the Portuguese authorities with Article 21 of the [Merger Regulation]', the Commission states, in paragraph 49 of the grounds for the contested decision, that the Portuguese authorities did not notify it of any public interest which they considered it necessary to protect by the decisions of 5 July and 11 August 2000.

29 In paragraph 50 of the grounds for the contested decision, the Commission observes that 'development of the shareholding structures in companies undergoing privatisation with a view to reinforcing the corporate capacity and the efficiency of the national production apparatus in a way that is consistent with the economic policy guidelines in Portugal was mentioned in the [decisions of 5 July and 11 August 2000] as the declared objective of Decree-Law No 380/93'.

30 In paragraph 55 of the grounds for the contested decision, the Commission notes that that objective is not one of the interests (public security, plurality of the media and prudential rules) regarded as intrinsically legitimate for the purposes of the second paragraph of Article 21(3) of the Merger Regulation

31 In paragraphs 56 and 57 of the grounds for the contested decision, the Commission holds that, by not communicating the interest in question to it, the Portuguese Republic had failed to fulfil its obligations under Article 21 of the Merger Regulation. It also holds, however, that the reasons underlying the decisions of 5 July and 11 August 2000 are clear from the text of the decisions themselves.

32 In that respect, in paragraph 58 of the grounds for the contested decision, the Commission states that 'the arguments underlying the two decisions opposing the concentration are mentioned in the text of the second decision, according to which it is necessary to protect development of the shareholding structures in companies undergoing privatisation with a view to reinforcing the corporate capacity and the efficiency of the national production apparatus in a way that is consistent with the economic policy guidelines in Portugal. The two decisions constitute barriers to the freedom of establishment and free movement of capital enshrined in the Treaty, and are not warranted under any grounds of public interest recognised in the case-law of the Court of Justice; in any event, the Portuguese Government has not advanced any such grounds. Moreover, the general principle of equal treatment, which is relied on by the Portuguese Government in the first decision, adds nothing of substance to the grounds set out above'.

33 The Commission concludes, in paragraph 59 of the grounds for the contested decision, that 'even apart from the failure by the Portuguese Government to communicate in due time the reasons for its decisions to the Commission in accordance with Article 21(3) of the [Merger] Regulation, the Commission must decline to recognise them as legitimate'.

34 In paragraph 60 of the grounds for the contested decision, under the heading 'Conclusion', the Commission states that, by adopting the decisions declining to authorise the acquisition of more than 10 % of the shares in Cimpor, the Portuguese Republic has in effect prohibited the acquisition of control of Cimpor by the notifying parties.

35 In paragraph 61 of the grounds for the contested decision, the Commission observes that, since the decision of the Portuguese Minister for Finance dated 5 July 2000, as reformulated on 11 August 2000, declining to authorise the acquisition of more than 10 % of the shares in Cimpor, does not appear to be based on public security, plurality of the media or prudential rules, 'the Portuguese authorities could not intervene and prohibit a concentration of Community dimension without communicating to the Commission any other public interest they wished to protect, pursuant to Article 21(3) of the [Merger] Regulation, before adopting the measures to which this decision relates'.

36 The Commission states, in paragraph 62 of the grounds for the contested decision, that 'Article 21(3) [of the Merger Regulation] would be deprived of all practical effect if, as a result of the absence of communication, the Commission were not entitled to assess whether a measure adopted by a Member State was justified by one of the interests expressly considered as legitimate by Article 21(3). Member States could easily avoid the scrutiny of the Commission by not communicating such measures. The structure of Article 21 is based on the balance between, on the one hand, Member States being under an obligation to communicate to the Commission in

advance the interest they claim to be legitimate, and, on the other, the Commission being under an obligation to render a decision within one month as to the compatibility of the claimed interest with Community law'.

37 According to paragraph 63 of the grounds for the contested decision, the Commission considers that it follows that 'Article 21 should be interpreted in the sense that, irrespective of whether a measure is communicated, the Commission is entitled to adopt a decision assessing whether such a measure is contrary to the principle of exclusive jurisdiction laid down by [the Merger Regulation]'.

38 The Commission concludes, in paragraph 64 of the grounds for the contested decision, that 'the measures adopted by the Portuguese authorities in relation to the notified operation, and in particular [the decisions of 5 July and 11 August 2000] cannot be regarded as measures designed to protect legitimate interests compatible with the general principles and other provisions of Community law. Those measures were therefore contrary to Community law, particularly Article 21 of [the Merger Regulation]'.

39 Paragraph 65 of the grounds for the contested decision states that 'the Portuguese Republic is therefore obliged to take the necessary measures to comply with Community law and withdraw the abovementioned decisions'.

40 Article 1 of the contested decision provides:

'The interests underlying the decision of the Portuguese Minister of Finance dated [5] July 2000, as reformulated on 11 August 2000, which were not communicated to

the Commission, contrary to Article 21(3) of [the Merger Regulation] are not compatible with Community law.'

The action

41 The Portuguese Republic raises as a preliminary point a question as to whether the contested decision may be regarded as having lapsed. It then makes six pleas in law in support of its action, claiming:

— infringement of Article 253 EC for lack of precise and sufficient indication of the legal basis for the measure;

— infringement of Article 253 EC for lack of an adequate statement of the reasons why the national measures were alleged to be incompatible with Community law;

— infringement of Article 7(1) EC and Article 21(1) and (3) of the Merger Regulation, in that the Commission lacked competence to adopt the contested decision in the absence of any communication from the Portuguese Republic concerning the interests protected by the national measures;

— infringement of Article 220 EC and Article 21(1) of the Merger Regulation, in that, having adopted the contested decision in the absence of the abovementioned communication, the Commission substituted itself for the Court of Justice in verifying the legitimacy of the Portuguese measures;

— breach of the third paragraph of Article 5 EC and of the principle of proportionality, firstly because the Commission did not limit its examination to the concentration of a Community dimension (Holderbank/Cimpor) and, secondly, because it adopted a definitive and irreversible measure notwithstanding the inaction of the notifying parties;

— misuse of procedure, in that, despite the absence of the abovementioned communication by the Portuguese Republic, the Commission adopted the contested decision rather than bringing an action for failure to fulfil obligations under Article 226 EC.

The preliminary question concerning lapse of the contested decision

42 The Portuguese Republic argues that the contested decision was taken following, and in the context of, the procedure which began with the notification of 4 July 2000. It submits that the withdrawal of the latter on 11 January 2001, after the adoption of the contested decision, put an end to the procedure, so that the legal basis on which the Commission could claim to found its competence to act under Article 21 of the Merger Regulation had disappeared. Therefore, the contested decision had lapsed.

43 In that regard, it is sufficient to note that, for the reasons given by the Advocate General in paragraphs 32 and 33 of his Opinion, withdrawal of the notification after the adoption of the contested decision cannot in any circumstances cause that decision to lapse. The contested decision thus continues to exist and to form the subject-matter of the action brought by the Portuguese Republic.

The third, fourth and sixth pleas

44 In its third, fourth and sixth pleas, which need to be examined together and before anything else, the Portuguese Government argues, essentially, that, in the absence of communication by the Portuguese Republic of the interests protected by the decisions of 5 July and 11 August 2000, the Commission did not have competence to adopt the contested decision.

45 First of all, while acknowledging that the interests underlying the decisions of 5 July and 11 August 2000 do not match any of the categories of legitimate interests expressly set out in the second subparagraph of Article 21(3) of the Merger Regulation, the Portuguese Government argues that the third subparagraph of Article 21(3) authorises the national protection of other public interests while placing on the Member State an obligation of communication to the Commission.

46 Only where a Member State communicates to the Commission its intention to rely on such other public interests can the Commission notify its decision to the Member State concerned. If the Member State has not made any such communication, then neither does the Commission have competence to rule on

the interests referred to in the second subparagraph of Article 21(3) of the Merger Regulation.

47 The Portuguese Government further argues that, in the absence of communication, the Commission risks ruling on a public interest that does not correspond to that actually pursued by the author of the national decision.

48 It then argues that since, in the absence of communication by the Member State concerned, the Commission cannot adopt any decision under the third subparagraph of Article 21(3) of the Merger Regulation, the function of reviewing and ensuring legality falls to the Court of Justice, or to the national courts under internal procedures. By adopting the contested decision, the Commission thus encroached on the jurisdiction of those courts, in breach of Article 21(1) of the Merger Regulation and Article 220 EC.

49 Finally, the Portuguese Government argues that, save for the competence of the Commission to issue a decision under the conditions laid down in the third subparagraph of Article 21(3) of the Merger Regulation, as interpreted by that Government, any situation of potential infringement by Member States of the obligation to communicate, or of the substantive limits of the conformity of public interests, must, in appropriate cases, be made the subject-matter of an action for failure to fulfil obligations under Article 226 EC. Therefore, by adopting the contested decision, the Commission directly infringed that article and committed a misuse of procedure.

50 It should be recalled that the Merger Regulation is based on the principle of a precise allocation of competences between the national and Community control

authorities. The 29th recital in its preamble provides that 'concentrations not referred to in this Regulation come, in principle, within the jurisdiction of the Member States'. By contrast, the Commission alone has competence to take all decisions relating to mergers with a Community dimension (Case C-170/02 P *Schlüsselverlag J.S. Moser and Others* v *Commission* [2003] ECR I-9889, paragraph 32).

51 At the same time, the Merger Regulation contains provisions which, for reasons of legal certainty and in the interests of the undertakings concerned, are designed to limit the duration of the controls which the Commission must carry out. Thus, under Article 4 of that regulation, notification to the Commission of a concentration operation with a Community dimension must take place within a week. Articles 6 and 10(1) of the Regulation provide that the Commission must begin its examination immediately and that it has a period of, normally, one month within which to decide whether or not to initiate the formal procedure for examining the compatibility of the operation with the common market. Under Article 10(3) of the regulation, the Commission must in principle rule on the matter within a period of four months, which runs from the decision to initiate the proceeding. Article 10(6) provides that '[w]here the Commission has not taken a decision ... within the deadlines ..., the concentration shall be deemed declared compatible with the common market' (*Schlüsselverlag J.S. Moser*, paragraph 33).

52 In the same way, under the third subparagraph of Article 21(3) of the Merger Regulation, any public interest other than the three interests set out in the second subparagraph of Article 21(3) must be communicated by the Member State concerned to the Commission and the latter must notify its decision within one month from that communication.

53 That demonstrates that the Community legislature intended to make a clear allocation between the interventions to be made by the national and by the Community authorities, and that it wished to ensure a control of mergers within deadlines compatible with both the requirements of sound administration and the requirements of the business world (see, to that effect, *Schlüsselverlag J.S. Moser*, paragraph 34).

54 Therefore, the Portuguese Government's interpretation of the third subparagraph of Article 21(3) of the Merger Regulation, to the effect that, in the absence of any communication of the interests protected by the decisions of 5 July and 11 August 2000, the Commission could not rule by decision on the compatibility of those interests with the common market, cannot be accepted.

55 If, as the Advocate General has rightly pointed out in paragraph 51 of his Opinion, the Commission were reduced, in the absence of any communication by the Member State concerned, to the sole option of bringing an action for failure to fulfil obligations under Article 226 EC, it would be impossible to obtain a Community decision within the short time-limits laid down by the Merger Regulation, with a consequent increase in the risk that such a decision may be taken only after national measures have already irretrievably prejudiced the merger with a Community dimension.

56 Moreover, the Portuguese Government's interpretation would render the third subparagraph of Article 21(3) of the Merger Regulation ineffective by giving Member States the possibility of easily circumventing the controls enacted by that provision.

57 It follows that, for the power to review public interests other than those specified in the second subparagraph of Article 21(3) of the Merger Regulation, conferred on the Commission by the third subparagraph of Article 21(3), to be effective, the

Commission must be recognised as having the power to rule by decision as to the compatibility of those interests with the general principles and other provisions of Community law, whether or not those interests have been communicated to it.

58 Whilst it is true that non-communication by the Member State concerned may make the Commission's task more uncertain and complex, in that the Commission might have difficulty identifying the interests protected by the national measures, the fact remains that, as the Advocate General has pointed out in paragraph 55 of his Opinion, the Commission always has the possibility of asking the Member State concerned for information. If, notwithstanding that request, the Member State does not provide the information requested, the Commission may take a decision on the basis of the information which it has at its disposal (see by analogy, in relation to State aid, Case C-301/87 *France* v *Commission* (*Boussac St Frères*) [1990] ECR I-307, paragraph 22).

59 Moreover, in a situation such as that in this case, where the Member State has not communicated the interests protected by the national measures in question, it is inevitable that the Commission will first examine whether those measures are justified by one of the interests specified in the second subparagraph of Article 21(3) of the Merger Regulation. If, in so doing, it finds that the Member State adopted the measures in question in order to ensure the protection of one of the legitimate interests enumerated in that subparagraph, it does not have to take its examination further and verify whether those measures are justified by any other public interest envisaged in the third subparagraph.

60 Given, therefore, that, as has been shown in paragraph 57 of this judgment, the Commission has the power under the third subparagraph of Article 21(3) of the Merger Regulation to adopt a decision as to the compatibility with the general principles and other provisions of Community law of public interests protected by a Member State other than those enumerated in the second subparagraph of Article 21(3), even where there has been no communication of those interests by the Member States concerned, it must be concluded that, in adopting the contested

decision, the Commission did not encroach on the jurisdiction of the Court of Justice or national courts, and did not therefore infringe Article 21(1) of the Merger Regulation or Article 220 EC. Nor has it infringed Article 226 EC or committed any misuse of procedure.

61 The third, fourth and sixth pleas must therefore be dismissed as unfounded.

The first plea in law

62 By its first plea, the Portuguese Government argues that the Commission infringed the duty to state reasons laid down by Article 253 EC by not indicating with sufficient precision the legal basis for the contested decision.

63 However, the wording of the contested decision, and in particular paragraphs 60 to 64 of the grounds, clearly show that it is based on the third subparagraph of Article 21(3) of the Merger Regulation.

64 The Portuguese Government's first plea must therefore also be dismissed as unfounded.

The second plea

65 In its second plea, the Portuguese Government accuses the Commission of stating insufficient reasons as to the alleged incompatibility of the national measures with Community law. In particular, the contested decision did not contain any specific substantive assessment of the interests underlying the measures adopted by the Portuguese authorities, based on reasons of fact and law, duly explained in the light of relevant Community law.

66 The Court has consistently held that the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, in particular, Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 19; Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63; and Case C-301/96 *Germany* v *Commission* [2003] ECR I-9919, paragraph 87).

67 It is true that the contested decision contains a brief summary of the reasons why the Commission considered the interests underlying the decisions of 5 July and 11 August 2000 incompatible with the general principles and other provisions of Community law.

68 However, as the Advocate General has noted in paragraphs 66 and 67 of his Opinion, having identified the interests protected by the national measures and established that they were not among those considered intrinsically legitimate for the purposes of the second subparagraph of Article 21(3) of the Merger Regulation, the Commission supplied a statement of reasons in paragraph 58 of the grounds for the contested decision, which, although extremely brief, allows the reader to understand the findings on which it bases its reasoning.

69 Moreover, as the Advocate General emphasises in paragraph 68 of his Opinion, the contested decision was adopted in a context that was well known to the Portuguese Government, namely in the context of the proceeding for failure to fulfil obligations which led to the judgment in *Commission* v *Portugal* cited above, and the Portuguese Government has not supplied the least indication to the Commission as to the compatibility of the public interests protected by the measures concerned with Community law, even in reply to the Commission's letter of 21 September 2000.

70 Having regard to that context, the Court finds that the contested decision could be reasoned in a summary manner (Case 73/74 *Groupement des fabricants de papiers peints de Belgique* v *Commission* [1975] ECR 1491, paragraph 31; Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 105), and that therefore sufficient grounds were stated for the contested decision (C-301/96 *Germany* v *Commission*, paragraphs 92 and 93).

71 The Portuguese Government's third plea is therefore unfounded.

The fifth plea

72 In its fifth plea, alleging breach of the principle of proportionality, the Portuguese Government argues, in the first part of the plea, that the Commission went beyond what was necessary to enforce Community law by declaring in the contested decision that the Portuguese Republic had to withdraw the decisions of 5 July and 11 August 2000 in their entirety and by generally stating in the operative part of that decision that the interests underlying those decisions were not compatible with Community law even though the contested decision shows that the notified operation gave rise to two concentrations, namely Secil/Cimpor and Holderbank/Cimpor, and that only the latter had a Community dimension.

73 In the second part of its plea, the Portuguese Government argues that, since the procedure for assessing the notified concentration was suspended at the time the contested decision was adopted, because of the absence of the information requested from the notifying parties, and since the contested decision was therefore adopted during a period in which it was uncertain whether the proceeding would be continued with or not, the Commission should have shown greater prudence and chosen to issue orders that were not definitive. The obligation to withdraw the decisions of 5 July and 11 August 2000 was neither appropriate to, nor compatible with, the pursuit of the objectives envisaged, and therefore constituted a breach of the principle of proportionality.

74 Concerning the first part of this plea, the Court finds that, as the Commission has observed, the two concentration operations were indissolubly linked, the public offer to purchase the capital of Cimpor, via Secilpar, having been launched with a view to sharing the assets of Cimpor between Secil and Holderbank. It was therefore not possible to limit the effects of the contested decision to the Holderbank/Cimpor concentration. The Commission was therefore right to hold in the contested

decision that the Portuguese Republic was obliged to withdraw the decisions of 5 July and 11 August 2000 in their entirety, and to state generally that the interests underlying those decisions were incompatible with Community law.

75 As for the second part, it is sufficient to note, as the Advocate General has pointed out in paragraph 74 of his Opinion, that the Commission was entitled to conclude that the inertia of the notifying parties was due at least in part to the adoption of the decisions of 5 July and 11 August 2000, and that, therefore, it was particularly important and urgent to intervene definitively.

76 It follows from the above considerations that the fifth plea in the action is also unfounded.

77 Since all of the pleas in the action are without foundation, the action must be dismissed.

Costs

78 Under Article 69(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. Since the Commission has applied for the Portuguese Republic to be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby,

1. **Dismisses the action;**

2. **Orders the Portuguese Republic to pay the costs.**

Skouris Jann Timmermans

Rosas Gulmann Puissochet

Cunha Rodrigues La Pergola Schintgen

Colneric von Bahr

Delivered in open court in Luxembourg on 22 June 2004.

Registrar President

R. Grass V. Skouris