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SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN TUOMIOISTUIN
EUROPEISKA UNIONENS DOMSTOL

JUDGMENT OF THE COURT (Fifth Chamber)

31 May 2018 *

(Reference for a preliminary ruling — Control of concentrations of undertakings — Regulation (EC) No 139/2004 — Article 7(1) — Implementation of a concentration prior to notification to the European Commission and declaration of compatibility with the common market — Prohibition — Scope — Concept of 'concentration' — Termination of a cooperation agreement with a third party by one of the merging undertakings)

In Case C-633/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sø- og Handelsretten (Maritime and Commercial Court, Denmark), made by decision of 25 November 2016, received at the Court on 7 December 2016, in the proceedings

Ernst & Young P/S

v

Konkurrencerådet,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, A. Tizzano (Rapporteur), Vice-President of the Court, A. Borg Barthet, M. Berger and F. Biltgen, Judges,

Advocate General: N. Wahl,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 15 November 2017

* Language of the case: Danish.

after considering the observations submitted on behalf of:

– Ernst & Young P/S, by G. Holtsø and J. Plum, advokater,

– the Danish Government, by C. Thorning, acting as Agent, and by J. Pinborg, advokat,

– the European Commission, by G. Conte and T. Vecchi, acting as Agents, and by H. Peytz, advokat,

after hearing the Opinion of the Advocate General at the sitting on 18 January 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 7(1) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ('the EC Merger Regulation') (OJ 2004 L 24, p. 1).

2 The request has been made in the context of an action for annulment brought by Ernst & Young P/S before the Sø- og Handelsretten (Maritime and Commercial Court, Denmark) against a decision of the Konkurrencerådet (Competition Council, Denmark) by which it found that, first, Ernst & Young, Ernst & Young Europe LLP, Ernst & Young Godkendt Revisionsaktieselskab, Ernst & Young Global Limited and EYGS LLP (collectively, 'the EY companies') and, secondly, KPMG Statsautoriseret Revisionspartnerselskab, Komplementarselskabet af 1. januar 2009 Statsautoriseret Revisionsaktieselskab and KPMG Ejendomme Flintholm K/S (collectively, 'the KPMG DK companies') had infringed the prohibition of implementing a merger prior to its approval by the Competition Council ('the standstill obligation'), in accordance with Paragraph 12c(5) of the Konkurrenceloven (Danish Law on competition).

Legal context

EU law

3 Recitals 5, 6, 20 and 34 of Regulation No 139/2004 read as follows:

'(5) ... it should be ensured that the process of reorganisation does not result in lasting damage to competition; Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it.

(6) A specific legal instrument is therefore necessary to permit effective control of all concentrations in terms of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations. ...

...

(20) It is expedient to define the concept of concentration in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market. It is therefore appropriate to include, within the scope of this Regulation, all joint ventures performing on a lasting basis all the functions of an autonomous economic entity. It is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time.

...

(34) To ensure effective control, undertakings should be obliged to give prior notification of concentrations with a Community dimension following the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest. ... The implementation of concentrations should be suspended until a final decision of the Commission has been taken. However, it should be possible to derogate from this suspension at the request of the undertakings concerned, where appropriate. ...'

4 Article 3 of the regulation, entitled 'Definition of concentration', provides in paragraphs 1 and 2:

'1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:

(a) the merger of two or more previously independent undertakings or parts of undertakings, or

(b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

2. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.'

5 Article 4 of that regulation, entitled 'Prior notification of concentrations and pre-notification referral at the request of the notifying parties', provides in the first subparagraph of paragraph 1:

'Concentrations with a Community dimension defined in this Regulation shall 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.'

6 Article 7 of the regulation, entitled 'Suspension of concentrations', provides in paragraphs 1 to 3:

'1. A concentration with a Community dimension as defined in Article 1, or which is to be examined by the Commission pursuant to Article 4(5), shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6).

2. Paragraph 1 shall not prevent the implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control within the meaning of Article 3 is acquired from various sellers, provided that:

(a) the concentration is notified to the Commission pursuant to Article 4 without delay; and

(b) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission under paragraph 3.

3. The Commission may, on request, grant a derogation from the obligations imposed in paragraph 1 or 2. The request to grant a derogation must be reasoned. In deciding on the request, the Commission shall take into account inter alia the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration. Such a derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, be it before notification or after the transaction.'

7 Article 21 of Regulation No 139/2004, entitled 'Application of the Regulation and jurisdiction', states in paragraph 1:

'This Regulation alone shall apply to concentrations as defined in Article 3, and Council Regulations (EC) No 1/2003 [of 16 December 2002 on the

implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1)], (EEC) No 1017/68 ..., (EEC) No 4056/86 ... and (EEC) No 3975/87 ... shall not apply, except in relation to joint ventures that do not have a Community dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent.'

Danish law

8 Paragraph 12c of the Danish Law on competition states:

'1. The Danish Competition and Consumer Authority shall decide whether a concentration may be approved or prohibited.

...

5. A concentration that is subject to the provisions of this Law shall not be implemented either before it has been notified or until it has been approved by the Competition and Consumer Authority under subparagraph 1 above.

...

6. The Competition and Consumer Authority may grant a derogation from the provisions of paragraph 5 and may be subject to conditions and obligations in order to ensure conditions of effective competition.'

9 It is apparent from the explanatory recitals to Paragraph 12c of the Danish Law on competition that the Danish rules on merger control are based on the provisions of Regulation No 139/2004 and are to be interpreted accordingly as regards the definition and the scope of both the concept of 'concentration' and the standstill obligation.

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 On 18 November 2013, the KPMG DK companies entered into a merger agreement with the EY companies ('the merger agreement').

11 At the material time, the KPMG DK and EY companies were both auditing firms active in auditing and accountancy services in Denmark.

12 At the time of conclusion of the merger agreement, the KPMG DK companies were members of an international network of independent auditing firms, known as KPMG International Cooperative ('KPMG International'). Since the KPMG DK companies were not structurally included in the KPMG International network, a cooperation agreement was concluded on 15 February 2010 between the KPMG DK companies and KPMG International ('the cooperation agreement'). Under that

agreement, the KPMG DK companies had the exclusive right to be included in KPMG International in Denmark and to use the trade marks of KPMG International for marketing purposes in that Member State.

13 The cooperation agreement also contained provisions on the allocation of customers, the obligation to service clients from other Member States and the annual compensation for participation in the network. In addition, it provided that the participating auditing firms could not conclude commercial contracts such as partnerships or joint ventures. That agreement also established a voluntary and integrated cooperation between the participating auditing firms, under which the firms operated according to the same standards and norms and presented themselves to clients as a combined network, although each of them was an autonomous and independent undertaking for the purposes of competition law.

14 In accordance with the merger agreement, immediately after its signature, the KPMG DK companies were to announce that, with a view to the merger with the EY companies, they were withdrawing from KPMG International from 30 September 2014 at the latest. Under the cooperation agreement, its termination by one of the parties was to take place with at least six months' notice before the end of KPMG International's accounting year.

15 It is common ground between the parties to the main proceedings that the merger in question did not have a Community dimension within the meaning of Regulation No 139/2004, that it had to be notified to the competent Danish authorities and that its implementation was subject to prior approval from those authorities.

16 After having signed the merger agreement on 18 November 2013, the KPMG DK companies, on the same day, terminated the cooperation agreement as of 30 September 2014. The termination of the cooperation agreement was not in itself subject to approval by the competition authorities.

17 The conclusion of the merger agreement was made public on 19 November 2013.

18 On 20 November 2013, KPMG International publicly announced its intention to maintain a presence on the Danish market and, for those purposes, it established a new auditing business in Denmark on 21 November 2013, even though the cooperation agreement was still in force.

19 Several of the KPMG DK companies' clients decided to change auditors, deciding to use either KPMG International or other operators.

20 The KPMG DK and EY companies implemented the pre-notification procedure as soon as the merger agreement was made public and first contacts with the Danish authorities were made on 21 November 2013.

21 On 13 December 2013, the Konkurrence- og Forbrugerstyrelsen (Competition and Consumer Authority, Denmark) was notified of the operation and the merger was

approved by decision of the Competition Council of 28 May 2014, subject to some commitments to be made by the parties. After that approval, the KPMG DK companies and KPMG International agreed to end the cooperation agreement from 30 June 2014.

22 By decision of 17 December 2014 ('the contested decision'), the Competition Council declared that the KPMG DK companies, by giving notice to terminate the cooperation agreement on 18 November 2013, in accordance with the merger agreement, that is to say, before the Competition Council approved the merger, had disregarded the prohibition, under the Danish Law on competition, of implementing a concentration prior to that approval.

23 The Competition Council bases the contested decision on an overall assessment of the factual circumstances, according to which the termination of the cooperation agreement is, inter alia, merger-specific, irreversible and likely to have market effects in the period between the notice of termination itself and the approval of the merger. In particular, the Competition Council held that it was not necessary to establish that that termination gave rise to market effects; the fact that it is likely to produce them is sufficient.

24 On 1 June 2015, Ernst & Young brought an action for annulment of the contested decision before the Sø- og Handelsretten (Maritime and Commercial Court) disputing, inter alia, the Competition Council's interpretation of the scope of the prohibition of implementation of a concentration prior to approval of that concentration by the Competition Council, the grounds of the contested decision, and the effect that the termination of the cooperation agreement had on the market.

25 Furthermore, Ernst & Young stated that the outcome of the dispute in the main proceedings will be relevant to the question of a possible criminal penalty, since, on 11 June 2015, the Competition and Consumer Authority referred the case to the Statsanklageren for Særlig Økonomisk og International Kriminalitet (State Prosecutor for Serious Economic and International Crime, Denmark) with a view to assessing the EY companies' conduct for the purposes of criminal law.

26 As the Danish rules on merger control are based on Regulation No 139/2004 and as the Competition Council referred, in the contested decision, essentially to the Commission's decision-making practice and to the case-law of the EU judicature, the referring court considered that the interpretation of Article 7(1) of Regulation No 139/2004 raised questions.

27 In those circumstances, the Sø- og Handelsretten (Maritime and Commercial Court) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) What criteria are to be applied in assessing whether the conduct or actions of an undertaking are covered by the prohibition in Article 7(1) of Regulation No 139/2004 (the prohibition of implementation prior to approval), and does

implementing action within the meaning of that provision presuppose that the action, wholly or in part, factually or legally, forms part of the actual change of control or merging of the continuing activities of the participating undertakings which — provided the quantitative thresholds are met — gives rise to the obligation of notification?

(2) Can the termination of a cooperation agreement, such as in the present case, which is announced under circumstances corresponding to those described [in the order for reference] constitute an implementing action covered by the prohibition in Article 7(1) of Regulation No 139/2004, and what criteria are then to be applied in making a decision?

(3) Does it make any difference in answering Question 2 whether the termination has actually given rise to market effects relevant to competition law?

(4) If the answer to Question 3 is in the affirmative, clarification is requested as to what criteria and what degree of probability should be applied in deciding [in the case in the main proceedings] whether the termination has given rise to such market effects, including the significance of the possibility that those effects could be attributed to other causes.'

Jurisdiction of the Court

28 The Commission has expressed doubts as to the Court's jurisdiction to hear and determine the present request for a preliminary ruling, since EU law is not applicable in the dispute in the main proceedings and the applicable law does not refer to EU law, only the *travaux préparatoires* to that law stating that it must be interpreted in the light of Regulation No 139/2004 as well as the case-law of the General Court and the Court of Justice.

29 In that regard, it must be recalled that, in accordance with Article 267 TFEU, the Court has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and acts of the EU institutions. In the context of cooperation between the Court and the national courts, established by Article 267 TFEU, it is for the national courts alone to assess, in view of the special features of each case, both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they put to the Court. Consequently, where questions submitted by national courts concern the interpretation of a provision of EU law, the Court is, in principle, obliged to give a ruling (judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 19 and the case-law cited).

30 Applying that case-law, the Court has held many times that it has jurisdiction to give preliminary rulings on questions concerning EU law in situations where the facts of the cases being considered by the national courts were outside the direct scope of EU law but where those provisions had been rendered applicable by

domestic law, which adopted, for internal situations, the same approach as that provided for under EU law. In those cases, it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, provisions or concepts taken from EU law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 20 and the case-law cited).

31 As regards the present reference for a preliminary ruling, it must be noted that, contrary to the Italian Law on competition at issue in the case which gave rise to the judgment of 11 December 2007, *ETI and Others* (C-280/06, EU:C:2007:775, paragraphs 23 and 24), the Danish Law on competition contains no direct reference to the provisions of EU law whose interpretation is sought.

32 Similarly, contrary to the provisions of the Hungarian Law on competition at issue in the case giving rise to the judgment of 14 March 2013, *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160, paragraph 21), the Danish Law on competition does not exactly reproduce the provisions corresponding to Regulation No 139/2004.

33 However, first, it follows from the information in the file submitted to the Court that the *travaux préparatoires* to the Danish Law on competition shows that the Danish legislature's intention was to harmonise national competition law in merger control with that of the European Union, since the national provisions, in essence, are based on Regulation No 139/2004. Paragraph 12c(5) of the Danish Law on competition introduces a prohibition on implementation of any concentration before it is notified or approved by the competent authorities, a prohibition which is essentially identical to that provided for in Article 7(1) of Regulation No 139/2004.

34 Second, the referring court, in its assessment of the particular circumstances of the case pending before it and, in particular, the *travaux préparatoires* to the applicable national law whose interpretation is a matter for the referring court, held that Danish law should be interpreted in the light, in particular, of the case-law of the Court.

35 In those circumstances, the Court has jurisdiction to answer the referring court's questions.

Questions 1 to 3

36 By its first to third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 7(1) of Regulation No 139/2004 must be interpreted as meaning that a concentration is implemented only by a transaction which, in whole or in part, in fact or in law, contributes to the change in control of the target undertaking. In particular, it seeks to ascertain whether the termination of a cooperation agreement, in circumstances such as those at issue in

the main proceedings, may be regarded as bringing about the implementation of a concentration and whether, in that regard, the question whether such a termination has produced market effects is relevant.

37 In order to answer those questions, it must be borne in mind that Article 7(1) of Regulation No 139/2004 merely provides that a concentration is not to be implemented either prior to its notification or until it has been declared compatible with the common market.

38 Thus, that provision provides no indication as to the circumstances in which a concentration is deemed to be implemented and, in particular, it does not specify whether the implementation of a concentration may take place after a transaction which does not contribute to the change in control of the target undertaking.

39 It must therefore be held that the wording of Article 7 does not, in itself, clarify the scope of the prohibition which it lays down.

40 When a textual interpretation of a provision of EU law does not permit its precise scope to be assessed, the provision in question must be interpreted by reference to its purpose and general scheme (judgment of 7 September 2017, *Austria Asphalt*, C-248/16, EU:C:2017:643, paragraph 20 and the case-law cited).

41 As regards the objectives pursued by Regulation No 139/2004, it appears particularly from recital 5 thereof that the regulation seeks to ensure that the reorganisation of undertakings does not result in lasting damage to competition. Accordingly, EU law must therefore include provisions governing concentrations that may significantly impede effective competition in the internal market or in a substantial part of it. For that purpose, according to recital 6 of that regulation, it must permit effective control of all concentrations in terms of their effect on the structure of competition in the European Union (see, to that effect, judgment of 7 September 2017, *Austria Asphalt*, C-248/16, EU:C:2017:643, paragraph 21).

42 It is precisely in order to ensure effective control that, as is apparent from recital 34 of Regulation No 139/2004, undertakings are obliged to give prior notification of concentrations and that their implementation should be suspended until a final decision has been taken.

43 It should be noted that, for those purposes, Article 7(1) of that regulation, which prohibits the implementation of a concentration, limits that prohibition only to concentrations as defined in Article 3 of that regulation, and thus excludes prohibition of any transaction which cannot be regarded as contributing to the implementation of a concentration.

44 It follows that, in order to define the scope of Article 7 of Regulation No 139/2004, account must be taken of the definition of the concept of concentration set out in Article 3.

45 Under that provision, a concentration is deemed to arise where a change of control on a lasting basis results from the merger of two or more previously independent undertakings or parts of undertakings, or the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings of direct or indirect control of the whole or parts of one or more other undertakings, that control being constituted by the possibility, conferred by rights, contracts or any other means, of exercising decisive influence on an undertaking.

46 It follows that a concentration within the meaning of Article 7 arises as soon as the merging parties implement operations contributing to a lasting change in the control of the target undertaking.

47 The fact that any partial implementation of a concentration falls within the scope of that article is thus in accordance with the requirement of ensuring effective control of concentrations. If the merging parties were prohibited from implementing a concentration by means of a single transaction, but it were open to them to achieve the same result by successive partial operations, that would reduce the efficiency of the prohibition in Article 7 of Regulation No 139/2004 and would thus put at risk the prior nature of the control required by that regulation and the pursuit of its objectives.

48 It is in the same vein that recital 20 of that regulation states that it is appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time.

49 However, where such transactions, despite having been carried out in the context of a concentration, are not necessary to achieve a change of control of an undertaking concerned by that concentration, they do not fall within the scope of Article 7 of Regulation No 139/2004. Those transactions, although they may be ancillary or preparatory to the concentration, do not present a direct functional link with its implementation, so that their implementation is not, in principle, likely to undermine the efficiency of the control of concentrations.

50 The fact that such transactions may produce market effects is in itself insufficient to justify a different interpretation of Article 7. First, the assessment of a transaction's effects on the market falls within the substantive examination of the concentration. The standstill obligation laid down in Article 7 of Regulation No 139/2004 applies irrespective of whether or not the merger is compatible with the common market, its purpose being precisely that of ensuring the Commission's effective control of all concentrations.

51 Second, it cannot be ruled out that a transaction having no effect on the market might nevertheless contribute to the change in control of the target undertaking and that therefore, at least partially, it implements the concentration.

52 It follows that, in the light of the objectives pursued by Regulation No 139/2004, Article 7(1) thereof must be interpreted as prohibiting the implementation by the

parties to the concentration of any transaction which contributes to lasting change of control over one of the undertakings concerned by that concentration.

53 Such an interpretation of Article 7 is also consonant with the general scheme of Regulation No 139/2004.

54 Although it is true that, according to recital 6 of the regulation, the preventative control of all concentrations established under that regulation concerns concentrations having an effect on the structure of competition in the European Union, it does not follow that any action of undertakings not producing such effects escapes the control of the Commission or that of the competent national competition authorities (judgment of 7 September 2017, *Austria Asphalt*, C-248/16, EU:C:2017:643, paragraph 30).

55 That regulation, like, in particular, Regulation No 1/2003, forms part of a legislative whole intended to implement Articles 101 and 102 TFEU and to establish a system of control ensuring that competition is not distorted in the internal market of the European Union (judgment of 7 September 2017, *Austria Asphalt*, C-248/16, EU:C:2017:643, paragraph 31).

56 As follows from Article 21(1) of Regulation No 139/2004, that regulation alone is to apply to concentrations as defined in Article 3 of the regulation, to which Regulation No 1/2003 is not, in principle, applicable (judgment of 7 September 2017, *Austria Asphalt*, C-248/16, EU:C:2017:643, paragraph 32).

57 By contrast, Regulation No 1/2003 continues to apply to the actions of undertakings which, without constituting a concentration within the meaning of Regulation No 139/2004, are nevertheless capable of leading to coordination between undertakings in breach of Article 101 TFEU and which, for that reason, are subject to the control of the Commission or of the national competition authorities (judgment of 7 September 2017, *Austria Asphalt*, C-248/16, EU:C:2017:643, paragraph 33).

58 Consequently, extending the scope of Article 7 of Regulation No 139/2004 to transactions not contributing to the implementation of a concentration would amount not only, as pointed out in essence by the Advocate General in point 68 of his Opinion, to extending the scope of the regulation in breach of Article 1 thereof, but also to correspondingly reducing the scope of Regulation No 1/2003, which would then no longer be applicable to such operations, even if they may give rise to coordination between undertakings, for the purposes of Article 101 TFEU.

59 In the light of the foregoing, it must be concluded that Article 7(1) of Regulation No 139/2004 must be interpreted as meaning that a concentration is implemented only by a transaction which, in whole or in part, in fact or in law, contributes to the change in control of the target undertaking.

60 As regards the question whether the termination of a cooperation agreement, in circumstances such as those in the main proceedings, may be regarded as bringing about the implementation of a concentration, it should be observed that, according to the circumstances described in the request for a preliminary ruling and which is for the referring court to determine, even though that withdrawal is subject to a conditional link with the concentration in question and is likely to be of ancillary and preparatory nature, the fact remains that, despite the effects it is likely to have on the market, it does not contribute, as such, to the change of control of the target undertaking.

61 Apart from the fact that it is a transaction concerning only one of the merging parties and a third party, namely KPMG International, the EY companies have not acquired the possibility of exercising any influence on the KPMG DK companies by that termination; as is apparent from paragraphs 12 and 13 of this judgment, the latter companies were, in the context of competition law, independent both before and after that termination.

62 In the light of all the foregoing considerations, the answer to the first to third questions is that Article 7(1) of Regulation No 139/2004 must be interpreted as meaning that a concentration is implemented only by a transaction which, in whole or in part, in fact or in law, contributes to the change in control of the target undertaking. The termination of a cooperation agreement, in circumstances such as those in the main proceedings, which it is for the referring court to determine, may not be regarded as bringing about the implementation of a concentration, irrespective of whether that termination has produced market effects.

The fourth question

63 In view of the answer to the first to third questions, there is no need to reply to the fourth question.

Costs

64 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 7(1) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ('the EC Merger Regulation') must be interpreted as meaning that a concentration is implemented only by a transaction which, in whole or in part, in fact or in law, contributes to the change in control of the target undertaking. The

termination of a cooperation agreement, in circumstances such as those in the main proceedings, which it is for the referring court to determine, may not be regarded as bringing about the implementation of a concentration, irrespective of whether that termination has produced market effects.

[Signatures]