ORDER OF THE COURT OF FIRST INSTANCE (Third Chamber)
11 March 2002 *

In Case T-3/02,

Schlüsselverlag J.S. Moser GmbH, established in Innsbruck (Austria),

J. Wimmer Medien GmbH & Co. KG, established in Linz (Austria),

Styria Medien AG, established in Graz (Austria),

Zeitungs- und Verlags-Gesellschaft mbH, established in Bregenz (Austria),

Eugen Ruß Vorarlberger Zeitungsverlag und Druckerei GmbH, established in Schwarzach (Austria),

'Die Presse' Verlags-Gesellschaft mbH, established in Vienna (Austria),

'Salzburger Nachrichten' Verlags-Gesellschaft mbH & Co. KG, established in Salzburg (Austria),

represented by M. Krüger, lawyer, Linz,

applicants,

* Language of the case: German.

Commission of the European Communities, represented by K. Wiedner, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by unlawfully failing to adopt a decision on the compatibility of a concentration with the common market, the defendant has failed to act,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: M. Jaeger, President, K. Lenaerts and J. Azizi, Judges,
Registrar: H. Jung,

makes the following

Order

Facts in the proceedings, procedure and the form of order sought by the applicants

1 By letter of 25 May 2001, the applicants, which are all companies operating in the Austrian media sector, lodged a complaint with the Commission regarding the acquisition by Verlagsgruppe News GmbH of Kurier-Magazine Verlags GmbH, owned by Zeitschriften Verlagsbeteiligungs-Aktiengesellschaft. News GmbH is, they claim, controlled by the Bertelsmann group.

2 In their complaint the applicants maintained that the concentration, which had been approved in Austria by the Oberlandesgericht Wien (Higher Regional Court, Vienna) by decision of 26 January 2001, had a Community dimension within the meaning of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1990 L 257, p. 13, as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1)). According to the applicants, the concentration should have been notified to the Commission and the Commission would then have been obliged to take a decision on the compatibility of that concentration with the common market.

3 By letter of 12 July 2001, the head of the Commission's task force on 'Control of concentrations between undertakings' at the Directorate-General for Competition (hereinafter, 'the Control of Concentrations Task Force') informed the applicants that the thresholds in Article 1(2)(b) of Regulation No 4064/89 had

not been reached as one of the two undertakings involved in the concentration, namely Kurier-Magazine Verlags GmbH, did not in fact achieve an annual turnover within the Community of EUR 250 million.

4 By letter of 7 August 2001, the applicants stated their opposition to that view.

5 The head of the Control of Concentrations Task Force subsequently stated, in a letter of 3 September 2001, that his office did not accept the argument put forward by the applicants and confirmed that the concentration did not have a Community dimension.

6 By letter of 11 September 2001, the applicants called upon the Commission, pursuant to the second paragraph of Article 232 EC, to formally define its position 'on whether or not to initiate an investigation procedure under Regulation No 4064/89'.

7 On 7 November 2001, the head of the Control of Concentrations Task Force sent the following letter to the applicants:

'Re: ZVB/News/Bertelsmann concentration

I acknowledge receipt of your letter of 11 September 2001...

I hereby confirm that, for the reasons given in my letter of 12 July 2001, my office does not propose to reconsider the above matter.

I also affirm that, in the absence of any competence under the regulation on control of concentrations, the Commission cannot adopt a decision in this legal matter.'

8 In those circumstances the applicants, by application lodged at the Registry of the Court of First Instance on 10 January 2002, brought the present action for a declaration of failure to act.

9 By a separate document lodged at the Registry of the Court of First Instance on the same date, the applicants asked for the proceedings to be expedited in accordance with Article 76a of the Rules of Procedure of the Court of First Instance.

10 The applicants claim that the Court should:

— declare that, by failing to take any decision on the complaint lodged by the applicants in regard to the establishment of a concentration with a Community dimension, which was notified and approved at national level by the Oberlandesgericht Wien in its capacity as Kartellgericht (Restrictive Practices Court) by judgment of 26 January 2001, the Commission has failed to fulfil its obligations under the EC Treaty;

— in the alternative, declare that the Commission has failed to call upon the parties to the concentration to notify it thereof;

— order the Commission to pay the costs.

Admissibility

11 Under Article 111 of the Rules of Procedure of the Court of First Instance, where an action is manifestly inadmissible or manifestly lacking any foundation in law, the Court of First Instance may, by reasoned order and without taking further steps in the proceedings, give a decision on the action.

12 In this case, the Court considers that there is sufficient information before it and has decided, pursuant to Article 111 aforesaid, to give a decision on the action without taking further steps in the proceedings.

The applicants' arguments

13 The applicants maintain, first, that the action was brought within the period of two months laid down in the second paragraph of Article 232 EC.

14 They refer next to the judgment of the Court of First Instance in Case T-3/93 *Air France* v *Commission* [1994] ECR II-121. They submit that, in that case, the Court of First Instance held admissible an action for annulment brought against a

statement by the spokesman for the Commission announcing that a proposed concentration fell outside the ambit of Regulation No 4064/89 since the concentration did not have a Community dimension. The only difference between *Air France* v *Commission* and the present case is the fact that, in this case, the Commission has not taken any decision. If the two cases were to be treated differently, it would mean that the possibility of affording judicial protection to competitors by enabling them to bring proceedings before the Court of First Instance, or of denying them that protection, would fall exclusively within the ambit of the Commission's discretion. If this action were inadmissible, therefore, the Commission's failure to act would enable it to avoid the risk of judicial review of a challengeable decision.

15 The applicants argue that, in *Air France* v *Commission*, cited above, the Commission itself took the view that the applicant in that case could have given the Commission formal notice requiring it to take a decision on the concentration concerned and could then have brought an action for failure to act if the Commission did not do so. The Commission itself therefore starts from the premiss that the action for failure to act is admissible.

16 The applicants also point out that, in this case, the Directorate-General for Competition had always stressed that its position was not binding on the Commission. However, in the absence of a decision attributable to the Commission, it is not possible to bring an action for annulment before the Court of First Instance. It is unacceptable for a Commission department to take refuge behind the non-binding nature of its legal position and for the Commission, at the same time, to refuse to take a challengeable decision.

17 Finally, the applicants argue that they would have been directly and individually concerned by the decision that the Commission failed to adopt because they are in direct competition with the undertakings involved in the concentration (see the judgment of the Court of Justice in Case C-68/95 *T. Port* v *Bundesanstalt für Landwirtschaft und Ernährung* [1996] ECR I-6065,paragraph 59, and the judgment of the Court of First Instance in Case T-17/96 *TFI* v *Commission* [1999] ECR II-1757, paragraph 27).

Findings of the Court

18 The second paragraph of Article 232 EC provides:

'The action [for failure to act] shall be admissible only if the institution concerned has first been called upon to act. If, within two months of being so called upon, the institution concerned has not defined its position, the action may be brought within a further period of two months.'

19 By letter of 11 September 2001, the applicants, referring to the concentration at issue, called upon the Commission, under the second paragraph of Article 232 EC, to formally define its position 'on whether or not to initiate an investigation procedure under Regulation No 4064/89'.

20 It must be observed that the letter of 7 November 2001 from the head of the Control of Concentrations Task Force constitutes the Commission's reply to the letter of formal notice of 11 September 2001. The letter of 7 November 2001 makes express reference to the letter of 11 September 2001.

21 It should next be considered whether the Commission's letter of 7 November 2001 amounts to a defining of its position within the meaning of the second paragraph of Article 232 EC, thereby bringing to an end the Commission's alleged failure to act.

22 It should be noted in that regard that, in that letter, the Commission states that it does not propose to reconsider the contested concentration. It refers to the reasons given in its letter of 12 July 2001. In that letter the Commission had

explained that the concentration did not have a Community dimension because of the fact that the thresholds in Article 1(2)(b) of Regulation No 4064/89 had not been reached.

23 In the letter of 7 November 2001, however, the Commission confirms that, in the absence of a Community dimension, it does not have competence, under Regulation No 4064/89, to adopt a decision in this matter.

24 It follows that the letter of 7 November 2001 amounts to a clear definition of its position in response to the letter of formal notice of 11 September 2001.

25 It is, moreover, clear from the judgment in *Air France* v *Commission*, cited above, that such a definition of its position constitutes an act challengeable under Article 230 EC. It was held in that judgment that a statement made on behalf of the Commission announcing that a concentration fell outside the ambit of Regulation No 4064/89, since it did not have a Community dimension, was capable of forming the subject-matter of an action for annulment.

26 The applicants cannot claim that the letter of 7 November 2001 only gives expression to the position of the Control of Concentrations Task Force and not that of the Commission. Although the letters of 12 July and 3 September 2001 do state that they 'express the view of the Control of Concentrations Department and are not binding on the European Commission' no such statement is made in the letter of 7 November 2001, which must therefore be regarded as defining the position of the Commission.

27 Finally, the fact that the letter of 7 November 2001 does not satisfy the applicants is of no relevance to the question whether the Commission has defined its position within the meaning of the second paragraph of Article 232 EC. According to case-law, Article 232 EC refers to failure to act in the sense of failure to take a decision or to define a position, and not to the adoption of a measure different from that desired or considered necessary by the persons concerned (see the judgments of the Court of Justice in Joined Cases C-15/91 and C-108/91 *Buckl and Others* v *Commission* [1992] ECR I-6061, paragraphs 16 and 17, and in Case C-25/91 *Pesqueras Echebastar* v *Commission* [1993] ECR I-1719, paragraph 12, and the order of the Court of Justice in Case C-44/00 P *Sodima* v *Commission* [2000] ECR I-11231, paragraph 83).

28 It follows from the foregoing that the applicants brought their action for failure to act on 10 January 2002, after they had received the Commission's letter of 7 November 2001, which must be regarded as defining a position for the purposes of Article 232 EC. The applicants therefore had no further interest in obtaining a declaration of failure to act since the failure to act was no longer subsisting. A judgment of the Court which, in such circumstances, found that there had been a failure to act on the part of the institution could not give rise to the measures for compliance referred to in the first paragraph of Article 233 EC (see Joined Cases T-194/97 and T-83/98 *Branco* v *Commission* [2000] ECR II-69, paragraph 57).

29 The action for failure to act is therefore manifestly inadmissible, so that there is no need to give a decision on the application for the proceedings to be expedited.

Costs

30 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.

31 In this case, however, the present order under Article 111 of the Rules of Procedure is made before the Commission has had an opportunity of applying for costs. It is therefore necessary to apply Article 87(3) of the Rules of Procedure, according to which the Court may order the costs to be shared where the circumstances are exceptional.

32 Since the applicants have been unsuccessful, they must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby orders:

1. **The application is dismissed as manifestly inadmissible.**

2. **The applicants shall pay the costs.**

Luxembourg, 11 March 2002.

H. Jung

Registrar

M. Jaeger

President