JUDGMENT OF THE COURT (Sixth Chamber)
25 September 2003 *

In Case C-170/02 P,

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),

and

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

represented by M. Krüger, Rechtsanwalt,

appellants,

* Language of the case: German.

APPEAL against the order of the Court of First Instance of the European Communities (Third Chamber) of 11 March 2002 in Case T-3/02 *Schlüsselverlag J.S. Moser and Others* v *Commission* [2002] ECR II-1473, seeking to have that order set aside,

the other party to the proceedings being:

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

defendant at first instance,

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet (Rapporteur), President of the Chamber, C. Gulmann, F. Macken, N. Colneric and J.N. Cunha Rodrigues, Judges,

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 8 May 2003,

gives the following

Judgment

1 By application lodged at the Court Registry on 7 May 2002, Schlüsselverlag J.S. Moser GmbH, J. Wimmer Medien GmbH & Co. KG, Styria Medien AG, Zeitungs- und Verlags-Gesellschaft mbH, Eugen Ruß Vorarlberger Zeitungsverlag und Druckerei GmbH, 'Die Presse' Verlags-Gesellschaft mbH and 'Salzburger Nachrichten' Verlags-Gesellschaft mbH & Co. KG appealed, under Article 49 of the EC Statute of the Court of Justice, against the order of the Court of First Instance of 11 March 2002, in Case T-3/02 *Schlüsselverlag J.S. Moser and Others* v *Commission* [2002] ECR II-1473 (hereinafter 'the contested order'), by which the Court of First Instance dismissed as manifestly inadmissible their action for a declaration that, by unlawfully failing to adopt a decision on the compatibility of a concentration with the common market, the Commission had failed to act.

Legal background

2 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.'

3 In the terms of Article 1(2) of 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, and corrigendum OJ 1990 L 257, p. 13, hereinafter 'the Merger Regulation'):

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

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

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

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

4 Article 4(1) of that regulation provides:

'Concentrations with a Community dimension defined in this Regulation shall be notified to the Commission not more than one week... .'

5 Under Article 6(1) of that regulation:

'The Commission shall examine the notification as soon as it is received.

(a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision.

(b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

...'

6 Article 21(1) of that regulation provides:

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

Facts of the dispute

7 By decision of 26 January 2001, the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria), which has jurisdiction in relation to the application of the Austrian law on competition, approved a concentration involving Zeitschriften Verlagsbeteiligungs-Aktiengesellschaft (hereinafter 'ZVB') and Verlagsgruppe News Beteiligungsgesellschaft (hereinafter 'VNB').

8 That transaction concerned the acquisition by News Gesellschaft mbH (hereinafter 'News Gesellschaft'), a subsidiary of VNB, of Kurier-Magazine Verlags GmbH (hereinafter 'Kurier-Magazine'), a company belonging to ZVB, in consideration of an injection by the latter of capital in News Gesellschaft.

9 By letter of 25 May 2001, the appellant companies, which are owners of newspapers in Austria, lodged a complaint with the Commission regarding that transaction, claiming that it had a Community dimension within the meaning of the Merger Regulation and that it should, therefore, have been notified to the Commission, the only authority with jurisdiction to determine its compatibility with the common market.

10 By letter of 12 July 2001, the head of the Commission's office responsible, within the Directorate-General for Competition, for the control of concentrations between undertakings (hereinafter 'the Merger Task Force') replied to the appellants that Kurier-Magazine's turnover in the Community was less than the threshold of EUR 250 million fixed in Article 1(2)(b) of the Merger Regulation and that, therefore, the Commission had no jurisdiction to make a determination on the transaction in question.

11 By letter of 7 August 2001, the applicants challenged that analysis, contending, in particular, that under the terms of the concentration agreement concerned, appointment of the editor and editor in chief of the two magazines brought together under Kurier-Magazine continued to be ZVB's responsibility. They gave further details of that contention in a letter of 9 August 2001, also sent to the head of the Merger Task Force.

12 The head of the Merger Task Force replied to both letters on 3 September 2001, stating that he had already been aware of those matters when he had signed his letter of 12 July 2001 and that the managers appointed by ZVB had no rights of veto capable of amounting to joint control of News Gesellschaft. He also confirmed his analysis that the concentration had no Community dimension.

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

14 By letter of 7 November 2001 (hereinafter 'the letter of 7 November 2001'), the head of the Merger Task Force replied to the appellants that he was confirming

that, 'for the reasons given in [his] letter of 12 July 2001, [his] office [did] not propose to reconsider the above matter' and that, 'in the absence of any competence under the Merger Regulation, the Commission [could] not adopt a decision in this legal matter'.

15 By application lodged on 10 January 2002 at the Registry of the Court of First Instance, the appellants brought an action against the Commission for a declaration of failure to act.

The contested order

16 The Court of First Instance considered that there was sufficient information before it and, without taking further steps in the proceedings, decided by the contested order, made pursuant to Article 111 of its Rules of Procedure, to dismiss the action as manifestly inadmissible.

17 It held, first, that the letter of 7 November 2001, which made express reference to the letter of 11 September 2001 calling upon the Commission to act, constituted the Commission's reply to that letter of formal notice.

18 Next, in concluding that the letter of 7 November 2001 constituted a definition of the Commission's position for the purposes of the second paragraph of Article 232 EC, the Court of First Instance held that, in that letter, the Commission made clear that it did not propose to reconsider the concentration in issue, referring for that purpose to the reasons given in its letter of 12 July 2001, and confirmed that, in the absence of a Community dimension, it did not have competence, under the Merger Regulation, to adopt a decision in that matter.

19 Finally, the Court of First Instance found that such a definition of its position constituted an act challengeable under Article 230 EC and that the appellants could not claim that the letter of 7 November 2001 expressed the position only of the Merger Task Force and not that of the Commission. The Court of First Instance observed in that regard that, although the letters of 12 July and 3 September 2001 stated that they 'express[ed] the view of the Merger Control Directorate and [were] not binding on the European Commission', no such statement appeared in the letter of 7 November 2001.

20 In those circumstances, the Court of First Instance held that the failure to act was no longer subsisting and that the appellants had no further interest in obtaining a declaration of failure to act, which rendered the action manifestly inadmissible.

The appeal

21 The appellants claim that the Court of Justice should set aside the contested order, declare that, by failing to adopt any decision with regard to the concentration in issue, the Commission has failed to fulfil its obligations under the EC Treaty, and order the Commission to pay the costs.

22 The Commission contends that the Court should dismiss the appeal and order the appellants to pay the costs.

23 The appellants submit that the letter of 7 November 2001 originated only from the head of the Merger Task Force and that it could not legally bind the Commission as an institution. The Court of First Instance consequently made an

error of law in finding that that letter constituted a definition of the Commission's position for the purposes of the second paragraph of Article 232 EC and that it had put an end to the failure to act.

24 The Commission submits that the action before the Court of First Instance was manifestly inadmissible, not on the grounds on which the contested order is based but on different grounds on which the Court of First Instance should have ruled in the first place. It maintains that no provision required it formally to define its position on the complaint which the appellants had made to it and, in any event, that the request to act which it was sent on 25 May 2001 was out of time.

Findings of the Court

25 The Commission's response to the ground of appeal that the Court of First Instance was wrong in holding the letter of 7 November 2001 to be a definition of its position putting an end to the failure to act is that it was under no obligation, in such a situation, formally to define its position on the appellants' complaint and that no failure to act could therefore be imputed to it.

26 That argument of the Commission cannot be accepted.

27 First, the Commission cannot refrain from taking account of complaints from undertakings which are not party to a concentration capable of having a Community dimension. Indeed, the implementation of such a transaction for the

benefit of undertakings in competition with the complainants is likely to bring about an immediate change in the complainants' situation on the market or markets concerned. That is why Article 18 of the Merger Regulation provides that interested third parties are entitled to be heard by the Commission, if they so request. Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time-limits and hearings provided for in Regulation No 4064/89 (OJ 1998 L 61, p. 1) also provides, in Article 11(c), that 'third parties, that is, natural or legal persons showing a sufficient interest, including customers, suppliers and competitors' have the right to be heard pursuant to Article 18.

28 Furthermore, the Commission cannot validly maintain that it is not required to take a decision on the very principle of its competence as supervising authority, when it is solely responsible, under Article 21 of the Merger Regulation, for taking, subject to review by the Court of Justice, the decisions provided for by that regulation. If the Commission refused to adjudicate formally, at the request of third-party undertakings, on the question whether or not a concentration which has not been notified to it falls within the scope of the regulation, it would make it impossible for such undertakings to take advantage of the procedural guarantees which the Community legislation accords them. The Commission would, at the same time, deprive itself of a means of checking that undertakings which are parties to a concentration with a Community dimension comply properly with their obligation to notify. Moreover, the complainant undertakings could not challenge, by means of an action for annulment, a refusal by the Commission to act which, as was stated in the previous paragraph, is likely to do them harm.

29 Finally, nothing justifies the Commission in avoiding its obligation to undertake, in the interests of sound administration, a thorough and impartial examination of the complaints which are made to it. The fact that the complainants do not have the right, under the Merger Regulation, to have their complaints investigated under conditions comparable to those for complaints within the scope of Regulation No 17 of the Council of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), does not mean that the Commission is not required to consider whether the matter is within its competence and to draw the necessary conclusions. It does not release the Commission from its obligation to give a

reasoned response to a complaint that it has specifically failed to exercise its competence.

30 In those circumstances, the Commission is not entitled to maintain that it could decline to define its position in this case and that, therefore, no failure to act could, in any event, be attributed to it.

31 On the other hand, the Commission argues correctly that the request to act which was sent to it on 25 May 2001 was, in any event, out of time.

32 The Merger Regulation is based on the principle of a clear division of powers between the supervisory authorities of the Member States and those of the Community. The 29th recital in its preamble provides that 'concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States'. Conversely, the Commission has sole jurisdiction to take all the decisions relating to concentrations with a Community dimension and, under Article 9 of that regulation, to decide to refer to the competent authorities of a Member State the file on certain transactions affecting more particularly a 'market, within that Member State, which presents all the characteristics of a distinct market'.

33 The Merger Regulation also contains provisions whose purpose is to restrict, for reasons of legal certainty and in the interest of the undertakings concerned, the length of the proceedings for investigating transactions which are the responsibility of the Commission. Thus, under Article 4 of that regulation, the Commission must be notified of a transaction with a Community dimension

within one week. Articles 6 and 10(1) of the regulation provide that the Commission then has a period equal, as a general rule, to one month in which to decide whether or not to initiate a formal investigation of the compatibility of the transaction with the common market. Under Article 10(3) of the regulation, the Commission must give a decision on the file at the end of a period of four months in principle, 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 to have been declared compatible with the common market'.

34 It follows from the provisions referred to in paragraphs 32 and 33 of this judgment that the Community legislature intended to lay down a clear division between the activities of the national authorities and those of the Community authorities, by avoiding successive definitions of positions by those different authorities on the same transaction, and that it wished to ensure scrutiny of concentrations within periods compatible both with the requirements of sound administration and those of commercial life.

35 In addition, the actions which the undertakings concerned, be they parties to the transaction or third parties, may take against decisions taken by the Commission are subject to the general condition of the time-limit fixed by the fifth paragraph of Article 230 EC and must therefore be made within a period of two months.

36 The requirements of legal certainty and of continuity of Community action which are at the origin of all those provisions would be disregarded if the Commission could, pursuant to the second paragraph of Article 232 EC, be requested to make a determination, outside a reasonable period, on the compatibility with the common market of a concentration which was not notified to it (see, to that

effect, Case 59/70 *Netherlands* v *Commission* [1971] ECR 639, paragraphs 15 to 24). Undertakings could thus lead the Commission to call in question a decision taken by the competent national authorities with regard to a concentration, even after the exhaustion of the possible legal remedies against such decision in the legal system of the Member State concerned.

37 In this case, the concentration in issue was notified on 5 September 2000 to the Oberlandesgericht Wien, which approved it on 26 January 2001. The appellants were entitled at any time during that period to request the Commission to examine whether the transaction had a Community dimension. On 25 May 2001, the date on which they made a complaint to the Commission, nearly four months had elapsed since the national authorities' decision approving completion of the transaction, that is to say, a period similar to that which is afforded the Commission, under Article 10(3) of the Merger Regulation, to undertake an investigation of a notified transaction, where the formal proceeding provided for that purpose has been initiated.

38 In those circumstances, the period of time at the end of which the Commission was seised of a complaint and subsequently called upon to act by the appellants could not, in this case, be regarded as reasonable and it was therefore no longer open to the appellants to bring an action for a declaration of failure to act in that respect.

39 The appellants' action for a declaration of failure to act was therefore, in any event, manifestly inadmissible.

40 It follows from all the foregoing that the appeal must be dismissed.

Costs

41 Under Article 69(2) of the Rules of Procedure, which apply to appeals by virtue of Article 118 thereof, the party which has been unsuccessful shall be ordered to pay the costs, if they are claimed in the other party's pleadings. Since the appellants have been unsuccessful in their grounds of appeal and the Commission has sought an order for costs against them, they must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the appeal;

2. **Orders Schlüsselverlag J.S. Moser GmbH, J. Wimmer Medien GmbH & Co. KG, Styria Medien AG, Zeitungs- und Verlags-Gesellschaft mbH, Eugen Ruß Vorarlberger Zeitungsverlag und Druckerei GmbH, 'Die Presse' Verlags-Gesellschaft mbH and 'Salzburger Nachrichten' Verlags-Gesellschaft mbH & Co. KG to pay the costs.**

Puissochet Gulmann Macken

Colneric Cunha Rodrigues

Delivered in open court in Luxembourg on 25 September 2003.

R. Grass

Registrar

J.-P. Puissochet

President of the Sixth Chamber