JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
30 September 2003 *

In Joined Cases T-346/02 and T-347/02,

Cableuropa SA, established in Madrid (Spain),

Región de Murcia de Cable SA, established in Murcia (Spain),

Valencia de Cable SA, established in Madrid,

Mediterránea Sur Sistemas de Cable SA, established in Alicante (Spain),

Mediterránea Norte Sistemas de Cable SA, established in Castellón (Spain),

represented by L. Castresana Sánchez and G. Samaniego Bordiu, lawyers, with an address for service in Luxembourg,

applicants in Case T-346/02,

* Language of the case: Spanish.

Aunacable SA, established in Madrid (Spain), represented by A. Creus Carreras and N. Lacalle Mangas, lawyers,

Sociedad Operadora de Telecomunicaciones de Castilla y León (Retecal) SA, established in Boecilli (Spain),

Euskaltel SA, established in Zamudio-Bizkaia (Spain),

Telecable de Avilés SA, established in Avilés (Spain),

Telecable de Oviedo SA, established in Oviedo (Spain),

Telecable de Gijón SA, established in Gijón (Spain),

R Cable y Telecomunicaciones Galicia SA, established in La Coruña (Spain),

Tenaria SA, established in Cordovilla (Spain),

represented by J. Jiménez Laiglesia, lawyer,

applicants in Case T-347/02,

v

Commission of the European Communities, represented by F. Castillo de la Torre, acting as Agent, with an address for service in Luxembourg,

defendant,

supported by

Kingdom of Spain, represented by L. Fraguas Gadea, acting as Agent, with an address for service in Luxembourg,

by

Sogecable SA, established in Madrid, represented by S. Martínez Lage and H. Brokelmann, lawyers,

by

DTS Distribuidora de Televisión Digital SA (Vía Digital), established in Madrid,

and by

Telefónica de Contenidos SAU, established in Madrid,

represented by M. Merola and S. Moreno Sanchez, lawyers,

APPLICATION for annulment of the Commission decision of 14 August 2002 referring the examination of the concentration aiming at the merger of DTS Distribuidora de Televisión Digital SA (Vía Digital) and Sogecable SA, to the Spanish competition authorities, pursuant to Article 9 of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (Case COMP/M.2845 — Sogecable/Canalsatélite Digital/ Vía Digital),

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

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

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 June 2003,

gives the following

Judgment

Legal context

1 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1), corrected version in 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), hereinafter 'Regulation 4064/89') provides for a system of control by the Commission of concentrations having 'a Community dimension' as defined by Article 1(2) and (3) of Regulation No 4064/89.

2 Article 9 of Regulation No 4064/89 allows the Commission to refer the examination of a concentration to the Member States. In particular, it provides as follows:

'1. The Commission may, by means of a decision notified without delay to the undertakings concerned and the competent authorities of the other Member States, refer a notified concentration to the competent authorities of the Member State concerned in the following circumstances.

2. Within three weeks of the date of receipt of the copy of the notification a Member State may inform the Commission, which shall inform the undertakings concerned, that:

(a) a concentration threatens to create or to strengthen a dominant position as a result of which effective competition would be significantly impeded on a market within that Member State, which presents all the characteristics of a distinct market, or

(b) a concentration affects competition on a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.

3. If the Commission considers that, having regard to the market for the products or services in question and the geographical reference market within the meaning of paragraph 7, there is such a distinct market and that such a threat exists, either:

(a) it shall itself deal with the case in order to maintain or restore effective competition on the market concerned, or

(b) it shall refer the whole or part of the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law.

If, however, the Commission considers that such a distinct market or threat does not exist it shall adopt a decision to that effect which it shall address to the Member State concerned.

In cases where a Member State informs the Commission that a concentration affects competition in a distinct market within its territory that does not form a substantial part of the common market, the Commission shall refer the whole or part of the case relating to the distinct market concerned, if it considers that such a distinct market is affected.

...

7. The geographical reference market shall consist of the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and

which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas. This assessment should take account in particular of the nature and characteristics of the products or services concerned, of the existence of entry barriers or of consumer preferences, of appreciable differences of the undertakings' market share between the area concerned and neighbouring areas or of substantial price differences.

8. In applying the provisions of this Article, the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned.

...'

The undertakings concerned

3 Cableuropa SA ('Cableuropa'), the first applicant in Case T-346/02, is a cable telecommunications operator ('cable operator') active in particular on the pay-TV markets in Spain. It has majority shareholdings in the other applicants in this case, namely Región de Murcia de Cable SA, Valencia de Cable SA, Mediterránea Sur Sistemas de Cable SA, and Mediterránea Norte Sistemas de Cable SA, which are also cable operators active in Spain.

4 Aunacable SAU ('Aunacable'), the first applicant in Case T-347/02, is a company grouping together five cable operators active in Spain, namely Able in Aragon, Canarias Telecom in the Canary Islands, Madritel in Madrid, Menta in Catalonia

and Supercable in the greater part of Andalusia. The other applicants in this case are regional cable operators ('regional cable operators') also active in Spain.

5 Sogecable SA ('Sogecable') is a commercial limited company whose main activities are essentially the management and operation of an analog pay-TV channel (Canal+) on the Spanish market. Sogecable also operates a platform for digital satellite television, Canalsatélite Digital, of which it controls 83.25%. Its activities also include the provision of technical services and the management of the subscription service, the production and sale of special-interest television channels, the production, distribution and showing of films, the acquisition and sale of sporting rights. Sogecable is, through Canal+ and Canalsatélite Digital, the biggest pay-TV operator in Spain.

6 By virtue of an agreement concluded on 28 June 1999 between the shareholders of Promotora de Informaciones SA ('Prisa') and of the Canal+ SA group ('Canal+ group') and renewed in 2002, Sogecable is jointly controlled by those two companies, each of which holds 21.27% of the shares, the remainder being held by several minority shareholders and allotted through stock exchanges. Prisa is a Spanish media group with interests in the press, publishing, radio and pay-TV sectors. The Canal+ group heads the European cinema and television division of the Vivendi Universal group ('Vivendi'). Vivendi works in the sectors of music, television, cinema, telecommunications, internet, publishing and the environment.

7 DTS Distribuidora de Televisión Digital SA ('Vía Digital') manages and operates a digital television platform on the Spanish market. It is also active in the production, purchase, sale, reproduction, distribution and showing of all types of audiovisual works. It is the second biggest multi-channel pay-TV operator in Spain.

8 Vía Digital is controlled by Telefónica de Contenidos SAU ('Telefónica de Contenidos'), a company which, up to 23 October 2002, was called Grupo Admira Media SA ('Admira'). As a wholly-owned subsidiary of Telefónica SA ('Telefónica'), the biggest telecommunications operator in the Spanish-speaking world, Telefónica de Contenidos brings together and manages the latter's holdings in the Spanish and Latin American audiovisual services markets.

Background of the case

9 On 3 July 2002 the Commission received notification pursuant to Regulation No 4064/89 of an agreement concluded between Sogecable and Admira on 8 May 2002 concerning the merger of Vía Digital with Sogecable by means of an exchange of shares. The agreement also provides for the acquisition by Sogecable of Admira's indirect holding in Audiovisual Sport SL ('AVS'), an undertaking through which Sogecable and Telefónica control the broadcasting rights in football matches of the first and second divisions of the Spanish Football League, other competitions, such as the UEFA Champions League and the FIFA World Championship, and other sporting events.

10 According to the agreement notified to the Commission, Sogecable will remain under the joint control of Prisa and the Canal+ group.

11 On 12 July 2002 the Commission published in the *Official Journal of the European Communities*, pursuant to Article 4(3) of Regulation No 4064/89, the fact of notification in Case COMP/M.2845 — Sogecable/Canalsatélite Digital/ Vía Digital and invited interested third parties to submit any observations they may have on the proposed concentration.

12 On the same day the Spanish Government requested the Commission, pursuant to Article 9(2)(a) of Regulation No 4064/89, to refer the matter to its own competition authorities on the ground that the concentration threatened to create a dominant position affecting competition in several Spanish markets.

13 On 18 July 2002 the Commission sent requests for information to ONO (see paragraph 72 below), Aunacable and the regional cable operators pursuant to Article 11 of Regulation No 4064/89. The undertakings concerned replied by letters of 23 July 2002 (ONO), 26 July 2002 (the regional cable operators) and 31 July 2002 (Aunacable).

14 On 23 July 2002 the Spanish Government amplified the request for referral by sending the Commission a revised document.

The contested decision

15 By decision of 14 August 2002 the Commission referred Case COMP/M.2845 — Sogecable/Canalsatélite Digital/Vía Digital to the competent authorities of the Kingdom of Spain pursuant to Article 9 of Regulation No 4064/89 ('the contested decision').

16 The contested decision distinguishes different markets for products and services affected by the concentration. They are the pay-TV market and markets upstream, namely those for film broadcasting rights, sporting rights and other programme contents, as well as telecommunications markets.

17 According to the contested decision, each relevant product market has a national dimension.

18 Regarding the pay-TV market, the contested decision states as follows (paragraph 17):

'The Commission has always maintained that the pay-TV market is delimited by linguistic or national frontiers. Even though certain market segments, such as the Eurosport sports channel, broadcast throughout the Community, television broadcasting takes place essentially on national markets, mainly because of differing national legislation, language barriers, cultural factors and competition conditions which differ from one country to another (for example, the structure of the cable television market). Accordingly, in the particular case of Spain, the geographical dimension is found to be national for language and administrative reasons. The Spanish market is therefore the geographical reference market. It presents all the characteristics of a distinct market within the meaning of Article 9(2)(a) and (7) of Regulation No 4064/89.'

19 With regard to the markets upstream of the pay-TV market, the contested decision explains first that 'the main programme contents which induce viewers to opt for pay-TV services in Spain are the first transmission of feature films with the biggest box office receipts (which are usually films produced by Hollywood studios, or American "majors") and football matches involving Spanish teams, particularly the League' (paragraph 21).

20 The national dimension of markets in film broadcasting rights is explained as follows:

'The rights in the coded broadcasting of films are generally assigned on an exclusive basis for variable periods, on a specific language basis and for a specific transmission area. In the case of Spain, the transmission rights are limited to Spanish territory; the geographical markets, which correspond to the film rights, are national. The Spanish market is therefore the geographical reference market, a market which presents all the characteristics of a distinct market within the meaning of Article 9(2)(a) and (7) of Regulation No 4064/89' (contested decision, paragraph 26).

21 Regarding the broadcasting rights for sports events, the contested decision (paragraphs 40 to 42) distinguishes first the market in broadcasting rights for football matches involving Spanish teams and states as follows:

'40. With regard to the sale of broadcasting rights for League and Cup matches as well as rights for the Champions League and UEFA Cup matches, those were granted to Spanish television operators. So far as the League and the Spanish Cup are concerned, the Spanish football clubs sold their rights individually to Telefónica, Sogecable, TV3 and AVS until the year..., with the exception of the final of the King's Cup. For the Champions League and the UEFA Cup, licences are granted to operators in each country, as the demand for matches varies from one country to another for cultural reasons. The UEFA sold the Champions League rights to Televisión Española (TVE) until the year...

41. With regard to purchasing, the wholesale and retail markets are also national because the rights are utilised essentially in Spain. So far as the Spanish League

and the Spanish Cup are concerned, the operators sold the match rights to AVS, which subsequently granted licences to various pay-TV companies and free-access television operators for broadcasting matches. TVE, which, as already mentioned, acquired the broadcasting rights for the Champions League and UEFA matches until..., granted licences to Vía Digital for the rights to be utilised on pay-TV until... Vía Digital subsequently granted Sogecable a non-exclusive licence to use those rights.

42. Therefore the Spanish market is the geographical reference market, a market which presents all the characteristics of a distinct market within the meaning of Article 9(2)(a) and (7) of Regulation No 4064/89.'

22 Regarding the broadcasting rights for other sports events and other entertainments giving rise to exclusive rights, the Commission stresses the national character of the market for language and cultural reasons (contested decision, paragraph 57).

23 With regard to the last market upstream of the pay-TV market, namely the market for the broadcasting rights of other programme contents, the contested decision explains as follows (paragraph 63):

'In previous decisions the Commission stated that special-interest channels are a distinct product market, with a national dimension. In general, special-interest channels are marketed. Their national geographical dimension is confirmed in the case of Spain because distribution takes place in Spain. Therefore the Spanish market is the geographical reference market, a market which presents all the characteristics of a distinct market within the meaning of Article 9(2)(a) and (7) of Regulation No 4064/89.'

24 So far as the geographical dimension of telecommunications markets is concerned, the contested decision explains as follows (paragraph 80 and 82):

'(a) Markets for internet access

80.... In previous decisions, the Commission has taken the view... that the retail supply of internet access services to end users, whether broad band or narrow band, constitutes a market with an essentially national dimension for reasons which are both technological (for example, the need for access to a local loop and local/free telephone numbers for the nearest point of presence or POP) and administrative (existence of different national regulatory frameworks). Therefore the Spanish market is the geographical reference market, a market which presents all the characteristics of a distinct market within the meaning of Article 9(2)(a) and (7) of Regulation No 4064/89.

(b) Fixed telephony markets and other telecommunications markets

...

82. The Commission's normal practice in earlier decisions confirms that the telecommunications markets listed in the previous section are essentially national (national infrastructures, exclusively national offers of services, conditions for licensing operators, availability of mobile telephony frequencies, roaming tariffs, etc.). Therefore the Spanish market is the geographical reference market, a market which presents all the characteristics of a distinct market within the meaning of Articles 9(2)(a) and 7 of Regulation No 4064/89.'

25 The Commission finds that, on each market, the concentration threatens to create or to strengthen a dominant position as a result of which effective competition would be significantly impeded on the Spanish market (contested decision, paragraphs 20, 29, 51, 55, 61, 68 and 109).

26 The Commission goes on to set out the following general conclusions in the contested decision (paragraphs 118 to 121):

'Conclusions

118. As the Kingdom of Spain is a substantial part of the common market, the Commission has, under Article 9(3) of Regulation No 4064/89, a broad discretion to decide whether to refer the concentration case to the Spanish national authorities with a view to the application of national law.

119. The concentration threatens to create or strengthen a dominant position only in markets with a national dimension, within the Kingdom of Spain.

120. The Spanish national authorities have sufficient means and are in a position to carry out a detailed investigation into the concentration, taking account of the national character of the markets in which the concentration threatens to create or strengthen a dominant position.

121. The Commission has verified that the conditions laid down in Article 9 of the Regulation on concentrations for a referral to the national authorities are

fulfilled in the present case and therefore considers, exercising its discretion under the Regulation, that it is appropriate to give a favourable reply to the request from the Spanish authorities and to refer the case to them with a view to applying the Spanish competition legislation.'

27 On 18 September 2002 the Commission gave notice of the contested decision to the applicants in Case T-347/02. The decision was notified to ONO the next day.

28 By two decisions of the Council of Ministers of 29 November 2002, the Spanish Government authorised the concentration in question, subject to various conditions.

Procedure

29 The applicants brought the present action by applications received by the Court Registry on 22 November 2002, registered under numbers T-346/02 and T-347/02.

30 In both cases, by separate documents lodged on the same day, the applicants applied for an expedited procedure under Article 76a of the Rules of Procedure of the Court of First Instance. On 16 December 2002 the Third Chamber of the Court, to which both cases were assigned, decided to grant the application.

31 The Commission lodged its statement in defence in both cases on 22 January 2003.

32 By documents lodged at the Court Registry on 19 February and 4 March 2003 respectively, the Kingdom of Spain, on the one hand, and Sogecable, Vía Digital and Telefónica de Contenidos, on the other, sought leave to intervene in both cases in support of the form of order sought by the Commission. The requests were granted by orders of the President of the Third Chamber of the Court of First Instance of 19 March and 10 April 2003. The interveners were asked to make their submissions at the hearing.

33 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of the Rules of Procedure, requested the parties to reply to written questions and to lodge certain documents. The parties did so within the time-limits allowed.

34 The parties presented oral argument and replied to questions put by the Court at the hearing on 11 June 2003. At the hearing a document was placed in the file of Case T-346/02 at the applicants' request.

35 After the parties had submitted their observations on this point at the hearing, the Court (Third Chamber) decided to join the two cases for the purpose of the judgment.

Forms of order sought by the parties

36 In Case T-346/02, the applicants claim that the Court should:

— annul the contested decision;

— order each party to bear its own costs.

37 In Case T-347/02, the applicants claim that the Court should:

— declare the action admissible and well founded;

— annul the contested decision;

— order the Commission to pay the costs.

38 In both cases, the Commission, supported by the interveners, contends that the Court should:

— declare the actions inadmissible;

— in the alternative, dismiss them as unfounded;

— order the applicants to bear the costs.

Admissibility

Arguments of the parties

39 The Commission, supported by the interveners, observes that the contested decision is addressed only to the Kingdom of Spain so that the applicants, as they are not the addressees of the decision, must prove that it is of direct and individual concern to them in accordance with the fourth paragraph of Article 230 EC. However, the Commission adds that it is not of direct and individual concern to them.

40 First of all, a decision such as the contested decision in no way prejudices the final decision which the national authorities will adopt on the concentration. Therefore the existence of a later independent decision of the State rules out the possibility of the applicants being regarded as directly concerned by the contested decision. On this point the Commission refers to the judgments of the Court in Case T-3/93 *Air France* v *Commission* [1994] ECR II-121, and Case T-96/92 *CCE de la Société Générale des grandes sources and Others* v *Commission* [1995] ECR II-1213, paragraph 40, and to the case-law relating to the right of private individuals to challenge decisions concerning State aid (Case T-114/00 *Aktionsgemeinschaft Recht und Eigentum* v *Commission* [2002] ECR II-5121, paragraph 73) and directives (Joined Cases T-172/98, T-175/98 to T-177/98 *Salamander and Others* v *Parliament and Council* [2000] ECR II-2487, paragraph 70).

41 In this context the Commission observes that, in the case of *Air France* v *Commission,* cited in paragraph 40 above, the contested decision did not ensure that there would be a decision on the merits of the concentration under national competition law. On the contrary, in that case the contested decision authorised the immediate implementation of the proposed operation and deprived third parties of their procedural rights. In the present case, the contested decision in no way authorised the concentration. The decision merely effected a transfer of competence without prejudicing the procedural safeguards for the third parties concerned. Referring to the judgments of the Court of Justice in Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203 and Case C-70/97 P *Kruidvat* v *Commission* [1998] ECR I-7183, the Commission adds that the important point with regard to the admissibility of the action is respect for the right to be heard and not observance of specific procedural rules. Unless it is to be presumed that the Member States, and in particular the Kingdom of Spain, do not respect that fundamental safeguard, it must be found that the contested decision is not of direct concern to the applicants. In any case, there is no 'variable-geometry' capacity to bring proceedings, depending on the procedural rules of the State to which the competence to examine a concentration is transferred (see, to that effect, Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 43). If the applicants considered that their right to be heard was not adequately safeguarded before the Spanish competition authorities, they could present their arguments in an action against the final decision adopted by those authorities. Regarding the applicants' argument that the third parties concerned had no right to make their views known at a formal hearing before the Spanish authorities, the Commission observes that, under Article 16 of Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time-limits and hearings provided for by Regulation No 4064/89 (OJ 1998 L 61, p. 1), a third party likewise has no such right in the administrative procedure before the Commission. A third party could make his point of view known only if the Commission deemed it appropriate.

42 The present cases are also very different from Case T-87/96 *Assicurazioni Generali and Unicredito* v *Commission* [1999] ECR II-203, where the Commission, in the contested decision, took the view that the formation of a joint venture was not a concentration within the meaning of Regulation No 4064/89. The applicants in that case were parties to the transaction and, consequently, the contested decision was addressed to them. The Commission adds that, although the parties have an individual right to see the formation of a joint venture assessed under Regulation No 4064/89, where the conditions for applying the Regulation

are fulfilled, there is no such right to have the operation dealt with by a particular authority where the conditions for referral to a Member State are fulfilled.

43 In Case T-347/02 the Commission also observes that, pursuant to Article 9(8) of Regulation No 4064/89, a Member State can take only the measures strictly necessary to safeguard or restore effective competition on the market concerned. The Commission adds that, if the national authorities' final decision does not conform with that provision, the applicants may plead such breach in an action against the decision.

44 Secondly, the Commission contends that the contested decision is not of individual concern to the applicants either. The mere fact that a person participates in one way or another in the process leading to the adoption of a decision does not distinguish him individually for the purpose of the fourth paragraph of Article 230 EC, unless the relevant Community legislation has laid down specific procedural guarantees for such a person (orders in Case T-60/96 *Merck and Others* v *Commission* [1997] ECR II-849, paragraph 73, and Case T-109/97 *Molkerei Großbraunshain and Bene Nahrungsmittel* v *Commission* [1998] ECR II-3533, paragraph 68). Formally, however, individuals play no part in the procedure under Article 9 of Regulation No 4064/89, as it is an entirely bilateral procedure between the Commission and the Member State making the request. The fact that the applicants submitted observations concerning the request for referral in the course of the administrative procedure is not therefore such as to distinguish them individually for the purpose of the fourth paragraph of Article 230 EC.

45 In Case T-346/02 the Commission also observes that the documents produced by ONO do not indicate the nature of the connection which is said to exist between the applicants and ONO. Nor was it possible to establish the extent to which the observations submitted by ONO concerning the effect of the concentration on it reflected its impact on the applicants.

46 The applicants in both cases claim that the contested decision is of direct and individual concern to them.

Findings of the Court

47 According to the fourth paragraph of Article 230 EC, 'any natural or legal person may... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'.

48 The applicants are not the addressees of the contested decision, which the Commission addressed to the Member State which had requested a referral under Article 9(2) of Regulation No 4064/89, namely the Kingdom of Spain. Accordingly it is necessary to ascertain whether the decision is of direct and individual concern to the applicants.

The question whether the contested decision is of direct concern to the applicants

49 It has consistently been held that, for a contested Community measure to be of direct concern to a natural or legal person, it must directly affect the applicant's legal situation and its implementation must be purely automatic and result from Community rules alone without the application of other intermediate rules (see Case C-386/96 P *Dreyfus* v *Commission* [1998] ECR I-2309, paragraph 43, and Case T-9/98 *Mitteldeutsche Erdöl Raffinerie* v *Commission* [2001] ECR II-3367, paragraph 47).

50 That is the case, in particular, where the possibility that addressees will not give effect to the Community measure is purely theoretical and their intention to act in conformity with it is not in doubt (Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207, paragraphs 8 to 10; *Dreyfus* v *Commission*, cited in paragraph 49 above, paragraph 44, and *Aktionsgemeinschaft Recht und Eigentum* v *Commission*, cited in paragraph 40 above, paragraph 73).

51 In the present case, it must therefore be ascertained whether the contested decision is capable of having direct and automatic effects on the applicants' legal position or whether, on the contrary, those effects will arise from the decision adopted by the Spanish competition authorities on referral.

52 The Commission did not, in the contested decision, rule on the compatibility of the concentration with the common market, but referred the examination of the concentration to the Spanish competition authorities who requested the referral on 12 July 2002. In accordance with point (b) of the first subparagraph of Article 9(3) of Regulation No 4064/89, those authorities are responsible for examining the effects of the concentration with regard to their national competition law. The only obligations imposed by Regulation No 4064/89 on the Spanish competition authorities in that regard are, first, in accordance with Article 9(6), that they must adopt their decision within a period of not more than four months after the Commission's referral and, second, in accordance with Article 9(8), that they must take 'only the measures strictly necessary to safeguard or restore effective competition on the market concerned'. However, since those obligations cannot determine precisely and with certainty the result of the examination of the merits carried out by the Spanish competition authorities, it must be held that the contested decision is not capable of directly affecting the competitive situation of the applicants, as only the final decision adopted by the Spanish competition authorities can have that effect.

53 However, that does not show that the contested decision is not of direct concern to the applicants. The question whether a third party is directly concerned by a Community measure which is not addressed to it must be examined in the light of

the purpose of that measure. The purpose of the contested decision is not to rule on the effects of the concentration on the relevant markets which are the subject of the referral, but to transfer responsibility for that examination to the national authorities which have requested the referral in order that they may give a ruling in accordance with their national competition law. In view of that purpose, it is irrelevant in the present case that the contested decision does not directly affect the competitive position of the applicants on the relevant markets in Spain (see, to that effect, Case T-119/02 *Royal Philips Electronics* v *Commission* [2003] ECR II-1442, paragraph 276).

54 In order to assess whether the applicants are directly concerned by the contested decision, it need only be determined whether that decision has direct and automatic legal effects for the applicants.

55 In that regard, it should be observed that, pursuant to Article 1(1) and Article 22(1) thereof, Regulation No 4064/89 is, in principle, applicable only to concentrations with a Community dimension as defined in Article 1(2) and (3) of that regulation. Thus, according to the first subparagraph of Article 21(2) of Regulation No 4064/89, concentrations with a Community dimension are not, in principle, subject to the application of the Member States' laws on competition.

56 In the present case, by referring the examination of the concentration in question to the Spanish competition authorities, the Commission terminated the procedure applying Regulation No 4064/89, initiated by the notification of the agreement on the merger of Vía Digital with Sogecable. According to point (b) of the first subparagraph of Article 9(3), after a referral the competent authorities of the Member State concerned are to apply their national competition law.

57 It follows that the effect of the contested decision which is the subject of the present action is to subject the concentration to exclusive review by the Spanish competition authorities ruling under their national competition law.

58 It must be held that the contested decision thus affects the applicants' legal situation (see, to that effect, *Royal Philips Electronics* v *Commission*, cited in paragraph 53 above, paragraphs 281 to 287).

59 By determining, through the referral to national competition law, the criteria for the assessment of the lawfulness of the concentration in question and the procedure and possible sanctions applicable to it, the contested decision alters the applicants' legal situation by depriving them of the opportunity to have the Commission review the lawfulness of the concentration from the point of view of Regulation No 4064/89 (see, by analogy, *Assicurazioni Generali and Unicredito* v *Commission*, cited in paragraph 42 above, paragraphs 37 to 44).

60 The review of a concentration carried out under the laws of a Member State cannot be considered, as regards its scope and effects, to be comparable to that carried out by the Commission under Regulation No 4064/89 (*Air France* v *Commission*, cited in paragraph 40 above, paragraph 69).

61 Contrary to the Commission's argument, every decision entailing a change in the legal system applying to the examination of a concentration is capable of affecting not only the legal situation of the parties to the operation in question, as occurred in the case of *Assicurazioni Generali and Unicredito* v *Commission*, cited in paragraph 42 above, but also that of third parties.

62 It must be observed that, irrespective of whether Spanish competition law confers upon third parties procedural rights similar to those safeguarded by Regulation No 4064/89, the contested decision, by terminating the procedure laid down by Regulation No 4064/89, has the effect of depriving third parties of the procedural rights which they derive from Article 18(4) of Regulation No 4064/89.

63 Finally, by the contested decision, the Commission precludes third parties from relying on the judicial protection which they enjoy under the Treaty. By referring the examination of the concentration to the Spanish competition authorities, which rule on the basis of their national competition law, the Commission deprives third parties of the opportunity to bring a subsequent action before the Court of First Instance under Article 230 EC to challenge the national authorities' assessments in that regard, when, had a referral not been made, the Commission's assessments could have been so challenged.

64 Consequently, since the effect of the contested decision is to deprive the applicants of a review of the concentration by the Commission on the basis of Regulation No 4064/89 and of the procedural rights under it for third parties and also of the judicial protection provided for by the Treaty, it must be held that the contested decision is capable of affecting the applicants' legal situation.

65 That effect is direct because the contested decision requires no additional implementing measure in order to render the referral effective. As soon as the contested decision is adopted by the Commission, the referral is immediate for the Member State concerned, which thus becomes competent to assess the concentration referred in the light of its national competition law.

66 In addition, it must be observed that, in accordance with Article 9(2) of Regulation No 4064/89, it was the Spanish authorities which requested the Commission to refer to them the examination of the effects of the concentration on the relevant markets in Spain. Accordingly, the possibility that the Spanish authorities would not act on the contested decision could be excluded and that is confirmed in the present case by the fact that, on 29 November 2002, the Spanish competition authorities adopted a decision on the concentration in question.

67 Consequently, it must be held that the contested decision is of direct concern to the applicants.

68 That finding cannot be called into question by the fact, pointed out by the Commission, that the applicants may bring an action against the national authority's decision in accordance with national remedies and, where appropriate, seek, within that framework, a preliminary ruling under Article 234 EC. The possible existence of remedies before the national courts cannot preclude the possibility of contesting the legality of a decision adopted by a Community institution directly before the Community judicature under Article 230 EC (*Air France* v *Commission*, cited in paragraph 40 above, paragraph 69, and *Royal Philips Electronics* v *Commission*, cited in paragraph 53 above, paragraph 290).

The question whether the contested decision is of individual concern to the applicants

69 Persons other than the addressees of a decision can claim to be individually concerned only if that decision affects them by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the

addressee (Case 25/62 *Plaumann* v *Commission* [1963] ECR 197, 223, and *Unión de Pequeños Agricultores* v *Council*, cited in paragraph 41 above, paragraph 36).

70 In the present case, the Commission does not dispute that the applicants' competitive position is affected by the concentration which was referred to the Spanish authorities. It is common ground that the applicants are the current principal competitors of the parties to the concentration on most of the markets in question. In paragraph 84 of the contested decision it is stated that 'the anti-competitive effects which the notified concentration could have... threaten in particular the cable operators in Spain who are the main source (and almost the only source, taking account of the situation regarding terrestrial digital television in Spain) of competition for the satellite television platform resulting from the merger' and that 'those cable operators... are also the principal alternative source of competition (effective in some cases, potential in others) for Telefónica on various telecommunications markets where the long-standing Spanish operator is already dominant'.

71 Furthermore, the applicants participated in the administrative procedure leading to the adoption of the contested decision.

72 Regarding the applicants in Case T-346/02, it must be observed that on 27 June 2002 ONO contacted the Commission, which on 18 July 2002 sent it a request for information under Article 11 of Regulation No 4064/89, to which ONO replied by letter of 23 July 2002. The participation of ONO in the administrative procedure may be deemed equivalent to the applicants' intervention in Case T-346/02. In reply to a question from the Court, they explained that, as indicated in the abovementioned letter of 23 July 2002, ONO is the name under which they all operate on the Spanish market. In the letter and in their reply to the Court, the

applicants stated, without being contradicted by the Commission, that ONO was the name under which the group of cable operators constituted by the Grupo ONO company operates. Grupo ONO holds all the shares in Cableuropa, which itself holds the majority of the shares of the other cable operators acting as applicants in Case T-346/02.

73 Likewise Aunacable, on the one hand, and the other applicants in Case T-347/02, on the other hand, sent the Commission letters dated 9 and 22 July 2002 respectively, in which they stated that the requirements of Article 9 of Regulation No 4064/89 were not fulfilled. On 18 July 2002 the Commission sent the applicants a request for information under Article 11 of Regulation No 4064/89, to which they replied on 26 July 2002 (applicants other than Aunacable) and 31 July 2002 (Aunacable).

74 In those circumstances it must be found, first, that the applicants would have had a right to be heard by the Commission if it had decided not to refer the matter to the Spanish authorities and had, on the contrary, initiated the so-called phase II procedure of Article 6(1)(c) of Regulation No 4064/89.

75 Under Article 18(4) of Regulation No 4064/89, third parties have a right to be heard by the Commission, in particular before the adoption of a decision on the completion of phase II, provided that they have so requested and have shown that they have a sufficient interest for that purpose (Case T-290/94 *Kaysersberg* v *Commission* [1997] ECR II-2137, paragraph 105). As the applicants' competitive position is affected by the concentration referred to the Spanish authorities, the applicants had a sufficient interest in being heard (see *Kaysersberg* v *Commission*, cited above, paragraph 109).

76 The applicants, who are intended to benefit from the procedural guarantees under Article 18(4) of Regulation No 4064/89, may secure compliance therewith only if they are able to challenge the contested decision before the Community courts (see, to that effect, *Cook* v *Commission*, cited in paragraph 41 above, paragraph 23).

77 Secondly, had the referral not been made, a final decision of approval by the Commission on the basis of Article 6(1)(b) of Regulation No 4064/89 would also have been of individual concern to the applicants as competing undertakings.

78 It must therefore be held that, had the referral not been made, it would have been open to the applicants, by way of an action for annulment under the fourth paragraph of Article 230 EC, to challenge the Commission's assessment of the effects of the concentration on the relevant markets in Spain (see, to that effect, *Royal Philips Electronics* v *Commission*, cited in paragraph 53 above, paragraph 295).

79 Since the contested decision deprives the applicants of the opportunity to challenge before the Court of First Instance assessments which it would have been entitled to challenge had the referral not been made, it must be held that the contested decision individually affects the applicants in the same way as they would have been affected by the approval decision had the referral not been made (see, to that effect, *Royal Philips Electronics* v *Commission*, cited in paragraph 53 above, paragraph 297).

80 Consequently, the applicants must be regarded as individually concerned by the contested decision.

81 It follows from the above considerations that the contested decision is of direct and individual concern to the applicants.

82 Consequently the actions are admissible.

The substance of the case

83 The applicants rely on three common pleas in support of their applications. The first plea alleges a breach of Article 9 of Regulation No 4064/89 in that the concentration had effects beyond Spanish territory. The second plea also claims a breach of Article 9 and of the principle of sound administration in that the Commission has a right only exceptionally to refer a concentration to the national authorities where the markets affected by the concentration constitute a substantial part of the common market. The third plea alleges a breach of Article 253 EC. The applicants in Case T-346/02 add a fourth plea alleging a breach of Article 9 of Regulation No 4064/89 in that the contested decision contains a 'blank' referral to the Spanish authorities. The first, second and fourth pleas should be examined before taking up the third.

First plea in law: breach of Article 9 of Regulation No 4064/89 in that the concentration has effects beyond Spain

Arguments of the parties

84 The applicants in both cases claim that, in the present case, Article 9 of Regulation No 4064/89 did not permit the Commission to refer the concentration in question to the national authorities.

85 In Case T-346/02, the applicants contend that it is clear from Article 9(2) of the regulation that the Commission has no right to refer a concentration to the national authorities where the markets in question extend beyond the boundaries of one Member State. As the concentration has a manifestly international dimension or, at least, an international dimension could not have automatically been ruled out by the Commission, it was in breach of Article 9(2) of the Regulation.

86 To prove the international dimension of the concentration in question, the applicants in Case T-346/02 explain, first, that the Telefónica, Canal+, Vivendi and Prisa groups have a strong European presence in telecommunications and also pay-TV. Secondly, the telecommunications markets extend beyond national frontiers, the internet networks are not national and many services cross borders, for example signals transmitted by satellite. Third, markets in audiovisual rights also have a cross-border dimension. The Commission itself had acknowledged in the decision of 21 March 2000, BSkyB/KirchPayTV (COMP/JV.37), that, on the audiovisual rights market, rights were acquired and utilised on a European or even worldwide basis.

87 At the hearing the same applicants pointed out that the parties to the concentration themselves admitted, in the notification of their concentration, that some of the markets concerned went beyond the frontiers of Spain, in particular the satellite services market, the technical services market, audiovisual markets (such as film production, which was said to be a world market), and the market in broadcasting rights for sports events, where the television operators were competing with channels operating at the European level. The applicants observe that language barriers are gradually disappearing and that the transmission of films and sports programmes by the internet makes those programmes accessible from countries other than Spain and enables users to choose their preferred language. According to the applicants, in the contested decision the

Commission merely asserted that certain markets mentioned by the national authorities in their request for referral should not be examined because they did not present problems in relation to competition, but the Commission did not ascertain whether those markets were national markets.

88 In support of their submissions, at the hearing the applicants in question lodged a copy of the non-confidential version of the notification of the concentration in question.

89 In the course of the hearing, they also observed that the Commission could refer the matter to the national authorities only if the latter had, in the request for referral, categorised the markets concerned as national markets. The amended version of the request had not been disclosed to the applicants during the administrative procedure before the Commission nor, furthermore, in the course of the procedures before the Spanish authorities. As the document in question was placed on the file following a request by the Court, it was incumbent on the Court to ascertain whether the request for referral fulfilled the conditions laid down by Article 9 of Regulation No 4064/89.

90 In Case T-347/02, the applicants claim that there was a manifest error of assessment on the part of the Commission in finding, in paragraph 119 of the contested decision, that 'the concentration threaten[ed] to create or strengthen a dominant position only in markets with a national dimension within the Kingdom of Spain', without considering the cross-border effects, if any, of the notified concentration. If there were any such effects, a referral of the case to the Spanish authorities would have been ruled out on the ground of non-compliance with the conditions laid down by Article 9 of Regulation No 4064/89.

91 The applicants in that case maintain that the concentration was capable of having cross-border effects. They point out, first, that the undertakings potentially

affected by the concentration are not only competitors in the Spanish market for multi-channel pay-TV, but also other operators in related markets (mainly the market for programme content) who are not necessarily established in the Spanish market. Accordingly, as Canal+ is one of the companies with joint control of the platform resulting from the concentration, and as it is an operator with interests in the European television market, it is possible that the concentration might have the effect of strengthening its position in international programme markets situated upstream of the pay-TV market. Like the other applicants, the applicants in Case T-347/02 note that the Commission itself acknowledged, in the BSkyB/KirchPayTV decision cited above, that, in the audiovisual rights market, the acquisition and utilisation of rights are activities which affect more than one Member State. Finally, the applicants contend that, with regard to the notified concentration, the Commission ought to have examined the so-called 'output deals' signed by the companies operating in the pay-TV market with the major American studios.

92 At the hearing the applicants in Case T-347/02 observed that, to show the existence of one or more 'distinct markets' within the meaning of Article 9(2)(a) of Regulation No 4064/89, it was not sufficient that the relevant geographical markets were national. A Member State could not be regarded as constituting a 'distinct market' unless the competition structure in that State differed from that in other Member States.

93 First of all, in that context, the applicants note that the language criterion is not sufficient to categorise a market as 'distinct', particularly as the same programme content can be offered in more than one language, as is the case with films on digital video disc (DVD). Secondly, the national audiovisual regulations created no specific barriers to entry for Spain, having regard to the level of the Community harmonisation of the relevant rules, as shown by the judgment in Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607. Third, the fact that

rights in programme content were distributed on a territorial basis did not make the Spanish market a 'distinct market' as the same programmes were distributed elsewhere with the same formats for utilisation and on the basis of the same royalty arrangements.

94 According to the applicants, there were several factors indicating that the Spanish market was not a 'distinct market'. First of all, the fact that Sogecable belonged to the Canal+ group reflected a process of consolidation taking place in all European markets in view of the financial difficulties in the audiovisual sector. Secondly, it had to be accepted that the nature of the products and services offered in all European markets was identical. Finally, the barriers to entry were the same and related in particular to access to programme content and access to the dominant distribution platform.

95 The applicants deny that they raised new submissions at the hearing. They explain that they adapted their arguments as a result of the judgment in the case of *Royal Philips Electronics v Commission*, cited in paragraph 53 above, which was given after they had lodged their applications. They state that they merely amplified the submissions they had already made in their applications. The applicants in Case T-347/02 add that the argument that the national dimension of a market is not sufficient to make it 'distinct' within the meaning of Article 9 of Regulation No 4064/89 had been raised in their letter of 22 July 2002 to the Commission.

96 The Commission, supported by the interveners, replies that the decisive criterion for determining the cases in which it has the option of referring a matter to the national authorities is the risk of anti-competitive effects in markets within a Member State which present the characteristics of distinct markets. In accordance with Article 9(2)(a), the contested decision identified the geographical reference markets and analysed the effects of the concentration on competition in those markets and had concluded that the concentration threatened to create or strengthen a dominant position only in markets having a national dimension within the Kingdom of Spain.

97 The European presence of the Telefónica, Canal+ and Vivendi groups and the international activity of the groups concerned could not, as such, determine the geographical dimension of the different product markets in which those operators were active. Likewise the cross-border effects of a concentration did not decide whether a proposed concentration should be referred to the national authorities.

98 The Commission adds that the applicants made certain submissions for the first time at the hearing which did not appear in the application. Accordingly there was a new argument that certain 'other markets' existed which were mentioned either by the parties to the concentration in their notification or by the Spanish authorities in their request for referral, and which were not examined by the Commission in the contested decision. Furthermore, the application did not include the submission that a distinction should be made between 'distinct market' within the meaning of Article 9(2)(a) of Regulation No 4064/89 and the concept of 'relevant geographical market'. Therefore the Court should dismiss those pleas as inadmissible pursuant to Article 48(2) of the Rules of Procedure. According to the Commission, the applicants cannot rely on the judgment in *Royal Philips Electronics* v *Commission,* which is cited in paragraph 53 above and was delivered between the lodging of the application and the hearing because it has consistently been held that a judgment given after the lodging of an application is not a new matter within the meaning of Article 48(1) of the Rules of Procedure. In so far as the applicants assert that certain submissions had already been made in the documents annexed to their application, the Commission observes that it is not incumbent on the Court to identify in the annexes pleas which are not raised as such in the application.

99 In any case, the applicants' arguments are unfounded.

Findings of the Court

100 It must be observed that the Spanish authorities requested the referral of the concentration on the basis of Article 9(2)(a) of Regulation No 4064/89. In the words of the contested decision, the Commission found that 'the concentration

threatens to create or strengthen a dominant position only in markets with a national dimension within the Kingdom of Spain' (paragraph 119). The Commission decided, pursuant to the first subparagraph of Article 9(3), to refer the case to the Spanish national competition authorities for a ruling on the basis of their national competition law.

101 It is clear from Article 9(2)(a) that, for a concentration to be the subject of referral on the basis of Article 9 of the Regulation, two cumulative conditions must be fulfilled. First, the concentration must threaten to create or strengthen a dominant position as a result of which effective competition would be significantly impeded on a market within the Member State in question. Secondly, that market must present all the characteristics of a distinct market.

102 With regard to the fulfilment of the conditions set out by Article 9(2)(a) of Regulation No 4064/89, it must be noted that the conditions for referral laid down by that provision are matters of law and must be interpreted on the basis of objective factors. For that reason, the Community judicature must, having regard to both to the specific features of the case before it and the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a concentration falls within the scope of Article 9(2)(a) of that regulation (*Royal Philips Electronics* v *Commission*, cited in paragraph 53 above, paragraph 326).

103 Regarding the first condition, the applicants do not dispute that the concentration threatens to create or strengthen a dominant position in Spain on the various product markets identified in the contested decision.

104 However, the applicants claim that the second condition is not fulfilled because the product markets identified in the contested decision are not markets within a Member State which present the characteristics of a distinct market.

105 On this point it should be noted, first, that, according to the first subparagraph of Article 9(3) of Regulation No 4064/89, the Commission is to establish whether there is a distinct market 'having regard to the market for the products or services in question and the geographical reference market within the meaning of paragraph 7'.

106 A reading of the first subparagraph of Article 9(3), in conjunction with Article 9(7) of Regulation No 4064/89, indicates that, in order to establish whether a Member State constitutes a distinct market for the purpose of Article 9(2) of that regulation, the Commission must take account of the criteria laid down in Article 9(7), which relate, in particular, to the nature and characteristics of the products or services concerned, the existence of entry barriers, consumer preferences and the existence of appreciable differences in market shares or prices between territories (*Royal Philips Electronics* v *Commission,* cited in paragraph 53 above, paragraph 333).

107 At the hearing, the applicants in Case T-347/02 argued that, for a national market to be deemed a 'distinct market' within the meaning of Article 9(2) of Regulation No 4064/89, the market in question must be distinguished from other markets not only because it is a separate geographical market, but also because its competition structure differs from that of other Member States.

108 It is necessary, first of all, to consider the admissibility of this argument, which was raised for the first time at the hearing.

109 In this connection the Court observes that, although Article 76a(3) of the Rules of Procedure provides that, in the framework of an expedited procedure, the parties may supplement their arguments and offer further evidence in the course of the oral procedure, while giving reasons for the delay in offering such further evidence, it is clear from the actual wording of this provision that it applies without prejudice to Article 48 of the Rules of Procedure, paragraph 2 of which states that no new plea in law may be introduced in the course of the proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

110 The judgment in *Royal Philips Electronics* v *Commission*, cited in paragraph 53 above, which was given after the actions were brought and to which the applicants refer to justify the argument set out in paragraph 107 above, cannot be regarded as a factor allowing a new plea in law to be introduced. That judgment merely confirms the law as known to the applicants at the time when they brought their action (see Case 11/81 *Dürbeck* v *Commission* [1982] ECR 1251, paragraph 17, and Case T-521/93 *Atlanta and Others* v *Council and Commission* [1996] ECR II-1707, paragraph 39).

111 However, a plea which may be regarded as amplifying a plea put forward previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible (Case T-252/97 *Dürbeck* v *Commission* [2000] ECR II-3031, paragraph 39).

112 In the present case it must be noted that the argument set out in paragraph 107 above does not go beyond the context of the dispute as defined in the application.

113 In this connection, the applicants in Case T-347/02 allege in their application that the Commission erred in its assessment in referring a concentration to the

national authorities in spite of the fact that the conditions laid down in Article 9 of Regulation No 4064/89 were not fulfilled. While it is unnecessary to establish whether, at the stage of the application, the applicants pleaded a distinction between 'distinct market' and 'geographical reference market', the application shows that the applicants complained that the contested decision was illegal on the ground of the Commission's erroneous application of the conditions set out in Article 9, in particular, the condition relating to the existence of distinct markets. In that context, it must be found that the submissions concerning the distinction to be made between 'distinct market' and 'geographical reference market' merely develop the applicants' arguments in the application to the effect that the Commission was in breach of Article 9 of Regulation No 4064/89 in taking the view that the product markets in question were markets within a Member State presenting all the characteristics of a distinct market. The submission reproduced in paragraph 107 above is closely connected with the first plea in law in the application and must therefore be deemed admissible.

114 Regarding the merits of that submission, it must be stated that Article 9 does not lend itself to the interpretation advocated by the applicants. It is clear from the actual wording of Article 9(3) of the regulation that the Commission is required to determine whether there is a distinct market on the basis of, first, a definition of the market for the relevant products or services and, secondly, a definition of the geographical reference market within the meaning of paragraph 7.

115 As appears from Article 9(7) of Regulation No 4064/89 and from paragraph 8 of the Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5), the geographical market to be taken into account consists of the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of

competition are appreciably different in those areas. As mentioned in paragraph 106 above, it is necessary, in that assessment, to take particular account of the nature and characteristics of the products or services concerned, the existence of entry barriers, consumer preferences, the existence of appreciable differences in the undertakings' market shares, or price differences.

116 Where the assessment of all these factors leads to the conclusion that the conditions of competition in the markets for the products or services in question in a Member State are appreciably different and are therefore different geographical markets, those markets must be regarded as distinct markets within the meaning of Article 9(2) of Regulation No 4064/89 (see, to that effect, *Royal Philips Electronics* v *Commission,* cited in paragraph 53 above, paragraphs 335 to 337).

117 Contrary to the applicants' submission, it is not relevant, in that connection, to ascertain whether certain structural elements of the relevant markets are present in other geographical markets. If it is shown that the competition conditions are not sufficiently homogeneous and that, in particular, consumer preferences and certain entry barriers confine a certain market to the national territory of a Member State, it is not sufficient, for the purpose of showing that that market is not a distinct market, that comparable products or services or similar selling methods exist in certain other territories. As for the presence of similar barriers to entry, they certainly do not refute the argument that the geographical markets in question are distinct markets. On the contrary, they corroborate it.

118 At this stage it is appropriate to examine the applicants' arguments that the Commission was not justified in concluding that there are distinct geographical markets within the meaning of Article 9(2) of Regulation No 4064/89.

119 On this point it must be recalled that the Court reviews assessments by the Commission concerning the definition of relevant markets by reference to a test of whether there was a manifest error of assessment (see, to that effect, Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585, paragraphs 26 and 32).

120 The contested decision gives the following reasons for the Commission's conclusion that the Spanish market is the relevant geographical reference market for each product market.

121 So far as the pay-TV market is concerned, the contested decision explains that, 'even though certain market segments, such as the Eurosport sports channel, broadcast throughout the Community, television broadcasting takes place essentially on national markets, mainly because of differing national legislation, language barriers, cultural factors and competition conditions which differ from one country to another (for example, the structure of the cable television market)' and that, 'in the particular case of Spain, the geographical dimension is found to be national for language and administrative reasons' (paragraph 17).

122 Regarding the markets upstream of the pay-TV market, the Commission begins by explaining, with regard to film broadcasting rights, that such rights 'are generally assigned on an exclusive basis for variable periods, on a language basis and for a specific transmission area' and that, 'in the case of Spain, the transmission rights are limited to Spanish territory; the geographical markets, which correspond to the film rights, are national' (contested decision, paragraph 26). With regard to the market for broadcasting rights in football matches involving Spanish teams, that market is also said to be Spanish. According to the Commission, football broadcasting rights have been granted to Spanish television operators (contested decision, paragraph 40), and those 'rights are utilised essentially in Spain' (contested decision, paragraph 41). Regarding broadcasting rights for other sporting events and entertainments which give rise to exclusive rights, the Commission points out that spectator preferences vary from country to

country and therefore competition conditions for the purchase of such rights also vary (paragraph 57). So far as Spain is concerned, the market in broadcasting rights for such events has a national dimension for language and cultural reasons (paragraph 57). Finally, with regard to special-interest channels, the national geographical dimension of the market is said to be confirmed 'in the case of Spain because distribution takes place in Spanish territory' (contested decision, paragraph 63).

123 Regarding the geographic dimension of telecommunications markets, the contested decision states that the retail supply of internet access services to end users, whether broad band or narrow band, constitutes a market with an essentially national dimension for reasons which are both technological (for example, the need for access to a local loop and local/free telephone numbers for the nearest point of presence or POP) and administrative (existence of different national regulatory frameworks) (paragraph 80). According to the Commission, the fixed telephony markets and other telecommunications markets are national for the following reasons: 'national infrastructures, exclusively national offers of services, conditions for licensing operators, availability of mobile telephony frequencies, roaming tariffs, etc.' (paragraph 82).

124 In support of its argument that the markets in question have a Spanish dimension, the Commission also refers in the contested decision to its past decisions (paragraphs 17, 63, 80 and 82).

125 It must be held that the evidence produced by the applicants in both cases does not show there was a manifest error of assessment by the Commission in defining the relevant geographical markets.

126 First, in so far as the applicants refer to the European presence of the parties to the concentration and of their parent companies, it is sufficient to note that the fact that an undertaking operates in different Member States does not automatically imply that the markets in which it operates have a dimension exceeding the territory of the Member States concerned. An undertaking may operate in more than one distinct market with a national dimension.

127 In addition, the undertakings which are parties to the concentration covered by Regulation No 4064/89 generally have an international dimension as the thresholds laid down in Article 1 of the regulation require those undertakings to have a certain minimum turnover in different Member States, thus ensuring that the concentrations covered by the regulation, that is to say, also concentrations which may be referred to the national authorities under Article 9, all have a 'Community dimension'.

128 Secondly, regarding the geographical dimension of the audiovisual rights markets as defined in the Commission's BSkyB/KirchPayTV decision of 21 March 2002 (cited in paragraph 86 above), there is no contradiction between the definition of the geographical market used in that decision and the definition used in the contested decision.

129 In the BSkyB/KirchPayTV decision, the Commission states as follows (paragraph 45): 'with regard to the geographic market for the acquisition of broadcasting rights, although rights can be sourced from anywhere in the world and some operators acquire rights for more than one territory at a time, it has to be borne in mind that broadcasting rights are still acquired mainly on a national basis or, at the most, by language area. Thus the Commission has noted that film broadcasting rights are usually granted for a given language version and broadcasting area.' In the abovementioned decision, therefore, as in the contested

decision, the Commission found support in the fact that television rights are generally acquired for a specific language area and for a specific territory, in particular a national area.

130 Although the Commission acknowledges, in paragraph 46 of the BSkyB/Kirch-PayTV decision, that for certain sporting events such as the Olympic Games there is consumer interest throughout Europe, in that decision the Commission did not settle the question whether the market in question was a distinct geographical market. On the other hand, it pointed out that, even if the television rights for such sporting events were acquired exclusively for the whole of Europe, they were nevertheless resold subsequently for each country.

131 Therefore the Commission's observations in the said decision are not such as to show that there was a manifest error of assessment by the Commission in finding, in the contested decision, that the Spanish market is a distinct market with regard to the broadcasting rights for different programme contents.

132 Third, regarding the applicant's statement, in Case T-347/02, that Canal+, the company with joint control of the platform resulting from the concentration, has interests in the European television market so that the concentration is likely to strengthen its position in the international markets for programme content, it should be observed that neither the international nature of that company's activities nor its strength in the programme markets contradict the Commission's finding, which was confirmed at the hearing by Sogecable, that the broadcasting rights are acquired on a national or at least a language basis.

133 The Commission's conclusion that the markets in question have a national dimension is likewise not contradicted by the applicants' assertion that, in

relation to certain sports events, the television operators are in competition with channels operating at a European level. The presence in a certain market of operators whose activities are international does not mean that the geographical dimension of that market goes beyond the national context. Furthermore, in paragraph 17 of the contested decision, the Commission observed that the fact that certain operators, such as the Eurosport sports channel, broadcast throughout the Community does not prevent television broadcasting from taking place essentially on national markets because of differing national legislation, language barriers, cultural factors and competition conditions which differ from one country to another. Consequently the applicants cannot argue that the Commission failed to take proper account of the presence, in Spanish markets for sports events, of a channel operating throughout Europe.

134 Fourth, regarding the submissions concerning the limited importance of language barriers and the fact that certain programmes are offered in several languages, the applicants observed that it is becoming increasingly possible for users to choose their preferred language version for DVDs, music, films and sports programmes distributed via the internet. However, it must be observed that the applicants have not produced the slightest evidence to refute the Commission's findings that language is a relevant factor in assessing the geographical extent of the pay-TV market and the audiovisual rights and telecommunications markets. In addition, the concentration in question does not involve the markets for films on DVD support or the markets for broadcasting musical works. With regard to the distribution of films and sports programmes over the internet, the applicants in Case T-346/02 themselves stated at the hearing that those were emerging markets.

135 Likewise with regard to the possibility, referred to by the applicants, that certain programmes are accessible via the internet or the third-generation mobile communication system (universal mobile telecommunication system) from countries other than Spain, it must be observed that the applicants have not shown how this possibility contradicts the definition in the contested decision of

the markets for acquiring programme content and for pay-TV. The possibility of accessing from outside the products and services offered on the Spanish market does not mean that it is not a distinct market as identified by the Commission in the contested decision.

136 Fifth, the applicants in Case T-347/02 contend that, in connection with the notified concentration, the Commission ought also to have examined the output deals concluded by the companies in the pay-TV market with the major American studios.

137 On this point, it appears from paragraphs 27 to 29 of the contested decision that the Commission did take the said contracts into account when assessing competition in the Spanish market for the acquisition of rights to the first and second transmissions of films which are the biggest box-office successes.

138 However, the applicants do not explain how a more detailed examination of the output deals could have called into question the geographical definition of the relevant markets. The existence of similar contracts in other Member States does not automatically lead to a finding that there is a European market because such a finding depends on an assessment of all the competition conditions present in the territories concerned. On this point also, therefore, the applicants' reasoning does not show that there was a manifest error of assessment by the Commission in the contested decision in finding that the markets for audiovisual rights affected by the concentration constitute distinct markets with a Spanish dimension.

139 Sixth, the applicants in Case T-364/02 claim that telecommunications markets extend beyond national borders, that internet networks are not national and that many services, such as the transmission of signals by satellite, cross borders.

140 With regard to telecommunications markets, including the market for access to the internet, it must be observed, however, that the applicants have adduced no argument to cast doubt on the findings in paragraphs 80 and 82 of the contested decision (see paragraph 123 above) relating to the geographical delimitation of telecommunications markets.

141 Regarding the transmission of signals by satellite, this market, like the markets for technical services and film production, mentioned at the hearing by the applicants in Case T-346/02, is not among the markets identified by the Commission as markets in which the concentration threatens to create or strengthen a dominant position.

142 On this point the applicants asserted at the hearing that the Commission had no right to refer the concentration in question to the national authorities without examining all the markets mentioned as being affected by the concentration, either by the parties to the concentration in their notification or by the Spanish authorities in their request for referral.

143 With regard to the admissibility of this argument, the applicants contend in substance that it is possible that certain other markets, identified by the parties to the concentration or by the Spanish authorities, have a dimension exceeding the national limits of Spain. This argument must be regarded as a further development of the applicants' first plea in their application, to the effect that the Commission had no power to refer a concentration to the national authorities because the markets in question affect trade within the Community and more than one Member State. As this submission is closely connected with the first plea in the application, it must be deemed admissible.

144 However, the applicants cannot base an argument on the fact that the Commission did not examine certain markets identified in the notification or the request for referral.

145 First of all, the Commission, when examining a concentration of which it has been notified, identifies the markets affected by the concentration on the basis of its own assessment and it cannot be bound by the appraisal of those markets by the parties to the concentration or indeed by the State requesting referral. Consequently the Commission cannot be criticised in any way for not accepting the conclusions of the parties to the concentration in relation to the identification of the markets affected and their geographical dimension.

146 Regarding the geographical delimitation which the parties to the concentration gave to the markets identified in the notification, it must also be observed that, whereas the first subparagraph of Article 9(3) of Regulation No 4064/89, read in conjunction with subparagraph 2(a), requires the Commission to examine the markets in which the concentration threatens to create or strengthen a dominant position as a result of which effective competition would be significantly impeded on a market within that Member State which presents all the characteristics of a distinct market, it is clear from the measures adopted by the Commission concerning the notification of a concentration covered by the said regulation, in particular section 6 of Form CO relating to the notification of a concentration pursuant to Regulation No 4064/89, annexed to Regulation No 447/98, that the parties to a concentration must indicate in their notification not only the 'markets affected' by the concentration, including all product markets where there is some overlapping in the parties' activities, either in the same product market or in markets upstream or downstream of a product market in which any other party to the concentration is engaged, but also markets 'related to affected markets' where any of the parties to the concentration are active and which are not themselves affected markets and, where there are no affected markets, the 'non-affected markets' on which the notified concentration would have an impact.

147 As the interveners observe, the mere fact that certain markets are identified by the parties to the concentration in their notification does not mean that those markets are affected by the concentration. Accordingly, at the hearing Sogecable stated, without being contradicted by the applicants, that the parties to the concentration are not present in the market for services by satellite or the market for signal-carrier services whereas Telefónica, which is present in the latter market and has a minority holding in a company present in the former market, is not a party to the concentration.

148 Regarding the geographical delimitation which the national authorities gave to the markets identified in their request for referral, it is incumbent on the Commission to ascertain, before referring the case to the national authorities, whether the conditions set out in Article 9(2)(a) of Regulation No 4064/89, in particular the condition relating to the existence of distinct markets, are fulfilled. The Court only has to examine the legality of the referral decision. Therefore it is not relevant, when reviewing the legality of the contested decision, to establish whether, in their request for referral, the Spanish authorities described certain markets as extending beyond the national limits of Spain.

149 In any case, the applicants, who, during the proceedings before the Court, were in possession of a non-confidential version of the revised request for referral of 23 July 2002, have not put forward any specific arguments on the basis of that document which are such as to cast doubt on the Commission's assessments in relation to the markets affected by the concentration.

150 It must also be observed that, in paragraph 14 of the contested decision, the Commission states that it made the following findings as a result of its examination of the market: 'In relation to some of the markets identified by the national authorities as markets for which it was necessary to examine the extent to which the concentration could impede effective competition as a result of the

creation or strengthening of a dominant position, such a threat could be dismissed. Hereafter, mention is made of the markets in which the concentration gives rise to a threat of the creation or strengthening of a dominant position.' This passage of the contested decision shows that, although the Commission did not examine some of the markets identified in the request for referral made by the national authorities, this is explained by the fact that the Commission considered that, in those markets, the concentration in question did not threaten to create or strengthen a dominant position.

151 It must be observed that the applicants have not put forward any argument capable of refuting the Commission's conclusion that there was no threat of the creation or strengthening of a dominant position in markets other than those examined in the contested decision. The applicants merely point out that certain other markets not examined in the contested decision are international in nature.

152 It follows that the applicants have not shown that the Commission ought to have examined certain other markets identified by the parties to the concentration in their notification or by the Spanish authorities in their request for referral.

153 Thus the applicants have not proved that there was a manifest error of assessment on the part of the Commission in finding that the markets affected by the concentration are distinct markets with a Spanish dimension.

154 Finally, it must be found that throughout their arguments in the framework of their first plea in law, the applicants have merely criticised the geographical delimitation of the relevant markets without specifying the geographical dimension which, according to them, the Commission ought to have adopted in the contested decision.

155 Therefore the Commission was entitled to take the view that the relevant product markets were distinct markets with a Spanish dimension.

156 It follows from the foregoing that the Commission correctly concluded that the second condition of Article 9(2)(a) of Regulation No 4064/89 for referring the case to the Spanish authorities was fulfilled.

157 Consequently the first plea in law must be dismissed.

Second plea in law: breach of Article 9 of Regulation No 4064/89 and of the principle of sound administration in that the Commission has a right only exceptionally to refer a concentration to the national authorities where the markets affected by the concentration constitute a substantial part of the common market

The parties' submissions

158 The applicants in both cases contend that, even assuming that the notified concentration affects only national markets, the Commission has a right only exceptionally, where the distinct markets affected by the concentration form a substantial part of the common market, to refer the case to the national authorities. According to the applicants, where the distinct markets affected by the concentration form a substantial part of the common market, Article 9 of Regulation No 4064/89 can be applied only in cases where the interests, in terms of competition, of the Member State in question can be effectively protected in no other way.

159 For this purpose the applicants in Case T-346/02 refer to the explanatory notes relating to Regulation No 4064/89 (*Bulletin of the European Communities Supplement* No 2/90), and to the Commission's past decisions. The applicants state that, in the past, the Commission has dealt with 180 concentration cases in the field of telecommunications, radio and television. In particular, the applicants cite MSG Media Service (Case IV/M.469, BSkyB/KirchPayTV (cited in paragraph 86 above), Bertelsmann/Kirch/Premiere (Case IV/M.993) and Newscorp/Telepiù (Case COMP/M.2876), which were not referred to the national authorities.

160 The applicants in Case T-347/02 refer to recital 27 of the preamble to Regulation No 4064/89, the explanatory notes relating to that regulation, recitals 10 and 11 of the preamble to Regulation No 1310/97 and to the Commission practice of referring cases to the national authorities, with regard to concentrations affecting the entire territory of a Member State, only in exceptional cases (Commission decisions of 12 December 1992 (Case IV/M.180 — Steetley/Tarmac IP/92/104), 29 October 1993 (Case IV/M.330 — McCormick/CPC/ Rabobank/Ostmann), 22 March 1996 (Case IV/M.716 — GEHE/Lloyds Chemist IP/96/254), 24 April 1997 (Case IV/M.894 — Rheinmetall/British Aerospace /STN Atlas), 10 November 1997 (Cases IV/M.1001 — Preussag/Hapag-Lloyd and IV/M.1019 — Preussag/TUI), 19 June 1998 (Case IV/M.1153 — Krauss-Maffei/Wegmann) and 22 August 2000 (Case IV/M.2044 — Interbrew/Bass)). The applicants note that, with regard to the pay-TV market, in the past the Commission has refused to grant requests for referral submitted by the national competition authorities. In that connection the applicants refer in particular the Commission decision of 27 May 1998 (Case IV/M.993 Bertelsmann/Kirch/ Premiere).

161 The same applicants allege that, since the concentration in the present case involves the whole of the national market and since the territory of a Member State, considered in its entirety, is a substantial part of the common market, the Commission breached the spirit of Article 9 of Regulation No 4064/89 and its own past practice in adopting the contested decision. According to the applicants, the Commission's established practice had been to examine transactions concerning the concentration of programme suppliers in a dominant position, on the one hand, and of dominant undertakings in the sector of infrastructures

and/or broadcasting, on the other. The Commission had systematically prohibited such concentrations with a Community dimension where they had the effect of excluding competitors from the market, a situation which could arise in the present case. In this connection the applicants refer to MSG Media Service (Case IV/M.469, OJ 1994 L 364, p. 1), Nordic Satellite Distribution (Case IV/M.490, OJ 1996 L 53, p. 20), RTL/Verónica/Endemol (Case IV/M.553, OJ 1996 L 134, p. 32) and Telefónica/Sogecable/Cablevisión (Case IV/M.709). In the last mentioned case, a prohibition decision was not adopted. The parties concerned decided to abandon the operation and to withdraw the notification after being informed of the Commission's intention to adopt a prohibition decision.

162 As in the cases mentioned in the previous paragraph, according to the applicants, it was necessary for the Commission to examine the present concentration to ensure that the pay-TV market in Spain remained accessible to competitors. In that way the Commission could have ensured that similar concentrations were treated in the same way in all the Member States. Furthermore, the applicants observe that the Commission aims to liberalise the telecommunications sector. According to them, the Commission is best placed to ensure that concentrations do not jeopardise the achievement of the aims of the Community telecommunications policy in a substantial part of the common market such as Spain.

163 The applicants also refer to the merger of digital pay-TV platforms in Italy, which was notified to the Commission on 16 October 2002 (Case COMP/M.2876 — Newscorp/Telepiù) but which, at the date of the contested decision, had already been referred to the Commission at the 'pre-notification' stage, as appears from the numbering of concentration cases notified to the Commission. That is said to be a further attempt to merge the Telepiù and the Stream platforms following a first proposed merger examined by the Italian competition authorities (provvedimento de l'Autorità Garante de la Concorrenza e del Mercato of 13 May 2002 (C5109 — Groupe Canal+/Stream)). In spite of the conditional authorisation by the Italian authorities, the parties finally abandoned the operation. In spite of their experience in that field, the said authorities did not request a referral

following the notification of the Newscorp/Telepiù concentration to the Commission. In those circumstances the Commission ought also to have examined the present concentration and profited from the simultaneous existence of two similar cases in order to formulate its policy on the subject.

164 At the hearing the applicants, after seeing the public version of the Commission's decision of 2 April 2003 approving the Newscorp/Telepiù concentration, pointed out the differences between the conditions for the cable operators' access to the exclusive rights arising from the Spanish authorities' decision approving the concentration referred to them by the contested decision, on the one hand, and the more advantageous access conditions imposed by the Commission for the Italian market in the Newscorp/Telepiù decision, on the other.

165 The applicants add that the only problem arising from the present concentration, which the Spanish authorities raised in support of their request for referral, was the fact that if the Commission had given consent to the concentration, it would have been necessary to amend the Spanish legislation. However, according to the applicants, such a reason is not sufficient to justify the referral of the case.

166 The applicants in both cases go on to observe that, through AVS, Sogecable and Telefónica control the broadcasting rights for first and second division matches of the Spanish Football League, as well as the broadcasting rights for other competitions such as the UEFA Champions League, the FIFA world championship and other sporting events. To gain access to the broadcasting rights for those matches, the cable operators would have had to sign contracts for obtaining such rights with Canalsatélite Digital and AVS, which are the legal owner and the beneficiary respectively. According to the applicants, a new version of the contracts ('AVS II' contracts) was notified to the Commission on 30 September 1999 in order to obtain exemption under Article 81(3) EC. As the Commission

was investigating a case closely connected with the concentration and which involved the same parties, the applicants consider that the Commission was better placed than the Spanish authorities to assess the compatibility of the concentration in question with the common market.

167 At the hearing the applicants in Case T-346/02 also referred to the Commission's current examination of the output deals.

168 The applicants in Case T-347/02 contend that, in those circumstances, the Commission also breached the principle of sound administration in adopting the contested decision. They rely on a number of other factors in seeking to show that the Commission was better placed to examine the concentration, which raised important questions of Community interest, such as relations between the media and the telecommunications industry and their consolidation under way. The Commission had previous contact with the parties and with the third parties affected by the concentration, which enabled it to be further ahead with the investigation relating to the concentration. It had received complaints from other operators in the Spanish market in question and was well aware of the problems in the sector. The Commission already knew of the concentration in relation to the Italian television platforms Telepiù and Stream.

169 On the other hand, the Spanish authorities are said to have limited experience of investigating operations in the pay-TV and telecommunications markets. Furthermore, the Spanish legislation (sections 14 to 18 of Ley 16/89 de defensa de la competencia (Act 16/89 on the protection of competition)) permitted the Spanish authorities to approve concentrations on the basis of criteria unrelated to those of Article 2 of the regulation, in particular, criteria connected with industrial and social policy. The application of national law would therefore create a risk to the uniformity of the policy currently implemented by the Commission in the markets concerned.

170 In both cases the applicants stated at the hearing that the fact that the Commission considered it necessary to indicate, in the contested decision, that the conditions for applying the so-called 'failing firm' theory were not fulfilled confirms that the Commission itself fears that the application by the Spanish authorities of their national law might call into question the Commission's competition policy.

171 The Commission, supported by the interveners, contends that the plea should be dismissed.

Findings of the Court

172 With this second plea, the applicants submit that the Commission breached Article 9 of Regulation No 4064/89 and the principle of sound administration in exercising the discretion which it has where both conditions of Article 9(2)(a) of the regulation are fulfilled.

173 In this connection, it follows from the first subparagraph of Article 9(3) of Regulation No 4064/89 that, if the distinct markets affected by the concentration constitute a substantial part of the common market, the Commission is not obliged to refer the concentration to the competent authorities of the Member State concerned. The Commission has the choice of dealing with the case itself or referring it to the national authorities for examination.

174 The wording of the first subparagraph of Article 9(3) shows that the Commission has a broad discretion as regards that decision. However, that discretion is not unlimited. Point (a) of the first subparagraph of Article 9(3) states that the

Commission may decide to deal with the case itself 'in order to maintain or restore effective competition on the market concerned'. Furthermore, Article 9(8) provides that the Member State concerned 'may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned'.

175 It follows from those provisions that, although the first subparagraph of Article 9(3) of Regulation No 4064/89 confers on the Commission a broad discretion as to whether or not to refer a concentration, it cannot decide to make such a referral if, when the Member State's request for a referral is examined, it is clear, on the basis of a body of precise and coherent evidence, that such a referral cannot safeguard or restore effective competition on the relevant markets (*Royal Philips Electronics* v *Commission*, cited in paragraph 53 above, paragraphs 342 and 343).

176 Review by the Community judicature of the question whether the Commission has properly exercised its discretion in deciding whether or not to refer a concentration is therefore a limited review which, in the light of Article 9(3) and (8) of Regulation No 4064/89, must be restricted to establishing whether the Commission was entitled, without committing a manifest error of assessment, to consider that the referral to the national competition authorities would enable them to safeguard or restore effective competition on the relevant markets so that it was unnecessary to deal with the case itself (*Royal Philips Electronics* v *Commission*, cited in paragraph 53 above, paragraph 344).

177 In the present case, it should be pointed out that the Member State concerned has specific laws on the control of concentrations and specialised bodies to ensure that those laws are implemented under the supervision of the national courts.

178 As the Commission maintains, it must be accepted that the national competition authorities are normally at least as well equipped as the Commission to examine concentrations with an exclusively national dimension, by virtue of their direct knowledge of the markets in question, the parties to the concentration and third parties, as well as their knowledge of the relevant national law.

179 As, in their request for referral, the Spanish authorities had specified the competition problems caused by the concentration in the markets concerned and as the Commission had satisfied itself that the conditions of Article 9(2)(a) of the Regulation were fulfilled, it was justified in taking the view, in the referral decision, that 'the Spanish national authorities have sufficient resources and are in a position to carry out a thorough investigation of the concentration, taking account, in particular, of the national nature of the markets in which the concentration threaten[ed] to create or strengthen a dominant position' (paragraph 120).

180 Accordingly, the Commission was reasonably entitled to take the view that the Spanish competition authorities would, in their decision on the referral, adopt measures to safeguard or restore effective competition on the relevant markets.

181 Regarding the applicants' assertion that the Spanish authorities referred to the need for an amendment of national law to justify the referral, which was denied by the Kingdom of Spain at the hearing, it is sufficient to note that the contested decision did not mention any such justification.

182 With regard to the exceptional nature of referrals to the national authorities of concentrations with a Community dimension, it is true that, as the applicants claim, the Community legislature anticipated, when adopting Regulation

No 4064/89, that such referrals would be bound, in principle, to be exceptional if the reference markets covered a substantial part of the common market. The legislature's intention is clear from a joint declaration of the Council and the Commission in relation to Article 9 of Regulation No 4064/89 (*Bulletin of the European Communities — Supplement* No 2/90):

'When a specific market represents a substantial part of the common market, the referral procedure provided for in Article 9 should only be applied in exceptional cases. There are indeed grounds for taking as a basis the principle that a concentration which creates or reinforces a dominant position in a substantial part of the common market must be declared incompatible with the common market. The Council and the Commission consider that such an application of Article 9 should be confined to cases in which the interests in respect of competition of the Member State concerned could not be adequately protected in any other way.'

183 As the Court observed at paragraphs 351 to 353 of the judgment in *Royal Philips Electronics* v *Commission*, cited in paragraph 53 above, that statement is still relevant after Regulation No 1310/97 amended Regulation No 4064/89. The amendments made by Regulation No 1310/97 for the most part do not concern the referral conditions laid down in Article 9(2)(a), which have remained essentially unchanged since the adoption of Regulation No 4064/89, but concern the referral conditions laid down by Article 9(2)(b), which is not at issue in the present case. Thus, in the green paper preceding the adoption of Regulation No 1310/97 (Green paper of the Commission on the review of the merger regulation, COM(96) 19 final, of 31 January 1996), the Commission described the aim of the referral procedure as follows (paragraph 94):

'[It] considers that, especially if there were not to be a threshold reduction, any amendments to Article 9 should be limited so as not to undermine the delicate balance struck by the current referral provisions or to negate the advantages of

the "one-stop shop" principle. Too frequent use of Article 9 could reduce the legal certainty afforded to companies and should probably be linked to a harmonisation of the main features of national merger systems.'

184 Likewise, in the 10th recital of the preamble to Regulation No 1310/97, the Council states that '[the rules governing referrals] protect the competition interests of the Member States in an adequate manner and take due account of legal security and the "one-stop shop" principle'.

185 However, it is clear from the foregoing statements that the exceptional nature of a referral is largely bound up with the 'one-stop shop' principle on which Regulation No 4064/89 is based (see, to that effect, *Royal Philips Electronics* v *Commission*, cited in paragraph 53 above, paragraph 350) and which ensures that undertakings may, in principle, expect a concentration with a Community dimension to be examined by a single competition authority.

186 That principle is not affected by a situation such as that in the present case, where all the affected markets have a national dimension and where, as a result of the referral of the case to the authorities of a Member State, they alone are called upon to examine the concentration from the viewpoint of national competition law.

187 The applicants also claim that, in referring the concentration to the Spanish authorities, the Commission failed to follow its past decisions. According to the applicants, the Commission normally refuses requests for referral from the national authorities, particularly in the pay-TV sector. In this connection the applicants refer to the Commission's decision of 27 May 1998 (Case IV/M.993 — Bertelsmann/Kirch/Premiere) and the other decisions cited in paragraph 161 above.

188 However, the fact that, in the contested decision, the Commission did not follow its previous practice in such matters is irrelevant because the approach taken in the contested decision conforms with the legal framework laid down by Article 9 of Regulation No 4064/89, in particular paragraphs 2(a) and (b) and the first subparagraph of paragraph 3 (*Royal Philips Electronics* v *Commission*, cited in paragraph 53 above, paragraph 357).

189 Furthermore, the applicants have not succeeded in showing how the Commission, in adopting the contested decision, allegedly failed to follow the decisions cited by the applicants, which relate both to cases where the Commission refused to refer the matter to the national authorities and to cases where there was a partial or complete referral to the national authorities. The mere fact that, in the past, the Commission may have refused to refer a particular case to the national authorities cannot prevent it from referring a case which has been notified to it at a later date in a different market or competition situation.

190 The applicants go on to refer to a wide range of factors which show, in their opinion, that the Commission itself ought to have examined the concentration which the Spanish authorities asked to be referred to them. For this purpose the applicants cite past decisions of the Commission in the audiovisual sector and refer to the risk of prejudicing the uniformity of the Commission's policy on concentrations with an inconsistent national decision. The applicants also mention certain factors peculiar to the present case, such as the Commission's simultaneous examination of the Newscorp/Telepiù case, the AVS II contracts and the output deals, and the Commission's contacts with several undertakings in the market in question.

191 In this connection, it must be observed, first, that the fact that, in a given sector, the Commission has decided itself to examine the concentration and has prohibited certain concentrations in the past can in no way prejudge the referral and/or examination of a later concentration because the Commission is required to carry out an individual appraisal of each notified concentration according to

the circumstances of each case, without being bound by previous decisions concerning other undertakings, other product and service markets or other geographical markets at different times. For the same reasons, previous decisions of the Commission relating to concentrations in a specific sector cannot prejudge the decision to be taken by the Commission on a request for referral to the national authorities of a concentration taking place in the same sector.

192 As for the fact that the Commission, by the contested decision, referred a concentration to the Spanish authorities although it decided itself to deal with the concentration in the same sector in the Italian market, which led to the adoption of the Newscorp/Telepiù decision of 2 April 2003, it is sufficient to note that, in the present case, the Spanish authorities requested the referral of the concentration pursuant to Article 9(2) of the regulation, whereas in the Newscorp/Telepiù case, the Italian authorities made no such request.

193 Regarding the alleged contradiction between the commitments accepted by the Commission in the Newscorp/Telepiù case, on the one hand, and the conditions imposed, on referral, by the Spanish authorities in their decision approving the concentration in the present case, on the other, it must be observed that the question whether the approval decision taken at national level is compatible with Community law, including previous decisions of the Commission, falls outside the scope of the present action, which contests the legality of the Commission's referral decision. In so far as the applicants base on that alleged contradiction arguments seeking to show the illegality of the contested decision, it is sufficient to observe that both the Newscorp/Telepiù decision and the Spanish authorities' decision are subsequent to the contested decision and therefore could not have affected its validity (see, to that effect, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraphs 15 and 16, and *Royal Philip Electronics* v *Commission*, cited in paragraph 53 above, paragraph 346).

194 In so far as the applicants contend that the Commission was no longer entitled to refer the case to the Spanish authorities once it became aware that it was to be notified of a concentration in the same sector with regard to Italy, it must be observed that, on the date of adoption of the contested decision, 14 August 2002, the Commission had not yet received notification, under Regulation No 4064/89, of the Italian case in question as notification was not made until 16 October 2002.

195 Although it is true that, at the date of adoption of the contested decision, the Commission, as it admitted at the hearing, was aware of the proposed concentration with regard to Italian pay-TV platforms, the Commission could not have foreseen, at that date, whether it would receive a request for referral from the Italian authorities in the matter of Newscorp/Telepiù. In any case, the mere possibility that, in the near future, another concentration agreement might be concluded in a sector which, although similar, was in a different geographical market, and that that agreement might be notified to the Commission, does not affect the Commission's power of appraisal when it is required to give a decision, in connection with a notified concentration, on a request for referral received from the national authorities under Article 9 of Regulation No 4064/89.

196 Likewise the applicants cannot contend that the contested decision is illegal on the ground that, by referring the case to the Spanish authorities, the Commission impaired the uniformity of its competition policy in the markets concerned, in particular because Spanish law permits the approval of a concentration on the basis of criteria other than those of Regulation No 4064/89.

197 The risk that the national authorities may, on referral, take a decision relating to a concentration in a certain sector which will not be entirely in accordance with the principles applied by the Commission itself in its previous decisions is inherent in the referral machinery established by Article 9 of Regulation No 4064/89. As appears from Articles 9(3), 21(2) and 22(1) of Regulation

No 4064/89, concentrations with a Community dimension which are referred to the national authorities are assessed in a legal framework different from that which applies to the other operations covered by that regulation, given that the Commission is required to examine concentrations on the basis of Regulation No 4064/89 only, whereas concentrations which are referred to the national authorities are examined from the viewpoint of national competition law.

198 In addition, if the national authorities concerned should fail to comply with their obligations under Article 10 EC and Article 9(6) and (8) of Regulation No 4064/89 (see above, paragraph 52), the Commission could, if necessary, decide to bring an action under Article 226 EC against the Member State concerned. Individuals may challenge the national authorities' decision on the referral in accordance with the domestic remedies provided for by national law (*Royal Philip Electronics* v *Commission*, cited in paragraph 53 above, paragraph 383).

199 Secondly, the Commission's examination of the AVS case does not show a manifest error of assessment by the Commission in deciding to refer to the national authorities the concentration arising from the merger of Vía Digital with Sogecable. It is common ground between the parties that the examination of the AVS case relates to the applicability of Article 81 EC to the AVS II contracts, in particular the exercise of the broadcasting rights held by AVS. Even if it is true that, following the concentration, AVS will be controlled by Sogecable, whereas previously it was jointly controlled by Telefónica/Admira and Sogecable, this does not rule out examination of that structural change by an authority other than that which examines the legality, from the viewpoint of Article 81 EC, of the utilisation of broadcasting rights by AVS. Furthermore, the fact that, regarding the treatment of a concentration, point (b) of the first subparagraph of Article 9(3) of Regulation No 4064/89 provides for the possibility of a partial referral means *a fortiori* that different authorities must be able to deal with a case relating to the application of Article 81 EC and a case concerning the application of Regulation No 4064/89, even if those cases involve in part the same undertakings.

200 For the same reasons, the fact that certain output deals were the subject of investigation by the Commission did not prevent the latter from referring to the Spanish authorities a concentration case affecting, among others, the markets in film broadcasting rights.

201 Finally, the mere fact that the Commission has contacts with certain operators active in the markets affected by the concentration and that certain third parties lodged a complaint with the Commission cannot affect the latter's power to refer a case to the national authorities.

202 Although the Commission has expertise in the sectors concerned after having itself dealt with numerous concentration cases and other competition cases concerning the markets affected by the concentration and in having maintained contacts for that purpose with the operators in question, it must be observed that the Commission's decisions in those cases can still serve as guidance for the national authorities in exercising their own powers. The fact that the Commission has such expertise certainly does not prove that there was a manifest error of assessment by it or that it breached the principle of sound administration by referring the case to the Spanish authorities.

203 It follows from the foregoing that the Commission could reasonably take the view that the referral of the case to the Spanish competition authorities would make it possible to maintain or restore effective competition on the markets in question, so that it was not necessary for it to deal with the case itself.

204 Consequently the second plea must be dismissed.

Fourth plea: breach of Article 9 of Regulation No 4064/89 in that the contested decision contains a 'blank' referral to the Spanish authorities

The parties' submissions

205 The applicants in Case T-346/02 observe that the operative part of the contested decision is worded in such a way that the decision entails a 'blank' referral of the case to the Spanish authorities in breach of Article 9 of Regulation No 4064/89.

206 According to the applicants, the Commission ought to have listed in Article 1 of the operative part of the contested decision the markets affected by the concentration in which there was a threat that the concentration would create or strengthen a dominant position as a result of which effective competition would be significantly impeded on a market within Spain. In addition, the applicants consider that Article 1 of the contested decision ought also to have ordered the Spanish authorities to take the necessary measures to maintain competition in those markets.

207 The applicants add that, in the present case, the Spanish authorities effectively acted as if a power 'in blank' had been delegated to them. They treated the case as if the concentration were to be examined from the beginning, disregarding the contested decision and the existing Community competition law.

208 The Commission, supported by the interveners, contends that this plea should be dismissed.

Findings of the Court

209 It must be observed that Article 1 of the operative part of the contested decision provides that, 'in accordance with Article 9 of Council Regulation No 4064/89 on the control of concentrations between undertakings, the notified concentration aiming at the merger of DTS Distribuidora de Televisión Digital, SA (Vía Digital) and Sogecable, SA, is hereby referred to the competent Spanish authorities'.

210 It follows that the Commission merely referred to the said authorities the concentration as notified to it, without indicating in the operative part of the contested decision the markets in which it considered that the concentration threatened to create or strengthen a dominant position as a result of which effective competition would be significantly impeded on a market within Spain which presents all the characteristics of a distinct market.

211 However, it must be borne in mind that the operative part of an act is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption (see Case C- 355/95 P *TWD* v *Commission* [1997] ECR I-2549, paragraph 21, and Joined Cases T-204/97 and T-270/97 *EPAC* v *Commission* [2000] ECR II-2267, paragraph 39).

212 In the statement of reasons preceding the operative part, the contested decision describes each of the relevant product markets (contested decision, paragraphs

15, 16, 21 to 25, 30 to 38, 56, 62 to 64 and 71 to 79), identifies the geographical reference markets (contested decision, paragraphs 17, 26, 39 to 42, 57, 62 to 64 and 80 to 82) and examines the effects of the concentration on competition in those markets (contested decision, paragraphs 18 to 20, 27 to 29, 43 to 55, 58 to 61, 65 to 68 and 83 to 109). The decision concludes that, in each of the identified product markets, namely, the pay-TV market and markets upstream (markets in film broadcasting rights, sporting rights and other programme contents) as well as telecommunications markets, the concentration threatens to create or strengthen a dominant position as a result of which effective competition would be significantly impeded on the Spanish market (contested decision, paragraphs 20, 29, 51, 55, 61, 68 and 109).

213 Having regard to the case-law cited in paragraph 211 above, the Commission was under no obligation to repeat, in the operative part, the markets affected by the concentration in which there was a threat that the concentration would create or strengthen a dominant position.

214 Moreover, it must be noted that the referral in the present case is a total referral. Accordingly it is not a partial referral which might have required, in the operative part, specification of the exact markets referred to the national authorities for examination.

215 Regarding the alleged lack of any instruction to the Spanish authorities to adopt the measures necessary to maintain competition on the markets concerned, Article 1 of the operative part refers to Article 9 of Regulation No 4064/89, paragraph 8 of which provides that the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition on

the market concerned. It was superfluous to repeat word for word in the operative part of the decision an obligation which follows directly from the legislative context to which the same operative part refers.

216 So far as the examination carried out by the Spanish authorities after the adoption of the contested decision is concerned, it must be pointed out that the legality of a decision must be assessed in the light of the information available when it was adopted (see, by analogy, the judgment in Case C-394/01 *France* v *Commission* [2002] ECR I-8245, paragraph 34 and the cases cited). The conduct of the Spanish authorities cannot therefore affect the legality of the contested decision.

217 Finally, it must be observed that, when examining the conditions for referral under Article 9(2)(a) of Regulation No 4064/89, the Commission cannot, without depriving point (b) of the first subparagraph of Article 9(3) of its substance, conduct an examination of the compatibility of the concentration in such a way as to bind the national authorities in regard to their substantive findings but must merely establish whether, prima facie, on the basis of the evidence available to it at the time when it assesses the merits of the request for referral, the concentration whose referral is requested threatens to create or strengthen a dominant position on the relevant markets (*Royal Philips Electronics* v *Commission*, cited in paragraph 53 above, paragraph 377). Provided the national competition authorities comply with the obligations arising from Article 9(6) and (8) of Regulation No 4064/89 and from Article 10 EC, they are free to rule on the substance of the concentration referred to them on the basis of a proper examination conducted in accordance with national competition law (see, to that effect, *Royal Philips Electronics* v *Commission*, cited in paragraph 53 above, paragraphs 369 to 371). Consequently the competent Spanish authorities cannot be deemed to be bound by the provisional assessments of the competition situation in the markets concerned, carried out by the Commission, on a prima facie basis, in its referral decision and for that purpose alone.

218 It follows that the fourth plea in law must also be dismissed.

Third plea in law: breach of Article 253 EC

Arguments of the parties

219 The applicants contend that the Commission breached Article 253 EC in so far as it did not state the reasons which led it to grant the Spanish authorities' request for referral.

220 The applicants in Case T-346/02 assert that the Commission ought, in the contested decision, to have given not only the reasons why it agreed, exceptionally, to the referral in the present case, but also the reasons justifying a departure from its established practice.

221 According to the same applicants, the Commission ought also to have replied to ONO's arguments in the administrative procedure concerning the European dimension of the concentration and the impossibility of referring such a concentration to the national authorities.

222 The applicants in Case T-347/02 claim that the contested decision seems inconsistent. It gives a detailed description of the competition problems which would be caused by the concentration in the markets concerned, while devoting only two paragraphs to the reasons which led the Commission to grant the Spanish authorities request for referral.

223 The reasons given in the contested decision to justify the referral are as follows: the concentration threatened to create or strengthen a dominant position in

certain markets with a national dimension; the Commission had a discretion to decide whether to refer the case and the Spanish national authorities were in a position to carry out a thorough investigation of the concentration. Those reasons are insufficient in an exceptional case such as the present, where the concentration affects a substantial part of the common market. The Commission had not even considered, in the contested decision, the cross-border consequences which the concentration could have. Finally, the fact that the Commission has a certain discretion does not mean that it has no obligation to state reasons.

224 The Commission, supported by the interveners, contends that the contested decision gives sufficient reasons because it considers in detail whether the conditions laid down by Article 9 of Regulation No 4064/89 for a referral to the national authorities are fulfilled.

Findings of the Court

225 The Community institutions' obligation under Article 253 EC to state the reasons on which a decision is based is intended to enable the Community judicature to exercise its power to review the legality of the decision and the persons concerned to know the reasons for the measure adopted so that they can defend their rights and ascertain whether or not the decision is well founded (Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 57).

226 In that regard, it should be observed that the contested decision was adopted on the basis of the first subparagraph of Article 9(3) of Regulation No 4064/89. It has already been found above, in connection with the first plea, that, for a concentration to be the subject of a referral under that provision, the two

conditions of Article 9(2)(a) must be satisfied. First, the concentration must threaten to create or to strengthen a dominant position as a result of which effective competition will be significantly impeded on a market within that Member State. Second, that market must present all the characteristics of a distinct market.

227 It must therefore be held that, in order to comply with the obligation to state reasons laid down in Article 253 EC, a referral decision adopted under the first subparagraph of Article 9(3) of Regulation No 4064/89 must contain a sufficient and relevant indication of the factors taken into consideration in establishing that there is a threat of the creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded on a market within the Member State concerned, and that there is a distinct market (*Royal Philips Electronics* v *Commission*, cited in paragraph 53 above, paragraph 395).

228 With regard to the first condition, it must be observed that the contested decision clearly states the reasons why the Commission considers that the concentration in question threatens to create a dominant position as a result of which effective competition would be significantly impeded on the relevant product markets in Spain. Those reasons relate, in particular, to the market shares held by the parties on the markets concerned in Spain, the consequences of the concentration between the dominant operator and the second biggest operator on the pay-TV market, which is characterised by strong barriers to entry, and the exclusive rights held by the parties to the concentration (contested decision, paragraphs 18 to 20, 27 to 29, 43 to 55, 58 to 61, 65 to 68 and 83 to 109).

229 Regarding the second condition, it must also be noted that the contested decision clearly states the reasons why the Commission considers that the relevant markets in Spain are distinct national markets (contested decision, paragraphs 17, 26, 39 to 42, 57, 62 to 64 and 80 to 82).

230 With regard to exercising its discretion where the distinct markets are a substantial part of the common market, the Commission explains in the contested decision that 'the concentration threatens to create or strengthen a dominant position only in markets with a national dimension, within the Kingdom of Spain' and that 'the Spanish national authorities have sufficient means and are in a position to carry out a detailed investigation of the concentration, taking account of the national character of the markets in which the concentration threatens to create or strengthen a dominant position'. The Commission states that, having verified that the conditions laid down in Article 9 of Regulation No 4064/89 are fulfilled, it considers, exercising its discretion under the Regulation, 'that it is appropriate to give a favourable reply to the request from the Spanish authorities and to refer the case to them with a view to applying the Spanish competition legislation' (contested decision, paragraphs 119 to 121).

231 This explanation is sufficient because it shows that the Commission considered that the Spanish authorities were able to maintain or restore effective competition in the markets concerned (see paragraphs 176 and 177 above).

232 As for the submissions put forward by ONO in the course of the administrative procedure, it must be observed that, although the Commission is obliged to state the reasons on which its decisions are based, mentioning the factual and legal elements which provide the legal basis for the measure in question and the considerations which have led it to adopt its decision, it is not required to discuss all the issues of fact and of law raised by every party during the administrative procedure (*Kaysersberg* v *Commission,* cited in paragraph 75 above, paragraph 150). In describing the relevant product markets as distinct markets with a national dimension and in setting out the reasons on which that finding is based, the Commission replied to ONO's arguments relating to the alleged European dimension of the concentration.

233 Therefore it must be concluded that the contested decision gives a sufficient statement of reasons.

234 It follows from the foregoing reasoning as a whole that the actions must be dismissed in their entirety.

Costs

235 Under Article 87(2) of the Rules of Procedure, the unsuccessful party it so be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to bear their own costs and jointly and severally to pay the costs incurred in connection with their actions by the Commission, Sogecable, Vía Digital and Telefónica de Contenidos, as applied for in their pleadings.

236 Under the first paragraph of Article 87(4) of the Rules of Procedure, Member States which intervened in the proceedings are to bear their own costs. The Kingdom of Spain will therefore bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber),

hereby:

1. Joins Cases T-346/02 and T-347/02 for the purposes of the judgment;

2. Dismisses the applications;

3. Orders the applicants to bear their own costs and jointly and severally to pay the costs of the Commission, Sogecable, Vía Digital and Telefónica de Contenidos incurred in connection with the applicants' actions;

4. Orders the Kingdom of Spain to bear its own costs.

Lenaerts Azizi Jaeger

Delivered in open court in Luxembourg on 30 September 2003.

H. Jung
Registrar

K. Lenaerts
President