

ORDER OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

25 May 2005 \*

In Case T-443/03,

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

**Euskaltel, SA**, established in Zamudio-Vizcaya (Spain),

**Telecable de Asturias SA**, established in Oviedo (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,

\* Language of the case: Spanish.

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,

by

**Sogecable, SA**, established in Tres Cantos, Madrid (Spain), represented by S. Martínez Lage and H. Brokelmann, lawyers,

and by

**Telefónica, SA**, established in Madrid, represented initially by M. Merola and S. Moreno Sánchez, and subsequently by M. Merola, lawyers,

interveners,

ACTION for annulment of the Commission decision of 21 October 2003 to take no further action on the applicants' complaint alleging infringement by the Spanish authorities of Article 9(8) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (corrected version OJ 1990, L 257, p. 13), in the context of the concentration between Vía Digital and Sogecable (Case COMP/M.2845 — Sogecable/Canal Satélite Digital/Vía Digital),

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

composed of: M. Vilaras, President, F. Dehousse and D. Šváby, Judges,

Registrar: H. Jung,

makes the following

**Order**

**Legal background**

- <sup>1</sup> Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1), as corrected (OJ 1990 L 257, p. 13) and as amended by Council Regulation (EC) No 1310/97 of 30 June

1997 (OJ 1997 L 180, p. 1) ('Regulation 4064/89'), provides for a system of control by the Commission of concentrations having 'a Community dimension' (Article 1(2) and (3)).

- 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 will 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 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.

...

6. The publication of any report or the announcement of the findings of the examination of the concentration by the competent authority of the Member State concerned shall be effected not more than four months after the Commission's referral.

...

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.'

### **Background to the dispute**

- <sup>3</sup> On 3 July 2002 the Commission received notice, in accordance with Regulation No 4064/89, of a concentration, consisting in the integration of Distribuidora de Televisión Digital SA ('Vía Digital') within Sogecable SA, pursuant to the agreement concluded on 8 May 2002 between Sogecable and Group Admira Media SA, a company controlled by Telefónica SA.

- 4 On 14 August 2002 the Commission adopted a decision to refer the concentration to the Spanish authorities, which approved the concentration on 29 November 2002, making its implementation subject to a number of conditions.
- 5 The applicants brought an action against the referral decision, which was dismissed by the judgment of the Court of First Instance in Joined Cases T-346/02 and T-347/02 *Cableuropa and Others v Commission* [2003] ECR II-4251 ('*Cableuropa*').
- 6 On 29 January 2003, Sogecable and Telefónica concluded a further agreement for the integration of Vía Digital within Sogecable, against which the applicants lodged a complaint, arguing that this constituted a new concentration which should have been notified to the Commission. The Commission rejected their complaint by decision of 14 March 2003.
- 7 The applicants then brought a further action (Case T-180/03) against that decision. Subsequently, the applicants withdrew that action, which was removed from the register by order of the Court of First Instance of 4 December 2003 in Case T-180/03 *Auna Operadores de Telecomunicaciones and Others v Commission*, not published in the ECR.
- 8 By letter of 22 April 2003, the applicants lodged a further complaint with the Commission. They requested the Commission to call on the Spanish authorities to provide forthwith a copy of the detailed plan for implementing the concentration agreements, to order the Spanish authorities, in application of Article 10 EC and Article 9(8) of Regulation No 4064/89, to amend forthwith the conditions they had fixed for implementing those agreements, in order to ensure effective competition on the relevant markets in Spain, and, in the event of their refusal, to bring an action against the Kingdom of Spain under Article 226 EC.

- 9 By a standard form letter of 8 May 2003 the Commission informed the applicants that it had registered their complaint under number 2003/4504 SG (2003) A/4540. That letter contained an annex describing the procedure against a Member State for failure to fulfil its obligations.
- 10 On 11 July 2003, the applicants sent a further letter to the Commission pointing out that their complaint could not be interpreted as being directed exclusively against the Kingdom of Spain for failure to fulfil its obligations under Article 9(8) of Regulation No 4064/89. They added that their complaint called on the Commission to act in accordance with that article. The applicants also reminded the Commission of its obligation to deal diligently and impartially with their complaint and, if necessary, to state the reasons for its decision to take no action.
- 11 By letter of 14 July 2003, the Commission replied to the three requests in the applicants' complaint of 22 April 2003. In response to the first request, it informed the applicants that a copy of the detailed plan for implementing the concentration agreements had in fact been requested from the Spanish authorities. As regards the second request, the Commission stated that neither Article 10 EC nor Article 9(8) of Regulation No 4064/89 required it to order a Member State to modify with immediate effect an act of its Government. It emphasised that the decision authorising the concentration between Sogecable and Vía Digital predated the Newscorp/Telepiù decision (COMP/M.2876) by four months and that it would therefore have been difficult for the Spanish authorities to impose the same conditions as those accepted by the Commission in the latter case. The Commission also recalled that those two decisions were the result of assessments specific to each market. Finally, as regards the applicants' third request, the Commission pointed out that it was under no obligation to commence proceedings under Article 226 EC, but had a discretion in that regard. The Commission concluded its letter by stating that it intended to take no further action and gave the applicants one month within which to make their observations.



- 12 The applicants replied to that request by letter of 25 July 2003, dealing point by point with the issues raised by the Commission. They explained, in particular, the consequences of the conditions fixed by the Spanish Government and the reasons why those conditions were not capable of ensuring effective competition on the relevant markets. They reminded the Commission of its obligation to deal diligently and impartially with their complaint and, above all, to give reasons for its decision not to investigate the existence of a possible infringement of Article 9(8) of Regulation No 4064/89. Lastly, the applicants called on the Commission to act within a period of two months.
- 13 By letter of 21 October 2003, the Commission informed the applicants of its decision to take no further action on their complaint. It pointed out that it was under no obligation to commence proceedings under Article 226 EC, but had discretion in that respect, which precluded individuals from bringing proceedings against its refusal to act. It added that the applicants' most appropriate course of action was to bring proceedings before the national courts.

### **Procedure and forms of order sought**

- 14 By application lodged at the Registry of the Court of First Instance on 31 December 2003, the applicants brought these proceedings.
- 15 The applicants claim that the Court of First Instance should:

— declare the action admissible and well founded;

— annul the Commission's decision of 21 October 2003;

— order the Commission to pay the costs.

<sup>16</sup> By a separate document, lodged at the Court Registry on 15 March 2004, the Commission raised an objection of inadmissibility in accordance with Article 114(1) of the Rules of Procedure of the Court of First Instance. It contends that the Court should:

— declare the action inadmissible;

— order the applicants to pay the costs.

<sup>17</sup> By separate acts lodged at the Court Registry on 1 April 2004, the Kingdom of Spain and Sogecable applied for leave to intervene in support of the form of order sought by the Commission. The President of the Third Chamber of the Court of First Instance granted their applications by orders of 15 June 2004 and 9 July 2004 respectively. The Kingdom of Spain and Sogecable both lodged their statements in intervention on 4 October 2004.

<sup>18</sup> By a document lodged at the Court Registry on 13 April 2004, Telefónica applied for leave to intervene in support of the form of order sought by the Commission. The President of the Third Chamber of the Court of First Instance granted its application by order of 27 July 2004. Telefónica lodged its statement in intervention on 15 November 2004.

## Admissibility

- 19 Under Article 114(1) of the Rules of Procedure, a party may apply to the Court First Instance for a decision on admissibility not going to the substance of the case. In accordance with Article 114(3), unless the Court otherwise decides, the remainder of the proceedings are to be oral. In the present case, the Court considers that it has sufficient information from the documents in the file to decide the application without opening the oral procedure.

### *Arguments of the parties*

- 20 The Commission, supported by the interveners, submits that the Court has already considered the circumstances forming the subject-matter of these proceedings in its judgments in Case T-119/02 *Royal Phillips Electronics v Commission* [2003] ECR II-1433 and *Cableuropa*. It follows that the only legal remedy available to the Commission against a Member State which infringes Article 9(8) of Regulation No 4064/89 is an action for failure to fulfil its obligations. The applicants themselves have the option of bringing an action before the national courts, which, moreover, they have done.
- 21 The Commission, supported by the interveners, argues that according to settled case-law individuals do not have standing to challenge a refusal by the Commission to commence proceedings against a Member State for failure to fulfil its obligations. The Commission has a discretion in that regard.

- 22 The Commission alleges that the applicants' argument that it has a general duty of diligence as regards the investigation of complaints completely misconstrues that case-law. The Commission, supported by Telefónica and Sogecable, adds that the procedural position of the parties who have lodged a complaint is fundamentally different in proceedings under Article 226 EC and in proceedings under Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-62, p. 87).
- 23 The Commission maintains that the distinction made by the applicants between its supposed refusal to investigate whether the Spanish Government has infringed Regulation No 4064/89 and a refusal to initiate infringement proceedings against the Kingdom of Spain does not exist in law and is completely illogical. The law does not recognise two separate decisions, one a refusal to investigate and the other a refusal to initiate proceedings once the investigation is completed. In both cases the only possible decision is to take no further action on the complaint.
- 24 The applicants submit that the objection of admissibility raised by the Commission is based on a 'self-serving distortion' of the application and on a singular interpretation of Article 9(8) of Regulation No 4064/89.
- 25 According to the applicants, the Commission has not only failed to examine their complaint diligently and impartially, but has acted directly against the Community interest, by allowing the referral mechanism provided for in Article 9 of Regulation No 4064/89 to lead directly to the fragmentation of national markets, in defiance of its obligation, laid down in that regulation, to ensure that the competition rules are applied consistently.

- 26 The applicants claim that the Commission's objection of inadmissibility is based on an *obiter dictum* of the Court of First Instance in *Cableuropa*. That judgment, in their submission, did not concern the application of Article 9(8) of Regulation No 4064/89 and the Commission could not infer that the Court of First Instance had considered that the only legal remedy available to the Commission against a Member State which infringes Article 9(8) of Regulation No 4064/89 is an action for failure to fulfil its obligations. Therefore, the Commission cannot assert, in support of its plea of inadmissibility, that the applicants' claim challenges a decided case.
- 27 As regards the Commission's argument that their action before the Tribunal Supremo would enable their rights to be effectively protected, the applicants rely on the case-law according to which the conditions for the admissibility of an action under Article 230 EC are not affected by the existence or non-existence of domestic remedies. They also claim that it is not certain that they can effectively invoke the infringement of Article 9(8) of Regulation No 4064/89 in the national proceedings. The national proceedings are limited to upholding the administrative act approving the concentration in its entirety, and cannot uphold or annul the individual conditions imposed by the Spanish authorities.
- 28 As regards the Commission's duty to act diligently and impartially in investigating the infringement by the national authorities of Article 9(8) of Regulation No 4064/89, the applicants assert that, although a Member State has exclusive jurisdiction once the case has been referred to it, that means that it applies its national law, not that it is relieved of the obligation to comply with Community law. The applicants submit that it is therefore for the Commission to monitor that obligation in accordance with that regulation.

29 The applicants maintain that a declaration that their action is inadmissible would amount to a denial of their right to judicial protection and their right to a thorough and impartial investigation of their complaint of an infringement of the competition rules.

### *Findings of the Court*

30 As a preliminary point, it must be observed that the parties disagree as to the subject-matter of the action. The Commission invokes Article 226 EC, while the applicants call for the application of Article 9(8) of Regulation No 4064/89 and compliance with the competition rules and the obligation to undertake a diligent and impartial investigation of complaints.

31 The applicants focus their action on the Commission's refusal to ascertain whether the Spanish authorities have complied with their obligations. For that purpose they rely on the obligation to undertake a diligent and impartial investigation of complaints in competition matters, which means that their action is admissible, to the extent that it concerns a failure by the Commission to discharge that obligation.

32 The applicants' arguments in that regard are based principally on the judgment in Case T-54/99 *max.mobil v Commission* [2002] ECR II-313. In that judgment, the Court of First Instance declared the action admissible by extending to Article 86 EC the obligation to undertake a diligent and impartial investigation enshrined in the context of Articles 81 EC and 82 EC and Articles 87 EC and 88 EC. However, in its

judgment of 22 February 2005 in Case C-141/02 P *Commission v max.mobile* [2005] ECR I-1283, delivered on appeal, the Court of Justice set aside the judgment of the Court of First Instance and dismissed the action brought by max.mobil against the Commission decision.

33 It follows that the case-law relied on by the applicants is wholly irrelevant in these proceedings.

34 Furthermore, the present case concerns a concentration and was brought after the decision to refer the matter to the national authorities.

35 The applicants have already brought an action against that referral decision which was dismissed by the Court of First Instance in *Cableuropa*. No appeal was brought against that judgment. The referral of the concentration to the national authorities is therefore definitive.

36 In its assessment of the admissibility of that action, the Court of First Instance held, in paragraphs 56 to 59 of that judgment:

‘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 ...

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 ...'

37 In order to declare the applicants' action admissible, the Court of First Instance therefore based its reasoning on the fact that the examination of the concentration at issue was referred to the national authorities applying their national law, thus preventing the Commission from reviewing the lawfulness of the concentration from the point of view of Regulation No 4064/89.

38 Furthermore, it is clear from paragraph 198 of *Cableuropa* that after the decision has been taken to refer the concentration to the national authorities the only course open to the Commission is to bring an action against those authorities for failure to fulfil their obligations. Individuals must have recourse to the national courts in order to challenge any decision taken by the national authorities after the referral.



- 39 It must be emphasised that the applicants have in fact challenged the decision of the Spanish authorities before the Spanish courts. They cannot therefore claim that they have been deprived of judicial protection.
- 40 After the decision has been taken to refer the concentration to the national authorities, those authorities must apply their national law in accordance with Community law. The applicants rightly state that the fact that the Member State has exclusive jurisdiction once the case has been referred means that the Member State will apply its national law, but not that it is relieved of the obligation to comply with Community competition law. They are also right to assert that it is for the Commission to monitor compliance with that obligation by the national authorities.
- 41 However, in the scheme laid down by the treaties, if the national authorities fail to fulfil their obligations, Article 226 EC provides that the Commission may bring the matter before the Court of Justice. It is under no obligation to do so.
- 42 It should be observed, moreover, that Regulation No 4064/89 does not lay down specific rules on the division of powers after the referral decision has been taken which derogate from the system provided for in the treaties. It is true that, as the applicants claim, Article 9(8) of Regulation No 4064/89 does not expressly exclude the power of the Commission to monitor compliance by the Member States with the obligations laid down in the Community competition rules. However, although that article imposes an obligation on the Member State concerned, neither the Treaties nor the secondary legislation provide for a special review procedure that must be carried out by the Commission.

- 43 The Commission may not, therefore, monitor compliance with that obligation other than by means of the procedure established by the Treaties in the case of a transaction falling within the jurisdiction of that Member State. As regards a concentration over which the Commission no longer exercises direct control after it has been referred to the national authorities, the Commission may act only under Article 226 EC, by bringing, where appropriate, an action against that Member State for failure to fulfil its obligations.
- 44 It is clear from settled case-law (Case 247/87 *Star Fruit v Commission* [1989] ECR 291; Case C-87/89 *Sonito and Others v Commission* [1990] ECR I-1981, paragraphs 6 to 9; and Case C-107/95 P *Bundesverband der Bilanzbuchhalter v Commission* [1997] ECR I-947, paragraph 19; and orders in Joined Cases T-479/93 and T-599/93 *Bernardi v Commission* [1994] ECR II-1115, paragraphs 27 and 28; Case T-84/94 *Bilanzbuchhalter v Commission* [1995] II-101, paragraphs 23 to 26; and Case T-575/93 *Koelman v Commission* [1996] ECR II-1, paragraph 71 and 72) that individuals do not have standing to challenge a refusal by the Commission to initiate proceedings against a Member State for failure to fulfil its obligations. The Commission is not required to commence proceedings for failure to fulfil obligations, but enjoys a discretion which precludes any right for individuals to require it to take a specific position and to bring an action against its refusal to take action.
- 45 In that regard, it should be added that the applicants' complaint clearly sought an order from the Commission to the Spanish authorities to modify certain conditions and, if necessary, to bring an action for failure to fulfil obligations. It should be borne in mind that the applicants asked the Commission, first, to request forthwith from the Spanish authorities a copy of the detailed plan for implementing the conditions adopted by the Spanish Government in its decision of 29 November 2002; second, to order the Spanish authorities to modify forthwith the conditions adopted in Case COMP/M.2845; and, third, should they refuse to do so, to commence proceedings against the Kingdom of Spain under Article 226 EC in order to ensure that it complies with its obligations under Article 9(8) of Regulation No 4064/89.

46 In the light of all of the foregoing considerations, the Commission was right, in the contested act, to decide to take no further action on the applicants' complaint on the ground that it was under no obligation to initiate proceedings under Article 226 EC, but enjoyed a discretion in that regard.

47 The Court must therefore grant the form of order sought by the Commission and declare the action inadmissible.

### **Costs**

48 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to pay the costs incurred by the Commission, in accordance with the form of order sought by the latter. Since Sogecable and Telefónica have applied for the costs of their intervention to be paid by the applicants, the latter must also be ordered to pay the costs incurred by each of those interveners.

49 According to the first subparagraph of Article 87(4) of the Rules of Procedure, the Member States which intervene in the proceedings are to bear their own costs. The Kingdom of Spain must therefore bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby orders:

- 1. The application is dismissed as inadmissible.**
  
- 2. The applicants shall bear their own costs and pay those incurred by the Commission, Telefónica SA and Sogecable SA.**
  
- 3. The Kingdom of Spain shall bear its own costs.**

Luxembourg, 25 May 2005.

H. Jung

Registrar

M. Vilaras

President