COMPLAINTS (PUBLISHING): THE MOSER CASE

Subject: Complaints
Concentrations
"Community dimension"
"Failure to act"

Industry: Publishing; newspapers

Parties: (See the list in the Court's Ruling below)
Commission of the European Communities

Source: Judgment of the Court of Justice of the European Communities, dated 25 September 2003, in Case C-170/02 P (Schlüsselverlag J.S. Moser GmbH et al v Commission of the European Communities)

(Note. This case arose from the dismissal of a complaint by a number of publishers that the Commission had failed to act on their complaint about a concentration involving the newspaper publishing industry in Austria. It illustrates the relationship between the procedure envisaged under the rules on competition for making formal complaints and the provisions of the Treaty enabling aggrieved parties to take legal action against an Institution of the European Communities if it has, in their view, "failed to act". In effect the Court's judgment in this case was to uphold the claim that the Commission was under a duty to explain its position. But the case was rejected as inadmissible as it was out of time. The essential paragraphs of the judgment are reproduced below.)

Judgment

1. [The appellants in this case appealed] against the order of the Court of First Instance of 11 March 2002, in Case T-3/02 *Schlüsselverlag J.S. Moser and Others* v *Commission* (hereinafter the contested order), by which the Court of First Instance dismissed as manifestly inadmissible their action for a declaration that, by unlawfully failing to adopt a decision on the compatibility of a concentration with the common market, the Commission had failed to act.

[Paragraphs 2 to 6 set out the legal background, with particular reference to Article 232 of the EC Treaty (on "failure to act") and the relevant provisions of the Mergers Regulation. Paragraphs 7 to 15 set out the facts of the dispute, which turn principally on the fact that, following the Austrian authorities' handling of a concentration, the Commission took the view that the concentration had no "Community dimension" and that it did not therefore propose to intervene. The appellants claimed that there was, on the contrary, a "Community dimension" to the case. Paragraphs 16 to 20 summarise the position adopted by the Court of First Instance, which had held the action to be inadmissible. Paragraphs 21 to 25 set out the grounds of the appeal.]

Findings of the Court

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

26. That argument of the Commission cannot be accepted.

27. First, the Commission cannot refrain from taking account of complaints from undertakings which are not party to a concentration capable of having a Community dimension. Indeed, the implementation of such a transaction for the benefit of undertakings in competition with the complainants is likely to bring about an immediate change in the complainants' situation on the market or markets concerned. That is why Article 18 of the Merger Regulation provides that interested third parties are entitled to be heard by the Commission, if they so request. Commission Regulation EC/447/98 on the notifications, time-limits and hearings provided for in Regulation EEC/4064/89 also provides, in Article 11(c), that third parties, that is, natural or legal persons showing a sufficient interest, including customers, suppliers and competitors have the right to be heard pursuant to Article 18.

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

29. Finally, nothing justifies the Commission in avoiding its obligation to undertake, in the interests of sound administration, a thorough and impartial examination of the complaints which are made to it. The fact that the complainants do not have the right, under the Merger Regulation, to have their complaints investigated under conditions comparable to those for complaints within the scope of Regulation 17/62 does not mean that the Commission is not required to consider whether the matter is within its competence and to draw the necessary conclusions. It does not release the Commission from its obligation to

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

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

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

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

33. The Merger Regulation also contains provisions whose purpose is to restrict, for reasons of legal certainty and in the interest of the undertakings concerned, the length of the proceedings for investigating transactions which are the responsibility of the Commission. Thus, under Article 4 of that regulation, the Commission must be notified of a transaction with a Community dimension within one week. Articles 6 and 10(1) of the regulation provide that the Commission then has a period equal, as a general rule, to one month in which to decide whether or not to initiate a formal investigation of the compatibility of the transaction with the common market. Under Article 10(3) of the regulation, the Commission must give a decision on the file at the end of a period of four months in principle, which runs from the decision to initiate the proceeding. Article 10(6) provides that, [w]here the Commission has not taken a decision ... within the deadlines ..., the concentration shall be deemed to have been declared compatible with the common market.

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

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

36. The requirements of legal certainty and of continuity of Community action which are at the origin of all those provisions would be disregarded if the Commission could, pursuant to the second paragraph of Article 232 of the EC Treaty, be requested to make a determination, outside a reasonable period, on the compatibility with the common market of a concentration which was not notified to it (see, to that effect, Case 59/70, *Netherlands* v *Commission*, paragraphs 15 to 24). Undertakings could thus lead the Commission to call in question a decision taken by the competent national authorities with regard to a concentration, even after the exhaustion of the possible legal remedies against such decision in the legal system of the Member State concerned.

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

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

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

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

[Paragraph 41 deals with costs, as set out in the ruling below.]

Court's Ruling

The Court hereby:
1. Dismisses the appeal;
2. Orders Schlüsselverlag J.S. Moser GmbH, J. Wimmer Medien GmbH & Co. KG, Styria Medien AG, Zeitungs- und Verlags-Gesellschaft mbH, Eugen Ruâ Vorarlberger Zeitungsverlag und Druckerei GmbH, Die Presse Verlags-Gesellschaft mbH and Salzburger Nachrichten Verlags-Gesellschaft mbH & Co. KG to pay the costs. ■

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