JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

28 September 2004 *

In Case T-310/00,

MCI, Inc., formerly MCI WorldCom, Inc. and then WorldCom, Inc., established in Ashburn, Virginia (United States of America), represented initially by K. Lasok QC, J.-Y. Art, lawyer, and B. Hartnett, barrister, and subsequently by K. Lasok QC, with an address for service in Luxembourg,

applicant,

supported by

Federal Republic of Germany, represented by W.-D. Plessing and B. Muttelsee-Schön, acting as Agents,

intervener,

v

Commission of the European Communities, represented initially by P. Oliver, P. Hellström and L. Pignataro, and subsequently by P. Oliver and P. Hellström, acting as Agents, assisted by N. Khan, barrister, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

supported by

French Republic, represented by G. de Bergues and F. Million, acting as Agents, with an address for service in Luxembourg,

intervener,

APPLICATION for annulment of Commission Decision 2003/790/EC of 28 June 2000 declaring a concentration incompatible with the common market and the EEA Agreement (Case COMP/M.1741 — MCI WorldCom/Sprint) (OJ 2003 L 300, p. 1),

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

composed of: J. Pirrung, President, A.W.H. Meij and N.J. Forwood, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 30 March 2004,

gives the following

Judgment

Facts and the procedure before the Commission

1 MCI, Inc., formerly MCI WorldCom, Inc. and then WorldCom, Inc. ('WorldCom') and Sprint Corp. ('Sprint') are both global communications companies with their head offices in the United States of America. In 1999 WorldCom's worldwide turnover amounted to approximately USD 37 billion and that of Sprint totalled approximately USD 17 billion. Until recently Sprint's activities in Europe were entirely or largely conducted through Global One, the joint venture it established in 1995 with Deutsche Telekom and France Télécom.

2 On 4 October 1999, WorldCom and Sprint signed an agreement and plan of merger which came within the definition of merger for the purposes of Article 3(1)(a) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1, corrigendum in OJ 1990 L 257, p. 13; subsequently repealed by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1)). The merger was to be effected through an exchange of Sprint shares for WorldCom shares, for an amount initially evaluated at USD 127 billion.

3 By letters of 20, 26 and 28 October 1999, WorldCom and Sprint advised the Commission of that agreement, informing it of the reasons for which they believed that the transaction did not have a Community dimension for the purposes of Article 1 of Regulation No 4064/89 and that it therefore did not have to be notified to the Commission under that regulation. They also stated that, since Sprint had given WorldCom a formal undertaking that it would divest itself of its holding in Global One before the merger took place, the calculation of Sprint's aggregate turnover in the Community for the purposes of Article 5 of Regulation No 4064/89 was not to include its portion of Global One's turnover.

4 On 29 October 1999, the Commission challenged that view and informed the parties that it had to take Sprint's share of Global One's turnover into account, which led it to find that the transaction envisaged did have a Community dimension. It stated that calculation of turnovers for the purpose of determining whether a concentration has a Community dimension has to be made at the time and under the factual circumstances of the signing of the merger agreement or at the latest at the time when the duty to notify arises. Turnover attached to certain activities may only be excluded when the notified agreement commits irrevocably as a condition precedent to dispose of those activities or if such activities have been divested between the closing of the accounts and the signature of the final merger agreement. The Commission found that that was not the case here.

5 By document of 10 January 2000 ('the notification'), received by the Commission on 11 January, WorldCom and Sprint ('the notifying parties') jointly notified their proposed concentration in accordance with Article 4(1) of Regulation No 4064/89 'without prejudice to the parties' position with respect to the jurisdictional issues relating to the attribution of Global One's turnover to Sprint'.

6 On 21 January 2000, Sprint concluded a formal agreement with Deutsche Telekom and France Télécom providing for the transfer of its interests in Global One.

7 On 2 February 2000, the notifying parties advised the Commission of that agreement and submitted a commitment within the meaning of Article 8(2) of Regulation No 4064/89, pursuant to which Sprint was to use every endeavour to complete without undue delay the transfer of its interests in Global One and, in the interim, was not to be involved in any way in the management of day-to-day operations of Global One. On 10 February 2000, the notifying parties provided the Commission with a memorandum explaining their views on the impact on the structure of competition in the affected markets that resulted from Sprint's divestiture of its holdings in Global One and stating the reasons which, in their view, allowed them to withdraw the notification.

8 Considering that the proposed commitment was insufficient, that the merger transaction in question did fall within the scope of Regulation No 4064/89 and that there were serious doubts as to the transaction's compatibility with the common market, the Commission decided on 21 February 2000 to 'initiate proceedings' (commence the procedure) pursuant to Article 6(1)(c) of Regulation No 4064/89. It identified three markets in respect of which the transaction raised competition problems: the market in 'top-level or universal internet connectivity', the market in global telecommunications services and the market in international voice telephony.

9 After obtaining a variety of information in response to requests under Article 11 of Regulation No 4064/89, on 3 May 2000 the Commission sent the notifying parties a statement of objections for the purposes of Article 12(2) of Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time-limits and hearings provided for in Regulation No 4064/89 (OJ 1998 L 61, p. 1, subsequently repealed by Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Regulation No 139/2004 (OJ 2004 L 133, p. 1)), in which it argued that the proposed merger would lead to the creation of a dominant position for the notifying parties, or to the strengthening of WorldCom's dominant position, in the market in top-level internet connectivity and the market in the provision of global telecommunications services to multinational corporations. The notifying parties responded to that statement of objections on 22 May 2000.

10 Following several meetings held to explore possible corrective measures, by letter of 8 June 2000 the notifying parties submitted a commitment (some 'remedies') to the Commission pursuant to Article 8(2) of Regulation No 4064/89 and Article 18(2) of Regulation No 447/98 regarding the divestiture of Sprint's internet activities.

11 On 5 June 2000, the Commission convened a meeting of the advisory committee on concentrations established by Article 19 of Regulation No 4064/89. The committee met on 22 June 2000 and delivered its opinion on the same day.

12 On 26 June 2000, Mr Monti, the Commissioner responsible for competition, travelled to Washington (United States) to meet with representatives of the United States Department of Justice ('DOJ'). He stated there at a press conference that his proposal to the Commission would be to prohibit the planned merger.

13 On 27 June 2000, the Commission received two letters by fax from the notifying parties in which they formally withdrew, first, the commitment submitted on 8 June 2000 and, second, the notification of 11 January 2000. The second letter contained the following statement:

'The parties no longer propose to implement the proposed merger in the form presented in the notification. In so far as the parties decide to merge their activities in a modified form in the future, the parties will make such notifications as are appropriate under the applicable merger laws.'

14 On the same day, the DOJ filed a formal complaint before the District Court of Columbia against WorldCom and Sprint, seeking a ruling that their proposed merger violated the Clayton Antitrust Act 1914 and a permanent injunction to prevent them from performing the merger agreement. That complaint was based on the perceived anti-competitive effects on the market in the provision of internet backbone services, as well as on a series of other markets.

15 Also on 27 June, Sprint issued a press release on its website concerning the judicial proceedings brought by the DOJ, which ended as follows:

'Sprint hopes that a sensible conclusion to this merger can be reached. The public benefits are too great to pass up.'

16 Also on the same day, ABC News's website published the following commentary:

'... statements issued by the two companies seemed to suggest that they have not quite given up on the proposed $128 billion mega-merger. Peter Lucht, a spokesman for WorldCom, would not say whether they had ended their bid. "The matter is still pending before the U.S. agencies", Lucht said.'

17 On 28 June 2000, the Commission adopted Decision 2003/790/EC declaring a concentration incompatible with the common market and the EEA Agreement (Case COMP/M.1741 — MCI WorldCom/Sprint) (OJ 2003 L 300, p. 1; 'the contested decision'), on the basis of, inter alia, Article 8(3) of Regulation No 4064/89.

18 The Commission found in recital 410 of the contested decision that the proposed merger 'would lead to either the creation of a dominant position for the merged entity or the reinforcement of a dominant position of MCI WorldCom in the market for the provision of top-level or universal connectivity as a result of which competition would be significantly impeded in the common market within the meaning of Article 2(3) of [Regulation No 4064/89]'. In recital 302, however, the Commission 'decided not to pursue further its objection related to the market for providing global telecommunications services'. In recitals 303 to 315, the Commission also dropped its complaints regarding the international voice telephony market.

19 The contested decision was communicated to the notifying parties on the same day.

20 On 13 July 2000, the notifying parties issued press releases stating that, in view of the opposition of the DOJ, they were terminating their merger agreement.

Procedure

21 By application lodged at the Registry of the Court of First Instance on 27 September 2000 the applicant brought the present action.

22 The Court (First Chamber) requested the applicant to submit in the reply its views on whether, having regard to the judgments in Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753 and Case T-22/97 *Kesko* v *Commission* [1999] ECR II-3775, it still had an interest in bringing proceedings, in view of the final abandonment of the proposed concentration following the intervention by the DOJ. The applicant complied with that request and in its reply the Commission also set out its position on this issue.

23 By order of 16 May 2001 of the President of the First Chamber of the Court of First Instance, the Federal Republic of Germany and the French Republic were granted leave to intervene in support of the applicant and the Commission respectively.

24 On 21 July 2002, WorldCom and most of its subsidiaries in the United States filed a voluntary petition for reorganisation under Chapter 11 of the United States Bankruptcy Code before the Bankruptcy Court for the Southern District of New York.

25 By letter of 4 October 2002 from the Registry of the Court of First Instance, the applicant was requested (i) to submit its views on the impact that events at that time might have on pursuit of the proceedings before the Court of First Instance, (ii) to state whether it considered that it still had an interest in seeking annulment of the contested decision, on the basis of the criteria set out by the Court of First Instance in *Gencor* and *Kesko*, both cited in paragraph 22 above, (iii) in particular, to state whether it considered that it still had any chance of bringing about in the future the concentration declared incompatible with the common market by the contested decision, or any other similar transaction, should the contested decision be annulled in accordance with the form of order sought by it and (iv) to produce, as soon as it had been accepted by its creditors and approved by the American court having jurisdiction, the business plan required under Chapter 11 of the United States Bankruptcy Code. The applicant complied with those requests by letters of 21 October 2002, 2 May 2003, 9 July 2003, 17 December 2003 and 11 March 2004.

26 The composition of the Chambers of the Court of First Instance changed at the beginning of the new judicial year and the Judge-Rapporteur was assigned to the Second Chamber, to which this case was itself accordingly assigned.

27 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure and to hold, first, a hearing specifically devoted to examination of the questions raised by the present action regarding admissibility, the interest in bringing proceedings and the power of the Commission to adopt the contested decision.

28 The parties presented oral argument and answered questions put by the Court at the hearing on 30 March 2004.

Forms of order sought

29 The applicant, supported by the Federal Republic of Germany, claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

30 The Commission, supported by the French Republic, contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Admissibility of the action

Arguments of the parties

31 In its reply, the applicant states first of all that it was in response to Mr Monti's remarks at the press conference on 26 June 2000 (see paragraph 12 above) that, the following day, the notifying parties withdrew their notification and formally advised the Commission that they had abandoned the proposed concentration in the form notified. The proceedings commenced on the same day (27 June) by the DOJ before the District Court of Columbia (see paragraph 14 above) had no legally enforceable effect, unlike the contested decision adopted on 28 June. It is therefore inaccurate to suggest that the proposed concentration was abandoned 'following the intervention' of the DOJ.

32 The applicant then maintains that it has an interest in applying for annulment of the contested decision under the criteria laid down by the Court of First Instance in *Gencor* (paragraphs 41 to 45) and in *Kesko* (paragraphs 57 to 64). In particular, the

proposed concentration was abandoned by the notifying parties when it was manifestly clear that the Commission would declare it to be incompatible with the common market. The fact that the Commission's assessment became public before the contested decision was adopted and the fact that the notifying parties acted in reliance on the decision prior to its formal issue do not deprive the applicant of its interest in seeking annulment.

33 Referring to Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, at paragraph 23, the applicant also pleads its fundamental right to judicial protection, which, it states, is enshrined in the EC Treaty as well as in Articles 16 and 21 of Regulation No 4064/89. It argues in particular that, in a Community governed by the rule of law, effective judicial review of the Commission's decision-making power under Regulation No 4064/89 cannot in any way be affected by the existence of judicial proceedings in other jurisdictions, especially since in the present case the contested decision is the only legal impediment to the proposed concentration.

34 In its comments of 21 October 2002 in response to the questions from the Court of 4 October 2002 (see paragraph 25 above), the applicant essentially states as follows: its being placed under the protection of Chapter 11 of the United States Bankruptcy Code has no legal effect on the continuance of the present action; it has an even greater interest than before in obtaining annulment of the contested decision, under the criteria laid down in *Gencor* and *Kesko*; and, more particularly, as a result of problems arising from structural overcapacity and reduced demand, and other problems, which have arisen since 2000 in the telecommunications sector it has a greater chance than before of being able to effect the concentration which was declared by the contested decision to be incompatible with the common market, or another, similar, transaction, if the contested decision is annulled in accordance with the form of order sought by it.

35 In its additional comments of 2 May 2003, the applicant refers inter alia to the imminent approval by the United States Bankruptcy Court of its final plan of reorganisation and states that it expects to emerge from the procedure under Chapter 11 of the United States Bankruptcy Code during the third quarter of 2003. Completion of the reorganisation proceedings will not affect its interest in a prompt resolution of the present dispute or the rights that may flow from a judgment in its favour.

36 The applicant annexed to its additional comments of 9 July 2003, 17 December 2003 and 11 March 2004, respectively, a copy of the order of the United States Bankruptcy Court of 7 July 2003 approving its proposal for a final settlement with the United States Securities and Exchange Commission, a copy of the order of the same court of 31 October 2003 approving its plan of reorganisation of 21 October 2003 and a copy of the order of that court of 25 February 2004 extending the period available to the applicant for complying with some of the conditions set out in its plan of reorganisation.

37 In its rejoinder, the Commission notes that in *Gencor* and *Kesko* the Court of First Instance attached considerable importance to the factual circumstances in which the action against the contested decision had been brought and to those in which the planned merger transaction had been abandoned.

38 It points out that in *Gencor* (paragraph 45) the Court of First Instance held that the fact that the basis for the concentration has disappeared cannot 'in itself' preclude judicial review of the decision in question. The Court clarified that statement in *Kesko* (paragraphs 61 to 64), in which, after having analysed the reasons for which the applicant had abandoned the planned transaction, it found that the abandonment had not been voluntary but was directly attributable to the contested decision and that, accordingly, the action was to be held admissible.

39 The Commission infers from this that the reasons for which the notifying parties have abandoned their merger plans, together with other circumstances, may indeed constitute grounds for the Court of First Instance to decline jurisdiction. If the notifying parties have made their decision for reasons unrelated to the contested decision, it may reasonably be concluded that the applicant lacks a sufficient interest in the outcome of the proceedings and that its action must be dismissed as inadmissible.

40 In the present case, WorldCom and Sprint themselves made it plain that they abandoned their merger plans for reasons unconnected with the contested decision. According to their statements, the proposed concentration was abandoned solely because of the opposition of the DOJ. The Commission refers more specifically to the following passage of the press release of 13 July 2000 issued by both the applicant and Sprint (see paragraph 20 above):

'The companies [WorldCom and Sprint] mutually agreed that the set of conditions ultimately demanded by the [DOJ] would compromise the customer and financial benefits of the merger. Because the [DOJ] asserted it could not be prepared to go to trial on its theories regarding the merger before next year, the companies decided it was not in the best interest of shareholders, customers and employees to pursue protracted litigation.'

41 In those circumstances, the applicant cannot justifiably maintain that the DOJ's complaint to the District Court of Columbia could not have been the cause of its decision to abandon its merger plans because that complaint was not binding.

42 The Commission concludes that the abandonment of the envisaged merger was not a direct consequence of the contested decision at all, that the ruling in *Kesko* is not relevant to the present case and that the action should be dismissed as inadmissible.

43 It adds that in *Kesko* (paragraph 55) one of the factors the Court of First Instance took into account was whether the merger plans were still alive on the date on which the action was commenced, in order to determine whether there was a vested, present interest in seeking the annulment of the contested decision. In the present case, however, the merger plans were abandoned in July 2000, well before the action was commenced on 27 September 2000.

Findings of the Court

44 In accordance with settled case-law, an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the annulment of the contested measure. In order for such an interest to be present, the annulment of the measure must of itself be capable of having legal consequences (see Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, paragraph 21, Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraphs 59 and 60 and the case-law cited, and Case T-188/99 *Euroalliages* v *Commission* [2001] ECR II-1757, paragraph 26) or, in accordance with a different form of words, the action must be liable, if successful, to procure an advantage for the party who has brought it (Case C-174/99 P *Parliament* v *Richard* [2000] ECR I-6189, paragraph 33, and Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 21).

45 Where an absolute bar to proceedings is at issue (orders in Case 19/85 *Grégoire-Foulon* v *Parliament* [1985] ECR 3771 and in Case 108/86 *D. M.* v *Council and ESC* [1987] ECR 3933; judgment in Case T-45/91 *McAvoy* v *Parliament* [1993] ECR II-83, paragraph 22), the Community judicature may raise it of its own motion (Case C-19/93 P *Rendo and Others* v *Commission* [1995] ECR I-3319).

46 In the field of application of Regulation No 4064/89, the Court of First Instance held in *Gencor*, cited in paragraph 22 above (paragraphs 41 to 45), that an undertaking which is party to a proposed concentration retains a legal interest in bringing proceedings for annulment of the Commission decision declaring that transaction incompatible with the common market even though, because of the disappearance of the contractual basis underlying it, the transaction can no longer be carried out even if the Court delivers judgment in the applicant's favour. The Court had regard, in particular, to the current and future legal consequences of the annulment of such a decision, by virtue of Article 233 EC, and to the requirement for judicial review of the legality of measures adopted by the Commission under Regulation No 4064/89.

47 Applying those principles to a case of abandonment of the proposed concentration, the Court added in *Kesko*, cited in paragraph 22 above (paragraphs 61 to 65), that where the circumstances of the case show that the abandonment has not been voluntary, but is a 'direct consequence' of a Commission decision, the undertaking in question retains an interest in seeking annulment of that decision.

48 Contrary to the Commission's submissions (see paragraph 43 above), that case-law cannot be limited solely to instances where the concentration is abandoned after an action has been brought before the Court of First Instance. That case-law is founded on the consideration that an undertaking which merely complies with a Commission decision, as it is obliged to do, does not in any way forfeit its interest in seeking annulment of the decision (*Kesko*, paragraph 59). Such an obligation is inherent in the very nature of decisions, as is apparent from the fourth paragraph of Article 249 EC. It therefore exists before, and whether or not, an action is brought, while the fact that an action does not have suspensory effect additionally justifies preservation of the interest in bringing proceedings where the transaction is abandoned while the case is in progress (Joined Cases 172/83 and 226/83 *Hoogovens Groep* v *Commission* [1985] ECR 2831, paragraph 19).

49 In the present case, the disappearance of the contractual basis for the merger transaction, following the notifying parties' abandonment of the proposed merger, cannot therefore in itself preclude judicial review of the contested decision.

50 The present instance might, however, be distinguished in two respects from the cases of *Gencor* and *Kesko*. First, while this contention is partially contested by the Commission, the applicant itself maintains that the merger transaction at issue was abandoned as early as 27 June 2000, that is to say before the contested decision was even adopted. Second, the Commission argues that the abandonment of the transaction is attributable more to the DOJ's opposition than to its own actions. In both respects, the question accordingly arises as to the extent to which the abandonment of the merger transaction may be considered to be a 'direct consequence' of the contested decision, within the meaning of *Kesko*, and as to what the consequences of such a distinction might be for the applicant's interest in bringing the present proceedings.

51 As regards the first of those two respects, it should be recalled that, by letter of 27 June 2000, the notifying parties formally stated to the Commission that they were withdrawing their notification and that they 'no longer [proposed] to implement the proposed merger in the form presented in the notification'.

52 The Court finds, first, that that statement was made immediately after Mr Monti's comments to the press on 26 June 2000 indicating that he intended to propose to the Commission that it prohibit the planned merger and, second, that the statement was clearly intended to prevent the adoption of the contested decision, whose discussion was included on the agenda for the Commission meeting of 28 June 2000.

53 However, in recital 12 of the contested decision the Commission refused to regard that statement as amounting to a formal withdrawal of the notified merger agreement. It accordingly considered itself competent to rule on the agreement, notwithstanding the terms in which the statement in question was couched.

54 Those considerations are sufficient in themselves to substantiate the applicant's interest in obtaining the annulment of a decision which is addressed to it and whose adoption it vainly sought to prevent by formally stating that it was abandoning the notified merger transaction with which the decision deals. It is to be noted that one of the main pleas put forward by the applicant in support of its claim for annulment is to the effect that the Commission did not have the power to adopt the contested decision, following the withdrawal of the notification on 27 June 2000.

55 It should be added that, as long as the contested decision, which is presumed to be valid until it is annulled by the Community judicature (Case 11/81 *Dürbeck* v *Commission* [1982] ECR 1251, paragraph 17), continues to stand, the applicant is prevented by law from merging with Sprint, at least in the configuration and under the conditions put forward in the notification, should it again have the intention to do so.

56 The fact that the applicant does not necessarily have that intention, or that it will perhaps not carry it out, is, in this respect, a purely subjective circumstance that cannot be taken into account when assessing its interest in bringing proceedings for the annulment of a measure which, unquestionably, produces binding legal effects such as to affect its interests by bringing about a distinct change in its legal position (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraph 62, Case T-87/96 *Assicurazioni Generali and Unicredito* v *Commission* [1999] ECR II-203, paragraph 37, and Joined Cases T-125/97 and T-127/97 *Coca-Cola* v *Commission* [2000] ECR II-1733, paragraph 77).

57 Therefore, the applicant has established a sufficient interest to seek annulment of the contested decision even if, as it claims, it really abandoned the transaction at issue on the day before the decision was adopted.

58 As regards the second of the two respects referred to in paragraph 50 above, it is true that the formal withdrawal of the notification and the abandonment of the proposed merger 'in the form presented in the notification', notified by fax of the notifying parties to the Secretariat of the Commission's Merger Task Force in Brussels on 27 June 2000 at 17.25 (see Annex 3 to the application, p. 185), coincide to the day, and even practically to the hour given the time difference, with the announcement that the DOJ was bringing proceedings before the District Court of Columbia, made in Washington in the morning of 27 June 2000 (see Annexes 1 and 11 to the defence). Furthermore, on the notifying parties' own admission (see their press release of 13 July 2000, cited in paragraph 40 above) the definitive abandonment of their proposed merger is consequent upon the proceedings brought by the DOJ before the District Court of Columbia.

59 However, even if the DOJ's opposition were the determining factor in the decision of the notifying parties to abandon the merger transaction, the fact remains that, as the applicant correctly points out, the contested decision is at the moment the only existing and certain legal obstacle to carrying out that transaction, should the notifying parties again wish to merge in the configuration and under the conditions put forward in the notification, since the proceedings instituted by the DOJ before the District Court of Columbia did not proceed to the grant of a prohibitory injunction and they were indeed voluntarily abandoned by the DOJ on 13 July 2000.

60 Nor can it be ruled out that the notifying parties would have chosen to defend themselves before the District Court of Columbia had the Commission not adopted the contested decision.

61 In those circumstances, and having regard to the fundamental principle according to which, in a community governed by the rule of law, adherence to legality must be properly ensured (Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-3801, paragraph 63), the present case cannot be distinguished sufficiently from those of *Gencor* and *Kesko* to justify a different outcome in relation to assessment of the applicant's interest in bringing proceedings at the time when the action was brought.

62 As to circumstances capable of having affected preservation of its interest after the action was brought, the observations lodged by the applicant on 21 October 2002, 2 May 2003, 9 July 2003, 17 December 2003 and 11 March 2004 indicate that its court-supervised reorganisation is progressing well.

63 In addition, the applicant stated in its observations and repeated at the hearing, without being contradicted by the Commission, that the sphere of its activities has remained unchanged since the action was brought and that it is still liable to carry out a transaction of the type declared by the contested decision to be incompatible with the common market.

64 Accordingly, the applicant retains an interest sufficient to pursue the present proceedings.

Power of the Commission to adopt the contested decision

65 In support of its claims, the applicant essentially puts forward two pleas for annulment alleging that the Commission did not have the power to adopt the contested decision.

66 In the first plea, which divides into two parts, the applicant submits that the Commission was not entitled to adopt the contested decision since the proposed merger did not have a Community dimension, be that on the date on which the procedure was initiated (first part) or, following a material change in circumstances, on the date on which the decision was adopted (second part).

67 In the second plea, the applicant contends that the Commission was not entitled to adopt the contested decision since the notifying parties had formally withdrawn their notification and had informed the Commission of the abandonment of the merger in the form envisaged in the notification.

68 The Court will begin by examining this second plea, to the effect that the Commission lacked the power to adopt the contested decision after the notification had been withdrawn and the merger in the form envisaged in the notification had been abandoned.

Arguments of the parties

69 The applicant, supported by the German Government, submits that the Commission acted *ultra vires* in adopting the contested decision on 28 June 2000 when, on 27 June 2000, the notifying parties had formally withdrawn their notification and advised it that they would not seek to implement the proposed concentration in the form notified and that, in so far as they decided to merge their activities in a modified form in the future, they would make the notifications required by the applicable provisions governing mergers.

70 In recital 12 of the contested decision, the Commission substantiated its competence in particular on the basis of the fact that the notifying parties' letter of 27 June 2000 did not amount to a formal withdrawal of the merger agreement of 4 October 1999 that was the object of the notification. The applicant maintains that this interpretation is artificial and contrary to a rational reading of the letter. As regards the notifying parties' press statements, to which the Commission refers in the defence in support of its claim that the parties had not abandoned the proposed concentration in the form notified (see paragraphs 15, 16 and 20 above), the applicant contends that there is no indication in the contested decision that they were taken into account by the Commission in its assessment. In any event, those statements do not in any way contradict the notifying parties' letter of 27 June 2000 to the Commission.

71 The applicant further submits that, in so far as the Commission took the view that the proposed concentration could be withdrawn only if the parties formally rescinded the merger agreement, it acted unreasonably, disproportionately, contrary to its own administrative practice and, accordingly, contrary to the principle of the protection of legitimate expectations (Case 344/85 *Ferriere San Carlo* v *Commission* [1987] ECR 4435, Case 129/87 *Fingruth* [1988] ECR 6121, paragraphs 14 to 16, and Case 14/88 *Italy* v *Commission* [1989] ECR 3677, paragraphs 28 to 31). The applicant considers that, following their letter of 27 June 2000, the notifying parties had a legitimate expectation that the Commission would not adopt a decision addressing the merits of the notified concentration, in accordance with its past administrative practice made public in a score of other cases.

72 The Commission contends that mere withdrawal of the notification does not suffice to deprive it of competence under Regulation No 4064/89. That can occur only if the notifying parties also abandon their merger plans.

73 It follows from the spirit and the letter of Regulation No 4064/89, in particular from the ninth and 17th recitals in its preamble and from Articles 2(2), 4, 7(1) and (5), 8 (4) and 11, that the Commission's competence is not limited to notified operations

alone, notification being merely the instrument which facilitates the exercise of the competence that the Commission enjoys in any event and which cannot depend merely upon the wishes of the parties (Case T-3/93 *Air France* v *Commission* [1994] ECR II-121, paragraph 53). Accordingly, the Commission submits that since it enjoys control over concentrations regardless of prior notification, conversely parties to a proposed merger cannot deprive it of its competence by withdrawing their notification, unless they also abandon their merger plans. On this view, the withdrawal of the notification also renders the notifying parties liable to fines under Article 14 of Regulation No 4064/89, unless the merger plans are abandoned too.

74 In the present case, it is manifest that on 28 June 2000 the notifying parties still entertained high hopes that the envisaged merger would proceed. This is clear from their press statements released on the previous day (see paragraphs 15 and 16 above). If such an important decision as abandonment of merger plans had actually been taken, the parties would not have missed that opportunity to announce it. Their letter of 27 June 2000 to the Commission was thus not entirely frank and should not be taken at face value, especially since the notifying parties did not announce their intention to abandon the merger plans to the American authorities until 13 July 2000 (see paragraph 20 above). The Commission concludes from the foregoing that the proposed concentration was still alive at the date of adoption of the contested decision.

75 As regards its past administrative practice, the Commission explains that in all the cases pleaded by the applicant the notified operation was terminated before the Commission closed the file. In none of those cases did the Commission regard mere withdrawal of the notification as sufficient. Indeed, in two cases it insisted on the production of proof, which had not been spontaneously supplied by the parties, that the merger plans had been abandoned. In the present case, the notifying parties did not provide any documentation or other evidence whatsoever in support of their assertion that they no longer intended to proceed with their merger plans.

76 In any event, the Commission rejects the suggestion that its own administrative practice, consisting of a series of individual decisions, could give rise to a legitimate expectation. It submits that such an expectation would, at the very least, have to rest on some notice of a general nature. It also submits that common sense dictates that a departure by it from a practice followed in a series of earlier decisions does not constitute per se unreasonable or disproportionate behaviour.

77 Lastly, in its rejoinder the Commission contends that *Ferriere San Carlo* and *Fingruth*, both cited in paragraph 71 above, are not relevant to the present case. Both of those judgments recorded the existence of a lacuna in the Community legislation, which had been remedied by consistent administrative practice of the Community institution concerned. In the present case, there is no lacuna in Regulation No 4064/89 and the applicant is in reality relying on a supposed legitimate expectation that the Commission will refrain from exercising the powers conferred on it by that regulation.

Findings of the Court

78 It is necessary first of all to establish the purport of the letter of 27 June 2000, cited in paragraph 13 above, in which the notifying parties formally withdrew their notification of 11 January 2000 and stated to the Commission that they 'no longer propose[d] to implement the proposed merger in the form presented in the notification'.

79 As is clear from its very wording, and contrary to the applicant's submissions in the present action, this letter concerned not the abandonment, as a matter of principle, of any idea of, or proposal for, a merger between WorldCom and Sprint, but only the abandonment of the proposed merger 'in the form presented in the notification'. The possibility of a merger 'in a modified form in the future' is indeed expressly

envisaged, hypothetically it is true ('in so far as'), in the same letter. Sprint's press release and the statements of WorldCom's spokesman on the same day, respectively cited in paragraphs 15 and 16 above, also confirm that on that date the notifying parties still entertained some hopes of merging their activities in one form or another, despite the opposition of the DOJ and the Commission to their proposal. The truth is that it was only by the press release of 13 July 2000, cited in paragraph 40 above, that the notifying parties publicly announced that they were definitively abandoning their proposed merger.

80 The question raised by the present plea is consequently whether, in the circumstances of the case, the Commission had the power to adopt a decision under Article 8(3) of Regulation No 4064/89, declaring the 'notified concentration' incompatible with the common market, when, without formally abandoning their proposed merger, the notifying parties had formally stated that they were withdrawing their notification and that they no longer proposed to implement the proposed merger in the form presented in the notification, while leaving open the possibility of merging their activities in a modified form in the future.

81 It should be pointed out at the outset that, in the form presented in the notification, the proposed merger was specifically that identified and described in the agreement and plan of merger signed by WorldCom and Sprint on 4 October 1999, to the exclusion of any other theoretically conceivable concentration between those parties.

82 Having regard to the specific form thus given to the proposal in the notification, the notifying parties' statement of 27 June 2000, signed by the lawyers duly instructed to represent them before the Commission, could only be interpreted as entailing the lapsing of the agreement and plan of merger as entered into by them and notified pursuant to Article 4 of Regulation No 4064/89.

83 In those circumstances, the distinction drawn by the Commission, in recital 12 of the contested decision, between the withdrawal of the notification and the withdrawal of the merger agreement signed on 4 October 1999 is excessively formalistic, even artificial.

84 First, that distinction does not take account of the fact that the notifying parties' letter of 27 June 2000 related not only to withdrawal of the notification but also to the abandonment of implementation of the proposed merger 'in the form presented in the notification', and therefore in the form of the merger agreement of 4 October 1999.

85 Second, the distinction fails to have regard to the implications of such an abandonment, which necessarily affects the effectiveness, if not the validity, of the merger agreement itself. The Commission's conclusion that the notifying parties' letter of 27 June 2000 'did not amount to a formal withdrawal of the merger agreement' does not follow logically from the notifying parties' affirmation that they 'no longer [proposed] to implement' that agreement.

86 In addition, the fact, relied upon by the Commission in recital 12 of the contested decision, that the notifying parties had left open the possibility of their merging their activities in a modified form in the future is not relevant when assessing whether, on the date on which the contested decision was adopted, there existed a formally valid merger agreement, capable of being performed by those parties, in respect of which the Commission could have exercised its merger control powers.

87 Besides, that fact is liable to weaken, rather than bear out, the Commission's argument, since it reveals that the notifying parties considered that the adoption of a fresh decision to merge was required in order to carry out the envisaged merger in the future, if appropriate.

88 In its pleadings, the Commission alleges, however, that the notifying parties were 'not entirely frank' in their letter of 27 June 2000, so that it should not 'be taken at face value'.

89 In so far as the Commission thus claims that at that date the notifying parties had not definitively abandoned their proposed merger, its allegation is well founded (see paragraph 79 above), but of no consequence. A valid merger agreement for the purposes of Regulation No 4064/89 does not automatically exist (or continue to exist) between two undertakings simply because they are considering merging (or continue to consider merging). Commission competence cannot rest on the mere subjective intentions of the parties. It depends, as made clear by Article 4 of the regulation, on 'the conclusion of the [merger] agreement'. In the same way as the Commission does not have the power to adopt a decision pursuant to Regulation No 4064/89 before such an agreement has been concluded, it ceases to have that power as soon as the agreement comes to be terminated, even if the undertakings concerned continue negotiations with a view to concluding an agreement 'in a modified form'.

90 In so far as the Commission claims more specifically that the notifying parties secretly maintained their merger agreement of 4 October 1999 in force notwithstanding the terms in which their official communication of 27 June 2000 was couched, it is clear that its allegation, which could be material, is not founded on any evidence capable of proving it to the required legal standard. In particular, there is nothing to support it in Sprint's press release or the statements of WorldCom's spokesman of 27 June 2000, even supposing that the Commission could have had regard to those documents which are not mentioned in the contested decision.

91 It follows from the foregoing that, in light of the notifying parties' letter of 27 June 2000, as summarised in paragraph 80 above and as interpreted in paragraphs 82 to 86 above, the Commission should have found that it no longer had the power, in the absence of a concentration 'agreement' within the meaning of Article 4 of Regulation No 4064/89, to adopt a decision under Article 8(3) of that regulation declaring the 'notified concentration' incompatible with the common market.

92 None of the other arguments put forward by the Commission in the present action is capable of calling that assessment into question.

93 It is true that, as the Commission has correctly maintained, referring to paragraph 53 of the judgment in *Air France*, cited in paragraph 73 above, its competence is not limited to notified concentrations alone, notification being merely the instrument which facilitates the exercise of the competence that the Commission enjoys in any event and which cannot depend merely upon the wishes of the parties.

94 In this connection, it is necessary to reject the German Government's argument that a decision of incompatibility pursuant to Article 8(3) of Regulation No 4064/89 can be adopted only where the, *ex hypothesi* unnotified, concentration has already been implemented and demerger measures pursuant to Article 8(4) of the regulation prove necessary. Such an interpretation is contrary both to the letter and to the spirit of Regulation No 4064/89, in particular Article 14(2)(c).

95 However, the Commission is required in its examination to take account of the existing legal and factual context and, in particular, to act on the basis of the precise provisions of the unnotified agreement bringing about the concentration (see, by analogy, concerning examination by the Commission of its own initiative of an unnotified agreement restricting competition, Case T-16/98 *Wirtschaftsvereinigung Stahl and Others* v *Commission* [2001] ECR II-1217, paragraphs 32 and 33).

96 Thus, while it is true that the parties to a merger agreement cannot deprive the Commission of its competence by withdrawing their notification, the Commission must still, when exercising that competence, rule on a real merger transaction and not, following withdrawal of the notification and abandonment of the transaction in the form initially envisaged, on vague intentions of the parties to merge their activities in a modified form in the future, as it has done in the present case.

97 Furthermore, the Commission cannot, without running the risk of making errors of assessment liable to have a substantial impact on its evaluation of the merger transaction actually in issue, conduct its assessment in relation to the provisions of an agreement whose implementation the parties have formally stated that they are abandoning.

98 In the present case, the notifying parties' letter to the Commission of 27 June 2000 implied, at the very least, that those parties anticipated making certain amendments to the notified merger agreement, before the envisaged merger might be achieved 'in a modified form', and that that agreement therefore no longer reflected their common intention. It follows that the assessment of the provisions of the notified agreement which was carried out in the contested decision necessarily fails to have regard to the scope of the new transaction that might be envisaged for the future by the notifying parties.

99 This error could have had a substantial effect on the assessment of the merger transaction conducted by the Commission in the contested decision. If the Commission had taken account of the actual effect of the merger transaction envisaged by the parties in a modified form, it is possible that its assessment would have been different and that it would have considered that that transaction was not incompatible with the common market (see, by analogy, *Wirtschaftsvereinigung Stahl*, cited in paragraph 95 above, paragraph 45).

100 It should also be noted that the errors of assessment which the Commission ran the risk of making by proceeding as it did in the present case were easily avoidable. In particular, no mandatory time-limit required it to adopt in great haste a decision as risky as the contested decision.

101 As is apparent from recital 11 of the contested decision, the Commission considered that the final deadline for adoption of that decision, after which the transaction would have been deemed compatible with the common market pursuant to Article 10(6) of Regulation No 4064/89, was Wednesday, 12 July 2000. In the defence, the Commission also explained that it meets as a college once a week, generally on Wednesdays, that decisions pursuant to Article 8(3) of Regulation No 4064/89 are almost systematically adopted under the oral procedure, in order to ensure greater transparency, and that the practice is to submit the draft at the penultimate meeting before the expiry of the deadline laid down in Article 10(3) of Regulation No 4064/89, in order to allow the college to decide on an amended text should a majority of its members object to the first draft.

102 Thus, if the Commission entertained doubts as to the purport or the frankness of the notifying parties' letter of 27 June 2000, it had time, when it met on Wednesday, 28 June 2000, to defer formal adoption of the contested decision until Wednesday, 5 July or Wednesday, 12 July 2000 and in the meantime to send the notifying parties a request for information pursuant to Article 11(1) of Regulation No 4064/89, if necessary by decision pursuant to Article 11(5).

103 Moreover, as provided by Article 10(4) of Regulation No 4064/89, the maximum period of four months set by Article 10(3) for taking a decision of incompatibility pursuant to Article 8(3) is exceptionally to be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision pursuant to Article 11. In accordance with Article 9(1)(a) and (d) of Regulation No 447/98, such circumstances exist inter alia where information which the Commission has requested from one of the notifying parties pursuant to Article 11(1) of Regulation No 4064/89 is not provided in full within the time-limit fixed by it, and where the notifying parties have failed to inform the Commission of material changes in the matters stated in the notification.

104 In the present case, therefore, the Commission was in a position to ascertain, by means of formal proof, that the merger agreement had really been withdrawn or abandoned, as it has on its own admission done in the past in the case of at least two other concentrations (see paragraph 111 below), if it did not consider that it had sufficient information to end the procedure having regard to the notifying parties' letter of 27 June 2000.

105 Nor can the Commission plead that it had to prevent possible wrongful or improper use of the notifying parties' letter of 27 June 2000.

106 In particular, there was no need to fear that the notifying parties, deliberately disregarding the prohibition in Article 7(1) of Regulation No 4064/89, would pursue the implementation of their proposed merger, whether in the notified form or in any modified form, after withdrawal of the notification. As the applicant and the German Government point out, the notifying parties could have proceeded in that way only by laying themselves open to the fines provided for in Article 14(2)(b) of Regulation No 4064/89, which may come to 10% of their aggregate turnover. Those fines have a deterrent effect equal to that of the fines envisaged by Article 14(2)(c) for cases where undertakings put into effect a concentration declared incompatible with the common market by decision pursuant to Article 8(3).

107 In view of all the foregoing considerations, it must be concluded that, by adopting the contested decision when the notifying parties had formally withdrawn their notification and informed the Commission of the abandonment of the merger in the form envisaged in the notification, that institution exceeded the limits of its powers under Regulation No 4064/89.

108 In any event, even if the Commission did not lack the power to adopt the contested decision, as it submits on the basis of the distinction drawn by it between withdrawal of the notification and withdrawal of the merger agreement, it is clear that in so doing the Commission unexpectedly departed from its consistent administrative practice, as made public. The applicant has referred to a score of cases in which the Commission was apparently satisfied with mere withdrawal of the notification by the parties concerned, in order to bring a procedure in a merger case to a close without a decision on the merits.

109 Thus, having regard to the Commission notices headed 'Withdrawal of notification of a proposed concentration', which are the only documents to have been published in Case No IV/M.608, Ericsson/Ascom (OJ 1995 C 292, p. 8), and Case No IV/M.680, Kvaerner/Amec (OJ 1996 C 8, p. 4), respectively, it seems that there the Commission decided to close the file, without adopting a decision, the very day that the notifying parties informed it that they had 'suspended the implementation of the proposed concentration notified' and 'therefore decided to withdraw the notification'.

110 Furthermore, in a large number of other cases (No IV/M.208, Scott/Mölnlycke; No IV/M.238, Siemens/Philips Kabel; No IV/M.388, Unilever France/Ortiz Miko; No IV/M.418, Tractebel/Distrigaz; No IV/M.494, Colonia/Lefac/KMK-CCI; No IV/M.562, Swissair/Sabena; No IV/M.592, RWE-DEA/Enichem Augusta; No IV/M.805, Telecom-2; No IV/M.852, BASF/Shell; No IV/M.888, Metallgesellschaft/AG; No IV/M.892, Hochtief/Deutsche Bank/Holzmann; No IV/M.905, Schweizer Rück/SAFR; No IV/M.948, Watt AG; No IV/M.974, Bertelsmann/Burda-Host; No IV/M.1010, Artémis/Worms & Cie; No IV/M.1047, Wienerberger/Cremer & Breuer (OJ 1998 C 93, p. 23); No IV/M.1246, LHZ/Carl Zeiss (OJ 1998 C 384, p. 9); No IV/M.1277, BLG Container/Maersk/Sea-Land Service (OJ 1998 C 290, p. 12); No IV/M.1321, Verbund/Kelag/Porr/OMV Proterra/Siemens/KRV (OJ 1998 C 382, p. 3); No IV/M.1431, Ahlström/Kvaerner (OJ 1999 C 263, p. 3); No IV/M.1447, Deutsche Post/Trans-o-flex (OJ 1999 C 130, p. 9); No IV/M.1609, Elf/Saga; No IV/M.1703, Phelps Dodge/Asarco (OJ 1999 C 313, p. 7); COMP/M.2117, Aker Maritime/Kvaerner (OJ 2001 C 9, p. 5); and COMP/M.1829, HMTF Nabisco Group Holdings/Burlington Biscuits/United Biscuits) the notice in the Official Journal and/or the press release

announcing the closure of the procedure merely state that 'the notifying parties informed the Commission that they withdrew their notification', without referring to the fate of the proposal or of the concentration agreement itself. By wording the public documents in question in that way, the Commission necessarily caused it to be believed in the relevant circles that withdrawal of the notification was, from its point of view, equivalent in practice to abandonment of the proposed concentration, even if its actual administrative practice may have been different.

111 The Commission referred, in the defence, to two cases (No IV/M.1328, KLM/Martinair (OJ 1999 C 162, p. 7), and No IV/M.1412, Hutchison Whampoa/RMPM/ECT (OJ 1999 C 256, p. 5)) in which, it submits, after the parties did not spontaneously supply proof that their merger plans had been abandoned, it insisted on the production of such proof before closing the file. However, the elements of those cases made public by notification in the Official Journal and/or a press release do not disclose such insistence on its part. In any event, the Commission does not explain why it did not proceed in the same way in the present case, instead of hurrying to adopt a negative decision, the day after the notification was withdrawn.

112 In those circumstances, the notifying parties were entitled to expect their letter of 27 June 2000 to be sufficient to result in closure of the file, in accordance with the Commission's prior administrative practice that had been made public and in the absence of indications to the contrary given by the Commission. Contrary to the Commission's submissions, the case-law of the Court of Justice confirms that a mere administrative practice or concession that is not contrary to the legislation in force and does not involve the exercise of discretion may give rise to a legitimate expectation on the part of the persons concerned, and that the expectation therefore does not necessarily have to be founded on a communication which is generally applicable (judgments in Case 84/85 *United Kingdom* v *Commission* [1987] ECR 3765, in *Ferriere San Carlo* and in *Fingruth*; order in Case C-152/88 R *Sofrimport* v *Commission* [1988] ECR 2931).

113 Accordingly the Commission, at the very least, infringed the legitimate expectation of the notifying parties by adopting the contested decision without first informing them that their letter did not satisfy it and that it intended to adopt a decision pursuant to Article 8(3) of Regulation No 4064/89 unless they supplied it immediately with formal proof of withdrawal of the merger agreement.

114 It follows from the foregoing that the second plea is well founded. Consequently, the contested decision must be annulled, in accordance with the form of order sought by the applicant, without there being any need to adjudicate on the other pleas and arguments put forward by it in support of its action.

Costs

115 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, 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 Commission has been unsuccessful it must be ordered to pay the costs, as claimed by the applicant.

116 However, in accordance with the first subparagraph of Article 87(4) of the Rules of Procedure, the Member States which intervened in the proceedings are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Annuls Commission Decision 2003/790/EC of 28 June 2000 declaring a concentration incompatible with the common market and the EEA Agreement (Case COMP/M.1741 — MCI WorldCom/Sprint);**

2. **Orders the Commission to bear, in addition to its own costs, those of MCI, Inc.;**

3. **Orders the Federal Republic of Germany and the French Republic to bear their own costs.**

Pirrung Meij Forwood

Delivered in open court in Luxembourg on 28 September 2004.

H. Jung J. Pirrung

Registrar President