

Case T-119/02

Royal Philips Electronics NV

v

Commission of the European Communities

(Competition — Concentrations — Admissibility — Commitments in the course of the first phase of examination — Serious doubts as to compatibility with the common market — Partial referral to national authorities)

Judgment of the Court of First Instance (Third Chamber), 3 April 2003 . . . II - 1442

Summary of the Judgment

1. *Competition — Concentrations — Investigation by the Commission — Adoption of a decision declaring a concentration compatible with the common market without initiating the Phase II procedure — Condition — Absence of serious doubts — Commitments entered into by the undertakings concerned likely to make the notified concentration compatible — Assessments of an economic nature — Margin of discretion — Review by the Court — Purpose — No manifest error of assessment (Council Regulation No 4064/89, Art. 6(1))*

2. *Procedure — Intervention — Plea in law not raised by the applicant — Inadmissible (EC Statute of the Court of Justice, Art. 37, third and fourth paras; Rules of Procedure of the Court of First Instance, Art. 116(3))*
3. *Procedure — Expedited procedure — Whether account to be taken of a plea first raised at the hearing — Infringement of the rights of the defence (Rules of Procedure of the Court of First Instance, Arts 76a and 116(4))*
4. *Competition — Concentrations — Assessment of compatibility with the common market — Commitments entered into by the undertakings concerned likely to make the notified concentration compatible — Requirement of compatibility with Article 81 EC — Commitment to grant trade-mark licences containing a clause requiring the licensee to concentrate sales on the territory of a Member State — Whether permissible (Art. 81(1) and (3) EC; Council Regulation No 4064/89, Art. 2(1))*
5. *Competition — Concentrations — Administrative procedure — Commitments entered into by the undertakings concerned — Modifications notified after the time-limit — Account taken by the Commission of the modified commitments in order to find the concentration compatible with the common market — Whether permissible — Conditions (Commission Regulation No 447/98, Art. 18(1); Commission Notice on remedies acceptable under Regulations No 4064/89 and No 447/98, para. 37)*
6. *Actions for annulment — Natural or legal persons — Measures of direct and individual concern to them — Decision to refer the examination of a concentration to the competent national authorities — Third-party undertaking (Art. 230, fourth para., EC; Council Regulation No 4064/89, Art. 9(3))*
7. *Actions for annulment — Natural or legal persons — Measures of direct and individual concern to them — Decision to refer the examination of a concentration to the competent authorities of a Member State — Third-party undertaking (Art. 230, fourth para., EC; Council Regulation No 4064/89, Art. 9(3))*
8. *Competition — Concentrations — Investigation by the Commission — Referral of the examination of a concentration to the competent authorities of a Member State — Conditions — Review by the Court — Scope (Council Regulation No 4064/89, Art. 9(2)(a))*

9. *Competition — Concentrations — Investigation by the Commission — Decision to refer the examination of a concentration to the competent authorities of a Member State — Discretion of the Commission — Review by the Court — Limits*
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10. *Competition — Concentrations — Investigation by the Commission — Decision to refer the examination of a concentration to the competent authorities of a Member State — Conditions — Risk of a fragmented assessment of a single transaction — Irrelevant*
(Council Regulation No 4064/89, Art. 9(2) and (3))
11. *Competition — Concentrations — Referral of the examination of a concentration to the competent authorities of a Member State — Obligations imposed on those authorities — Limits*
(Art. 10 EC; Council Regulation No 4064/89, Art. 9)
12. *Competition — Concentrations — Referral of the examination of a concentration to the competent authorities of a Member State — Effects — Exclusive competence of the national authorities to rule on the concentration — Commission may not bind the national authorities as to their substantive findings*
(Council Regulation No 4064/89, Art. 9(2) and (3))
13. *Acts of the institutions — Statement of reasons — Obligation — Scope — Decision to refer the examination of a concentration to the competent authorities of a Member State*
(Art. 253 EC; Council Regulation No 4064/89, Art. 9(2)(a) and (3))

1. Although the Commission has no discretion as regards the initiation of the Phase II procedure where it encounters serious doubts with respect to the compatibility of a concentration with the common market, it nevertheless enjoys a certain margin of discretion in identifying and evaluating the circumstances of the case in order to determine whether or not they present serious doubts or, where commitments have been proposed, whether they continue to present them. Even if the notion of 'serious doubts' is an objective one, the identification of such doubts necessarily requires the Com-

mission to carry out complex economic assessments, in particular where it must assess whether the commitments proposed by the parties to the concentration are sufficient to dispel those serious doubts.

Where the Community Courts are called on to consider whether, having regard to their scope and content, such commitments are of a kind which

permits the Commission to adopt a decision of approval without initiating the Phase II procedure, it must examine whether the Commission was entitled, without committing a manifest error of assessment, to take the view that those commitments constituted a direct and sufficient response capable of clearly dispelling all serious doubts.

raised by the applicant. Such a plea must be rejected as inadmissible.

(see paras 203-204, 212-213)

(see paras 77, 80)

2. Whilst the third paragraph of Article 37 of the Statute of the Court of Justice and Article 116(3) of the Rules of Procedure of the Court of First Instance do not preclude the intervener from advancing arguments which are new or which differ from those of the party he supports, lest his intervention be limited to restating the arguments advanced in the application, it cannot be accepted that those provisions permit him to alter or distort the context of the dispute defined in the application by raising new pleas in law. Therefore, an intervener, who must, under Article 116(3) of the Rules of Procedure, accept the case as he finds it at the time of his intervention and whose submissions in an application to intervene are, under the fourth paragraph of Article 37 of the Statute of the Court of Justice, to be limited to supporting the submissions of one of the main parties, does not have standing to raise a plea which has not been
3. Where, in an expedited procedure under Article 76a of the Rules of Procedure of the Court of First Instance, a plea was not — in accordance with paragraph 2 of that article — the subject of a statement in intervention within the meaning of Article 116(4) of those Rules and was necessarily and unavoidably submitted for the first time at the hearing before the Court, it is capable of prejudicing the right, pursuant to the adversarial principle, of the party whose claims it is intended to counter to state its views properly in that regard. If the Court were to have to examine such a plea and, as the case may be, declare it to be well founded, that might result in an infringement of the rights of the defence in the proceedings before the Court.
4. The Commission cannot, when applying Regulation No 4064/89, approve commitments which are contrary to the competition rules laid down in the Treaty because they impair the preser-

(see para. 205)

vation or development of effective competition in the common market. In that context, the Commission must appraise the compatibility of those commitments in particular according to the criteria of Article 81(1) and (3) EC.

A clause which, in the context of a commitment to grant trade-mark licences imposed on the parties to the concentration, obliges a licensee to concentrate the sale of the products covered by the licence on his territory does not, in principle, have as its object or effect the restriction of competition within the meaning of Article 81(1) EC and, even if it has to be interpreted as prohibiting the licensees from exporting products bearing the trade mark in question to other Member States, is not such as to restrict competition appreciably on the relevant markets in the Community or affect significantly trade between the Member States within the meaning of that provision if it is clear that, in respect of the products concerned, the markets are national in dimension and are not affected by significant parallel imports.

(see paras 216-218)

hearings provided for in Regulation No 4064/89 on the control of concentrations between undertakings must be interpreted as meaning that, whilst the parties to a concentration cannot oblige the Commission to take account of commitments and modifications to them submitted after the three-week time-limit for notification prescribed in Article 18(1), the Commission must nevertheless be able, where it considers that it has the time necessary to examine them, to authorise the concentration in light of those commitments, even if modifications are made to them after that time-limit.

Consideration of such modifications made after that time-limit is also in keeping with the Notice on remedies acceptable under Regulations No 4064/89 and Regulation No 447/98, adopted by the Commission and binding on it in so far as it does not depart from the rules in the Treaty and from Regulation No 4064/89 if those modifications can be regarded as limited modifications within the meaning of paragraph 37 of that notice.

(see paras 235, 239, 242, 249)

5. Article 18(1) of Regulation No 447/98 on the notifications, time-limits and
6. For a Community measure to be of direct concern to a natural or legal

person within the meaning of Article 230 EC, it must directly affect the person's legal situation and its implementation must be purely automatic and result from Community rules alone without the application of other intermediate rules.

The purpose of a decision to refer the examination of a concentration to the competent authorities of a Member State, adopted by the Commission under Article 9(3) of Regulation No 4064/89 on the control of concentrations between undertakings is not to rule on the effects of the concentration on the relevant markets which are the subject of the referral but to transfer responsibility for the examination of certain aspects of the concentration to those national authorities which have requested the referral in order that they may give a ruling in accordance with their national competition law.

However, since the effect of that referral decision is to deprive a third-party undertaking of the opportunity to have the Commission review the lawfulness of the concentration from the point of view of Regulation No 4064/89, of the procedural rights conferred by that regulation on third parties and of the judicial protection provided for by the Treaty, it must be regarded as capable of affecting the legal situation of that undertaking.

7. Persons other than the addressees of a decision can claim to be individually concerned within the meaning of Article 230 EC only if that decision affects them by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee.

Where, under Regulation No 4064/89 on the control of concentrations between undertakings, a third-party undertaking would, in its capacity as the main competitor of the parties to the concentration the position of which was taken into account by the Commission in the administrative procedure conducted by it and on account of its active participation in that procedure, have been regarded as individually concerned by a decision of the Commission declaring the concentration compatible with the common market, it must also be regarded as being so affected by the decision to refer the examination of the concentration to the competent authorities of a Member State, since that decision deprives it of the opportunity to challenge before the Community Courts assessments which it would have been entitled to challenge had the referral not been made.

(see paras 272, 280, 286)

(see paras 291-292, 297)

8. For a concentration to be the subject of a referral on the basis of Article 9(2)(a) of Regulation No 4064/89, that provision requires two cumulative conditions to be satisfied. First, the concentration must threaten to create or strengthen a dominant position as a result of which effective competition will be significantly impeded on a market within that Member State. Second, that market must present all the characteristics of a distinct market.

Those conditions are matters of law and must be interpreted on the basis of objective factors. For that reason, the Community judicature must, having regard both to the specific features of the case before it and the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a concentration falls within the scope of Article 9(2)(a) of Regulation No 4064/89.

(see paras 326-327)

of a concentration to the competent national authorities of a Member State under the first subparagraph of Article 9(3) of Regulation No 4064/89, that discretion is not unlimited. The Commission cannot decide to make such a referral if, when the Member State's request for a referral is examined, it is clear, on the basis of a body of precise and coherent evidence, that such a referral cannot safeguard or restore effective competition on the relevant markets.

Review of that question by the Community Courts is a limited review which, in the light of Article 9(3) and (8) of Regulation No 4064/89, must be restricted to establishing whether the Commission was entitled, without committing a manifest error of assessment when it adopted the decision, to consider that the referral to the national competition authorities would enable them to safeguard or restore effective competition on the relevant market so that it was unnecessary to deal with the case itself.

(see paras 342-344, 346)

9. Although the Commission has broad discretion as regards the decision whether or not to refer the examination

10. The Commission is entitled to consider that the referral of the examination of a

concentration to the competent national authorities of a Member State under Article 9(3) of Regulation No 4064/89 will safeguard or restore effective competition on the relevant markets if the Member State concerned has specific laws on the control of concentrations and specialised bodies to ensure that those laws are implemented under the supervision of the national courts and if, in their request for a referral, the national authorities identified the precise competition problems raised by the concentration on the relevant markets.

Although the referral conditions laid down in Article 9(2)(a) and (b) of Regulation No 4064/89 are to be interpreted restrictively so that referrals to national authorities of concentrations with a Community dimension are limited to exceptional cases, the risk that concentrations with a Community dimension will, in a large number of cases, be subject to a fragmented assessment undermining the 'one-stop-shop' principle cannot invalidate such a referral decision. That risk is inherent in the referral procedure currently provided for in Regulation No 4064/89. It is not for the Court, even in the course of its review of the Commission's exercise of its discretion under the first subparagraph of Article 9(3) of Regulation No 4064/89, to act in place of the legislator in order

to fill any loopholes in the referral system established by Article 9 of that regulation.

(see paras 347-349, 354-356)

11. The national authorities to which the Commission has referred the decision on the compatibility of a concentration with the common market must comply with the obligations imposed by Article 9 of Regulation No 4064/89 and, pursuant to Article 10 EC, take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions and abstain from any measure which might jeopardise the attainment of the objectives of the Treaty. Provided they comply with those obligations, they are free to rule on the substance of the concentration referred to them on the basis of a proper examination conducted in accordance with national competition law.

(see paras 369-371)

12. When adopting a referral decision under Article 9 of Regulation No 4064/89, the Commission is not obliged, with a view to avoiding the

adoption of contradictory decisions, to consult the national competition authorities beforehand or to initiate Phase II with respect to those aspects of the concentration which are not the subject of the referral decision solely in order to maintain the possibility of cooperation with the national competition authorities. The referral decision terminates the procedure applying Regulation No 4064/89 to those aspects of the concentration which are the subject of the referral and transfers exclusive competence to assess those aspects to the national competition authorities ruling on the basis of their national law, with the result that the Commission loses any power to deal with those aspects. It cannot therefore be permitted to intervene in the decision-making process of the national competition authorities, even if it decides to initiate the Phase II procedure with respect to those aspects of the concentration which are not the subject of the referral decision.

Therefore, when examining the conditions for referral under Article 9(2)(a) of Regulation No 4064/89, the Commission cannot, without depriving point (b) of the first subparagraph of Article 9(3) of that regulation of its substance, conduct an examination of the compatibility of the concentration in such a way as to bind the national authorities in regard to their substantive findings but must merely establish whether, *prima facie*, on the basis of the evidence available to it at the time

when it assesses the merits of the request for referral, the concentration whose referral is requested threatens to create or strengthen a dominant position on the relevant markets. The risk that the decision of the national authorities will be inconsistent, or even irreconcilable, with the decision adopted by the Commission is inherent in the referral system established by Article 9 of Regulation No 4064/89.

(see paras 372-373, 377, 381)

13. In order to comply with the obligation to state reasons laid down in Article 253 EC, a decision to refer the examination of a concentration to the competent national authorities of a Member State which has been adopted under Article 9(2)(a) of Regulation No 4064/89 must contain a sufficient and relevant indication of the factors taken into consideration in establishing that there is a threat of the creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded on a market within the Member State concerned, and that there is a distinct market.

(see para. 395)