Case T-114/02

BaByliss SA

v

Commission of the European Communities

(Competition — Concentrations — Regulation (EEC) No 4064/89 — Action brought by a third party — Admissibility — Commitments in the course of the first phase of examination — Trade mark licence — Modification of commitments — Time-limits — Financial aid by the State — Nominal purchase price — Serious doubts as to the compatibility of the concentration with the common market — Absence of commitment on markets with serious competition problems)

Summary of the Judgment

1. *Actions for annulment — Natural or legal persons — Measures of direct and individual concern to them — Decision declaring a concentration compatible with the common market — Third-party undertaking which actively participated in the administrative procedure and which has the status of a potential competitor — Whether admissible*

   (Art. 230, fourth para., EC)

2. *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)

3. *Competition — Concentrations — Investigation by the Commission — Commitments entered into by the undertakings concerned likely to make the notified concentration compatible with the common market — Nature of commitments allowing the Commission to refrain from initiating the Phase II procedure — Commitments excluding all serious doubts — Behavioural commitments — Whether included*

(Council Regulation No 4064/89, Art. 6(1); Commission Notice on remedies acceptable under Regulations No 4064/89 and No 447/98)

4. *Competition — Concentrations — Assessment of compatibility with the common market — Commitments entered into by the undertakings concerned likely to make the notified concentration compatible — Concentration between undertakings active on the markets for small electrical household appliances — Commitment to grant trade-mark licences — Remedy for competition problems raised by the concentration — Conditions*

(Council Regulation No 4064/89, Art. 8(2))

5. *Competition — Concentrations — Assessment of compatibility with the common market — Commitments entered into by the undertakings concerned likely to make the notified concentration compatible — Concentration between undertakings active on the markets for small electrical household appliances — Commitment to grant trade-mark licences — Limited obligation to obtain supplies imposed on one licensee — Whether permissible — Conditions*

(Council Regulation No 4064/89, Art. 8(2))

6. *Competition — Concentrations — Assessment of compatibility with the common market — No dominant position impeding competition created or strengthened — Assessment criteria — Absence of a significant overlap between the parties to a concentration — Relevance — Limits*

(Council Regulation No 4064/89, Art. 2(2) and (3))

7. *Competition — Concentrations — Assessment of compatibility with the common market — No dominant position impeding competition created or strengthened — Assessment criteria — Presence of competitors — Relevance dependent on strength of competitors*

(Council Regulation No 4064/89, Art. 2(2) and (3))

8. *Competition — Concentrations — Assessment of compatibility with the common market — No dominant position impeding competition created or strengthened — Independent assessment of the various markets for the products concerned — Limits — Need to take account of the overall competition situation and the factors liable to strengthen the economic power of the entity arising from the concentration — Failure to establish the absence of serious risks in the case of a concentration of the turnover of the entity arising from the concentration on the sectors not dominated*

(Council Regulation No 4064/89, Art. 2(2) and (3))

9. *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))

10. *Competition — Concentrations — Assessment of compatibility with the common market — Commitments entered into by the undertakings concerned likely to make the notified concentration compatible with the common market — 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))

1. A Commission decision declaring a concentration compatible with the common market is not of individual concern within the meaning of the fourth paragraph of Article 230 EC to third undertakings not party to the concentration or addressees of the decision unless it 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.

Although mere participation in the procedure leading to the decision is not, in itself, sufficient to show that the decision is of individual concern to a third-party undertaking, particularly in the field of concentrations, the careful examination of which requires regular contact with numerous undertakings, active participation in the administrative procedure is nevertheless a factor regularly taken into account in competition matters, including in the more specific area of the control of concentrations, to establish, in con-

junction with other specific circumstances, the admissibility of an action brought by a third-party undertaking.

Thus, where the parties to the concentration operate on oligopolistic markets characterised by substantial barriers to entry arising from strong brand loyalty and by the difficulty of access to retail trading, an action brought by such an undertaking is admissible if it has actively participated in the procedure and may claim the status of a potential competitor.

(see paras 91, 95, 99)

2. Article 18(1) of Regulation No 447/98 on the notifications, time-limits and 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 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 140, 143, 150)

3. Neither Regulation No 4064/89 nor the Commission Notice on remedies acceptable under Regulations No 4064/89 and No 447/98 expressly stipulate what kind of commitments can or must be accepted on the completion of Phase II or in the framework of Phase I. As Regulation No 4064/89 aims to prevent the creation or strengthening of market structures as a result of which effective competition in the common market would be significantly impeded, the proposed commitments must be such as to permit the Commission to conclude that the concentration in question will not create or strengthen a dominant position. In that connection there is no material differ-

ence between the commitments made in Phase I and those in Phase II although, as an in-depth market study is not carried out in Phase I, the former must not only permit such a conclusion, but must also be sufficient to rule out clearly any serious doubt on that point.

Thus, where neither the competition problems in question nor the nature of the commitments proposed by the undertakings concerned are such as to prevent the Commission from concluding that the serious doubts can be removed on the completion of Phase I, the Commission does not err in law in not initiating Phase II.

(see paras 169-170, 176, 181-182)

Although a sale of assets is often the most suitable corrective measure for easily remedying a competition problem, particularly in the case of horizontal overlap, the possibility cannot in principle be ruled out that a licence agreement may be suitable for remedying identified competition problems. Thus, the possibility cannot automatically be ruled out that commitments which are prima facie behavioural, for instance not to use a trade mark for a certain period, or to make part of the production capacity of the entity arising from the concentration available to third-party competitors or, more generally, to grant access to essential facilities on non-discriminatory terms, may themselves also be capable of preventing the emergence or strengthening of a dominant position. Moreover, whilst the effectiveness of such a licence depends on several factors which are more difficult to assess than a sale of assets, it cannot automatically be ruled out that the Commission will be able to assess the relevant parameters in the course of Phase I.

4. A commitment which is behavioural is capable of remedying the competition problems created by a concentration in so far as it prevents the emergence or strengthening of a dominant position. This is true, in the case of a concentration between undertakings operating on markets for small electrical household appliances which are characterised by the fact that trade marks are the most important factor in competition on those markets, of a commitment to grant a trade-mark licence. However, the duration of that commitment must be such that, given the average life of the products concerned, it enables the licensees, over a transitional period during which they will be entitled to use their own trade mark together with the licensed trade mark ('co-branding'), to ensure the migration from that trade mark to their own trade marks, so that they can compete

effectively against the trade mark concerned after the transitional period.

(see paras 191-193, 195, 205, 207, 210)

5. In the context of a commitment by the parties to a concentration to grant trade-mark licences in respect of a variety of products to different licensees in different Member States, which is designed to remedy the competition concerns, a clause providing for the imposition on one of the licensees, for a limited period of two years, of an obligation partly to obtain supplies of a single product at a supply price equal to the industrial cost price plus general costs, so as to preserve jobs at certain sites, is permissible since it does not have the effect of strengthening the position of the new entity arising from the concentration or of rendering the licence less effective. The same is true where the commitment provides the licensees with a mere option of obtaining their supplies from the new entity.

(see paras 238-242)

6. The genuine absence of any significant overlap between the parties to a concentration is such as to rule out serious doubts as to the compatibility of the concentration with the common market, even with respect to the product markets in which the new entity arising from the concentration has a market share of more than 40% because, in that case, the dominant position is not being created or strengthened by the concentration, since it already exists.

However, in order for the Court to be able to exercise its power of review properly, a Commission decision declaring that the concentration does not raise serious doubts because there is no overlap must not merely indicate the market shares of the parties concerned within a 10% bracket, since, although it may be true that there is no significant overlap where the market share of one of the undertakings is close to 0%, the same cannot be true where it is close to 10%.

Moreover, whilst such an absence of significant overlap is a valid reason for concluding that there are no serious doubts when the Commission is at first examining competition in an individual product market, there are no grounds

for taking that factor into account when carrying out a more general examination of all the product markets of a particular country.

(see paras 318, 320-321, 326)

7. The mere finding that, although it would hold a market share equal to or exceeding 40%, the entity arising from the concentration would face competitors does not mean that the concentration does not raise doubts in relation to that market. The presence of competitors is likely to modify, or even eliminate, that entity's dominant position only if those competitors hold a strong position which acts as a genuine counterweight.

(see para. 329)

8. Where the Commission bases its assessment of whether a notified concentration raises serious doubts as to its compatibility with the common market on a finding that each of the products sold by the parties to the concentration corresponds to a distinct market and that the various national markets are likewise distinct, it must appraise the competition situation on a each market separately.

It is not, however, an absolute rule that different product markets constitute distinct markets and it may be found necessary to modify the assessment of a particular product market in the light of the competition situation in all other product markets of the Member State concerned.

There is particular justification for taking the overall competition situation into account where the parties to the concentration operate in a sector in which the brand is the most important competition factor and in which the reputation of the brand is to the advantage of all the products carrying it even though they represent the same number of distinct markets.

Likewise, in order to assess an undertaking's competition position, the Commission may have to take into account its portfolio of brands or the fact that it has large market shares in a number of markets for the products concerned.

Where, having regard to the likelihood that a dominant position will be created or strengthened, that assessment of the overall competition situation gives rise to serious doubts as to the compatibility of the proposed concentration with the common market, the Commission cannot rule out those doubts by arguing that they will become a reality only if the markets affected by the dominant position created by the concentration generate the largest part of the turnover achieved by the entity arising from the concentration, which could then adopt anti-competitive practices without there being a risk that distributors would penalise that conduct by spurning its products on the markets on which, in total, it achieves the largest part of its turnover, even though its position is not dominant.

Not only does Regulation No 4064/89 aim to prohibit the creation or strengthening of a dominant position rather than the abuse of one, but the unavoidability and dissuasive effect of the retaliation by distributors and, therefore, the absence of a risk of abusive conduct by the entity arising from the concentration may not be presumed but rather must be established by the Commission to the requisite legal standard.

(see paras 339, 342-343, 349, 353, 360, 362-365)

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

(see paras 417-418)

10. 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 preservation 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 421-423)