

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 29 July 1987

**relating to a proceeding under Article 86 of the EEC Treaty (IV/32.279 —
BBI/Boosey & Hawkes: Interim measures)**

(Only the English text is authentic)

(87/500/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Whereas:

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty⁽¹⁾, as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 3 and 16 thereof,

Having regard to the application of Brass Band Instruments Ltd and others dated 12 March 1987 alleging an infringement of Article 86 of the Treaty by Boosey & Hawkes plc and requesting the Commission to adopt interim measures,

Having regard to the Commission Decision of 27 April 1987 to open a proceeding in this case,

Having given Boosey & Hawkes plc the opportunity to make known its views on the objections raised by the Commission in accordance with Article 19 (1) of Regulation No 17 and with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17⁽²⁾,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

I. THE FACTS

The nature of the present Decision

(1) This Decision provides for interim measures pending a final decision on the application made under Article 3 of Regulation No 17 by three United Kingdom undertakings: Brass Band Instruments Ltd ('BBI'), Gabriel's Horn House (Band Instrument Company) Ltd ('GHH'), both of Portsmouth, Hampshire, and RCN Music ('RCN') of Luton, Bedfordshire, alleging that an infringement of Article 86 of the EEC Treaty had been committed by Boosey & Hawkes plc ('B&H') of Edgware, Middlesex.

The undertakings

(2) The activities of B&H include the manufacture and sale of musical instruments. Prior to the present case it was the only British manufacturer of brass wind instruments. It had total world-wide sales (all products) in 1985 of £ 38 million (ECU 67 million).

(3) GHH is a major retailer of brass band instruments and, prior to the present case, had the second largest sales of B&H instruments in the United Kingdom. In 1985 its total turnover was £ 480 000 (ECU 840 000), of which 70 % was in B&H brass band instruments.

RCN is a repairer of brass band instruments for manufacturers, dealers and private customers which has in the past carried out contract repair work for B&H.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

(4) In April 1986 the principals of GHH and RCN founded a company, BBI, for the purpose of manufacturing and marketing a broad range of instruments for brass bands. BBI will operate from premises in Luton adjoining those of RCN and will receive certain marketing and financial support services from RCN and GHH.

The background

Brass bands

(5) B&H is one of the world's largest manufacturers of musical instruments. It is particularly known for its brass wind instruments. Its efforts in the brass sector are aimed particularly at supplying the needs of British-style brass bands. These bands originated in the North of England, where interest is particularly strong, but the 'brass band movement' has spread to many other countries including the Netherlands, Belgium, Denmark and Germany. Brass bands are distinguished from other types of bands using wind instruments (e.g. Marching, Fanfare, Harmonie or wind bands) by their all-brass instrumentation, (as laid down in championship rules), their musical repertoire and their distinctive sound. There is a strong emphasis on inter-band contests, and B&H is closely involved in the organization and promotion of the two major competitions, namely the United Kingdom National Championships and the European Brass Band Championships. The Championship rules which govern the instrumentation of the competing bands influence the composition of British-style brass bands generally.

(6) Brass band instrumentation comprises soprano cornets (E_b), cornets (B_b), flugel horns, tenor horns, baritones, trombones, euphoniums, and tubas (BB_b and EE_b). B&H manufactures several broad ranges of brass instruments to suit the particular requirements of different customer categories (contesting brass bands, educational, etc.). Its 'Sovereign' range is aimed particularly at contesting brass bands and its '700' range provides a slightly cheaper alternative while still being intended for competing bands. All the leading contesting brass bands in England are composed almost entirely of B&H instruments, and amongst enthusiasts as a whole the first preference is always for B&H. Typically a competing band will consist of 85 % to 90 % B&H instruments. The so-called 'background brass' instruments, i.e. tenor horns, baritones,

euphoniums and tubas, will almost invariably all be B&H instruments. There is some room for substitution in the case of 'foreground brass' (only 15 % of the instruments in the typical band) where the trombones and, to a lesser extent, cornets may be made by other manufacturers. According to the applicants, demand in the Community for brass band instruments is currently worth an estimated 10 million ECU, a figure contested by B&H as being too high. Only one other manufacturer in the world — Yamaha — currently makes a broad range of instruments intended for brass bands. B&H instruments usually command a substantial price premium over the equivalent Yamaha instruments. Despite this price difference, Yamaha has so far made only a limited impression on the market.

BBI

(7) BBI was set up by the principals of RCN (who were former employees of B&H) and of GHH specifically to compete with the B&H 'Sovereign' range of brass band instruments. BBI based some of its designs on instruments made by B&H's predecessors but in order to avoid copyright problems used only instruments made before 1912 when the United Kingdom Copyright Act came into force. A large proportion of components for BBI's instruments were to be made under contract by a German manufacturer and then assembled in the Luton factory. BBI plans to market a broad range by direct selling to brass bands, in contrast to B&H which sells primarily through specialist brass band dealers. B&H believed that the direct selling methods of BBI would enable that firm to undercut the prices of its retail dealer network, while offering a product of the same technical excellence. According to information reaching B&H, BBI intended to manufacture at the rate of 200 instruments per month, some 40 % of B&H's current production.

The complaint

(8) The applicants allege that, as soon as B&H became aware in late November 1986 of the existence of BBI and of its connections with GHH and RCN, it took a series of abusive actions to ensure that the new manufacturing venture was eliminated before it could become established.

Certain actions were said to have been aimed directly at BBI but others were (it is alleged) intended to undermine it indirectly by damaging the existing retail and repair businesses of the individuals behind the new venture.

(9) The most significant allegations may be summarized as follows :

- (a) that B&H had pursued unjustified litigation in the United Kingdom against BBI for breach of copyright which it (B&H) eventually had to abandon but which had the effect of imposing a heavy financial burden on the applicants and of delaying the launching of the new range at a critical time ;
- (b) that B&H had managed for some time effectively to cut off BBI's source of components in Germany by bringing an unjustified legal action for 'slavish copying' against the supplier (B&H lost both the initial proceedings and the later appeal) ;
- (c) that B&H had taken reprisals against GHH and RCN by withdrawing credit facilities and closing their account without notice, refusing them all further supplies of instruments and spare parts, harassing them by oppressive legal proceedings for debt, and in the case of GHH, attempting (unsuccessfully) to procure the finance company with which it worked to repossess GHH's stock.

(10) The present application for interim measures is concerned particularly with the refusal of supplies to GHH and RCN. No supplies have been made to either GHH or RCN since 8 December 1986 although all outstanding liabilities to B&H have been cleared since March. According to the applicants, their existing businesses are commercially dependent upon B&H and unless supplies are resumed there is a real and substantial risk of their bankruptcy with consequential harmful effects upon BBI.

The arguments of B&H

(11) The present Decision is not directly concerned with the allegations of vexatious litigation and other harassing tactics but only with the closure of accounts and refusals to supply.

In relation to this refusal to supply, B&H argues that its decision summarily to cut off GHH and RCN was not motivated by any desire to foreclose competition. The reason given to the applicants at the time was that they were bad payers. In the present proceedings B&H maintains this position and argues further that it was, and still is, entitled to refuse to do business with GHH and RCN because they had been 'disloyal and dishonest' in their dealings with B&H. Serious allegations (which

are strongly denied by the applicants) are made which relate to a period of several years ago.

B&H also argues that whether or not its charges are in fact well founded is irrelevant, the important factor being that it strongly believes them to be justified, so that were it now to be required to resume supplies to RCN or GHH on any terms whatever, the morale of its employees would be seriously damaged.

The documentary evidence

(12) It is correct that just before B&H became aware of the impending entry into the market of BBI it was strengthening its credit control and negotiations were in progress with GHH regarding a rolling payment scheme to clear its arrears (the sums owed to B&H on 'open account' were in addition to those due to the financing agents Borg Warner).

The applicants make the point that at this stage there was no talk from B&H that its account would abruptly be closed, and that the negotiations were being conducted in an amicable fashion. Further, it is said that a large part of the outstanding moneys related to quality disputes and goods which GHH had returned to B&H as defective. It says that it has always met its liabilities to the financing agents on time. Whatever the truth on this point may be, it appears from the documentary evidence obtained by the Commission during an investigation at B&H under Article 14 of Regulation No 17 that B&H regarded the arrival of BBI as a serious threat.

Internal reports and board minutes from November 1986 to February 1987 stress the 'competitive threat' from BBI and refer to 'strenuous efforts to combat this new competitor'.

The documentary evidence so far obtained would appear to support the applicants' claim that the actions taken against GHH and RCN were part of these efforts.

A report from the Chairman of the Board dated 28 November 1986 describes the new operation as a 'serious threat' to B&H and identifies GHH (said to be 'one of our best customers') as being behind it. The report sets out the action already taken by B&H to meet the threat. The first step listed is as follows : 'We are issuing a writ on GHH for the total amount owed to us (i.e. about £ 36 000) and financing agents Borg Warner are taking similar actions on the debt owing to them of about £ 119 000 and also trying to repossess the instruments'.

As for the allegations of fraud and misconduct made by B&H, the available evidence does not support the argument that they were the main reason for the decision to stop supplies. At this stage B&H does not wish details of its evidence to be revealed to the applicants. It would therefore be inappropriate, particularly at the stage of interim measures, for the Commission to consider whether the allegations are well founded or not. If they are relevant, they will have to be resolved either in the main proceedings or in some other appropriate forum.

The effect on the applicants

(13) According to the applicants, the actions taken by B&H against them have had serious effects. In the first place, the launching by BBI of the new range had been delayed for at least several months. The legal proceedings brought in England and Germany (although ultimately unsuccessful) meant that BBI could not begin operations even on a limited scale until recently at a time of year when very few instruments are sold. The effect of the various actions taken against GHH and RCN has (they claim) not only been to hinder the conduct of those businesses but also to put at risk the personal financial positions of their principals and consequently the viability of BBI. Statements made by GHH at the beginning of the dispute which might indicate that GHH could shift its business to other suppliers are explained as an expression of defiance or as bluff. Stocks of B&H instruments at GHH have fallen to only one third of normal levels and a considerable part is not readily saleable. Evidence has been provided by the applicants of the cumulative financial effect of the actions taken by B&H against BBI both directly and through GHH and RCN. The original working capital available to finance BBI has been exhausted. It is now said to be reliant upon overdraft facilities which are close to the limit set by the banks. The liabilities of BBI are secured against the private assets of the proprietors of GHH and RCN. If the new venture is abandoned the repercussions would extend to their businesses and to their personal finances.

II. LEGAL ASSESSMENT

Conditions for ordering interim measures

(14) The Commission's power under Article 3 of Regulation No 17 to require the termination of an

infringement of the competition rules includes the power to order interim measures in cases where, *inter alia*, the conduct complained of has the effect of injuring other undertakings and it is essential to ensure that pending a final decision no irreparable damage is caused (Case 792/79 *R Camera Care v. Commission* (1)).

It is not necessary for the Commission to make a definitive finding that an infringement has occurred. However, before it will grant interim measures in a case such as the present the Commission requires to be satisfied that:

- there is a reasonably strong *prima facie* case establishing an infringement,
- there is a likelihood of serious and irreparable harm to the applicants unless measures are ordered,
- there is an urgent need for protective measures.

Any measures the Commission takes must be of a temporary and conservatory nature and restricted to what is required in the given situation. The Commission must also have regard to the legitimate interests of the undertaking which is the subject of the interim measures. The interim measures may not go beyond the framework of the Commission's powers to order the termination of an infringement in the final decision.

Application of these principles to the present case

Prima facie case of infringement

(15) The main points at issue in this respect are (i) whether B&H holds a dominant position, and (ii) whether its behaviour constitutes an abuse. At this stage the Commission does not have to make a final determination on these points. The question here is whether legal and factual elements exist showing a reasonably strong *prima facie* case.

Dominant position

(16) The dominant position referred to in Article 86 relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers (Case 27/76 *United Brands v. Commission* (2)).

(1) (1980) ECR 119, p. 130.

(2) (1978) ECR 207.

Besides the ability to behave independently of competitive pressures, this may also involve the ability to exclude existing competition or prevent the entry of newcomers.

Relevant market

(17) To determine whether an undertaking is dominant it is necessary to identify the 'relevant market', i.e. the area of competition in which the market power of the allegedly dominant undertaking (and of any actual or potential competitors) is to be judged.

There are many producers of musical instruments supplying the Community. It is not alleged that B&H is dominant in this broad market or even in the wind or brass sectors as a whole. Brass instruments may be used by orchestras, by pupils in schools, or in a variety of types of professional or amateur bands. Within a broad product market, sub-markets may exist which constitute relevant markets for the purposes of the application of EEC competition rules. The essential question is whether the sub-market is sufficiently distinct in commercial reality to allow a supplier which dominates it the power to exclude competition or control prices.

B&H's efforts in the brass field are directed principally towards the particular needs of British-style brass bands. It is in this specialized market segment that BBI intended to compete with B&H (a fact remarked upon by B&H in its own documents). The evidence produced by the applicants indicated that this sector may reasonably constitute an identifiable market (or sub-market) in the Community with its own peculiar conditions of supply and demand. B&H now disputes the existence of any such identifiable market, but it is significant that in several of its own internal documents a discrete 'brass band' market is distinguished (in which it is said to be dominant).

The fact that a market is defined in relatively narrow terms does not exclude the application of Article 86 (Case 26/75 General Motors v. Commission⁽¹⁾; Case 22/78 Hugin v. Commission⁽²⁾). This may be the case particularly where there are significant barriers to entry.

B&H's market position

(18) On the assumption that the area of effective competition is the one defined above, the evidence

would support the applicants' argument that B&H is dominant. According to the applicants, B&H has a market share of some 80 % to 90 %. As its own documents show, B&H instruments are the 'automatic first choice' of all the top brass bands. The only serious competitor to B&H in this segment so far has been Yamaha, a Japanese manufacturer which after 20 years has, despite its size and resources, been unable to make a significant impression on the specialized brass band market. Competition from other musical instrument producers is peripheral. A high market share does not however on its own create a presumption of dominance. Where, however, a producer enjoying this attribute is able to control prices or restrict the entry of new competitors to the market, the requirements of Article 86 may be met.

Other factors which tend in the present case to support a preliminary finding of dominance include the strong buyer preference for B&H instruments, the price premium of B&H instruments over currently available substitutes, B&H's influence over access to the market by potential competitors through the dependence upon it of retail dealers and its technical lead and experience, its close identification with the brass band 'movement' and the probability of success (unless it is prevented) of the exercise of its market power against the applicants in the present case.

Abuse of dominant position

(19) A course of conduct adopted by a dominant undertaking with a view to excluding a competitor from the market by means other than legitimate competition on the merits may constitute an infringement of Article 86.

In the present case the documentary evidence indicates that B&H embarked on a course of conduct intended to remove the competitive threat from BBI, and that its withdrawal of supplies from GHH and RCN was part of that plan.

It is well established that refusal of supplies by a dominant producer to an established customer without objective justification may constitute an abuse under Article 86 (Case 27/76 United Brands v. Commission; Cases 6/73 and 7/73 Commercial Solvents⁽³⁾).

⁽¹⁾ (1975) ECR 1367.
⁽²⁾ (1979) ECR 1869.

⁽³⁾ (1974) ECR 223.

On the facts of the present case, the dependence of GHH and RCN on B&H products is such that there was a substantial likelihood of their going out of business as a result of the withholding of supplies.

The injury to competition would be aggravated where (as is alleged here) the stated purpose of the action is indirectly to prevent the entry into the market of a potential competitor to the dominant producer.

A dominant undertaking may always take reasonable steps to protect its commercial interests, but such measures must be fair and proportional to the threat. The fact that a customer of a dominant producer becomes associated with a competitor or a potential competitor of that manufacturer does not normally entitle the dominant producer to withdraw all supplies immediately or to take reprisals against that customer.

There is no obligation placed on a dominant producer to subsidize competition to itself. In the case where a customer transfers its central activity to the promotion of a competing brand it may be that even a dominant producer is entitled to review its commercial relations with that customer and on giving adequate notice terminate any special relationship. However, the refusal of all supplies to GHH and RCN, and the other actions B&H has taken against them as part of its reaction to the perceived threat of BBI, would appear in the circumstances of the present case to go beyond the legitimate defence of B&H's commercial interests.

Effect on trade between Member States

(20) According to the applicants, B&H now has a virtual monopoly of the brass band instruments market in the Community. If BBI enters the market it would be the only serious competitor of B&H in this sector. BBI's planned operation will rely to a significant extent on the import of components to the United Kingdom from other Member States. Its new range of instruments will be marketed in other Member States besides the United Kingdom. The elimination of BBI as a competitor would thus have both a direct and a potential effect upon trade between Member States and affect the structure of competition in the relevant market sector.

Conclusion

(21) On the documentary evidence currently available, the Commission considers that a sufficient *prima facie* case of abuse under Article 86 has been established for it to order limited interim measures. It

may be however that following a full examination of the case B&H will be able to establish that its actions against GHH and RCN had a valid commercial justification. The present Decision does not pre-empt any ultimate finding to that effect or on the other aspects of the alleged abuse of dominant position.

Likelihood of irreparable harm

(22) On the basis of the evidence obtained there is good reason to suppose that unless B&H is forthwith required to resume supplies to GHH and RCN those two undertakings will soon be forced to cease trading, with consequential effects upon the viability of BBI. There would also be serious personal financial consequences for the owners of those businesses. An eventual finding in the main decision that B&H had abused its dominant position under Article 86 would be illusory if meanwhile BBI and the other undertakings had been put out of business. If the applicants go into liquidation, B&H will be confirmed as effectively the only producer of instruments suitable for brass bands in the Community.

Urgency

(23) The particular urgency in the present case arises from the fact that, although BBI is in theory now free to recommence the introduction of its new range, its continued existence is linked financially and commercially to that of GHH and RCN. These two undertakings have been refused supplies of instruments and spare parts by B&H since the beginning of the year and as a result their commercial activities are severely inhibited.

The order

(24) The Commission therefore intends to make an order which will as far as possible ensure that the applicants are not put out of business pending the final outcome of the administrative procedure by the very means of which the applicants complain. In the present case the most urgent need is to require B&H to resume supplies of its instruments, spare parts and materials to GHH and RCN.

The terms applicable to GHH should be equivalent to those which were applied before the cessation of supplies. Given the state of relations between B&H and the applicants, it would however be inappropriate to require B&H to extend them credit. Delivery should therefore be made against cash or banker's draft. However, if payment is made in this way, GHH should be given the usual 5 % rebate for prompt payment.

As regards supplies of spare parts and materials to the repair business of RCN, B&H should charge prices which are reasonable, although payment should be made in cash.

As regards the duration of the order, it is appropriate to draw a distinction between GHH and RCN. Since it could be said that GHH could not expect to retain indefinitely its special status as a B&H main dealer once the new BBI range comes in, it is fair to limit any order to such limited period as is necessary to enable it to adjust. The Commission considers that a reasonable period is until the end of 1987. During and after that period however GHH should be able to obtain supplies from other dealers and B&H should not prevent it from doing so. ('Guidelines' issued by B&H to its dealers discourage the practice.) In the case of RCN, its legitimate need for B&H spare parts and materials will persist in the foreseeable future not only to recondition B&H instruments taken in part-exchange but also to meet the needs of consumers. According to the applicants, RCN is the major specialist repairer of brass band instruments in the United Kingdom.

(25) The Commission considers that the legitimate interests of B&H will not be affected adversely by the present Decision. GHH was considered its 'best customer' prior to the dispute and B&H cannot be harmed by resuming supplies on a cash basis for a limited period. The susceptibilities of B&H as to the effect on employees' morale if its management is compelled to supply the applicants are not a decisive consideration.

The Commission has as a condition for granting the present interim measures required GHH and RCN to undertake to deal fairly with B&H instruments and in particular not publicly to denigrate them or use them as a bait or loss-leader. In the event of any breach of this undertaking the Commission reserves the right to amend or cancel the present Decision.

Finally, it is necessary to make provision for periodic penalty payments in the event of any default under the terms of this Decision and to make provision for reporting in the event that B&H is for genuine reasons unable to meet a particular order,

receipt any reasonable order placed in writing (including by telex or telefax) after the notification of this Decision by GHH or RCN for B&H musical instruments or spare parts or materials intended for the repair or maintenance of B&H instruments, provided that, if the applicants choose to obtain the said instruments or spare parts ex works, B&H is entitled to insist that collection be made by an independent carrier.

Article 2

1. Subject to paragraph 3, B&H is required to make supplies to GHH on terms and conditions equivalent to those applied immediately before the closure of its account. Supplies to RCN shall be made at reasonable prices.
2. B&H shall notify the Commission forthwith of any change in its list prices and terms of trade.
3. B&H shall not be required to supply GHH or RCN except against payment in cash or by banker's draft but in such a case it shall afford GHH the normal cash settlement discount (currently 5 %) granted to 'approved accounts'.
4. Save as otherwise provided in this Decision, B&H's standard terms of delivery for the United Kingdom shall apply to all transactions with GHH and RCN.

Article 3

B&H shall take all reasonable steps by way of quality control procedures to ensure that the instruments supplied to GHH are of merchantable quality and free from defects and that the spare parts and materials supplied to RCN are similarly fit for their intended purpose and free from defects. In the event that any item ordered cannot immediately be supplied, B&H shall forthwith inform the Commission by telex of the reasons for non-availability and indicate the steps it proposes to take to meet the order within a reasonable time or the reasons why it is not possible to do so.

HAS ADOPTED THIS DECISION :

Article 1

Boosey & Hawkes (including its subsidiary companies) ('B&H') is hereby required to meet within seven days of

Article 4

B&H shall not prevent or seek to prevent GHH from obtaining supplies of B&H brass band instruments from any B&H recommended brass band dealer.

Article 5

A penalty of 1 000 ECU per day shall be payable in respect of any period during which B&H fails to comply with the provisions of this Decision.

Article 6

The provisions of this Decision as regards the obligation to supply GHH shall continue until 31 December 1987. As regards the other obligations, this Decision shall apply until the termination of the administrative procedure in the present case.

Article 7

This Decision is addressed to Boosey & Hawkes plc, Sonorous Works, Deansbrook Road, Edgware, Middlesex, United Kingdom.

Done at Brussels, 29 July 1987.

For the Commission

Peter SUTHERLAND

Member of the Commission