

In support of its action, the applicant raises the following heads of complaint:

— breach of Article 2(1) of the Regulation on concentrations ⁽¹⁾ by reason of what the applicant considers to be the inappropriate appraisal of the proposed concentration, in that the Commission failed to take account of the history of the banking sector in Poland, the large amount of foreign investment and the reasons why the Polish Government introduced limitations on investments in the event of the privatisation of State banks. The applicant further submits that the Commission breached Article 2(1) of the Regulation inasmuch as, when concluding its appraisal of the compatibility of the proposed concentration with the common market, it failed to take account of the existence and effects of Article 3(9) of the privatisation agreement, ⁽²⁾ which, in the view of the applicant, amounts to a legal barrier to market entry within the terms of Article 2(1)(b) of the Regulation on concentrations. The applicant also contends that the Commission adopted an inappropriate evaluation of concentrations on the Polish banking market and also erred in its appraisal of the effect which the proposed concentration would have on competition within the market for investment funds and a number of specific markets within the Polish banking sector;

— breach of Article 6(1) of the Regulation on concentrations, inasmuch as the proposed concentration ought, according to the applicant, to have given rise to serious doubts on the Commission's part as to its compatibility with the common market and should have led to the initiation of proceedings or the second phase of the investigation as to whether the proposed operation comes within the scope of the Regulation on concentrations;

— breach of Article 11 of the Regulation on concentrations, breach of Article 5 of the implementing regulation ⁽³⁾ and infringement of the principle of fair and proper administration; the applicant takes the view that the notification of the concentration, as indicated by the parties, was incomplete inasmuch as it did not contain any information on the matter of the conditions of the privatisation agreement, in particular Article 3 thereof, and as such should not at all have been taken into consideration by the Commission;

— breach of the duty to cooperate resulting from Article 10 of the Treaty establishing the European Community by reason of the failure, before the decision was adopted, to take into consideration the legitimate interests of the Republic of Poland, the protection of which is provided for in Article 21(4) of the Regulation on concentrations; in the view of the applicant, the Commission was under an obligation, prior to the adoption of the decision recognising the concentration as being compatible with the common market, to take action for the purpose of obtaining full information on any legitimate interests of the Member States, *a fortiori* as it was possible for the Commission, when monitoring the Polish banking market over the period prior to the Republic of Poland's accession to the European Union, to familiarise itself with the structure of that market, and the Commission must have been aware of

the existence of a legitimate public interest on the part of the Polish Government in guaranteeing the application and implementation of the strategies of de-monopolisation and privatisation;

— breach of Article 253 EC and of the obligation to provide specific reasons for a decision, a failure which, in the view of the applicant, renders more difficult the reconstruction and monitoring of the correctness of the process by which the law is applied by the Commission.

⁽¹⁾ Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1).

⁽²⁾ Agreement on the sale of shares in Bank Polska Kasa Opieki Spółka Akcyjna – Grupa Pekao S.A. entered into on 23 June 1999 between the State Treasury of the Republic of Poland and Unicredito Italiano SpA and Allianz AG.

⁽³⁾ Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2004 L 133, p. 1).

Action brought on 21 February 2006 — Fardem Packaging v Commission

(Case T-51/06)

(2006/C 96/34)

Language of the case: Dutch

Parties

Applicant: Fardem Packaging B.V. (Edam, Netherlands) (represented by: F.J. Leeflang, lawyer)

Defendant: Commission of the European Communities

Form of order sought

The applicant claims that the Court should:

- set aside in whole or in part the decision addressed to Fardem;
- reduce the fine imposed on Fardem;
- order the Commission to pay the costs of the present proceedings.

Pleas in law and main arguments

The applicant is challenging the Commission decision of 30 November 2005 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/F/38.354 — Industrial bags), in which the applicant was held to be jointly and severally liable in respect of its participation in a cartel and ordered to pay a fine.

In support of its action the applicant alleges breach of Article 81 EC, Article 253 EC, and Article 23(2) of Regulation No 1/2003, as well as infringement of the principle of care, the principle that reasons must be given, and the principle of equal treatment.

The applicant first submits that the Commission has misunderstood the applicant's defence with regard to its conduct both before and after 1997. While the applicant does not deny that it took part in the cartel, it points out that, prior to 1997, it was entirely dependent on its then parent company. After 1997, however, it was independent and its intentions altered gradually but fundamentally.

The applicant goes on to submit that the Commission proceeds on the basis of an erroneous appraisal of the facts with regard to the applicant's participation in the 'Valveplast', 'Benelux' and 'Teppema' groups, as also with regard to its participation in the 'Belgium' and 'Block Bags' groups. The applicant claims that the Commission accepted a number of conclusions which were negligent and inaccurate in regard to several forms of conduct. The applicant also points out that the Commission failed to take any account of the fact that the 'Belgium' and 'Block Bags' groups were terminated prior to 1997.

Furthermore, the applicant alleges that the Commission erred in its appraisal of the facts relating to the determination of geographical markets. The applicant points out in this regard that it has no turnover in Spain and only a minimal turnover in France.

The applicant also criticises the Commission on the ground that it did not apply the leniency notice to the applicant and that it failed to treat certain facts indicated by the applicant as amounting to mitigating circumstances.

With regard to the determination of the basic amount of the fine, the applicant disputes that the individual market shares were determined on the basis of turnover achieved instead of tonnage, the application of differentiated treatment in categories on the basis of market share and the expression of that differentiation in categories, as well as the application of the basic amount of the fine to each category as determined.

The applicant concludes that the Commission was wrong to decide that the applicant and Kendrion N.V. constituted an economic unit, on which ground Kendrion was unjustly fined as a result of a breach committed by the applicant.

Action brought on 21 February 2006 — Harry's Morato v OHIM

(Case T-52/06)

(2006/C 96/35)

Language of the case: Italian

Parties

Applicant: Harry's Morato SpA (Altavilla Vicentina, Italy) (represented by: Niccoló Ferretti, Giovanni Casucci, Fabio Trevisan, lawyers)

Defendant: Office for Harmonisation in the Internal Market (OHIM)

Other party to the proceedings before the Board of Appeal: Ferrero OhG mbH

Form of order sought

The applicant claims that the Court should:

- amend decision R 600/2005-1 of the First Board of Appeal of 16 December 2005;
- call on the OHIM to immediately register the trade mark 'Morato' further to the application for registration No 1 849 439 and subsequent restriction, in the absence of any real subjective impediment and in any case in view of the fact that it does not conflict with the trade mark 'MORATO', and order the defendant to pay the costs.

Pleas in law and main arguments

Applicant for a Community trade mark: The applicant

Community trade mark concerned: Figurative mark 'Morato' (application for registration No 1 849 439), for goods in Class 30.

Proprietor of the mark or sign cited in the opposition proceedings: FERRERO OHG mbH.

Mark or sign cited in opposition: German word mark 'MORETTO' (No 39 707 273), for goods in Class 30.