Pleas in law and main arguments

In support of the action, the applicant relies on two pleas in law.

1. First plea in law, alleging infringement of Article 13(2) of the Treaty on European Union and of Article 27(3) and (4) of Council Directive 92/83/EEC of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages. By adopting the contested Regulation the Commission is alleged to have interfered in the Czech national requirements for the complete denaturing of alcohol, despite the fact that the Czech Republic had not sent any communication to the Commission under Article 27(3) of Directive 92/83 and the Commission had repeatedly, on the other hand, communicated that it disagreed with that approach. Under Article 27(4) of Directive 92/83, it is however not permissible to interfere in a Member States national requirements for the complete denaturing of alcohol without a communication from that Member State.

2. Second plea in law, alleging infringement of Article 27(1)(a) of Directive 92/83, since eurodenaturant 1:1:1 does not meet the purpose of that provision in so far as it does not provide sufficient guarantees in the fight against tax evasion. Eurodenaturant 1:1:1 is a very weak denaturing mixture, and alcohol completely denatured with that mixture may easily be misused for the manufacture of alcoholic beverages.

Action brought on 14 January 2017 — Fastweb v Commission

(Case T-19/17)

(2017/C 070/36)

Language of the case: Italian

Parties

Applicant: Fastweb S.p.A. (Milan, Italy) (represented by: M. Merola, L. Armati, A. Guarino and E. Cerchi, lawyers)

Defendant: European Commission

Form of order sought

The applicant claims that the Court should:

— annul the contested decision in its entirety;

— order the Commission to pay the costs of the proceedings.

Pleas in law and main arguments

Fastweb S.p.A. is seeking annulment of the decision of 1 September 2016 by which the European Commission authorised the merger in Case M.7758 Hutchinson 3 Italy/Wind/JV, pursuant to Article 8(2) of [Council] Regulation (EC) No 139/2004 [of 20 January 2004] on the control of concentrations between undertakings ('the EC Merger Regulation') (OJ 2004 L 24, p. 1), declaring the transaction whereby Hutchinson Europe Telecommunications (HET) and VimpelCom Luxembourg Holdings (VIP) acquire joint control of a newly-created joint venture (JV) by conferring on that JV their respective activities in the telecommunications sector in Italy to be compatible with the internal market, that compatibility being subject to conditions and obligations aimed at enabling the entry into the internal market of a new [mobile] network operator (MNO).

In support of the action, the applicant relies on seven pleas in law.

1. First plea in law, alleging infringement of essential procedural requirements, infringement of the principles of sound administration and transparency, and infringement of Article 8 of the regulation mentioned above.

— The applicant claims in that regard that the Commission's investigation is vitiated by serious and manifest omissions, first and foremost of a procedural nature, in particular: (A) shortcomings that occurred before the final commitments were submitted, consisting in a failure to prepare, when faced with several serious candidates interested in the package of measures, a transparent and non-discriminatory procedure capable of guaranteeing that the best candidate would be selected, and in incorrectly accepting a 'fix-it-first' preventive remedy proposed too late in the procedure; and (B) shortcomings in the inquiry that took place after the final commitments were submitted, in particular the failure to assess certain aspects of those commitments (for example with regard to the roaming agreement) and the lack of adequate further examination regarding the suitability of the proposed acquirer, shortcomings rendered more obvious by the lack of market testing.

2. Second plea in law, alleging a manifest error of assessment and shortcomings in the Commission's investigation in so far as the Commission considered that the entry of a new MNO was in itself sufficient to resolve the horizontal effects of the merger, without considering the factors that had determined the success of the entry of H3G, a wholly-owned subsidiary of Hutchinson through which the latter operates.

— The applicant claims in that regard that the Commission, in particular, did not concern itself with verifying whether the new MNO had (whether on the retail market or on the wholesale market) operating capacity, economic conditions and incentives at its disposal that were at least equivalent, as a whole, to those of H3G, which in its early years was operating within a rapidly-expanding market. In addition, the Commission should have taken into consideration the effect produced on competitive dynamics by the one-sidedness of the termination rate available to H3G, which gave it a significant advantage with respect to other MNOs.

3. Third plea in law, alleging a manifest error of assessment of the package of commitments.

— The applicant claims in that regard that the comparison with H3G's frequency holdings pre-merger in itself raises serious doubts regarding the adequacy of the proposed spectrum allocation. In addition, the Commission relied on future, uncertain events, such as the participation of the new MNO in the future calls for tenders, without however taking into account the high costs connected with the impending renewal and refarming of the transferred frequencies. The Commission accepted the transfer of an inadequate number of sites, relying on uncertain agreements with the tower companies. Lastly, the transitional agreement concluded with the notifying parties, which has a structure based on capacity, strongly reduces the incentive to invest.

4. Fourth plea in law, alleging that the Commission, by basing the analysis of the merger and the commitments on the incorrect assumption that the price is the only significant competitive factor within the relevant market, failed to conduct a proper inquiry.

— The applicant claims in that regard that the Commission disregarded the fact that network coverage and quality are of comparable importance, and that it should not have confined itself to a static analysis of the preferences of a very biased sample of users in the 'low spender' category. In addition, the Commission disregarded the prospective importance of the merger, which is decisive for a new entrant, which requires additional bargaining levers compared with an established operator (such as H3G). The selection of an acquirer capable of addressing the converging demand would have ensured greater effectiveness and sustainability of the commitments over time.

5. Fifth plea in law, alleging an incorrect assessment of the suitability of the commitments for resolving the concerns regarding coordinated effects on the retail market.

— The applicant claims in that regard that, in order to be able to act in a truly aggressive way and 'break' the collusive equilibrium, the new entrant would have to be able to act independently of other MNOs. However, the formula selected for the making available of resources (roaming agreements and the national multi-operator core network (MOCN)) creates a close dependence between the new MNO and the JV for a protracted period. The contested decision is further vitiated by a failure to carry out a proper inquiry as regards the compatibility of the roaming contracts/national MOCN with Article 101 TFEU.

6. Sixth plea in law, alleging that the commitments are unsuitable for responding to the competition concerns on the wholesale access market.

— The applicant claims in that regard that, in particular, the Commission erred in its reconstruction of the counter-factual scenario and in not requiring any specific measure, relying exclusively on the assurance that Iliad will have an incentive to offer such services notwithstanding (i) the lack of measures to that effect and (ii) that operator's experience in France. On the contrary, the commitments encourage the new MNO to target and acquire specifically and solely the clientele of mobile virtual network operators (MVNOs).

7. Seventh plea in law, alleging infringement of Article 8(2) of Regulation No 139/2004 and infringement of the principle of sound administration.

   — The applicant claims in that regard that the Commission accepted Iliad as a suitable acquirer without taking into consideration the risks to the effectiveness of the commitments inherent in the entry of an operator with its characteristics and without adequate guarantees having been provided in the commitments, in particular with regard to network coverage/quality.

Action brought on 18 January 2017 — Jalkh v Parliament

(Case T-26/17)

(2017/C 070/37)

Language of the case: French

Parties

Applicant: Jean-François Jalkh (Gretz-Armainvillers, France) (represented by: J.-P. Le Moigne, lawyer)

Defendant: European Parliament

Form of order sought

The applicant claims that the General Court should:

— annul the decision of 22 November 2016 taken by the European Parliament to waive the applicant's parliamentary immunity and to adopt report No A8-3019/2016 of Mr [X];

— order the European Parliament to pay to Mr Jalkh the sum of EUR 8 000 by way of compensation for the non-material damage suffered;

— order the European Parliament to pay all the costs of the proceedings;

— order the European Parliament to pay to Mr Jalkh, by way of reimbursement of recoverable costs, the sum of EUR 5 000.

Pleas in law and main arguments

In support of the action, the applicant relies on nine pleas in law.

1. First plea in law, alleging infringement of Article 9 of the Protocol on the privileges and immunities of the European Communities. The applicant is of the view that the Parliament misapplied the rules on immunity of Members of the French Parliament, and that it intentionally confuses Articles 8 and 9 of Protocol No 7 on the privileges and immunities of the European Union.

2. Second plea in law, based on the necessary application of Article 9 of the Protocol on the privileges and immunities of the European Communities. According to the applicant, the statements and opinions expressed in Mr Le Pen's speech on the Front National website came within the scope of the political activities of Mr Le Pen and the applicant.

3. Third plea in law, alleging breach of the very concept of parliamentary immunity. The applicant takes the view that the European Parliament feigns ignorance of the fact that, in a democracy, parliamentary immunity offers a twofold immunity from legal proceedings: non-liability and freedom from criminal prosecution.

4. Fourth plea in law, alleging failure to adhere to the consistent decision-making practice of the Committee on Legal Affairs of the European Parliament on:

   — freedom of expression

   — *fumus persecutionis*

5. Fifth plea in law, alleging failure to respect Community legal certainty and frustration of legitimate expectations.