4. Fourth plea in law, alleging that the SRB has breached its obligation to provide reasons for the contested decision, contrary to Article 296 TFEU.

(1) Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1).

Action brought on 4 January 2019 — Clatronic International/EUIPO (PROFI CARE)

(Case T-5/19)

(2019/C 82/73)

Language of the case: English

Parties

Applicant: Clatronic International GmbH (Kempen, Germany) (represented by: O. Löffel, lawyer)

Defendant: European Union Intellectual Property Office (EUIPO)

Details of the proceedings before EUIPO

Trade mark at issue: International registration designating the European Union in respect of the figurative sign PROFI CARE — Application for registration No 1 372 358

Contested decision: Decision of the First Board of Appeal of EUIPO of 15 October 2018 in Case R 504/2018-1

Form of order sought

The applicant claims that the Court should:

— annul the contested decision;

— order EUIPO to pay the costs.

Pleas in law

— Infringement of Article 7(1)(b) and (c) of Regulation (EU) 2017/1001 of the European Parliament and of the Council;

— Infringement of Article 94(1) of Regulation (EU) 2017/1001 of the European Parliament and of the Council.

Action brought on 11 January 2019 — Fastweb v Commission

(Case T-19/19)

(2019/C 82/74)

Language of the case: Italian

Parties

Applicant: Fastweb SpA (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 decision of 31 August 2018 by which the Commission authorised the merger in Case M.9041 — HUTCHINSON/WIND TRE pursuant to Article 6(1)(b) and Article 6(2) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ('the Regulation');

— order the Commission to pay the costs.

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 Articles 2 and 8 of the Regulation: manifest error of assessment and shortcomings in the Commission's investigation in that the Commission considered that the entry of a new Mobile Network Operator (MNO) was in itself sufficient to resolve the horizontal effects of the merger, without considering the factors that had brought about the success of H3G.

   — In that regard, the applicant alleges a manifest error of assessment and shortcomings in the Commission's investigation in that 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 brought about the success of the entry of H3G. In Case M.7758, the Commission had already, in particular, not concerned 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 operated 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.

2. Second plea in law, alleging infringement of Articles 2 and 8 of the Regulation and manifest error of assessment of the MNO package.

   — In that regard, the applicant alleges a manifest error of assessment as regards the package of commitments. In particular, 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 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.

3. Third plea in law, alleging infringement of Articles 2 and 8 of the Regulation, manifest error of assessment and failure to conduct a proper inquiry by basing the analysis of the merger and the commitments on the incorrect assumption that price is the only significant competitive factor, disregarding quality and convergence.

   — The applicant refers to the failure to conduct a proper inquiry in that the Commission based the analysis of the merger and the commitments on the incorrect assumption that price is the only significant competitive factor in the relevant market. The Commission disregarded the fact that network coverage and quality are of comparable importance and 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 also disregarded the potential importance of the convergence, 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.

4. Fourth plea in law, alleging infringement of Articles 2 and 8 of the Regulation and failure to conduct a proper inquiry in that the Commission failed to consider that the merger pursued an anti-competitive objective.

— The applicant claims in that regard that whereas, on the one hand, the Commission accepted that, for the parties, the reasons underlying the merger was market repair, on the other hand, it did not undertake any analysis of the anti-competitive coordination pursued by the parties by means of the merger. The new decision is therefore vitiated by that serious failure to conduct a proper inquiry.

5. Fifth plea in law, alleging infringement of Articles 2 and 8 of the Regulation and manifest error of assessment as regards the suitability of the commitments intended to meet the concerns regarding coordinated action on the retail market and failure to conduct a proper inquiry also in respect of the compliance of roaming agreements and the national multi-operator core network (MOCN) with Article 101 TFEU.

— The applicant complains that the suitability of the commitments intended to meet the concerns regarding coordinated action on the retail market was incorrectly assessed. 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 national MOCN) creates a close degree of dependence between new MNO and the Joint Venture for a protracted period, as demonstrated by the most recent auctions for the award of frequencies in Italy and, more generally, the commercial policies of all MNOs. The contested decision is further vitiated by a failure to carry out a proper inquiry as regards the compatibility of the roaming agreements and national MOCN with Article 101 TFEU.

6. Sixth plea in law, alleging infringement of Articles 2 and 8 of the Regulation and manifest error of assessment as regards the suitability of the commitments intended to respond to the competition concerns on the wholesale access market and call origination on mobile networks.

— The applicant claims in that regard that the Commission erred in its reconstruction of the counter-factual scenario and in considering 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 customers of Mobile Virtual Network Operators.

7. Seventh plea in law, alleging infringement of Article 8(2) of the Regulation, errors of assessment and breach of the principle of sound administration.

— The applicant alleges in that regard infringement of Article 8(2) of the Regulation (error of assessment) and breach of the principle of sound administration (failure to conduct a proper inquiry) in that it accepted Iliad as a suitable acquirer without taking into consideration the risks to the effectiveness of the commitments relating to the entry of an operator with Iliad's characteristics and without adequate guarantees having been provided in the commitments, in particular with regard to network coverage/quality.

8. Eighth plea in law, alleging manifest error of assessment and failure to conduct a proper inquiry in that the Commission failed to assess in any way the reasons underlying the new merger.

— The applicant claims in that regard that the Commission itself, already in the 2016 decision, had indicated that 'market repair' was the reason for the merger, without nevertheless analysing the implications. In the new decision, the Commission, once again, did not take that essential fact into consideration or carry out any assessment of the objectives of the new operation, including with respect to the fulfilment of the reasons underlying the original operation. Furthermore, the Commission — in breach of its own practice and case-law — failed to assess the immediate effects of the removal of competitive pressure on the market linked to the co-decision power of VEON.

9. Ninth plea in law, alleging manifest error of assessment in that the Commission did not consider it necessary, in the light of the changing market conditions, to adjust the commitments.

— The applicant submits in this regard that the Commission expressed the view that there had been no significant changes in the relevant market compared to the time of adoption of the 2016 decision in Case M.7758, without, however, giving adequate reasons.