

Press and Information Division

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Judgments of the Court of First Instance in Cases T-114/02 et T-119/02

BaByliss v Commission // Philips v Commission

THE COURT OF FIRST INSTANCE FOR THE MOST PART CONFIRMS THE COMMISSION'S DECISION APPROVING THE MERGER BETWEEN SEB AND MOULINEX.

Nevertheless the Court annuls the decision insofar as it concerns the markets in those countries not subject to the conditions imposed by the Commission in approving that merger.

In 2002 the Commission approved a merger by which SEB (a French manufacturer of small electrical household goods with worldwide trade marks) took control of certain activities of Moulinex (a French company, and direct competitor of SEB) in the area of small electrical kitchen goods. This merger took place in the framework of a receivership procedure in France and was notified to the Commission in conformity with the Community Merger Regulation.

In order to dispel serious doubts aroused by the merger in relation to competition, the Commission's decision was subjected to certain commitments, notably:

- a) SEB must grant third parties an exclusive licence to the mark Moulinex for a period of 5 years in 9 member States of the European Economic area (Germany, Austria, Belgium, Denmark, Greece, Norway, the Netherlands, Portugal and Sweden) in order to permit those parties to use that mark with their own mark (co-branding) and
- b) SEB must abstain from using the mark Moulinex for three years following the expiry of these licences.

The final version of these undertakings was proposed by SEB and Moulinex only after the expiry of the time period laid down by the Merger Regulation (three weeks after the notification of the concentration).

However the Commission approved the merger without imposing any commitments in regard to the Spanish, Italian, Finnish, British and Irish markets.

The Commission also complied with the request made by the French competition authorities to allow them to examine the effects of the proposed merger on competition in France.

BaByliss, a French company, which wished to acquire some of the activities of Moulinex and position itself as a potential competitor on the market for small household electrical appliances brought a case before the Court of First Instance against the decision of the Commission.

Moreover, Philips, a Dutch company and a direct competitor of SEB, also brought a case before the Court of First Instance requesting the annulment of the merger decision. In addition, Philips contested the referral to the French authorities.

The evaluation of the Court of First Instance

Expiry of the time limit

The Court considers that the time limit is only imposed on the notifying parties, not on the Commission. It observes that the limit was designed to allow the Commission to have the appropriate time to evaluate the commitments, to consult third parties and also to avoid commitments being presented at “the last minute”. The Commission, therefore, had the right to accept commitments after the expiry of the three week time limit.

The commitments

The Court considers that Philips could not validly argue that the licence holders would suffer from parallel imports of Moulinex goods. During the approval procedure, Philips had themselves underlined the absence of any significant parallel imports on the markets in question and the existence of distinct national markets, with regard to the national distributions, supply and logistics structures.

The Court also considers that the duration of the licences provided for by the commitments was adequate. It observes that, if the licences for the mark Moulinex are conceded for a period of five years, SEB would be deprived, by virtue of the commitments, of the right to use the Moulinex mark in the nine Member States concerned for eight years. The migration of the Moulinex mark to the marks of the licencees was therefore assured, notably in view of the characteristics of the markets (in particular the life cycle of the products in question of 3 years)

However, the Court annuls the decision insofar as it concerns the markets in the countries not covered by the commitments. According to the Commission, if in these countries, the total turnover of the combined SEB-Moulinex on the markets where they would have a dominant position, only represented a small amount of their total turnover, retailers would be able to punish any attempt at anti-competitive behaviour by SEB-Moulinex on other markets (product range effect)

The Court rejects this justification. In this respect, it notes, particularly, that the Commission omitted to take account of the entirety of the markets dominated by SEB-Moulinex, in particular those in which there was no significant overlap. These circumstances could effectively dismiss fears of the creation or reinforcement of a dominant position on the markets concerned, but the Commission should, however, have taken into consideration the total turnover for these markets in order to verify the possibility of a product range effect.

The decision to refer to the French authorities

The Court considers that the two conditions laid down by the Merger Regulation for referring a merger to a Member State were fulfilled. As regards the problem of the creation or reinforcement of a dominant position on the internal market of a Member State, the Court notes that the new entity would have an unrivalled range of products and portfolio of marks in France. As regards the existence of a distinct market, the Court observes that France effectively constitutes such a market, having regard, notably, to differences in price, different marks, and the national distribution, supply and logistics structures.

The Court states, however, that the systematic referral to member States when the products in question raise concerns for distinct national markets, could damage the principle of a « one stop shop » (sole control by the European authorities). Nevertheless, the Court considers that this risk is inherent in the referral procedure laid down in the Merger regulation. The Court considers that it is not its place to supplement Community legislation in view of the lacunae in the referral mechanism.

The French competition authorities approved the merger (insofar as it concerned France) without imposing any commitments, basing its decision on a theory (failing company theory^a) that the Commission had explicitly excluded in its decision of approval. The Court confirms, nevertheless, the legality of the referral should only be assessed at the moment that the Commission adopts its decision.

Consequently the Court rejects the claims by Philips against the decision in its entirety.

Reminder: An appeal, limited to points of law, can be brought before the Court of Justice against the decision of the Court of First Instance in the two months following its notification

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at approximately 3 pm today.*

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^a According to this theory, the clients of the failed company - Moulinex - would have been taken by its direct competitor - SEB - anyway.