JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
3 April 2003 *

In Case T-119/02,

Royal Philips Electronics NV, established at Eindhoven (Netherlands), represented by E.H. Pijnacker Hordijk and N.G. Cronstedt, lawyers,

applicant,

supported by

De'Longhi SpA., established at Treviso (Italy), represented by M. Merola, I. van Schendel, G. Crichlow and D. P. Domenicucci, lawyers,

intervener,

* Language of the case: English.

Commission of the European Communities, represented by V. Superti and K. Wiedner, of its Legal Service, acting as Agents, assisted by J.E. Flynn, lawyer, with an address for service in Luxembourg,

defendant,

supported by

SEB SA, established at Écully (France), represented by D. Voillemot and S. Hautbourg, lawyers,

and by

French Republic, represented by G. de Bergues et F. Million, acting as Agents, with an address for service in Luxembourg,

interveners,

APPLICATION for annulment of, first, the Commission's decision SG(2002)D/228078 of 8 January 2002, based on Article 6(1)(b) and Article 6(2) of Regulation No 4064/89 and Article 57 of the Agreement on the European Economic Area, not to oppose the concentration between SEB and Moulinex and to declare it compatible with the common market and with the

Agreement on the European Economic Area, subject to compliance with the proposed commitments (Case COMP/M.2621 — *SEB/Moulinex*) and, second, the Commission's decision C(2002)38, of 8 January 2002, adopted on the basis of Article 9(2)(a) of Regulation No 4064/89, referring part of the examination of that concentration to the French authorities,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: K. Lenaerts, President, J. Azizi and M. Jaeger, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 9 October 2002,

gives the following

Judgment

Relevant legislation

1 Article 1 of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1990 L 257, p. 13), as last

amended by Council Regulation (EC) No 1310/97 (OJ 1997 L 180, p. 1, hereinafter 'Regulation No 4064/89') provides that the regulation is to apply to concentrations with a Community dimension as defined in Article 1(2) and (3).

2 Under Article 4(1) of Regulation No 4064/89, concentrations must be notified to the Commission in advance.

3 Moreover, Article 7(1) of Regulation No 4064/89 provides that a concentration with a Community dimension may not be put into effect either before its notification or until it has been declared compatible with the common market. However, Article 7(4) allows the Commission to grant, on request, a derogation from that obligation to suspend the concentration.

4 Under Article 6(1)(b) of Regulation No 4064/89, where the Commission finds that the notified concentration, although falling within the scope of Regulation No 4064/89, does not raise serious doubts as to its compatibility with the common market, it must decide not to oppose it and must declare it compatible with the common market ('Phase I Procedure').

5 Conversely, under Article 6(1)(c), where the Commission finds that the notified concentration falls within the scope of Regulation No 4064/89 and raises serious doubts as to its compatibility with the common market, it must decide to initiate proceedings ('Phase II Procedure').

6 Article 6(2) of Regulation No 4064/89 provides as follows:

'Where the Commission finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts within the meaning of paragraph 1(c), it may decide to declare the concentration compatible with the common market pursuant to paragraph 1(b).

The Commission may attach to its decision under paragraph 1(b) conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into *vis-à-vis* the Commission with a view to rendering the concentration compatible with the common market.'

7 Under Article 18(1) of Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time-limits and hearings provided for in Regulation No 4064/89 (OJ 1998 L 61, p. 1), 'commitments proposed to the Commission by the undertakings concerned pursuant to Article 6(2) of Regulation (EEC) No 4064/89 which are intended by the parties to form the basis for a decision pursuant to Article 6(1)(b) of that Regulation shall be submitted to the Commission within not more than three weeks from the date of receipt of the notification'.

8 In its Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98 (OJ 2001 C 68, p. 3, hereinafter the 'Remedies Notice'), the Commission sets out its guidelines with respect to commitments.

9 Article 21(1) of Regulation No 4064/89 provides that the Commission is to have sole competence to take the decisions provided for in that regulation. Article 21(2) states that no Member State is to apply its national legislation on competition to any concentration that has a Community dimension.

10 However, Article 9 of Regulation No 4064/89 allows the Commission to refer the examination of a concentration with a Community dimension to the Member States. That article provides in particular:

'1. The Commission may, by means of a decision notified without delay to the undertakings concerned and the competent authorities of the other Member States, refer a notified concentration to the competent authorities of the Member State concerned in the following circumstances.

2. Within three weeks of the date of receipt of the copy of the notification a Member State may inform the Commission, which shall inform the undertakings concerned, that:

(a) a concentration threatens to create or to strengthen a dominant position as a result of which effective competition will be significantly impeded on a market within that Member State, which presents all the characteristics of a distinct market, or

(b) a concentration affects competition on a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.

3. If the Commission considers that, having regard to the market for the products or services in question and the geographical reference market within the meaning of paragraph 7, there is such a distinct market and that such a threat exists, either:

(a) it shall itself deal with the case in order to maintain or restore effective competition on the market concerned, or

(b) it shall refer the whole or part of the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law.

If, however, the Commission considers that such a distinct market or threat does not exist it shall adopt a decision to that effect which it shall address to the Member State concerned.

In cases where a Member State informs the Commission that a concentration affects competition in a distinct market within its territory that does not form a substantial part of the common market, the Commission shall refer the whole or part of the case relating to the distinct market concerned, if it considers that such a distinct market is affected.

...

6. The publication of any report or the announcement of the findings of the examination of the concentration by the competent authority of the Member State concerned shall be effected not more than four months after the Commission's referral.

7. The geographical reference market shall consist of the area in which the undertakings concerned are involved in the supply and demand of products and services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas. This assessment should take account in particular of the nature and characteristics of the products or services concerned, of the existence of entry barriers or of consumer preferences, of appreciable differences of the undertakings' market share between the area concerned and neighbouring areas or of substantial price differences.

8. In applying the provisions of this Article, the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned.

9. In accordance with the relevant provisions of the Treaty, any Member State may appeal to the Court of Justice, and in particular request the application of Article 186, for the purpose of applying its national competition law.

...'

Facts

1. *The undertakings concerned*

11 The application in the present case, made by Philips (hereinafter also referred to as 'the applicant'), seeks annulment of, first, the Commission's decision

approving, subject to conditions, the concentration between SEB and Moulinex (Commission's decision SG (2002) D/228078 of 8 January 2002) and, second, the Commission's decision referring part of the examination of that concentration to the French authorities (Commission's decision C (2002) 38 of 8 January 2002).

12 The applicant is a Dutch company active, *inter alia*, in the development, manufacture and marketing of small electrical household appliances. Its small electrical appliances are marketed within Europe under the 'Philips' trade mark.

13 SEB is a French company active worldwide in the development, production and marketing of small electrical household appliances. SEB markets its products under two trade marks with an international dimension ('Tefal' and 'Rowenta') and four local trade marks ('Calor' and 'SEB' in France and Belgium, 'Arno' in Brazil and the Mercosur countries and 'Samurai' in the Andean Pact countries).

14 Moulinex is a French company active worldwide in the development, production and marketing of small electrical household appliances. Moulinex markets its products under two international trade marks ('Moulinex' and 'Krups') and one local trade mark ('Swan' in the United Kingdom).

2. *National proceedings*

15 On 7 September 2001 bankruptcy proceedings were initiated against Moulinex before the Tribunal de Commerce (Commercial Court), Nanterre, France. In accordance with French law, administrators were appointed by the court to

establish whether Moulinex should continue its activities, be transferred to a third party or be liquidated. Since, in the present case, the continuation of its business activities was found to be impossible, the administrators set out to find a possible purchaser for all or part of the business activities of Moulinex.

16 In the course of those proceedings, SEB put forward a proposal to purchase certain elements of Moulinex's business relating to small electrical household appliances, namely:

— the right to exploit the trade marks Moulinex, Krups and Swan in respect of all products concerned; and

— part of the production facilities (eight of the 18 Moulinex production sites and some of the equipment located at the sites not purchased) allowing for the production of at least certain models of all the products manufactured by Moulinex apart from vacuum cleaners and microwave ovens; and

— some of the marketing companies, namely, for Europe, solely the German and Spanish companies.

17 In letters sent to the administrators (on 20 September 2001) and the President of the Tribunal de Commerce (on 3 October 2001), the applicant submitted proposals to purchase part of Moulinex, namely its worldwide Krups activities. The applicant believes that its proposals were never considered by the administrators. In any event, it did not receive a formal reply to the proposals submitted.

18 By judgment of 22 October 2001, the Nanterre Tribunal de Commerce accepted the purchase offer made by SEB.

3. *Procedure before the Commission*

19 On 27 September 2001, at the request of SEB, the Commission granted a derogation with suspensive effect as provided for by Article 7(4) of Regulation No 4064/89. The Commission's decision was principally based on the fact that the administrators had demanded that all purchase offers be unconditional. The derogation granted by the Commission was limited to the management of the purchased assets.

20 On 13 November 2001 the proposed partial acquisition by SEB of certain assets of Moulinex was notified to the Commission under Article 4 of Regulation No 4064/89.

21 On 21 November 2001 the Commission published the notice provided for by Article 4(3) of Regulation No 4064/89 in the *Official Journal of the European Communities*. In paragraph 4 of that notice, the Commission invited 'interested third parties to submit their possible observations on the proposed operation'.

22 The Commission sent out a request based on Article 11 of Regulation No 4064/89 to the applicant on 16 November 2001. Philips submitted its reply to the Commission's request on 26 November 2001.

23 The applicant also commissioned NERA to carry out a competitive assessment of the proposed transaction. The resulting report, dated 4 December 2001, was submitted by Philips to the Commission in the course of its examination.

24 On 5 December 2001 the parties to the concentration proposed commitments to the Commission.

25 The applicant had a meeting with the Commission on 6 December 2001.

26 On 7 December 2001 the French competition authorities requested a referral of part of the case under Article 9(2)(a) of Regulation No 4064/89 with respect to the effects of the concentration on competition on certain markets for the sale of small electrical household appliances in France.

27 The applicant submitted additional written evidence and information to the Commission on 10 and 19 December 2001.

28 In response to concerns expressed by the Commission, the parties to the concentration revised their initial commitments on 18 December 2001.

29 In a second request for information under Article 11 of Regulation No 4064/89 of 19 December 2001, the Commission asked Philips to comment on the modified commitments proposed. In its reply of 21 December 2001, Philips provided the Commission with its comments on the proposed commitments. In that reply,

Philips explained its view that the proposed commitments should be regarded as insufficient. Furthermore, Philips urged the Commission to reject the request made by the French authorities under Article 9(2)(a) of Regulation No 4064/89.

30 As a result of observations submitted by interested third parties, the parties to the concentration revised their commitments once again.

31 On 8 January 2002 the Commission approved, subject to conditions, the concentration between SEB and Moulinex on the basis of Article 6(1)(b) and (2) of Regulation No 4064/89 and Article 57 of the Agreement on the European Economic Area ('the Approval Decision'). However, that decision does not deal with the French market, inasmuch as the Commission acceded, by a further decision of 8 January 2002 ('the Referral Decision'), to the request for referral of part of the case by the French authorities.

32 The Approval Decision was communicated to Philips on 7 February 2002. The Referral Decision has neither been published nor communicated to Philips.

The Approval Decision

1. *The relevant product markets*

33 Paragraph 16 of the Approval Decision states that the economic sector affected by the concentration in issue is that of the sale of small electrical household

appliances, which can be divided into 13 product categories: deep friers and skillets; mini ovens; toasters; sandwich and waffle makers; appliances for the preparation of informal meals ('stone grill', 'wok party', 'raclette', 'fondue', etc.); electrical barbecues and indoor grills; rice and steam cookers; electric filter coffee machines; kettles; espresso machines; blenders and mixers; irons and ironing stations; and personal care appliances (health and beauty appliances). The first 11 product categories are commonly referred to as kitchenware.

34 The Commission considers that each category of appliances can constitute a distinct product market with the exception of mixers, irons and ironing stations and personal care appliances. However, the Commission takes the view that the question whether those product categories must be sub-divided can be left open since, however they are defined, the results of the competition analysis are the same (paragraph 25 of the Approval Decision).

35 The Commission's findings are based essentially on an analysis of demand-side substitutability, inasmuch as each category has a specific function and is intended for a distinct end use.

36 Furthermore, the Commission rejects supply-side substitutability by the supplier. It points out that, even if all the manufacturers were in a position to manufacture all types of small electrical household appliances, the cost and time involved in entering a new market may be substantial.

2. *The relevant geographical markets*

37 According to the Commission, 'a national definition of the relevant geographical markets must be regarded as having the greatest credibility at the end of the Phase I examination' (paragraph 30 of the Approval Decision).

3. *Importance of the trade marks*

38 The Commission states that trade marks are one of the principal factors influencing the choice of the ultimate consumer and therefore constitute one of the major elements of competition between manufacturers of small electrical household appliances (paragraph 36 of the Approval Decision).

39 In that connection, it points out that SEB and Moulinex invest significant sums in maintaining the reputation of their trade marks (paragraph 38 of the Approval Decision). It also states that the offers received in the course of the sale of Moulinex related almost exclusively to the trade marks of that group rather than to the production units (paragraph 39 of the Approval Decision).

4. *Competition analysis*

40 With respect to the effects on competition of the concentration at issue, the Commission, first of all, rejects the argument that the effects of the concentration are no different from those of the competitive situation which would have arisen from the liquidation of the Moulinex group. In that regard, it states:

'Following the Phase I examination, such an argument cannot be accepted since, from the start of the court-supervised reorganisation of the Moulinex group, a number of undertakings indicated their interest in acquiring trade marks owned by that group. Furthermore, the possibility cannot be ruled out that certain items of equipment or industrial property would have been acquired by third parties other than SEB. Given the importance of the trade mark on the relevant markets, those third parties would probably have been in a position to restore, entirely or partially, the competition capacity of Moulinex' (paragraph 41 of the Approval Decision).

41 At the end of its analysis, the Commission concludes that the notified concentration raises serious doubts as to its compatibility with the common market on a number of markets for kitchenware (paragraph 44 of the Approval Decision). With respect to the geographical markets examined in the Approval Decision, it observes in essence that:

— in Portugal, Greece, Belgium and the Netherlands, where, prior to the concentration, SEB and Moulinex at times held significant positions in the small household electric appliances sector, the situation of those companies would be strengthened by the addition of the other undertaking and the transaction would lead to combinations of — in some cases, large — market shares with respect to a large number of the categories of goods concerned. According to the Commission, that market strength will be increased by an unrivalled portfolio of trade marks, whereas operators such as Philips, Braun or Taurus have only one single trade mark (paragraphs 43 and 45 to 47 of the Approval Decision);

— in Germany, Austria, Denmark, Sweden and Norway, the transaction would substantially change the competition conditions on a number of product markets (paragraph 43 of the Approval Decision);

— lastly, in other Member States, the transaction would change competition conditions only marginally (paragraph 43 of the Approval Decision).

42 According to the Commission, the notified transaction thus raises serious doubts as to its compatibility with the common market on the following markets (paragraph 128 of the Approval Decision):

— Germany: deep friers and barbecues/grills;

— Austria: deep friers and informal meals;

— Belgium: food mixers, espresso machines, kettles, toasters, informal meals, barbecues/grills, irons and ironing stations;

— Denmark: deep friers and portable ovens;

— Greece: deep friers, kettles, sandwich/waffle makers, espresso machines and food mixers;

— Norway: deep friers and portable ovens;

— the Netherlands: deep friers, espresso machines, mini-ovens, informal meals, barbecues/grills, irons and ironing stations;

— Portugal: deep friers, toasters, coffee machines, espresso machines, kettles, mini-ovens, sandwich/waffle makers, informal meals, barbecues/grills and food mixers;

— Sweden: deep friers.

43 On the other hand, the Commission concluded that the proposed concentration did not raise serious doubts as to the personal care market in any of the countries (with the exception of France) regardless of how the product market is defined since the parties' combined share of the market is less than 20% (paragraph 44 of the Approval Decision).

5. Commitments of the parties to the concentration

44 Nevertheless, following the commitments proposed by the parties to the concentration, the Commission found that the serious doubts as to the compatibility of the concentration with the common market could be overcome since those commitments constituted a direct and immediate response to the competition problems identified in the decision with respect to markets outside France.

45 Initially, the commitments submitted by the parties to the concentration on 5 December 2001 envisaged a withdrawal from the entire European Economic Area (hereinafter the 'EEA') for a period of two years of all goods with the

Moulinex trade mark in the following categories: deep friers, portable ovens, informal meals, barbecues/grills, irons and ironing stations. However, according to the Commission, those initial commitments would not allow the substitution of another operator for the Moulinex group and did not concern all of the markets in respect of which the transaction potentially raised serious doubts (paragraph 135 of the Approval Decision).

46 On 18 December 2001 the parties therefore 'improved their proposal so as to make it practicable and effective' (paragraph 135 of the Approval Decision). That new proposal provided for an exclusive licence to use the trade mark Moulinex for a period of three years (coupled with a commitment not to enter the market under the trade mark Moulinex for a further year) in respect of all the product categories in Belgium, Greece, the Netherlands and Portugal and in respect of deep friers in Germany, Austria, Denmark, Norway and Sweden. The holders of such a licence would be subject to an obligation to obtain supplies of toasters, coffee machines, kettles and food mixers from the licensor.

47 However, the third parties invited to submit observations were critical of those commitments, particularly with respect to the licence period and period of non-entry, the obligation to obtain supplies, the absence of any corrective adjustment to offset the effects of the notified transaction on competition on certain markets, the absence of any circumstances sufficiently serious to warrant, in economic terms, the entry of a new operator on the relevant markets and the lack of effective control by the licensee over the Moulinex trade mark within the framework of the remedies relating specifically to deep friers, since SEB would continue to enjoy the use of the trade mark on the other goods (paragraph 136 of the Approval Decision).

48 According to the Approval Decision, SEB therefore 'perfected' its commitments by extending the licence to use the trade mark to cover all small household electrical appliances for Germany, Austria, Denmark, Norway and Sweden. SEB thus aligned the commitment in respect of those five countries with that already proposed in respect of Belgium, Greece, the Netherlands and Portugal. SEB also extended the term of the licence to five years (and to three years for the non-entry commitment) and withdrew the obligation requiring the licensee to obtain supplies from the licensor (paragraph 137 of the Approval Decision).

49 In paragraph 146 of the Approval Decision, the commitments accepted by the Commission in each of the nine countries concerned (Belgium, Greece, the Netherlands, Portugal, Germany, Austria, Denmark, Sweden and Norway) are summarised as follows:

'(a) the commitment to grant an exclusive licence to sell household electrical appliances under the Moulinex trade mark for a period of five years covering the 13 categories of products mentioned in this decision, as defined in Section 1(a) of the commitments set out in the annex to this decision;

(b) the commitment not to market products bearing the Moulinex trade mark in the countries concerned during the term of the licence and for a further period of three years following the expiry of the licence, as provided for in Section 1(c);

(c) the commitment not to market models of Moulinex products under a trade mark other than Moulinex in the territories in respect of which the licensee or licensees have concluded a supply contract or been granted an industrial property licence as provided for in Section 1(e);

(d) the commitment to enter into supply agreements (at a supply price corresponding to the industrial cost price plus the general costs associated with production and delivery of the products to the licensee) with, and/or grant licences covering industrial property rights in respect of all products concerned, with the exception of food mixers in Germany, to any licensee requesting such a contract or licence, as provided for in paragraph 1(d) of the commitments;

(e) the commitment to pursue the general policy of the development of new models and to maintain the full economic and competitive value of the Moulinex trade mark in each of the nine States concerned until the conclusion of the licence agreements as provided for in Section 1(h) of the commitments.'

50 The details of the commitments offered by SEB are set out in the annex to the Approval Decision.

51 In Section 2(g) of the annex setting out the commitments, it is provided that:

'If the approval of this concentration by a different competition authority is made subject to commitments which either run counter to the present commitments or give rise to a situation going beyond what is necessary in order to re-establish competition on each of the relevant markets, the SEB group may request a review of the present commitments by the Commission with a view to removing those contradictions or releasing the SEB group from all or part of the conditions and obligations contained in the present commitments which are no longer necessary.'

The Referral Decision

52 By letter of 7 December 2001, the French authorities asked the Commission to refer the notified concentration to them with respect to the assessment of the effects of the transaction on the markets for deep friers, toasters, electric filter

coffee machines, espresso machines, kettles, ovens, waffle makers, informal meals, barbecues/grills, pressure cookers, mixers and ironing stations in France.

53 That request was based on Article 9(2)(a) of Regulation No 4064/89. The French authorities considered that, as required by that article, the concentration concerned 'threatens to create or to strengthen a dominant position as a result of which effective competition would be significantly impeded on a market within that Member State, which presents all the characteristics of a distinct market'.

54 On 8 January 2002, the Commission granted the French authorities' request for referral and adopted the Referral Decision.

55 In recitals 11 to 22 of the Referral Decision, the Commission states first of all that each category of small electrical household appliances constitutes a distinct product market and that the geographical markets for small electrical household appliances are national in dimension.

56 At the end of the analysis in recitals 23 to 41, the Commission concludes that 'the transaction in question, prima facie, threatens to create or to strengthen a dominant position as a result of which effective competition would be significantly impeded on the markets for the sale of small electrical household appliances in France'. The Referral Decision states that on the relevant markets in France the new entity will be of unrivalled size (recitals 29 to 32), have an unrivalled range of products (recitals 33 to 35) and an unrivalled portfolio of trade marks (recitals 36 to 38) and that the current and potential competition is insufficient (recitals 39 to 41).

57 On that basis, the Commission considers that the French authorities' request is well founded and in accordance with Article 9(3) of Regulation No 4064/89.

58 In the operative part of the Referral Decision, the Commission states that:

'The notified concentration, which consists in the planned acquisition of certain activities of Moulinex by SEB, shall, by this decision and on the basis of Article 9(3) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, be referred to the competent authorities of the French Republic in respect of the French markets for small electrical household appliances with a view to the application of national law.'

59 On 8 July 2002 the French Minister for Economic Affairs authorised the concentration without remedies on the basis of the 'failing firm doctrine'.

Procedure and forms of order sought by the parties

60 By application lodged at the Registry of the Court of First Instance on 17 April 2002, the applicant brought the present action.

61 By a separate document of the same date, lodged at the Registry of the Court of First Instance, the applicant applied for the case to be dealt with under the

expedited procedure provided for by Article 76a of the Rules of Procedure of the Court of First Instance of the European Communities. On 2 July 2002 the Court of First Instance granted the application.

62 On 24 June 2002 the Commission filed an objection of inadmissibility pursuant to Article 114 of the Rules of Procedure in so far as the application is directed against the Referral Decision. On 28 June 2002 the applicant replied to a written question of the Court of First Instance asking it to elaborate on the admissibility of its action on that point. On 15 July 2002 the applicant lodged its written observations on the objection of inadmissibility raised by the Commission.

63 By applications lodged at the Registry of the Court of First Instance on 19 July 2002 and 27 August 2002, SEB and the French Republic requested leave to intervene in support of the forms of order sought by the Commission. By application lodged at the Registry of the Court of First Instance on 8 August 2002, De'Longhi sought leave to intervene in support of the forms of order sought by the applicant. Those requests were granted by order of the President of the Third Chamber of 19 September 2002. At their requests, SEB and De'Longhi were granted leave, first, to lodge a statement of intervention and, second, to submit certain documents cited in their applications for leave to intervene.

64 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure and, within the framework of measures of organisation of procedure, asked the parties to produce certain documents and answer written questions. The parties complied with those requests within the prescribed time-limit.

65 The oral arguments of the parties and their answers to the oral questions were heard at the hearing on 9 October 2002.

Forms of order sought by the parties

66 The applicant, supported by De'Longhi, claims that the Court of First Instance should:

— annul the Approval Decision and order the Commission to pay the costs;

— annul the Referral Decision and order the Commission to pay the costs.

67 The Commission, supported by SEB and the French Republic, contends that the Court of First Instance should:

— dismiss the application;

— order Philips to pay the costs.

Law

68 By its action the applicant seeks annulment of both the Approval Decision and the Referral Decision. It is therefore necessary to examine each of those heads of claim in turn.

1. *The claim for annulment of the Approval Decision*

69 It is clear from the application that the applicant raises two pleas in law in support of its claim for annulment of the Approval Decision. The first plea alleges

that the commitments offered by SEB during Phase I are insufficient. The second plea alleges that those commitments were offered too late.

The first plea: insufficiency of the commitments offered by SEB during the Phase I procedure

70 By this plea, the applicant alleges, essentially, that the commitments accepted during the Phase I procedure were insufficient to allow the Commission to rule out all serious doubts as to the compatibility of the concentration with the common market and the Commission should therefore have initiated the Phase II procedure.

71 In support of that plea, the applicant submits, in its application, that the insufficiency of the commitments results from the following:

— the absence of protection of licensees against parallel imports of products marketed by SEB under the Moulinex trade mark;

— the short duration of the licences and the subsequent period of non-use of the Moulinex trade mark;

— the exclusion of the relevant markets in France from the scope of the commitments;

— the failure to take account of the detrimental effects of the geographical scattering of the licences;

— the possibility of granting licences to retail businesses;

— the possibility that there will be different licensees for the different Member States;

— the possible renegotiation of commitments following the outcome of the procedure before the French competition authorities.

72 However, at the hearing, following an observation of the Court of First Instance, the applicant withdrew the argument based on the possibility of granting licences to retail businesses.

73 At the hearing, De'Longhi, for its part, claimed that the insufficiency of the commitments results from the following:

— the absence of a licence in Italy, Spain and Finland;

— the sharing of the market for the Moulinex trade mark;

— the absence of protection of the licensees against parallel imports of products marketed by SEB under the Moulinex trade mark.

(a) Preliminary observations

74 For the purpose of examining the present plea, it should be noted that, at the end of the Phase I procedure, the Commission found that there were serious doubts on several markets for small electrical household appliances in nine Member States of the EEA, namely Germany, Austria, Belgium, Denmark, Greece, Norway, the Netherlands, Portugal and Sweden.

75 The Approval Decision, in particular recital 44, indicates that those serious doubts arise essentially from the fact that in those nine Member States the concentration leads to market shares exceeding 40% on the relevant product markets, those combinations of market shares being strengthened in certain Member States by the fact that the new entity will have a unique portfolio of trade mark as compared to its competitors ('portfolio effect'). Following the commitments offered by SEB, the Commission nevertheless decided not to oppose the concentration and to declare it compatible with the common market by a decision adopted at the end of the Phase I procedure. The commitments accepted by the Commission provide, essentially, that SEB is obliged, in each of the nine Member States concerned, to grant an exclusive licence to sell 13 categories of small electrical household appliances under the Moulinex trade mark for a term of five years (first subparagraph of Section 1(a) of the commitments) and not to market those categories of products and other appliances for household use under the Moulinex trade mark in those same Member States for the term of the licence and for a period of three years after its expiry (first subparagraph of Section 1(c) of the commitments). According to the third subparagraph of Section 1(a) of the commitments, 'the purpose of that licence is to authorise the use of the Moulinex trade mark together with the licensee's own trade mark in order to enable the licensee, during and after that period of "co-branding", to establish or strengthen its own trade mark on the market concerned'.

76 By the present action, the applicant does not dispute the serious doubts described in the Approval Decision. In particular, the applicant does not claim that the

Commission should have expressed serious doubts other than those described in that decision. Further, the applicant does not dispute that the commitments accepted by the Commission are designed to remove the serious doubts described in the Approval Decision. However, by the present plea, the applicant disputes that those commitments are sufficient to allow the Commission to overcome the serious doubts it expressed in that decision and claims that the Commission should have initiated the Phase II procedure.

77 Although the Commission has no discretion as regards the initiation of the Phase II procedure where it encounters serious doubts with respect to the compatibility of a concentration with the common market, Article 6(1)(c) of the Regulation providing that, in that case, the Commission 'shall decide to initiate proceedings', it nevertheless enjoys a certain margin of discretion in identifying and evaluating the circumstances of the case in order to determine whether or not they present serious doubts or, where commitments have been proposed, whether they continue to present them (see, by analogy, Case T-73/98 *Prayon-Rupel* v *Commission* [2001] ECR II-867, paragraphs 45 to 47). Even if the notion of 'serious doubts' is an objective one, the identification of such doubts necessarily requires the Commission to carry out complex economic assessments, in particular where it must assess whether the commitments proposed by the parties to the concentration are sufficient to dispel those serious doubts.

78 Given the complex economic assessments which the Commission is required to carry out in exercising the discretion which it enjoys with respect to examining the commitments proposed by the parties to the concentration, the applicant must, in order to obtain annulment of a decision approving a concentration on the ground that the commitments are insufficient to dispel the serious doubts, show that the Commission has committed a manifest error of assessment.

79 However, in exercising its power of judicial review, the Court of First Instance must take into account the specific purpose of the commitments entered into

during the Phase I procedure, which, contrary to the commitments entered into during the Phase II procedure, are not intended to prevent the creation or strengthening of a dominant position but, rather, to dispel any serious doubts in that regard. It follows that the commitments entered into during the Phase I procedure must constitute a direct and sufficient response capable of clearly excluding the serious doubts expressed.

80 Consequently, where the Court of First Instance is called on to consider whether, having regard to their scope and content, the commitments entered into during the Phase I procedure are such as to permit the Commission to adopt a decision of approval without initiating the Phase II procedure, it must examine whether the Commission was entitled, without committing a manifest error of assessment, to take the view that those commitments constituted a direct and sufficient response capable of clearly dispelling all serious doubts.

81 It is in the light of those principles that the complaints and arguments put forward by the applicant in support of the present plea must be considered.

(b) Licences permit parallel trade in SEB products under the Moulinex trade mark

Arguments of the parties

82 The applicant, supported by De'Longhi, submits that, by agreeing to the grant of temporary (exclusive) licences instead of the divestiture of the Moulinex trade mark, the Commission has committed a manifest error of assessment, since the licensees of the Moulinex trade mark will not be protected against parallel imports of products bearing the Moulinex trade mark that have been put on the market by SEB outside the territory covered by the licence.

83 The applicant observes that, under Community law, trade mark licences do not offer the licensee absolute protection against the proprietor of the trade mark within the territory covered by the licence. Once products bearing the trade mark concerned have been put on the market by the proprietor of the trade mark in territories which that proprietor has reserved for itself, such products must be able to circulate freely within the Community and, thus, also within the territory covered by the licence.

84 In the present case, the applicant considers that the lack of protection for the licensee against parallel trade in Moulinex products marketed by SEB, even during the term of the licence, will seriously diminish the effect of the licence as a means of allowing the licensee to exploit the goodwill attached to the Moulinex trade mark by gradually re-branding the products sold by it under that trade mark, and will increase the likelihood that SEB will easily regain the consumer brand loyalty attached to the Moulinex brand after the non-use period as provided for in the commitments.

85 In that respect, the applicant notes that, although the Commission may have analysed current cross-border sales in small electrical household appliances, it has not raised the question of the extent to which the proposed commitments may stimulate parallel trade.

86 In the applicant's view, the only way in which full territorial protection may be granted (and justified) is by a full and irrevocable divestiture of the Moulinex trade mark for the territories in which the acquisition of the Moulinex trade mark raises serious competition concerns.

87 The Commission, supported by the French Republic and SEB, claims that the applicant's arguments in that regard should be rejected.

Findings of the Court

88 When defining the relevant geographical markets, the Commission found, in recital 30 of the Approval Decision, that 'a national definition of the relevant geographical markets must be regarded as having the greatest credibility at the end of the Phase I examination'.

89 It is apparent from Recital 27 of the Approval Decision that that finding is based on the results of the investigation conducted by the Commission during the Phase I procedure, which revealed that the market shares held by the operators on the markets vary considerably as between Member States and product categories (recital 27(a)), that trade mark penetration differs greatly according to geographical zone (recital 27(b)), that the characteristics of the products may vary between the Member States on account of the peculiarities and preferences of consumers (recital 27(c)), that customer/supplier relationships are forged principally on a national basis (recital 27(d)), that the prices charged to distributors may vary significantly as between national markets and follow different trends (recital 27(e)), that the logistic structures are national (recital 27(f)) and that the distribution structures are national and that, likewise, the relative importance of the distribution channels varies greatly from Member State to Member State (recital 27(g)).

90 More specifically, as regards the relationship between customers and suppliers, the Commission found, in recital 27(d), that:

'Customer/supplier relationships are forged principally on a national basis. Although there are global contracts with certain international supermarket groups, they relate only to annual global sales targets. During the Commission's investigation, the groups in question confirmed that their purchasing policy

continues to be set at a national level. Thus, contracts concluded on a national basis contain all the reference clauses for products, prices, supply and invoicing.'

91 By the present action, the applicant disputes neither the national dimension of the relevant markets nor any of the findings made by the Commission in recital 27 of the Approval Decision.

92 On the contrary, it should be noted that the Commission's findings in that regard are based on the replies to requests for information which the Commission sent on 16 November 2001 to the competitors of the parties to the concentration in accordance with Article 11 of Regulation No 4064/89 ('the questionnaire sent to the competitors'). Thus, in response to question 12 of that questionnaire, the applicant itself stated that the markets are national in dimension. Likewise, in paragraph 2 of the NERA report sent to the Commission by the applicant during the administrative procedure, it is expressly concluded that the relevant markets are national. In support of that conclusion, both the applicant and NERA put forward essentially the factors considered in recital 27 of the Approval Decision.

93 Consequently, it is clear that the Commission relied in particular on the observations of the competitors, including the applicant, when rejecting, at the Phase I stage, the definition of the geographical markets proposed by the parties to the concentration, which maintained that those markets were global.

94 While it is true that one of the factors leading the Commission to conclude that there are distinct national markets, namely the different price levels in the Member States, may encourage the development of parallel imports between Member States, it must be pointed out, on the other hand, that the other factors referred to by the Commission in support of that conclusion, namely the fact that

the trade marks of the products and their characteristics vary between the Member States and that supply, logistics and distribution are structured on a national basis, may hinder the development of such imports.

95 The applicant itself conceded that fact during the administrative procedure when it told the Commission, in response to question 16 of the questionnaire sent to the competitors, that:

'In our experience parallel import/exports within the EU do occur but not to a great extent due to the different national characteristics of the markets in the different EU countries. We estimate that on average a total of some 5% of the products in a given market would be parallel imported extra if prices were to increase by more than 10%.'

96 Similarly, De'Longhi stated, in response to the same question, that:

'The analysis of the relevant markets over the last five years shows to what degree parallel imports are a rare phenomenon. It is not foreseeable that that will change in the near future'.

97 Furthermore, in an e-mail sent to the Commission on 10 December 2001 regarding the geographical dimension of the relevant markets, the applicant stated, in support of a national definition of those markets, that:

'Furthermore, we refer to the Commission Decisions in Kingfischer/BUT (IV/M.1248 of 1998) and Kingfischer/Grosslabor (IV/M.1282 of 1999) where

the Commission confirmed that cross-border trading of [among other things] toasters and irons within Europe is minimal and that many of the suppliers, although global players, tend to have a national sales policy due to different consumer preferences.'

98 Accordingly, it must be concluded that the parties agree that, prior to the concentration in question, parallel imports of products of the Moulinex brand were minimal in the territory of the European Union because the relevant markets are national in dimension.

99 Nevertheless, the applicant maintains that the Commission did not examine the extent to which the commitments accepted in the Approval Decision may stimulate parallel imports. At the hearing, the applicant and De'Longhi stated that the nature of the commitments may, for example, lead SEB to encourage its distributors in the territories which are not subject to the commitments to supply independent retailers in the Member States covered by the commitments, which would result in an increase in parallel imports to the detriment of the licensees of the Moulinex trade mark in those States.

100 However, neither during the administrative procedure nor during the procedure before the Court of First Instance did the applicant or De'Longhi submit any evidence in support of those claims, which therefore remain allegations which have not been otherwise substantiated.

101 On the contrary, in response to question 16 of the questionnaire sent to the competitors, De'Longhi itself expressly stated that 'it is not foreseeable' that the minimal amount of parallel imports will 'change in the near future'.

102 Moreover, neither the applicant nor De'Longhi disputes that the products concerned will continue to fall within the scope of distinct national markets after completion of the concentration.

103 Accordingly, it is not evident that the commitments are capable of substantially increasing parallel imports. On the contrary, the fact that, in accordance with the commitments, the Moulinex trade mark may be licensed to different licensees in each of the Member States concerned appears to reinforce the national nature of the relevant markets. In that case, instead of being held by a sole economic operator, that trade mark will be held by distinct economic operators with the right to use the Moulinex trade mark in the territory licensed to them. At the hearing, De'Longhi submitted that such a licence system leads to a partitioning of the market which is likely to create additional obstacles to intra-Community trade.

104 The applicant's arguments as to the failure to take parallel imports into account therefore do not show that the Commission has committed a manifest error of assessment in that regard.

(c) The duration of the licences and of the post-term sales ban is manifestly too short

Arguments of the parties

105 The applicant, supported by De'Longhi, alleges that the duration of the exclusive licence and of the post-term marketing ban is manifestly too short to allow a competitor to exploit the goodwill attaching to the Moulinex trade mark.

106 According to the applicant, a successful introduction of new trade marks on the relevant product markets is highly exceptional and successful re-branding of products in product markets such as that in the present case takes considerably more than five years.

107 By way of example, the applicant explains that, in Brazil, it took Philips more than 10 years to transfer customer brand loyalty from its 'Walita' brand to its 'Philips' brand in the area of personal care products in a case where the 'original' trade mark was to be phased out entirely.

108 Further, in contrast to the situation in Brazil, in the present case, (i) SEB will remain on the market in adjacent geographic markets as proprietor of the trade mark the goodwill in which is to be transferred to the licensee, (ii) SEB will undoubtedly actively re-enter the licensed territory with the Moulinex trade mark following the expiry of the post-term marketing ban, and (iii) even during the term of the licence, the licensee is not protected against parallel trade in SEB products bearing the Moulinex trade mark. The applicant submits that, in those circumstances, the likelihood of a successful transfer of the goodwill attaching to the Moulinex trade mark to the licensee of that trade mark is seriously affected, whereas SEB will be able to regain that goodwill after the non-use period provided for in the commitments.

109 The applicant stresses that, contrary to what the Commission appears to believe (paragraph 140 of the Approval Decision), there is no link between the average life cycle of electrical household appliances (three years) and the term of the licence and the post-term re-entry ban, since brand loyalty does not come and go with individual products.

110 Finally, the applicant expects that it will be relatively easy for SEB to reintroduce the Moulinex brand following the expiry of the post-term sales ban, given the strength of its existing market position and portfolio of brands, the fact that it has

been allowed to remain active with the Moulinex brand in a considerable number of EC/EEA Member States not included in the remedy scheme and the fact that the Moulinex brand is not new but, on the contrary, a brand that, until only a few years previously, had been very strong in the Member States in which it will be reintroduced.

111 The Commission, supported by the French Republic and SEB, claims that the applicant's arguments in that regard should be rejected.

Findings of the Court

112 When considering the applicant's pleas as to the duration of the commitments, it should be borne in mind that, according to the second subparagraph of Section 1(a) of the commitments, their purpose is to permit the use of the trade mark Moulinex in combination with a trade mark of the licensee in order to enable the licensee, during and after that period of 'co-branding', to establish or reinforce its own trade mark on the relevant market. For that purpose, the licensee will, for the term of the Moulinex trade mark licences, be authorised either to immediately use the Moulinex trade mark in combination with its own trade mark or to use it alone, temporarily, in order to change subsequently to 'co-branding'. According to that provision, the licensee will also be free to change from 'co-branding' to its own trade mark at any time during the term of the licence.

113 Moreover, in order to achieve that purpose, the commitments provide, in the third subparagraph of Section 1(g), that the licensees must be operators possessing their own trade mark which can be used in association with the Moulinex trade mark, but not operators whose principal activity involves retail sales.

114 It follows that the purpose of the commitments is not to permit the use of the Moulinex trade mark as such by each of the licensees but to enable them, over a transitional period during which they will be entitled to use their own trade mark together with the Moulinex trade mark, to ensure the migration from the Moulinex trade mark to their own trade marks, so that they can compete effectively against the Moulinex trade mark after the transitional period, when SEB will again be entitled to use the Moulinex trade mark in the nine Member States concerned.

115 Consequently, contrary to what the applicant claims, the commitments are not designed to introduce a new trade mark to the nine Member States concerned but to enable the licensees to establish or strengthen their own trade mark as a mark effectively competing with the Moulinex trade mark.

116 Moreover, since the purpose of the commitments is to enable the licensees to establish or strengthen their own trade mark as a mark effectively competing with the Moulinex trade mark, it is irrelevant for the applicant to claim that, in view of its current large market share, its trade mark portfolio and the reputation of the Moulinex trade mark, SEB will be able to easily reintroduce the Moulinex trade mark in the nine Member States concerned. The question is not whether SEB will be able to reintroduce the Moulinex trade mark in the Member States concerned — which must, after all, be presumed when determining whether the commitments accepted in the Approval Decision are sufficient — but whether the licensees will be able to establish or strengthen their own position as effective competitors of SEB.

117 It is therefore necessary to examine whether the duration of the transitional period established by the commitments is sufficient to achieve that aim.

118 In that regard, it must be observed, first, that, according to the first subparagraph of Section 1(c) of the commitments, each of the licences to the Moulinex trade mark in the nine Member States concerned will run for a term of five years. In addition, according to that provision and the second subparagraph of Section 1(c), SEB is to abstain, for the term of the licence and for a period of three years after its expiry, from marketing under the Moulinex trade mark in the nine Member States concerned small electrical household appliances coming under one or other of the 13 products categories in question and other household appliances not included in those product ranges, such as vacuum cleaners and microwave ovens.

119 Those provisions indicate that, contrary to what the applicant suggests, the total duration of the commitments pursuant to which SEB will not be able to market products under the Moulinex trade mark is not five years but eight years, namely the five-year duration of the first period, during which the licensee will have the exclusive right to use the Moulinex trade mark alone or together with its own trade mark, and the three-year duration of the second period, during which SEB will abstain from marketing under the Moulinex trade mark in the countries concerned. It follows that SEB will be deprived of the right to use the Moulinex trade mark in the Member States concerned for eight years.

120 Those provisions also indicate that any use of the Moulinex trade mark in the nine Member States concerned will cease for a period of at least three years and, at least in theory, of eight years at most. Under the commitments, each licensee remains free to decide when to switch from 'co-branding' to its own trade mark alone. In its statement in intervention, SEB stated that the current candidates for the grant of a licence intend to migrate from 'co-branding' to their own trade mark after a period of three to four years, which will mean that, in the Member States concerned, the Moulinex trade mark will disappear for a period of about five years.

121 Such an absence of product lines of the Moulinex brand will enable the licensees to establish with lasting effect the reputation of their own trade mark. In

addition, such an absence also means that SEB will not be able to recover the positions held by Moulinex once it is able to reintroduce the trade mark to the relevant markets at the end of the non-marketing period.

122 Moreover, in recital 140 of the Approval Decision, the Commission stated that the average life cycle of small electrical household appliances is about three years and the applicant has not contradicted that statement.

123 It is therefore clear that the duration of the commitments will cover a period equal to about three product life cycles, whilst the period during which all use of the Moulinex trade mark will cease will be equal to at least one product life cycle.

124 The Commission stated, without being contradicted by the applicant, that, on a neighbouring market to that for the products in question, namely the market for large household electrical appliances, Whirpool successfully migrated from the Philips trade mark to the Whirpool trade mark in three years between 1990 and 1993, which is equivalent to the life cycle of the product. That migration was successful despite the fact that the Philips trade mark was present and maintained by Philips on adjacent markets.

125 Moreover, in its Notice on restrictions directly related and necessary to concentrations (OJ 2001 C 188, p. 5, paragraph 15), the Commission stated that, in the event of the transfer of an undertaking, the maximum acceptable duration of a ban on competition imposed on the seller in order to guarantee the transfer to the buyer of the full value of the transferred assets is three years where the transfer of the undertaking includes the goodwill and know-how and two years where only the goodwill is transferred. In the present case, the period for which SEB will abstain from using the Moulinex trade mark in the licensees' territories is eight years.

126 Second, it should be pointed out that, according to the first subparagraph of Section 1(g) of the commitments, the licensees must be 'operators currently present on the market or potentially capable of entering it, viable, independent without any links to the SEB group and in possession of the competence and motivation necessary to provide active and effective competition on the relevant markets'. Moreover, as was pointed out above, according to the third subparagraph of Section 1(g), the licensees must have their own trade mark which is capable of being associated with the Moulinex trade mark and not be operators whose principal activity is retail sales.

127 The Court finds that, by limiting the grant of licences to operators who are already on the market or capable of penetrating it in the short term and who possess their own trade mark, those provisions are capable of effectively ensuring that the licensees will become effective competitors within the period provided for by the commitments. This is confirmed still further by the fact that, even if they have their own trade marks, operators whose principal activity is retail sales are nevertheless excluded under the third subparagraph of Section 1(g) from the circle of potential holders of a licence to the Moulinex trade mark. In recitals 27(d) and 37 of the Approval Decision, the Commission stated — and has not been contradicted by the applicant — that those operators' own trade marks, namely the 'distributors' brands', do not have a strong presence on the relevant markets.

128 In light of those circumstances, it must be concluded that the duration of the commitments does not appear to be manifestly insufficient to enable the licensees of the Moulinex trade mark to establish or strengthen their own trade mark as a mark which can effectively compete with the Moulinex trade mark in the nine Member States concerned.

129 Accordingly, the applicant's complaints as to the duration of the commitments must be rejected.

(d) Failure to include France, where competition concerns are the most serious

Arguments of the parties

130 The applicant, supported by De'Longhi, states that the Commission has failed to impose any conditions with respect to the national market in which the competition situation is most affected by the acquisition in question, namely France. It has failed to do so even though SEB is unlikely to find serious and viable candidates for any licences as long as licensees have no certainty as to the 'solution' to be finally adopted with respect to the French market and there is, therefore, a serious risk of SEB's position on the French market undermining the remedies imposed in respect of the other Member States affected.

131 According to the applicant, this is because, first, during this period, SEB will continue to manage Moulinex's affairs as its own and remain able to exploit the Moulinex trade mark when using distribution channels throughout the Community. Second, SEB's access to commercially sensitive information relating to Moulinex's (lack of) production, capacity, strategy and market performance will give SEB an additional competitive advantage as it will allow SEB to adapt its market behaviour according to information not available to its competitors.

132 The Commission, supported by the French Republic and SEB, claims that the applicant's arguments in that regard should be rejected.

Findings of the Court

133 By decision of 8 January 2002 adopted on the basis of Article 9(2)(a) of Regulation No 4064/89, the Commission referred to the French competition authorities the examination of the effects of the concentration on the relevant markets in France. As the Commission expressly states in recital 43, the Approval Decision does not therefore concern those markets.

134 Since, as a result of the Referral Decision, the relevant markets in France are excluded from the investigation carried out in connection with the Approval Decision, the question whether the Commission was entitled to exclude those markets from the scope of the commitments proposed by the parties to the concentration so as to dispel any serious doubts at the end of Phase I cannot be separated from the examination of the legality of the Referral Decision. That question is examined below in connection with the assessment of the claim for annulment of the Referral Decision.

135 When assessing the claim for annulment of the Approval Decision, it is therefore necessary to establish only whether, as the applicant claims, the effectiveness of the commitments accepted by the Commission in each of the nine Member States concerned may be affected by the fact that the relevant markets in France are the subject of a separate examination by the French competition authorities, the outcome of which was pending and uncertain when the Approval Decision was adopted.

136 As has already been held above, the parties agree that the products in question relate to distinct national markets. Thus, in recital 27 of the Approval Decision, the Commission, *inter alia*, found that the relationship between customers and

suppliers, the logistic structures and the distribution structures are organised at a national level, and the applicant has not contradicted that finding.

137 Moreover, the Court has already found that parallel imports of the products concerned between Member States are minimal.

138 Accordingly, it must be held that the uncertainties surrounding the outcome of the procedure in France do not appear to be capable of prejudicing the conclusion of agreements to licence the Moulinex trade mark with serious, viable licensees in other Member States. In view of the geographical dimension of the relevant product markets and in the absence of significant parallel imports between Member States, the licensees of the Moulinex trade mark in the nine Member States concerned are not in competition with the potential operator or operators using the Moulinex trade mark on the relevant markets in France. *A fortiori*, the situation of the licensees outside France cannot therefore be affected by the uncertainty as to the identity of the future user of the Moulinex trade mark in France.

139 In any event, even if the uncertainty alleged by the applicant were such as to hinder the conclusion of licence agreements with serious viable operators in the nine Member States concerned, it should be observed that, as the Commission rightly submitted, Section 1(i) of the commitments makes SEB's choice of licensees subject to its approval, whereby it will establish, in accordance with Section 1(g) of the commitments, that the licensees are 'operators currently present on the market or potentially capable of entering it, viable, independent without any links to the SEB group and in possession of the competence and motivation necessary to provide active and effective competition on the relevant markets'.

140 In addition, the commitments ensure that residual use of the Moulinex trade mark by SEB during the period of negotiation of the licences will not exceed the minimum necessary to conclude those licence agreements, as Section 1(h) of the commitments provides that, if SEB does not conclude licence agreements within the prescribed period — as extended, where appropriate, on account of exceptional circumstances — an independent agent approved by the Commission will carry out that task instead of SEB. Section 2(e)(iv) of the commitments provides that the agent will have a time-limit by which to complete that task.

141 Moreover, the uncertainty concerning the outcome of the procedure in France is basically limited by the fact that, under Article 9(6) of Regulation No 4064/89, the French authorities must rule on the concentration within a maximum of four months.

142 The applicant also submits that, during the period of examination of the concentration by the French authorities, since SEB will not be in a position to propose serious and viable licensees, it will continue to manage the activities of Moulinex and will still be entitled to make use of the Moulinex trade mark when negotiating with the distribution networks throughout the entire Community. Moreover, SEB will have access to sensitive commercial information relating to Moulinex which will enable it to adapt its market behaviour on the basis of information not available to its competitors.

143 By those arguments, the applicant therefore complains that the Commission permitted SEB to effect the concentration without conditions, in so far as, pending the conclusion of all the licence agreements, SEB is entitled to use the Moulinex trade mark in all the Member States, including those covered by the commitments, which, in particular, enables it to gain access to certain sensitive commercial information.

144 Apart from the fact that that complaint is unrelated to the exclusion of the relevant markets in France from the scope of the commitments, it should be noted that the applicant has not claimed that the period within which SEB must conclude the licence agreements is too long.

145 Moreover, the use of the Moulinex trade mark by SEB during the period of licence negotiation is justified by SEB's obligation under the fourth subparagraph of Section 1(h) of the commitments to maintain 'the full economic and competitive value of the Moulinex trade mark in each of the nine Member States concerned until the conclusion of those agreements'. Far from undermining the effectiveness of the undertakings, that clause indisputably helps to ensure that effectiveness since it enables the licensees to establish themselves immediately as effective competitors. It cannot be denied that the conclusion of licence agreements in nine different Member States is a relatively complex process and that a failure to use the Moulinex trade mark during that process would adversely affect the competitiveness of that trade mark.

146 It follows from the above that the Commission did not commit a manifest error of assessment by excluding the relevant markets in France from the scope of the commitments.

(e) Failure to take into account the geographical impact of the scattering of licences

Arguments of the parties

147 The applicant, supported by De'Longhi, alleges that a temporary licensing remedy that covers a limited number of — in some cases, geographically

isolated — Member States does not place an adequate competitive constraint on SEB.

148 In particular, as far as Spain is concerned, the applicant explains that, as a result of the Approval Decision, SEB will be able not only to acquire or strengthen a dominant position on a number of product markets, but also to encircle the Portuguese market, which is one of the national markets on which the joint position of the SEB and Moulinex trade marks is strongest. In those circumstances, the applicant does not see how, under normal economic conditions, a sufficiently attractive commercial perspective can be offered to a potential temporary licensee of the Moulinex trade mark for Portugal.

149 The applicant thus submits that the unqualified approval of the transaction as far as the Spanish market is concerned will have significant consequences for the effectiveness of the remedies proposed by SEB for the territory of Portugal. The applicant also submits that the strengthening of SEB's position in Spain poses a direct threat to the effectiveness of any remedies that may be imposed with respect to France.

150 The applicant observes that the failure by the Commission to consider the cross-border aspects of the competition on the relevant markets and, for the purposes of this case, their impact on the effectiveness of the remedies imposed constitutes a deviation from established practice, as expressed in Case COMP/M.1802 *Unilever/Amora-Maille* of 8 March 2000, Case IV/M.1578 *Sanitec/Sphinx* of 1 December 1999 and Case COMP/M.2283 *Schneider/Legrand* of 10 October 2000.

151 The Commission, supported by the French Republic and SEB, claims that the applicant's arguments in that regard should be rejected.

Findings of the Court

152 By this plea, the applicant essentially complains that the Commission limited the commitments solely to those Member States in which the Commission found that there were serious doubts as to the compatibility of the concentration with the common market and did not extend them to the other Member States. According to the applicant, SEB's position in the latter Member States may impair the effectiveness of the commitments in respect of the former.

153 First of all, it should be pointed out that, as the Commission rightly observed, the applicant, in raising this complaint, merely makes general claims which are in no way substantiated. In the application, the only specific argument put forward by the applicant in support of its complaint is the claim that 'the Commission should, in particular, have taken account of the situation in Spain' on the ground, essentially, that SEB 'will be in a position to encircle the Portuguese market, one of the national markets on which the joint position of the SEB and Moulinex trade marks is by far the strongest'. The applicant also claims, without substantiating its claim, that the position of SEB in Spain threatens the effectiveness of any measure which might be imposed with respect to France.

154 In response to a written question of the Court of First Instance asking the applicant to explain the scope of its complaint in that regard, the applicant stated that, by that complaint, it does not contest the analysis as such of competition on the relevant markets in Spain but solely the fact that the Commission did not examine the possible interaction between the different national markets. Besides the interaction, described in the application, between the relevant markets in Spain on the one hand and those in Portugal and France on the other, the applicant referred, in its answers, to the situation of Finland as compared with the

other Scandinavian countries. In its answers, the applicant reiterated that, in its view, in order for the commitments to enable an independent competitor to establish itself successfully, the Commission should have included in the scope of the commitments the Member States in which no serious doubts were identified.

155 For the purpose of considering the present complaint, it is should be observed, first of all, that by virtue of the commitments SEB undertakes to grant to a third party an exclusive licence to the Moulinex trade mark in nine Member States, namely Austria, Germany, Belgium, Denmark, Greece, Norway, the Netherlands, Portugal and Sweden. However, the commitments do not oblige SEB to conclude such a licence agreement in the other Member States, namely Spain, Finland, France, Ireland, Italy and the United Kingdom.

156 The applicant is therefore correct in pointing out, in the sole example substantiated by it in the application, that the commitments provide for the grant of a licence to use the trade mark for Portugal but not for Spain.

157 Moreover, the reason why the commitments cover the relevant markets in Austria, Germany, Belgium, Denmark, Greece, Norway, the Netherlands, Portugal and Sweden is that the Commission found that, on several relevant product markets in those Member States, the concentration raised serious doubts as to its compatibility with the common market.

158 On the other hand, since the Commission has referred the examination of the effects of the concentration on the relevant markets in France to the French competition authorities, those markets are not covered by the commitments. As regards the relevant markets in Spain, Finland, Ireland, Italy and the United

Kingdom, the Commission, according to the assessment carried out in recitals 83 to 127 of the Approval Decision, considered that the concentration changes the conditions of competition there only marginally. Consequently, it concluded that the concentration does not raise serious doubts there as to its compatibility with the common market.

159 Thus, with regard to the relevant markets in Spain, the Commission found, in recitals 115 to 117, that, despite the strong market position of SEB and Moulinex on two product markets, namely for kettles and for mini-ovens, the retailers have alternative trade marks with a strong reputation which are used for the entire range of small electrical household appliances in place of those of the parties. Accordingly, the Commission took the view that '[a]ny attempt at anti-competitive conduct on those markets would therefore be penalised by reduced purchases of SEB and Moulinex products on the other markets where the merged entity achieves [85-95%] of its turnover, which may render unprofitable any price increase by the parties'. In response to a written question of the Court of First Instance, the applicant confirmed that it does not dispute that assessment.

160 Furthermore, it should be observed that, as pointed out above, the parties agree that the products concerned are sold on distinct national markets. It is relevant to point out that, as stated in paragraph 91 et seq. above, during the administrative procedure before the Commission, the applicant itself advocated a definition of the geographic dimension of the relevant markets on national lines.

161 Thus, it can be regarded as established that the relevant markets in Spain and the relevant markets in Portugal are distinct national markets, in the same way as the relevant markets in the other Member States.

162 Finally, as stated above, the applicant itself conceded that parallel imports are minimal on the relevant markets.

163 Accordingly, the Court finds that the grant of a licence to the Moulinex trade mark in one of the nine Member States covered by the commitments can in no way be affected by the situation prevailing in another Member State, even if, as in the case of the relevant markets in Spain, that other Member State is a neighbouring State. Since the applicant concedes, first, that there is no risk of the creation or strengthening of a dominant position on the relevant markets in Spain and, second, that those markets are national markets distinct from the relevant markets in Portugal and that parallel imports between those markets are minimal, it must be concluded that it acknowledges that it was unnecessary to require the conclusion of a licence agreement in Spain and that the competition situation prevailing in Spain cannot affect the competitive position of the licensee of the Moulinex trade mark in Portugal.

164 As regards the applicant's submission that the position of the Moulinex and SEB trade marks in Portugal is one of the strongest, it must be observed that, far from establishing that a licence for the relevant markets in Portugal would be unattractive, that fact, on the contrary, seems likely to encourage operators to obtain a licence for those markets, particularly because the largest market share in that Member State is held not by SEB but by Moulinex.

165 For the same reasons, those considerations apply with respect to the alleged effects which the strengthening of SEB's position in Spain may have on the commitments which may be imposed in France or with respect to the alleged effects which the strengthening of SEB's position in Finland may have on the commitments imposed in Sweden, Norway and Denmark.

166 Finally, the above findings cannot be called into question by the fact that, because of the 'portfolio effect', the Commission extended the trade mark licence in each of the nine Member States covered by the commitments to all the relevant products, including those in respect of which the concentration does not create or strengthen a dominant position.

167 It is apparent from recital 141 of the Approval Decision that the reason for the extension of the commitments to all the relevant products is the Commission's concern to prevent SEB from being able to use the Moulinex trade mark in competition with the licensees in the nine Member States concerned. Conversely, the fact that SEB may continue to use the Moulinex trade mark on the national markets not covered by the commitments does not result in its competing with the licensees in the Member States in respect of which the Commission has raised serious doubts, because those licensees hold an exclusive licence. Consequently, the reasoning underlying recital 141 of the contested decision does not entail an obligation on the Commission to extend the commitments to all the Member States.

168 Accordingly, the applicant's present complaint cannot lead to a finding that the Commission has committed a manifest error of assessment. It must therefore be rejected.

(f) Possibility of different licensees for different Member States

Arguments of the parties

169 The applicant, supported by De'Longhi, submits that the possibility, under the scheme of commitments, that different licensees may be found for different Member States will seriously impair the effectiveness of the remedies in relation to the market situation, since it increases the risk that any licensees found by SEB will not constitute viable competitors.

170 The Commission, supported by the French Republic and SEB, claims that the applicant's arguments in that respect should be rejected.

Findings of the Court

171 It should be observed that, under the first subparagraph of Section 1(a) of the commitments, SEB undertakes to grant an exclusive licence of the Moulinex trade mark in each of the nine Member States concerned. In accordance with the commitments, in particular the third subparagraph of Section 1(c), those licences may be granted to one or more licensees.

172 For the purpose of considering the applicant's complaint, it must, first of all, be pointed out again that the parties agree that the products in question are sold on distinct national markets. Moreover, since the licences provided for in the commitments are exclusive, only one licensee of the Moulinex trade mark will be designated in each of the Member States concerned. The third subparagraph of Section 1(c) of the commitments provides that each of the licensees must further undertake to market products bearing the Moulinex trade mark only in the territory or territories licensed to it and for which the products are intended. Consequently, it must be held that the licensees of the Moulinex trade mark will not, in principle, directly compete with one another.

173 Moreover, as held above, parallel imports of the products concerned between Member States are minimal. Consequently, parallel imports of products bearing the Moulinex trade mark put on the market by each of the licensees in their respective territories will represent competition for the other licensees only to a marginal degree.

174 Accordingly, the fact that there will be different licensees for different Member States can in no way threaten the viability of the licensees. In any event, Section 1(g) and (i) of the commitments provide that the licensees must have certain attributes and satisfaction of those requirements is subject to supervision by the Commission.

175 It must therefore be concluded that the Commission has not committed a manifest error of assessment. The applicant's complaint must therefore be rejected.

(g) Possibility of the renegotiation of commitments following the outcome of the appraisal by the French authorities

Arguments of the parties

176 The applicant, supported by De'Longhi, argues that the Commission has committed a grave error of assessment by accepting the caveat contained in Section 2(g) of the commitments.

177 In the applicant's view, the effect of that caveat is that, if the French authorities propose a solution which would run counter to or go beyond what is necessary to re-establish normal competitive conditions on markets outside France, SEB may claim a revision (that is, a relaxation) of the present commitments by the Commission.

178 The applicant submits that this gives rise to the highly realistic possibility that, by accepting any commitments other than those accepted by the Commission, the French authorities will either undermine altogether the remedies imposed by the Commission or provide SEB with the opportunity to renegotiate the commitments given to the Commission.

179 The applicant considers that the mere existence of such a risk seriously affects the stability of the conditions attached by the Commission to its approval of the acquisition in respect of Member States other than France. Moreover, the caveat jeopardises the commercial attractiveness of any licence which may be granted by SEB for other Member States, given the uncertain nature of the commitments offered by SEB to the Commission.

180 The Commission, supported by the French Republic and SEB, claims that the applicant's arguments in that respect should be rejected.

Findings of the Court

181 It should be observed that Section 2(g) of the commitments provides that:

'If the approval of this concentration by a different competition authority is made subject to commitments which either run counter to the present commitments or give rise to a situation going beyond what is necessary in order to re-establish competition on each of the relevant markets, the SEB group may request a review of the present commitments by the Commission with a view to removing those

contradictions or releasing the SEB group from all or part of the conditions and obligations contained in the present commitments which are no longer necessary.'

182 In response to a written question of the Court of First Instance in that regard, the Commission stated that the aim of that provision was to avoid a situation in which the parties to the concentration are obliged to propose to the French competition authorities — to which the Commission has referred the examination of the effects of the concentration on the relevant markets in France — commitments which are disproportionate to the aim of re-establishing effective competition. The Commission thus stated in its answers that the commitments imposed by the French competition authorities 'would run counter' to the commitments accepted by it if, for example, they were to contain an obligation of SEB to transfer production units. In that case, SEB would no longer be in a position to conclude, at the licensees' request, a supply agreement for all or some of the products concerned, as provided for in the first subparagraph of Section 1(d) of the commitments.

183 The applicant is right to claim that Section 2(g) of the commitments ('the renegotiation clause') is capable of affecting the commitments accepted in the Approval Decision. As is shown by the example given by the Commission to illustrate a situation in which commitments 'would run counter' to each other, the application of the renegotiation clause may lead the Commission to revise the commitments accepted in the Approval Decision in order to take account of the outcome of the procedure before the French competition authorities. Thus, in the case given as an example by the Commission, it could, in accordance with that clause, release SEB from the obligation to supply the licensees at their request, as provided for in the first subparagraph of Section 1(d) of the commitments.

184 Thus, the effectiveness of the commitments accepted in the Approval Decision may be affected in two ways by the renegotiation clause. First, that clause may lead to a subsequent revision of those commitments, thus undermining the rights

acquired by the licensees on the basis of the commitments accepted in the Approval Decision. Second, simply because it provides for the possibility of a subsequent revision of the commitments, the renegotiation clause may discourage operators from seeking a licence to the Moulinex trade mark.

185 The applicant's complaints and arguments must be considered taking into account those two aspects.

186 First, to the extent that, by the present complaint, the applicant objects to the Commission's acceptance of the renegotiation clause in so far as it is may lead to a revision of the commitments provided for in the Approval Decision, it should be observed that, by their decision of 8 July 2002 given following the referral, the French competition authorities approved the concentration in question without imposing commitments.

187 Accordingly, it must be held that, as the Commission rightly pointed out in its answers to the written questions of the Court, SEB will be unable to benefit from Section 2(g) of the commitments since that clause only applies if the approval of the French competition authorities is made subject to commitments.

188 Consequently, as the applicant's complaint has become devoid of purpose at the time of the Court's judgment, it is no longer necessary to rule on it.

189 In any event, even if the French competition authorities had imposed commitments when approving the concentration, it should be observed that, since Section 2(g) of the commitments provides that revision of the commitments accepted in the Approval Decision requires a prior request from SEB, the

applicant's legal situation would not have been affected at the stage of the present action. As a result the complaint would have been inadmissible.

190 The applicant's legal situation would have been affected only if SEB had requested a renegotiation after which the Commission revised the commitments provided for in the Approval Decision. In that case, it would have been for the applicant, where appropriate, to bring annulment proceedings before the Court of First Instance. It should be pointed out that that action would not have concerned Section 2(g) of the commitments but the new decision adopted by the Commission to modify the commitments provided for in the Approval Decision.

191 Second, in so far as the applicant, by the present complaint, objects to the Commission's acceptance of the renegotiation clause because, merely by its inclusion in the Approval Decision, it may dissuade operators from seeking a licence, the Court must examine the effects of that clause on those operators at the time of the adoption of the Approval Decision.

192 The Court observes that, when the Approval Decision was adopted, the renegotiation clause affected the legal situation of potential applicants for a licence to the Moulinex trade mark because, at that time, there was uncertainty as to the outcome of the procedure before the French competition authorities.

193 However, the adoption of the French competition authorities' decision would put an end to that uncertainty. In those circumstances, it is clear that the effect of the renegotiation clause was not to prevent but, at most, to delay the conclusion of licence agreements for the Moulinex trade mark until such time as the operators interested in such a licence were able to know the outcome of the procedure in France.

194 It should be pointed out that the delay affecting the conclusion of licence agreements was not unlimited. Article 9(6) of Regulation No 4064/89 provides that the publication of any report or the announcement of the findings of the examination of the concentration by the competent authority of the Member State concerned is to be effected not more than four months after the Commission's referral. Moreover, under Section 1(h) of the commitments, the conclusion of licence agreements by SEB is subject to time-limits which may, in exceptional circumstances, be extended. At the hearing, the parties informed the Court that such an extension had in fact been granted in order to allow the candidates for the grant of a licence to know the outcome of the procedure before the French competition authorities. Finally, under Section 2(e)(iv), if SEB does not grant licences within the time-limits prescribed by Section 1(h), it is to be replaced by an agent in carrying out that task.

195 Consequently, it does not appear that Section 2(g) of the commitments was capable of undermining the effectiveness of the commitments at the time of the adoption of the decision. The applicant's complaint in that respect is therefore unfounded.

(h) The absence of a licence in Italy, Spain and Finland

Arguments of the parties

196 At the hearing, De'Longhi claimed that the commitments did not dispel the serious doubts as to the compatibility of the concentration on certain relevant markets in Italy, Spain and Finland.

197 Thus, as regards the relevant markets in Italy, De'Longhi observes that the Approval Decision itself states that the new entity will hold market shares exceeding 40% on three relevant markets, namely food mixers, informal meals and kettles. De'Longhi points out that the Commission has imposed no commitment in that Member State. After having found, in recital 121 of the decision, that the concentration will have little impact on competition on the food mixers market since the new entity is subject to competition from, in particular, Braun (10-20%), Philips (0-10%) and De'Longhi (0-10%), the Commission concluded, in recital 123, that the concentration did not raise serious doubts on the kettles and informal meals markets on the ground that, as those markets represent only 0-5% of the value of the whole 'kitchen' range of small electrical household appliances, retailers will be able to penalise any attempted anti-competitive conduct on those markets by reducing their purchases of SEB/Moulinex products on the other markets where the joint entity realises 90-100% of its turnover. According to the Commission, that possibility would render unprofitable any price increase by the parties on the two relevant markets.

198 De'Longhi notes that the same reasoning is followed with respect to the relevant markets in Spain (recitals 115 to 117) and Finland (recitals 118 to 120).

199 According to De'Longhi, such reasoning is unfounded. On the contrary, it considers that, rather than retaliating, the retailers active in supermarket distribution will prefer to cooperate with SEB in order to exclude from that type of distribution the suppliers competing with SEB which are unable to offer the same supply conditions as SEB.

200 The Commission, supported by the French Republic and SEB, claims that the arguments put forward by De'Longhi should be rejected.

Findings of the Court

201 In its reply to a written question of the Court asking it to clarify its complaint based on the absence of commitments in certain Member States, the applicant indicates that, by that complaint, it does not contest as such the assessment of the relevant markets in Italy, Spain and Finland but solely the fact that the Commission did not consider the interaction between the different national markets.

202 However, it is precisely that assessment by the Commission in respect of the relevant markets in Italy, Spain and Finland which De'Longhi challenges by the arguments set out above.

203 The Court finds that, in doing so, De'Longhi alters the context of the dispute as defined in the application. Whilst the third paragraph of Article 40 of the EC Statute of the Court of Justice and Article 116(3) of the Rules of Procedure do not preclude the intervener from advancing arguments which are new or which differ from those of the party he supports, lest his intervention be limited to restating the arguments advanced in the application, it cannot be held that those provisions permit him to alter or distort the context of the dispute defined in the application by raising new pleas in law (see, to that effect, Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1, 18, Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 22, Case C-245/92 P *Chemie Linz* v *Commission* [1999] ECR I-4643, paragraph 32, Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 21, Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraph 75, Joined Cases T-125/96 and T-152/96 *Boehringer* v *Council and Commission* [1999] ECR II-3427, paragraph 183, and Case T-395/94 *Atlantic Container Line and Others* v *Commission* [2002] ECR II-875, paragraph 382).

204 Therefore, since an intervener must, under Article 116(3) of the Rules of Procedure, accept the case as he finds it at the time of his intervention and since, under the fourth paragraph of Article 40 of the EC Statute of the Court of Justice, the submissions made in an application to intervene are to be limited to supporting the submissions of one of the main parties, De'Longhi, as an intervener, does not have standing to raise the present plea based on the absence of a licence in Italy, Spain and Finland. Consequently, the present plea raised by the intervener must be rejected as inadmissible.

205 Moreover, if the Court were to have to consider that plea and, as the case may be, declare it to be well-founded, that might result in an infringement of the rights of the defence in the proceedings before the Court. Since, in the present expedited procedure under Article 76a of the Rules of Procedure, that plea was not — in accordance with paragraph 2 of that article — the subject of a statement in intervention within the meaning of Article 116(4) of the Rules of Procedure and was necessarily and unavoidably submitted for the first time at the hearing before the Court, it is capable of prejudicing the Commission's right, pursuant to the adversarial principle, to state its views properly in that regard (see, to that effect, Case C-480/99 P *Plant and Others* v *Commission and South Wales Small Mines* [2002] ECR I-277, paragraphs 24 and 33, and Case C-259/96 P *Council* v *De Nil and Impens* [1998] ECR I-2915, paragraph 31).

206 Accordingly, this plea must be rejected.

(i) Sharing of the market for the Moulinex trade mark

Arguments of the parties

207 At the hearing, De'Longhi submitted, for the first time, that the commitments accepted in the Approval Decision will lead to sharing of the market for the

Moulinex trade mark. It claims that that market sharing is strengthened by the last subparagraph of Section 1(c) of the commitments, which prohibits the licensees from exporting the products which they market under the Moulinex trade mark to the territories of the other licensees and to those of SEB.

208 According to De'Longhi, such market sharing is not covered by Commission Regulation (EC) No 240/96 of 31 January 1996 on the application of Article [81](3) of the Treaty to certain categories of technology transfer agreements (OJ 1996 L 31, p. 2) and, consequently, is prohibited by Article 81(1).

209 As De'Longhi brought that problem to the Commission's attention during the administrative procedure, it claims that the Commission should have examined whether the commitments did not raise serious doubts in that regard.

210 The Commission, supported by the French Republic and SEB, claims that De'Longhi's arguments should be rejected.

Findings of the Court

211 In submitting that the commitments will lead to sharing of the market for the Moulinex trade mark, De'Longhi is putting forward a plea that was not raised by the applicant.

212 Whilst the third paragraph of Article 37 of the EC Statute of the Court of Justice and Article 116(3) of the Rules of Procedure do not preclude the intervener from advancing arguments which are new or which differ from those of the party he supports, lest his intervention be limited to restating the arguments advanced in the application, it cannot be accepted that those provisions permit him to alter or distort the context of the dispute defined in the application by raising new pleas in law (see, to that effect, *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority*, *CIRFS and Others* v *Commission*, paragraph 22, *Chemie Linz* v *Commission*, paragraph 32, *Siemens* v *Commission*, paragraph 21, *British Airways and Others* v *Commission*, paragraph 75, *Boehringer* v *Council and Commission*, paragraph 183, and *Atlantic Container Line and Others* v *Commission*, paragraph 382, cited above).

213 Therefore, since an intervener must, under Article 116(3) of the Rules of Procedure, accept the case as he finds it at the time of his intervention and since, under the fourth paragraph of Article 37 of the EC Statute of the Court of Justice, the submissions made in an application to intervene are to be limited to supporting the submissions of one of the main parties, De'Longhi, as an intervener, does not have standing to raise the present plea alleging that the commitments lead to market sharing. Consequently, the present plea raised by the intervener must be rejected as inadmissible.

214 In any event, even if it were admissible, the plea raised by the intervener is unfounded.

215 It is clear from Article 2(1) of Regulation No 4064/89 that when, in the course of examining the compatibility of a concentration with the common market, the Commission is appraising whether the concentration creates or strengthens a dominant position within the meaning of Article 2(2), it must 'take into account the need to maintain and develop effective competition within the common

market in view of, among other things, the structure of the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community'.

216 It is therefore correct that, as De'Longhi submits, the Commission cannot, when applying Regulation No 4064/89, approve commitments which are contrary to the competition rules laid down in the Treaty inasmuch as they impair the preservation or development of effective competition in the common market. In that context, the Commission must appraise the compatibility of those commitments in particular according to the criteria of Article 81(1) and (3) EC (which, in reference to Article 83 EC, constitutes one of the legal bases for Regulation No 4064/89, see Case T-251/00 *Lagardère* v *Commission* [2002] ECR I-4825, paragraph 85).

217 However, in the present case, it must be observed, first, that the last subparagraph of Section 1(c) of the commitments provides that 'the licensee or licensees shall undertake to market products bearing the Moulinex trade mark only in the territory or territories licensed to them and for which the products are intended'. Contrary to what De'Longhi claims, it does not follow from the terms of that clause that the commitments expressly impose on the licensees of the Moulinex trade mark a ban on exports to the other Member States. The clause can be interpreted as merely obliging the licensees to market products bearing the Moulinex trade mark in the territory licensed to them. A clause obliging a licensee to concentrate the sale of the products covered by the licence on his territory does not, in principle, have as its object or effect the restriction of competition within the meaning of Article 81(1).

218 Second, it should be noted that, even if, as the applicant maintains, the clause at issue had to be interpreted as prohibiting the licensees from exporting products bearing the Moulinex trade mark to other Member States, De'Longhi has not shown how, in the present case, that clause would be contrary to Article 81(1).

De'Longhi does not explain how, having regard to the national dimension of the relevant product markets and the absence of significant parallel imports between the Member States, the clause at issue might appreciably restrict competition on the relevant market in the Community or significantly affect trade between the Member States within the meaning of Article 81(1). It is settled case-law that even an agreement imposing absolute territorial protection may escape the prohibition laid down in Article 81(1) if it affects the market only insignificantly (Case C-306/96 *Javico* [1998] ECR I-1983, paragraph 17, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 85, and Case 5/69 *Völk* v *Vervaecke* [1969] ECR 295, paragraph 7).

219 Moreover, De'Longhi does not establish that a licensee of the Moulinex trade mark who is not protected against, at least, active competition from the other licensees in respect of the territory licensed to him would be prepared to accept the risk of marketing products bearing that trade mark together with his own trade mark by way of 'co-branding'. The purpose of the commitments is to enable the licensees, over a transitional period during which they will be entitled to use their own trade mark together with the Moulinex trade mark, to ensure the migration from the Moulinex trade mark to their own trade marks, so that they can compete effectively against the Moulinex trade mark after the transitional period, when SEB will again be entitled to use the Moulinex trade mark in the nine Member States concerned. It must be held that, in such a context, the absence of any protection of the licensees against, at least active, competition from the other licensees could undermine the strengthening of the trade marks competing with the Moulinex trade mark and thus adversely affect competition on the relevant market in the territory of the Community. Consequently, in so far as they prohibit active sales, the provisions of the clause at issue cannot be regarded as necessarily restricting competition within the meaning of Article 81(1) (see, to that effect, Case 258/78 *Nungesser* v *Commission* [1982] ECR 2015, paragraph 57, and Case 262/81 *Coditel* v *Ciné-Vog Films* [1982] ECR 3381, paragraph 15).

220 It follows from the above considerations that De'Longhi's arguments alleging that the commitments lead to market sharing must be rejected.

(j) Conclusion as to the first plea

221 It follows from all the above considerations that none of the complaints and arguments raised by the applicant is capable of showing that, by accepting the commitments proposed by SEB at the end of Phase I, the Commission committed a manifest error of assessment.

222 Consequently, the first plea must be rejected in its entirety.

The second plea: the commitments were not proposed in time

(a) Arguments of the parties

223 The applicant, supported by De'Longhi, argues that the Commission should not have allowed SEB to make any substantial alteration to its remedy proposal following the market test but, instead, should have adopted an Article 6(1)(c) decision.

224 The applicant claims that Phase I remedies may be modified only slightly following the market test because such remedies are 'designed to provide a straightforward answer to a readily identifiable competition concern' (paragraph 37 of the Remedies Notice). In the present case, the remedies which SEB had initially offered in Phase I were, in the applicant's view, grossly and manifestly insufficient.

225 The Commission, supported by the French Republic and SEB, claims that the applicant's arguments in that regard should be rejected.

(b) Findings of the Court

226 The parties to the concentration proposed commitments to the Commission on three occasions during the Phase I procedure, namely on 5 December 2001, 18 December 2001 and on an unspecified subsequent date before the adoption of the Approval Decision on 8 January 2002.

227 The tenor of each of those commitments was, essentially, as follows:

— in the initial version of 5 December 2001 ('the initial version of the commitments'), the commitments provided for the withdrawal, from the entire EEA and for a period of two years, of five categories of the products under the Moulinex trade mark;

— in the modified version of 18 December 2001 ('the modified version of the commitments'), the commitments provided for an exclusive licence to the Moulinex trade mark for a period of three years, together with a commitment not to enter the market under the Moulinex trade mark for a further year after expiry of the licence, in respect of all the product categories in Belgium, Greece, the Netherlands and Portugal and for deep friers in Germany, Austria, Denmark, Norway and Sweden, as well as an obligation of the licensees to obtain supplies in respect of four categories of the relevant products;

— finally, in the final version accepted in the Approval Decision ('the final version of the commitments'), the commitments provide for an exclusive licence to the Moulinex trade mark for a period of five years, together with a commitment not to enter the market under the Moulinex trade mark for three years following expiry of the licence, in respect of all the categories of small electrical household appliances in Austria, Germany, Belgium, Denmark, Greece, Norway, the Netherlands, Portugal and Sweden, as well as an obligation of the licensee in Germany to obtain supplies for a period of two years in respect of one category of the relevant products.

228 It should be noted that Article 18(1) of Regulation No 447/98 states:

'Commitments proposed to the Commission by the undertakings concerned pursuant to Article 6(2) of Regulation (EEC) No 4064/89 which are intended by the parties to form the basis for a decision pursuant to Article 6(1)(b) of that Regulation shall be submitted to the Commission within not more than three weeks from the date of receipt of the notification.'

229 In the present case, since the concentration was notified on 13 November 2001, the time-limit for the proposal of commitments to the Commission during Phase I expired, in accordance with the method of calculating time-limits laid down in Articles 6 to 9 and 18(3) of Regulation No 447/98, on 5 December 2001. It follows that the initial version of the commitments was lodged with the Commission within the time-limit prescribed by Article 18(1) of Regulation No 447/98.

230 However, it is undisputed that the initial version of the commitments is not that which was finally accepted by the Commission in the Approval Decision. According to recital 135 of the Approval Decision, the initial version of the commitments did not permit the Commission to dispel all serious doubts as to the compatibility of the concentration with the common market because it did not permit Moulinex to be replaced by an agent and did not cover all the markets on which the concentration might raise serious doubts.

231 It is undisputed that both the modified version and the final version of the commitments were submitted by the parties to the concentration after expiry of the three-week time-limit prescribed by Article 18(1) of Regulation No 447/98. Accordingly, it must be examined whether the Commission was entitled to accept those commitments without infringing that provision.

232 For the purpose of that examination, regard must first be had to the terms of the applicable provisions of Regulation No 4064/89 and Regulation No 447/98.

233 Under Article 18(1) of Regulation No 447/98, the parties to the concentration have a period of three weeks within which to submit to the Commission the commitments which 'are intended by the parties to form the basis' for a decision adopted at the end of Phase I.

234 Likewise, the second subparagraph of Article 10(1) of Regulation No 4064/89 provides that Phase I is to be extended to six weeks if, after notification of a concentration, the undertakings concerned submit commitments pursuant to Article 6(2) of that regulation which 'are intended by the parties to form the basis' for a decision at the end of Phase I.

235 It follows from the wording of those provisions that the three-week time-limit prescribed by Article 18(1) of Regulation No 447/98 is intended to be binding on the parties in the sense that the Commission is not obliged to take commitments into consideration in Phase I if the parties submit them after expiry of that time-limit. On the other hand, it is not apparent from the wording of those provisions that the Commission is prohibited from considering such commitments submitted out of time.

236 In order to determine whether Article 18(1) of Regulation No 447/98 must nevertheless be interpreted in that way, its wording must be considered in the light of the aims pursued by it.

237 In that connection, it should be pointed out that that provision was introduced by Regulation No 447/98, which repealed Commission Regulation (EC) No 3384/94 on the notifications, time-limits and hearings provided for in Regulation No 4064/89 (OJ 1994 L 377, p. 1) following the adoption of Regulation No 1310/97. The latter regulation inserted into Regulation No 4064/89 rules on the offering of commitments during Phase I. In recital 16 in the preamble to Regulation No 447/98, the Commission states that the time-limits for the submission of commitments prescribed by that regulation are necessary 'in order to enable the Commission to carry out a proper assessment of commitments that have the purpose of rendering the concentration compatible with the common market, and to ensure due consultation with other parties involved, third parties and the authorities of the Member States'.

238 That recital therefore indicates that, by the introduction of the time-limit prescribed by Article 18(1) of Regulation No 447/98, the Commission intended to ensure that it would have sufficient time to assess the commitments and consult third parties. While the pursuit of that aim necessarily requires that the time-limit laid down by that provision is binding on the parties to the concentration, so as to preclude them from submitting commitments, before expiry of Phase I, at a time which does not leave the Commission a sufficient period within which to assess them and consult third parties, it in no way requires that the time-limit be likewise binding on the Commission. The Commission is perfectly able to find that, having regard to the circumstances of the case, a shorter period is sufficient for such assessments and consultations.

239 It follows that Article 18(1) of Regulation No 447/98 must be interpreted as meaning that, whilst the parties to a concentration cannot oblige the Commission to take account of commitments and modifications to them submitted after the time-limit of three weeks, the Commission must nevertheless be able, where it considers that it has the time necessary to examine them, to authorise the concentration in light of those commitments even if modifications are made after expiry of the three-week time-limit.

240 It follows from the foregoing that the Commission was entitled to accept the modified version of the commitments and the final version of those commitments after the three-week period provided for by Article 18(1) of Regulation No 447/98, that period not being binding on it.

241 In any event, contrary to what the applicant claims, the Commission, in accepting those commitments, complied with the relevant principles laid down by it in the Remedies Notice.

242 First of all, it should be noted in that regard that, contrary to what the Commission suggests in its defence, that notice is not devoid of any binding legal obligation. The Commission is bound by notices which it issues in the area of supervision of concentrations, provided they do not depart from the rules in the Treaty and from Regulation No 4064/89 (see, to that effect, Case C-382/99 *Netherlands* v *Commission* [2002] ECR I-5163, paragraph 24, and Case C-351/98 *Spain* v *Commission* [2002] ECR I-8031, paragraph 53). Moreover, the Commission cannot depart from rules which it has imposed on itself (see, in particular, Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 53).

243 In the Remedies Notice, the Commission stated:

> '37 Where the assessment shows that the commitments offered are not sufficient to remove the competitive concerns raised by the merger, the parties will be informed accordingly. Given that phase I remedies are designed to provide a straightforward answer to a readily identifiable competition concern, only limited modifications can be accepted to the proposed commitments. Such modifications, presented as an immediate response to the result of the consultations, include clarifications, refinements and/or other improvements which ensure that the commitments are workable and effective.'

244 In the present case, it is clear, and undisputed by the applicant, that the changes made to the modified version of the commitments by the final version are limited modifications within the meaning of paragraph 37 of the Remedies Notice. As compared with the previous version, the final version of the commitments merely prolongs the term of the exclusive licence and of the subsequent obligation not to enter the market, extends to five additional Member States the principle applied in respect of the first four that the licence is to cover all the small electrical household products and, finally, reduces the scope of the supply obligation. Since

those modifications relate only to the scope, in terms of temporal and geographical application and in terms of products, of the obligations provided for in the modified version of the commitments, they can be regarded as limited modifications designed to improve or refine the modified version of the commitments for the purposes of paragraph 37 of the Remedies Notice.

245 With respect to the changes made to the initial version by the modified version of the commitments, which converted the obligation to withdraw the Moulinex trade mark into an obligation to grant an exclusive licence to use that trade mark, it should be observed that, like the withdrawal of the trade mark, the grant of an exclusive licence has the effect of depriving the proprietor of the Moulinex trade mark, in this case SEB, of the right to use that trade mark in the territories concerned. To that extent, the fact that the grant of an exclusive licence permits a third party to use the trade mark can therefore be regarded as an 'improvement' as compared to a mere withdrawal.

246 Moreover, in the present case, the modified version of the commitments provided, in the first subparagraph of Section 1(1)(b) and in the first subparagraph of Section 1(2)(b), that SEB was to abstain from using the Moulinex trade mark for a period of one year after expiry of the licence agreements. In addition, the second subparagraph of Section 1(1)(a) and the third subparagraph of Section 1(2)(a) provided that the licensees would be entitled to stop using the Moulinex trade mark at any time during the three-year term of the licence for the purpose of migrating definitively to their own trade mark. In accordance with those provisions, the Moulinex trade mark would have been withdrawn from the market for a period of at least one year and, at least in theory, of four years at most. Following the adoption of the final version of the commitments, the term of the licence was extended to five years and SEB's obligation not to use the Moulinex trade mark after expiry of the licence was extended to three years, so that the Moulinex trade mark will be withdrawn from the market for a period of at least three years and, at least in theory, for eight years at most. It follows that, contrary to what the applicant claims, the modified version and the final version

of the commitments are not limited to substituting the grant of licences to use the Moulinex trade mark for the withdrawal of that trade mark provided for by the initial version but have reinforced that withdrawal by obliging SEB to grant a licence. For that reason also, the modified version and the final version of the commitments are an 'improvement' as compared with the initial version.

247 Furthermore, even though third parties apparently were not expressly consulted on the initial version of the commitments, that improvement can be regarded as 'an immediate response to the result of the consultations' with third parties intended to render the commitments 'workable and effective'. In response to question 25 of the questionnaire sent to the competitors, the applicant itself stated that 'for a sustainable position on each national product market concerned two factors are of critical importance: brand loyalty of the consumers and structural access to the various distribution channels'. Having regard to that answer, the Commission was entitled logically to conclude from the consultation of third parties that a licence to the Moulinex trade mark constituted an immediate response to the problems identified by them since, in contrast to a mere withdrawal of the trade mark, such a licence permits an operator with a reputable trade mark and access to distribution channels to be substituted for Moulinex.

248 It is also apparent from the file before the Court that, in a note dated 17 December 2001 'on the possible commitments of SEB', De'Longhi expressly suggested to the Commission that 'as an alternative to the transfer, SEB could be required to undertake to grant licences to use the Moulinex trade mark to third party purchasers in all the national markets on which the concentration entails particularly significant anti-competitive effects'. Even if, as it claimed at the hearing, De'Longhi qualified that statement in its response to the questionnaire on the commitments of 3 January 2002, the fact nevertheless remains that it constitutes evidence confirming that the Commission was entitled to consider that a commitment to grant licences constituted an immediate response to the consultations with third parties, as De'Longhi itself recommended that option before it was proposed by SEB.

249 For all those reasons, the modified version and the final version of the commitments can be regarded as limited modifications which, in accordance

with paragraph 37 of the Remedies Notice, may be accepted by the Commission after expiry of the period prescribed by Article 18(1) of Regulation No 447/98.

250 Consequently, the second plea must be rejected in its entirety.

Conclusion as to the claim for annulment of the Approval Decision

251 It follows from all the above considerations that the applicant's claim for annulment of the Approval Decision must be dismissed as unfounded.

2. *The claim for annulment of the Referral Decision*

252 Since the Commission contests the admissibility of the application in so far as it seeks annulment of the Referral Decision, it must first be examined whether it is open to the applicant to contest that decision.

Admissibility

253 The Commission asserts that the application is inadmissible on two grounds. First, it submits that the applicant is not directly and individually concerned by

the Referral Decision. Second, it claims that the application, in so far as it seeks annulment of the Referral Decision, does not comply with the formal requirements of the Rules of Procedure.

(a) Direct and individual concern of the applicant

Arguments of the parties

254 The Commission, supported by the French Republic and SEB, submits, in accordance with Article 114 of the Rules of Procedure, that the application is wholly inadmissible in so far as it is directed against the Referral Decision, which is neither addressed to Philips nor of direct and individual concern to it.

255 The Commission points out that the Referral Decision is addressed only to the French Republic, so that, as a person other than the addressee of that decision, Philips is required to show direct and individual concern pursuant to the fourth paragraph of Article 230 EC.

256 The Commission avers that an Article 9 decision to refer is a 'decision' within the meaning of Article 230. It is more than a mere preparatory step in an administrative procedure, since it definitively transfers responsibility for the assessment of the referred aspects of the notified concentration from the Commission to the authorities of the Member State concerned.

257 However, the Commission submits that, in contrast to an Article 6(1)(a) decision (see, for example, Case T-87/96 *Assicurazioni Generali* v *Commission* [1999] ECR II-203; Case T-2/93 *Air France* v *Commission* [1994] ECR II-323), an Article 9 decision, such as the Referral Decision, has no effect on the legal position of third parties such as Philips. In the Commission's view, such a decision plainly has an effect on the legal position of the Member State to which the concentration is referred. The Commission makes no submissions on the issue whether the decision may have an effect on the legal position of the notifying parties.

258 First, the Commission points out that, as a result of an Article 9 decision, the aspects of the transaction which are referred must be scrutinised by the national authorities. In that respect, the Commission explains that such a decision may only be taken in the circumstances set out in Article 9(2)(a) or (b), which presupposes that there is indeed a competition issue which the national authorities in question are well placed to address. The Commission also points out that the reference is made 'with a view to the application of that State's national competition law' (Article 9(3)(b)) and that Article 9(8) provides that 'the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned'. According to the Commission, it follows that the competition issue identified in the request for referral must be addressed and that the decision to refer does not in any way prejudge or predetermine the outcome of the national review process.

259 Second, the Commission emphasises that the procedure laid down in Article 9 is one in which third parties have no role whatsoever, the matter being entirely a bilateral one between the Commission and the requesting Member State. In the Commission's view, that is a strong indication of the fact that the legislature understood that such decisions had no effect on the legal position of third parties, as otherwise it might have been expected that their views would be sought.

260 Hence, the Commission maintains that Philips's legal position will be affected only by the final decision taken by the French authorities. According to the Commission, the assessment of the effects of the transaction on the French market is thus entirely at large; any action by Philips in respect of the situation on the French market is premature and, as regards the Commission, misdirected. Philips will have the opportunities afforded by French law to challenge the position adopted by the French authorities should it disagree with it.

261 Accordingly, the Commission rejects all the grounds of admissibility raised by the applicant.

262 First, as regards the active participation of Philips in the handling of the case, the Commission recalls that there is no role for third parties in the Community procedure leading to the Referral Decision. The fact that Philips urged the Commission not to grant the request lodged by the French authorities cannot alter that position. In so far as Philips is referring to participation in the procedure conducted by the French competition authorities, the Commission considers that this may be relevant to any challenge it might wish to bring in France against the outcome of those proceedings but can have no relevance at all to an application in respect of a decision taken by another authority, namely the Commission.

263 Second, as regards the fact that the Commission assessed the competitive situation with particular regard to the position of Philips as the principal competitor of the parties to the concentration, the Commission points out that this is linked by Philips expressly to the Approval Decision. The Commission infers that Philips does not intend to rely on it as regards the admissibility of the challenge to the Referral Decision. The Commission submits that Philips is plainly right not to rely on the wording of the Approval Decision in respect of a market in which the Commission has entrusted the analysis to another authority.

264 Third, as regards the fact that Philips was a (disappointed) contender for part of the Moulinex business, and that its market position will be appreciably affected by the decision of the French Minister and the conditions imposed by the Commission on the basis of Article 6(2) of Regulation No 4064/89, the Commission submits again that, in so far as this refers to the decision to be taken by the French authorities, it may be relevant to any challenge that Philips may wish to bring against that decision. By contrast, the Commission stresses that the Referral Decision has had no impact at all on Philips's position on the French market.

265 For all those reasons, the Commission maintains that the application should be declared inadmissible in so far as it is directed against the Referral Decision. The Commission requests the Court to rule specifically on the admissibility of that aspect of the case, which is its primary submission in relation to the Referral Decision, and which is a matter of considerable importance to the Commission since challenges such as that of Philips could, if held to be admissible, seriously affect the efficient and expeditious dispatch of business under the Regulation.

266 The applicant, supported by De'Longhi, submits that it is directly and individually concerned by the Referral Decision and that, consequently, its application for annulment of the Referral Decision is admissible.

Findings of the Court

267 By its objection of inadmissibility the Commission does not dispute that the Referral Decision is a decision which can be the subject of an application for annulment. However, it submits that the action is inadmissible on the ground that the applicant does not show that the decision is of direct and individual concern to it.

268 It should be observed that, according to the fourth paragraph of Article 230 EC, 'any natural or legal person may... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'.

269 The applicant is not the addressee of the Referral Decision, which the Commission addressed to a Member State which had requested a referral under Article 9(2) of Regulation No 4064/89. Accordingly, it must be examined whether the decision is of direct and individual concern to the applicant.

— Direct interest

270 In its objection of inadmissibility, the Commission claims that, although the Referral Decision produces legal effects for the Member State concerned, it produces none for third parties because it in no way prejudices the final decision on the merits to be made by the French competition authorities with respect to those aspects of the concentration which were referred to them. According to the Commission, only that decision can affect the competitive situation of the applicant on the relevant markets in France.

271 By that argument, the Commission thus disputes that the Referral Decision directly concerns the applicant.

272 In accordance with settled case-law, for a contested Community measure to be of direct concern to a private applicant, it must directly affect the applicant's legal situation and its implementation must be purely automatic and result from

Community rules alone without the application of other intermediate rules (see, *inter alia*, Case C-386/96 P *Dreyfus* v *Commission* [1998] ECR I-2309, paragraph 43, and Case T-9/98 *Mitteldeutsche Erdöl-Raffinerie* v *Commission* [2001] ECR II-3367, paragraph 47).

273 That is the case, in particular, where the possibility that addressees will not give effect to the Community measure is purely theoretical and their intention to act in conformity with it is not in doubt (Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207, paragraphs 8 to 10, and *Dreyfus* v *Commission*, cited above, paragraph 44).

274 In the present case, it must therefore be examined whether the Referral Decision is capable of directly and automatically affecting the applicant's legal position or whether, on the contrary, those effects will arise from the decision adopted on the referral by the French competition authorities.

275 In that regard, the Court agrees with the Commission that the Referral Decision is not capable of directly affecting the competitive position of the applicant on the relevant markets in France. Having regard to the Referral Decision, the Commission did not, in the Approval Decision, rule on the compatibility of the concentration with the common market as regards its effects on the relevant markets in France but referred the examination of that question to the French competition authorities which requested that referral on 7 December 2001. In accordance with point (b) of the first subparagraph of Article 9(3) of Regulation No 4064/89, those authorities are responsible for examining the effects of the concentration on the relevant markets in France with a view to the application of national competition law. The only obligations imposed by Regulation No 4064/89 on the French competition authorities in that regard are, first, in accordance with Article 9(6), that they must adopt their decision within a period of not more than four months after the Commission's referral and, second, in accordance with Article 9(8), that they must take 'only the measures strictly necessary to safeguard or restore effective competition on the market concerned'.

However, since those obligations cannot determine precisely and with certainty the result of the examination of the merits carried out by the French competition authorities, it must be held that the Referral Decision is not capable of directly affecting the competitive situation of the applicant on the relevant markets in France, as only the final decision adopted by the French competition authorities can have that effect.

276 However, that does not show that the Referral Decision is not of direct concern to the applicant. The question whether a third party is directly concerned by a Community measure which is not addressed to it must be examined in the light of the purpose of that measure. The purpose of a referral decision is not to rule on the effects of the concentration on the relevant markets which are the subject of the referral but to transfer responsibility for the examination of certain aspects of the concentration to the national authorities which have requested the referral in order that they may give a ruling in accordance with their national competition law. In view of that purpose, it is irrelevant in the present case that the Referral Decision does not directly affect the competitive position of the applicant on the relevant markets in France.

277 In order to assess whether the applicant is directly concerned by the Referral Decision, it need only be determined whether that decision, in so far as its purpose is to refer the examination of part of the concentration to the French competition authorities, has a direct and automatic legal effect on the applicant.

278 In that regard, it should be observed that, pursuant to Article 1(1) and Article 22(1) thereof, Regulation No 4064/89 is, in principle, applicable only to concentrations with a Community dimension as defined in Article 1(2) and (3) of that regulation. Thus, according to the first subparagraph of Article 21(2) of Regulation No 4064/89, concentrations with a Community dimension are not, in principle, subject to the application of the Member States' laws on competition.

279 In the present case, by referring the examination of certain aspects of the concentration in question to the French competition authorities, the Commission terminated the procedure applying Regulation No 4064/89, initiated by the notification of the agreement on the partial acquisition by SEB of assets held by Moulinex, by finding that the conditions for referral laid down in Article 9(2)(a) of that regulation were satisfied, namely that the 'concentration threatens to create or to strengthen a dominant position as a result of which effective competition would be significantly impeded on a market within that Member State, which presents all the characteristics of a distinct market'. According to point (b) of the first subparagraph of Article 9(3), having found that there is such a distinct market and that such a threat exists, the Commission is to refer all or part of a concentration with a Community dimension to the competent authorities of the Member State concerned and those authorities are to apply their national competition law.

280 It follows that the effect of the Referral Decision which is the subject of the present action is, first, to exclude the application of Regulation No 4064/89 to the part of the concentration referred and, second, to subject that part of the concentration to exclusive review by the French competition authorities ruling under their national competition law.

281 It must be held that the Referral Decision thus affects the applicant's legal situation.

282 By determining, through the referral to national competition law, the criteria for the assessment of the lawfulness of the concentration and the procedure and possible sanctions applicable to it, the Referral Decision affects the legal situation of the applicant by depriving it of the opportunity to have the Commission review the lawfulness of the concentration from the point of view of Regulation No 4064/89 (see, by analogy, Case T-87/96 *Assicurazioni Generali and Unicredito* v *Commission* [1999] ECR II-203, paragraphs 37 to 44).

283 The review of a concentration carried out under the laws of a Member State cannot be considered, as regards its scope and effects, to be comparable to that carried out by the Commission under Regulation No 4064/89 (Case T-3/93 *Air France* v *Commission* [1994] ECR II-121, paragraph 69).

284 Moreover, by terminating the procedure laid down by Regulation No 4064/89, the effect of the Referral Decision is to deprive third parties of the procedural rights which they derive from Article 18(4) of Regulation No 4064/89 and which they could otherwise have exercised if the Commission had opened the Phase II procedure.

285 Finally, by that decision, the Commission precludes third parties from relying on the judicial protection which they enjoy under the Treaty. By referring the examination of the effects of the concentration on the relevant markets in France to the French competition authorities, which rule on the basis of their national competition law, the Commission deprives third parties of the opportunity to bring a subsequent action before the Court of First Instance under Article 230 EC to challenge the national authorities' assessments in that regard, when, had a referral not been made, the Commission's assessments could have been so challenged.

286 Consequently, since the effect of the Referral Decision is to deprive the applicant of the application of Regulation No 4064/89 and the procedural rights under it for third parties and of the judicial protection provided for by the Treaty, it must be held that the Referral Decision is capable of affecting the legal situation of the applicant.

287 That effect is direct since the Referral Decision requires no additional implementing measure in order to render the referral effective. As soon as the Referral Decision is adopted by the Commission, the referral is immediate for the

Member State concerned, which thus becomes competent to assess the part of the concentration referred in the light of its national competition law.

288 In addition, it must be observed that, in accordance with Article 9(2) of Regulation No 4064/89, it was the French authorities which requested the Commission to refer to them the examination of the effects of the concentration on the relevant markets in France. Accordingly, the possibility that the French authorities would not act on the Referral Decision could be excluded and that is confirmed in the present case by the fact that, on 8 July 2002, the French competition authorities adopted their final decision on the aspects of the concentration referred to them.

289 Consequently, it must be held that the Referral Decision directly affects the applicant.

290 That finding cannot be called into question by the fact, pointed out by the Commission, that the applicant may bring an action against the national authority's decision in accordance with national remedies and, where appropriate, seek, within that framework, a preliminary ruling under Article 234 EC. The possible existence of remedies before the national courts cannot preclude the possibility of contesting the legality of a decision adopted by a Community institution directly before the Community judicature under Article 230 EC (*Air France*, cited above, paragraph 69).

— Individual concern

291 Persons other than the addressees of a decision can claim to be individually concerned only if that decision affects them by reason of certain attributes

peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee (see, *inter alia*, Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107, and Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 36).

292 In the present case, the Commission does not dispute that the Approval Decision is of individual concern to the applicant. The parties agree that the applicant is one of the principal current competitors of the parties to the concentration on the relevant markets. In recital 32 of the Approval Decision, the applicant is thus mentioned as one of the operators which, like SEB, Moulinex, Bosch, Braun and De'Longhi, offer a wide range of products in the small electrical household appliances sector and have a pan-European presence. Further, at several points in the decision, in particular recitals 51, 57, 65 and 75, the Commission assessed the concentration, taking into account the position of the applicant. Finally, the applicant actively participated in the single administrative procedure leading to the adoption of the Approval Decision and submitted observations which might have influenced the Commission's assessment of the concentration and the commitments proposed to remove the competition problems raised by it.

293 However, the Commission submits that those facts, while distinguishing the applicant individually in connection with its claim for annulment of the Approval Decision, are not relevant when the admissibility of the claim for annulment of the Referral Decision is being considered.

294 That argument cannot be upheld.

295 Since, in view of the above undisputed facts, the Approval Decision is of individual concern to the applicant, it must be held that, had the referral not been made, it would have been open to the applicant, by way of an action for annulment under Article 230 EC, to challenge the Commission's assessment of the effects of the concentration on the relevant markets in France.

296 In that regard, it should be pointed out that, although the Commission alleges that the Approval Decision does not deal with the applicant's position on the relevant markets in France, it does not, however, claim that the applicant is not one of the principal current competitors of the parties to the concentration on those markets. In recital 34 of the Referral Decision, the Commission also expressly stated that, on the relevant markets in France, the applicant has the largest range of products after the parties to the concentration. Likewise, in their request for referral, the French authorities stated that the Philips trade mark is the 'principal' trade mark competing with SEB and Moulinex in France.

297 Since the Referral Decision deprives the applicant of the opportunity to challenge before the Court of First Instance assessments which it would have been entitled to challenge had the referral not been made, it must be held that the Referral Decision individually affects the applicant in the same way as it would have been affected by the Approval Decision had the referral not been made (see, by analogy, Case C-68/95 *T. Port* [1996] ECR I-6065, paragraph 59).

298 Consequently, the applicant must regarded as individually concerned by the Referral Decision.

— Conclusion

299 It follows from the above considerations that the Referral Decision is of direct and individual concern to the applicant.

300 Accordingly, the applicant is entitled to challenge the legality of that decision under Article 230 EC.

(b) Compliance of the application with the formal requirements of the Rules of Procedure

Arguments of the parties

301 The Commission, supported by the French Republic and SEB, notes that Philips, despite its intention to bring these proceedings and to seek an expedited ruling pursuant to Article 76a of the Rules of Procedure, has not at any time requested a copy (or a non-confidential version) of the Referral Decision from the Commission. This lack of diligence on its part has led it to lodge a defective application, in that the measure which it seeks to challenge is not annexed, contrary to the requirements of Article 44(4) of the Rules of Procedure.

302 At the hearing, the Commission, in response to a question of the Court of First Instance in that regard, confirmed at the hearing that it claims that the application is formally inadmissible on that ground.

Findings of the Court

303 Pursuant to the second paragraph of Article 19 of the EC Statute of the Court of Justice, which is applicable to the Court of First Instance by virtue of Article 44(4) of the Rules of Procedure, the application is to be accompanied, where appropriate, by the measure the annulment of which is sought.

304 In the present case, it is undisputed that the Referral Decision was not annexed to the application.

305 However, it should be pointed out, first, that the Rules of Procedure do not state that failure to annex the contested measure to the application automatically results in its inadmissibility. Article 44(4) of the Rules of Procedure merely provides that the application is to be accompanied 'where appropriate' by the contested measure. Further, under Article 44(6) of the Rules of Procedure, if the application does not comply with the requirements laid down in Article 44(3) to (5), the Registrar must prescribe a reasonable period within which the applicant is to put his application in order. Should the applicant fail to do so, the Court of First Instance is to decide whether the non-compliance with the conditions renders the application formally inadmissible. In the present case, the Registrar did not ask the applicant to put its application in order.

306 Second, although the applicant admitted in its answers to the written questions of the Court of First Instance that it did not request a copy of the Referral Decision from the Commission, at the hearing it referred to a letter by which it made such a request, in response to which the Commission, on 7 February 2002, sent it a

copy of the Approval Decision but not of the Referral Decision. The Commission has not disputed that claim. It stated itself at the hearing that, if such a request had been made and refused by the Commission, the failure to annex the Referral Decision would not render the application inadmissible.

307 Accordingly, the objection of inadmissibility raised by the Commission in that connection must be rejected.

(c) Conclusion as to admissibility

308 It follows from the above that the action is admissible, in so far as it seeks annulment of the Referral Decision.

Substance

309 The applicant raises four pleas in law for annulment of the Referral Decision. The first plea alleges infringement of the principles underlying Article 9 of Regulation No 4064/89. The second plea alleges that the Commission unreasonably deviated from its established practice regarding Article 9 of Regulation No 4064/89. The third plea alleges infringement of Article 6(1)(c) and (2) of Regulation No 4064/89 in so far as the Referral Decision undermines the Approval Decision. The fourth plea alleges a failure to state reasons or infringement of the principle of proper administration.

310 In response to a written question of the Court, the applicant stated that paragraph 87 of its application, entitled 'Misuse of powers and responsibilities under Regulation No 4064/89', does not constitute a separate plea but was intended solely to summarise the preceding four pleas. It is therefore unnecessary to treat that paragraph of the application as a separate plea.

(a) The first and second pleas: infringement of the principles underlying Article 9 of Regulation No 4064/89 and an unreasonable deviation from the practice established in relation to that article

Arguments of the parties

311 First, the applicant, supported by De'Longhi, alleges that, notwithstanding the wording of Article 9(3) of Regulation No 4064/89 — which suggests that, should the criteria mentioned in Article 9(2) be fulfilled, the Commission is free to choose either to deal with the case itself or to refer the relevant part of the case to the competent authorities of the Member State concerned — the freedom of choice enjoyed by the Commission is not unlimited.

312 The applicant notes that, when Regulation No 4064/89 was adopted (and amended), the Council and the Commission stated that:

'*[...] when a specific market represents a substantial part of the common market, the referral procedure provided for in Article 9 should only be applied in exceptional cases. There are indeed grounds for taking as a basis the principle that a concentration which creates or reinforces a dominant position in a*

substantial part of the common market must be declared incompatible with the common market. The Council and the Commission consider that such an application of Article 9 should be confined to cases in which the interests in respect of competition of the Member State concerned could not be adequately protected in any other way.' ('Merger control law in the European Union', European Commission, Brussels-Luxembourg, 1998, p. 54.)

313 In the present case, the applicant considers that there is nothing to suggest that the interests of France could not be adequately protected in any other way than by a referral to the French authorities.

314 In that respect, the applicant points out, first, that the Commission does not indicate in the Approval Decision (paragraph 27) that the structural characteristics of the various national product markets concerned in the case were different and, second, that, in recent cases, the Commission has shown that it is capable of addressing competition issues that arise within the French market (see, for example, Case COMP/M.2283 — *Schneider/Legrand* of 10 October 2001 and Case COMP/M.1628 — *Totalfina/Elf* of 9 February 2000).

315 Second, the applicant submits that the Referral Decision deviates from the Commission's established practice since the situation on the national markets concerned in this case is not structurally different from the position on other markets.

316 The applicant observes that, since on all national markets of all Member States trade marks are the key to success and on all national markets the portfolio of SEB/Moulinex brands is unrivalled, the only aspect of the French markets which may single them out from the others is that they involve the most serious competition concerns, i.e. a matter of degree rather than nature. The applicant submits that this cannot constitute a valid reason for a partial referral.

317 The applicant argues that, on the contrary, matters giving rise to such serious competition concerns on a number of national markets as in the present case should not be fragmented since such fragmentation only serves to jeopardise a coherent assessment of the case and the implementation of effective remedies. By way of example, the applicant refers to the *Carnival Corporation/P&O Princess* case, in which the Commission stated:

'The Commission has carefully weighed the arguments for and against such referral, and in particular the fact that the rival bid for P&O Princess, launched by Royal Caribbean, is currently under investigation in the United Kingdom. However, as the Commission's own preliminary investigation revealed that the operation proposed by Carnival also raised competition concerns in other Member States, the Commission considers that it is under these circumstances more appropriate not to fragment the case and not to conduct parallel investigations in Europe.' Press release of 11 April 2002 (IP/02/552).

318 At the hearing, De'Longhi claimed that the referral procedure established by Article 9 of Regulation No 4064/89 constitutes a derogation from the principle of the Commission's exclusive competence with respect to concentrations with a Community dimension. If a serious loophole in the system of Community control of concentrations is to be avoided, that article must be interpreted in such a way as to ensure that the referral procedure does not undermine the uniform application of Community law and the effectiveness of the corrective measures adopted by the Commission in order to secure undistorted competition in the European Union. Far from showing that the Commission has broad discretion, the fact that, where the conditions of Article 9(2)(a) are satisfied, the Commission may, in accordance with the first subparagraph of Article 9(3), either deal with the concentration itself or refer it to the national authorities indicates, on the contrary, that the Commission is obliged to be cautious in applying the referral procedure, as the first subparagraph of Article 9(3) does not require a referral.

319 The Commission, supported by the French Republic and SEB, claims that the plea should be rejected.

Findings of the Court

320 Pursuant to Article 9(2) of Regulation No 4064/89, a referral may be made in two distinct cases.

321 In the first case, provided for by Article 9(2)(a), the Member State concerned must show in its request for referral that 'a concentration threatens to create or to strengthen a dominant position as a result of which effective competition would be significantly impeded on a market within that Member State, which presents all the characteristics of a distinct market'. According to the first subparagraph of Article 9(3) of Regulation No 4064/89, if the Commission considers that, having regard to the market for the products or services in question and the geographical reference market, there is such a distinct market and that such a threat exists, it shall either, in accordance with point (a), 'itself deal with the case in order to maintain or restore effective competition on the market concerned' or, in accordance with point (b), 'refer the whole or part of the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law'.

322 In the second case, provided for by Article 9(2)(b), the Member State concerned must show in its request for referral that 'a concentration affects competition on a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market'. According to the second subparagraph of Article 9(3), '[i]n cases where a Member State informs the Commission that a concentration affects competition in a distinct market within its territory that does not form a substantial part of the common market, the Commission shall refer the whole or part of the case relating to the distinct market concerned, if it considers that such a distinct market is affected'.

323 In the present case, it is undisputed that the French authorities requested the partial referral of the concentration with a view to examining its effects on the relevant product markets in France on the basis of Article 9(2)(a) of Regulation No 4064/89. According to the Referral Decision, the Commission found that the conditions laid down by that article were satisfied and, pursuant to point (b) of the first subparagraph of Article 9(3), decided not to deal itself with the examination of the effects of the concentration on the relevant markets in France but to refer it to the French competition authorities for a ruling on the basis of national competition law.

324 By its first and second pleas, the applicant essentially complains that the Commission made the referral in breach of Article 9 of Regulation No 4064/89. In response to a question of the Court at the hearing, the applicant confirmed that, by those pleas, it claims that the Referral Decision is contrary both to Article 9(2)(a) and Article 9(3) of Regulation No 4064/89.

325 Consequently, in order to assess the merits of those pleas, it must be examined, first, whether the conditions for a referral laid down by Article 9(2)(a) were satisfied in the present case and, second, whether the Commission properly applied Article 9(3) in deciding to refer the examination of the effects of the concentration on the relevant markets in France to the French competition authorities rather than dealing itself with that question.

326 The conditions for referral laid down by Article 9(2)(a) are matters of law and must be interpreted on the basis of objective factors. For that reason, the Community judicature must, having regard both to the specific features of the

case before it and the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a concentration falls within the scope of Article 9(2)(a).

327 In that regard, it must be stated that, for a concentration to be the subject of a referral on the basis of Article 9(2)(a), that provision requires two cumulative conditions to be satisfied. First, the concentration must threaten to create or strengthen a dominant position as a result of which effective competition will be significantly impeded on a market within that Member State. Second, that market must present all the characteristics of a distinct market.

328 With respect to the first condition, the Commission concluded, in recital 41 of the Referral Decision, that the concentration 'prima facie, threatens to create a dominant position as a result of which effective competition will be significantly impeded on the markets for the sale of small electrical household appliances in France'.

329 It is apparent from the Referral Decision that the Commission based that conclusion on four considerations:

— First, on the relevant markets in France, the new entity will be of unrivalled size. According to recitals 29 to 32, the Commission found, in particular, that the parties will hold market shares exceeding 60% on 11 of the relevant product markets, that the new entity will be four times the size of its nearest competitor and that both parties to the concentration already held sizeable positions before the concentration. According to the Commission, it follows that the concentration does not involve the merger of two operators of average size attaining the leading position in the sector but the substantial strengthening of the existing leader and will lead to the elimination of one direct competitor.

— Second, the new entity will have at its disposal an unrivalled range of products on the relevant markets in France. In recitals 33 to 35, the Commission points out, in particular, that the concentration will enable the new entity not to supplement its range but to become the leader for all the products of its existing range, thus strengthening its negotiating power in relation to its retailer customers.

— Third, the new entity held an unrivalled portfolio of trade marks on the relevant markets in France. In recitals 36 to 38, the Commission states, in particular, that the parties to the concentration hold seven trade marks, of which two, SEB and Calor, are primarily sold in France.

— Finally, the fourth consideration is the fact that current and potential competition is insufficient in France. In recitals 39 to 41, the Commission finds, essentially, that entry barriers will be considerably strengthened given the size of the new entity on all the relevant markets in France, its range of products and its portfolio of trade marks.

330 It must be held, and it is undisputed, that those considerations are sufficient to show that the concentration threatens to create or strengthen a dominant position on the relevant markets in France within the meaning of Article 9(2)(a) of Regulation No 4064/89. In the Referral Decision, the Commission was therefore entitled to conclude that there was such a threat. The first condition for a referral laid down by Article 9(2)(a) must therefore be regarded as satisfied.

331 It must then be considered whether the second condition relating to the existence of a distinct market is likewise satisfied.

332 In that regard, it should be pointed out that, according to the first subparagraph of Article 9(3) of Regulation No 4064/89, the Commission is to establish whether there is a distinct market 'having regard to the market for the products or services in question and the geographical reference market within the meaning of paragraph 7' (cited in paragraph 10 above).

333 A reading of the first subparagraph of Article 9(3) in conjunction with Article 9(7) of Regulation No 4064/89 indicates that, in order to establish whether a Member State constitutes a distinct market for the purposes of Article 9(2) of that regulation, the Commission must take account of the criteria laid down in Article 9(7), which relate, in particular, to the nature and characteristics of the products concerned, the existence of entry barriers, consumer preferences and the existence of appreciable differences in market shares or prices between territories.

334 As has already been held in connection with the assessment of the claim for annulment of the Approval Decision, it is undisputed in the present case that the relevant products fall within the scope of distinct national markets.

335 Thus, in recital 22 of the Referral Decision, the Commission stated that, in concluding that there were distinct national markets, it took into account, 'in particular, the fact that (i) market shares vary as between Member States and product categories, (ii) market penetration of the trade marks differs greatly according to the market, (iii) prices may vary significantly as between national markets and also follow different trends, (iv) commercial and marketing policies are set nationally in order to take account of the peculiarities and preferences of consumers, which vary from Member State to Member State, (v) logistic structures are national, (vi) distribution structures are national and the relative importance of the distribution channels (supermarket distribution, specialised

chains, department stores...) varies greatly from Member State to Member State, and (vii) customer/supplier relationships are forged principally on a national basis, even where internationally established supermarket distributors are concerned'.

336 It must be held that those criteria are such as to establish, in accordance with Article 9(7) of Regulation No 4064/89, that the conditions of competition in each Member State, including France, are 'appreciably different' from those prevailing on the relevant markets in the other Member States.

337 Moreover, with respect to the relevant markets in France, it follows from recital 20 of the Referral Decision that, according to the French authorities, there are specific conditions of competition on the relevant markets in France as a result of '(i) the very large market shares of the new entity in France and smaller shares in the other Member States despite the fact that the level of imports and low transport costs should have promoted their homogenisation, (ii) the new entity's unrivalled portfolio of trade marks, which will create entry barriers specific to the French market, and (iii) a specific distribution structure for supermarket distribution in France in contrast to the other countries and supply agreements which continue to be concluded at a national level'.

338 In view of those considerations, the applicant cannot claim that the relevant markets in France are not structurally different from those in the other Member States. The fact that the new entity will hold a larger market share in France than in the other Member States, that the entry barriers are significant and that the retail sale of the relevant products essentially takes place by way of supermarket distribution distinguishes the competitive structure of the relevant markets in France from those in the other Member States.

339 Moreover, the applicant expressly concedes that the relevant markets in France can be distinguished from the markets in the other Member States by the fact that they raise 'the most serious' doubts in relation to competition. Contrary to what the applicant claims, such a difference, relating not to the nature but to the intensity of competition, can distinguish a Member State for the purposes of Article 9(2) of Regulation No 4064/89. The criteria laid down in Article 9(7), to which the first subparagraph of Article 9(3) refers, expressly include 'appreciable differences of the undertakings' market shares between the area concerned and neighbouring areas'.

340 For all those reasons, it must be held that the relevant markets in France are distinct markets within the meaning of Article 9(2)(a) of Regulation No 4064/89. The second condition for referral laid down by that article thus being satisfied, the Commission was entitled to consider that the concentration in question could be the subject of a referral under the first subparagraph of Article 9(3).

341 However, it must still be considered, second, whether, by actually referring the examination of the effects of the concentration on the relevant markets in France to the French competition authorities, the Commission correctly applied the first subparagraph of Article 9(3). As De'Longhi rightly observed, even where the Commission considers that the conditions for referral are satisfied, that article does not oblige it to refer the examination of the concentration to the competent authorities of the Member State concerned but it may equally decide to deal with it itself.

342 It is apparent from the wording of the first subparagraph of Article 9(3) that the Commission has broad discretion as regards that decision. However, as the Commission itself conceded in its defence, that discretion is not unlimited. Point (a) of the first subparagraph of Article 9(3) states that the Commission may decide to deal with the case itself 'in order to maintain or restore effective

competition on the market concerned'. Furthermore, Article 9(8) provides that the Member State concerned 'may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned'.

343 It follows from those provisions that, although the first subparagraph of Article 9(3) of Regulation No 4064/89 confers on the Commission broad discretion as to whether or not to refer a concentration, it cannot decide to make such a referral if, when the Member State's request for a referral is examined, it is clear, on the basis of a body of precise and coherent evidence, that such a referral cannot safeguard or restore effective competition on the relevant markets.

344 Review by the Community judicature of the question whether the Commission has properly exercised its discretion in deciding whether or not to refer a concentration is therefore a limited review which, in the light of Article 9(3) and (8) of Regulation No 4064/89, must be restricted to establishing whether the Commission was entitled, without committing a manifest error of assessment, to consider that the referral to the national competition authorities would enable them to safeguard or restore effective competition on the relevant market so that it was unnecessary to deal with the case itself.

345 In the present case, it must be found that, in contrast to the Commission, which approved the concentration in question only after the commitments relating to the Moulinex trade mark had been offered, the French competition authorities, by decision of 8 July 2002, approved the concentration with respect to its effects on the relevant markets in France without imposing commitments, relying on the 'failing firm' doctrine.

346 Nevertheless, the legality of a measure must be assessed at the time of its adoption. Thus, in the present case, it is not necessary to rule on the compatibility of the French competition authorities' decision with the Commission's Approval Decision — which, in recital 41, expressly rejected the application of the 'failing firm' doctrine — in order to establish whether the Commission properly exercised the discretion conferred on it by the first subparagraph of Article 9(3) of Regulation No 4064/89 and it need only be determined whether, at the time when the Commission adopted the Referral Decision, it was entitled to take the view that the referral would permit the safeguarding or restoration of effective competition on the relevant markets.

347 In that regard, it should be pointed out — and the applicant does not dispute — that the Member State concerned has specific laws on the control of concentrations and specialised bodies to ensure that those laws are implemented under the supervision of the national courts. Moreover, in their request for a referral, the French authorities identified the precise competition problems raised by the concentration on the relevant markets in France.

348 Accordingly, it must be held that the Commission was reasonably entitled to take the view that the French competition authorities would, in their decision on the referral, adopt measures to safeguard or restore effective competition on the relevant markets. That is all the more the case because, contrary to what the applicant maintains, since the relevant products are sold on distinct national markets, the referral to the French competition authorities was not liable to undermine the Approval Decision or the commitments entered into in it.

349 The argument advanced by the applicant and, at the hearing, by De'Longhi that the referral to the French competition authorities resulted in the fragmentation of the examination of the concentration, thus jeopardising a coherent assessment of it, cannot call that conclusion into question.

350 Such fragmentation is certainly undesirable in view of the 'one-stop-shop' principle on which Regulation No 4064/89 is based, by virtue of which the Commission has exclusive competence to examine concentrations with a Community dimension. It cannot be denied that the systematic referral of concentrations with a Community dimension which concern products relating to distinct national markets would rob that principle of its substance. In its defence, the Commission even stated that, where, as in the present case, each Member State constitutes a distinct national market, it might find it necessary to refer the examination of a concentration to all the Member States requesting such a referral.

351 When Regulation No 4064/89 was adopted, the Council and the Commission stated, in the declaration cited in paragraph 311 above, that the 'application of Article 9 should be confined to cases in which the interests in respect of competition of the Member State concerned could not be adequately protected in any other way'.

352 Contrary to what the Commission claims in the present proceedings, those statements are still relevant after Regulation No 1310/97 amended Regulation No 4064/89. The amendments made by Regulation No 1310/97 for the most part do not concern the referral conditions laid down in Article 9(2)(a), which have remained essentially unchanged since the adoption of Regulation No 4064/89, but concern the referral conditions laid down by Article 9(2)(b), which is not at issue in the present case. Thus, in the green paper preceding the adoption of Regulation No 1310/97 (Green paper of the Commission on the review of the merger regulation, COM(96) 19 final of 31 January 1996), the Commission described the aim of the referral procedure as follows:

> '94 [It] considers that, especially if there were not to be a threshold reduction, any amendments to Article 9 should be limited so as not to undermine the delicate balance struck by the current referral provisions or to negate the advantages of the "one-stop shop" principle. Too frequent use of Article 9

could reduce the legal certainty afforded to companies and should probably be linked to a harmonisation of the main features of national merger systems.'

353 Likewise, in recital 10 of Regulation No 1310/97, the Council states that '[the rules governing referrals] protect the competition interests of the Member State in an adequate manner and take due account of legal security and the "one-stop-shop" principle'.

354 It must be held that those statements clearly indicate that the Council and the Commission intended that the referral conditions laid down in Article 9(2)(a) and (b) of Regulation No 4064/89 should be interpreted restrictively so that referrals to national authorities of concentrations with a Community dimension are limited to exceptional cases.

355 However, since, as was held above, the wording of Article 9(2) and (7) of Regulation No 4064/89 permits the Commission to refer the examination of a concentration to the national authorities where distinct national markets are concerned, the risk that concentrations with a Community dimension will, in a large number of cases, be subject to a fragmented assessment undermining the 'one-stop-shop' principle is inherent in the referral procedure currently provided for in Regulation No 4064/89.

356 Contrary to De'Longhi's claim, it is not for the Court, even in the course of its review of the Commission's exercise of its discretion under the first subparagraph of Article 9(3) of Regulation No 4064/89, to act in place of the legislator in order

to fill any loopholes in the referral system established by Article 9 of that regulation.

357 Similarly, the applicant's assertion that in the present case the Commission deviated from its previous practice in such matters, which the Commission, moreover, expressly acknowledged in its answers to the Court's written questions, is irrelevant because the practice followed in the Referral Decision which is the subject of the present action falls within the scope of the legal framework laid down by Article 9 of Regulation No 4064/89, in particular paragraph 2(a) and (b) and the first subparagraph of paragraph 3. The fact that the Commission, in connection with the Carnival/P&O concentration, refused the referral requested by the United Kingdom on the ground that it is preferable 'not to fragment the case and not to conduct parallel investigations in Europe' must also be regarded as irrelevant, since the relevant markets in that case are different from those in question in the present case.

358 It follows from all the above considerations that the conditions for referral laid down by Article 9(2)(a) of Regulation No 4064/89 were satisfied in the present case and that the Commission properly applied the first subparagraph of Article 9(3) of that regulation in referring the examination of the effects of the concentration on the relevant markets in France to the French competition authorities.

359 The first and second pleas must therefore be rejected in their entirety.

(b) The third plea: infringement of Article 6(1)(c) and (2) of Regulation No 4064/89 in so far as the Referral Decision undermines the Approval Decision

Arguments of the parties

360 The applicant, supported by De'Longhi, argues that the Referral Decision leaves the Commission with no means of intervening should the French authorities accept remedies — or even approve the acquisition without conditions — which undermine the remedies accepted by the Commission and/or do not fully remove the serious competition concerns existing in France.

361 Given the very substantial market shares and the portfolio strength of SEB/Moulinex in France, the applicant is of the view that the only appropriate remedy is one which requires SEB to divest the Moulinex trade mark to a competitor for use on the French market. Anything less than this would, in the applicant's view, undermine the remedies in relation to the other nine EC/EEA Member States, and would not dispel the severe competition concerns raised by the combination of SEB/Moulinex on the French market.

362 In particular, the applicant considers that a remedy along the lines of those accepted by the Commission for other national markets would not constitute a sufficient and adequate remedy because, even if SEB were able to find a viable competitor willing to take a licence to use the Moulinex trade mark for a term of limited duration, a period of five plus three years would never be sufficient to secure a transfer of consumer loyalty from the well-known Moulinex trade mark to the trade mark of the competitor.

363 Finally, the applicant notes that, by accepting the possibility of renegotiating the commitments following the conclusion of the procedure in France, the Commission not only shifted the primary responsibility for the case onto the French authorities but also created a serious risk that the ultimate resolution by the French Minister may affect, after the event, the commitments previously given by SEB in respect of the other Member States. Should the French authorities impose remedies going beyond those accepted by the Commission with regard to other Member States, SEB would be able to demand renegotiation of the latter remedies on the ground that they are contradictory or excessive.

364 At the hearing, De'Longhi submitted that, in view of the fact that the referral procedure established by Article 9 of Regulation No 4064/89 is a derogation from the principle of the Commission's exclusive competence with regard to concentrations with a Community dimension, it is for the Commission to apply that procedure carefully and rigorously. Thus, De'Longhi considers, first, that the Commission could have consulted the national authority at the outset. Second, it claims that the Commission could have initiated the Phase II procedure in relation to those aspects of the concentration which are not the subject of the Referral Decision in order to maintain the possibility of collaborating with the French competition authorities. Third and lastly, it alleges that, since Article 9(2)(a) of Regulation No 4064/89 does not permit a referral if the concentration threatens to create or strengthen a dominant position, the Commission, by adopting the Referral Decision on the basis of that article, necessarily precluded the French competition authorities from approving the concentration on the basis of the 'failing firm' doctrine since that doctrine relates to situations in which the concentration is not the cause of the threat of creation or strengthening of a dominant position (Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraph 110).

365 The Commission, supported by the French Republic and SEB, claims that that plea should be rejected.

Findings of the Court

366 First of all, inasmuch as, by the present plea, the applicant complains that in the commitments accepted in the Approval Decision the Commission provided for the possibility of renegotiating the commitments at the end of the proceedings before the French competition authorities, it should be observed that that complaint has already been rejected in connection with the assessment of the claim for annulment of the Approval Decision.

367 By the present plea, the applicant also submits, however, that the partial referral of the concentration to the French competition authorities may give rise to contradictory decisions, without the Commission being able to intervene.

368 In that regard, it should be observed that — as was held in connection with the examination of the objection of inadmissibility raised by the Commission — by referring certain aspects of the concentration to the French competition authorities on the basis of Article 9(2)(a) and the first subparagraph of Article 9(3), the Commission terminated the procedure applying Regulation No 4064/89 and transferred it to the French competition authorities ruling on the basis of their national competition law.

369 Pursuant to Article 9(6) of Regulation No 4064/89, in exercising their powers the French competition authorities must give their ruling within a period of not more than four months of the Commission's referral and, pursuant to Article 9(8), they must take 'only the measures strictly necessary to safeguard or restore effective competition on the market concerned'.

370 Moreover, according to Article 10 EC, the Member States must take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions and must abstain from any measure which might jeopardise the attainment of the objectives of the Treaty.

371 However, provided they comply with those obligations, the French competition authorities are free to rule on the substance of the concentration referred to them on the basis of a proper examination conducted in accordance with national competition law.

372 Consequently, contrary to what De'Longhi maintains, the Commission was not obliged, with a view to avoiding the adoption of contradictory decisions, to consult the French competition authorities beforehand. By adopting the Referral Decision, the Commission terminated the procedure applying Regulation No 4064/89 to those aspects of the concentration which are the subject of the referral and transferred exclusive competence to assess those aspects to the French competition authorities ruling on the basis of their national law; it thereby lost any power to deal with those aspects. It cannot therefore be permitted to intervene in the decision-making process of the French competition authorities.

373 Similarly, contrary to what De'Longhi claims, the Commission was not obliged to initiate Phase II with respect to those aspects of the concentration which are not the subject of the Referral Decision solely in order to maintain the possibility of cooperation with the French competition authorities. Where the Commission finds that the commitments proposed by the notifying parties during Phase I are sufficient to dispel all serious doubts as to the compatibility of the concentration with the common market, it may, in accordance with Article 6(2) of Regulation No 4064/89, approve the concentration at the end of the Phase I procedure without initiating the Phase II procedure. In any event, as stated above, even if the Commission had decided to initiate the Phase II procedure with respect to those aspects of the concentration which are not the subject of the Referral Decision, it

would have been deprived of any competence to deal with the aspects referred to the national authorities, because, by adopting the Referral Decision, it transferred those aspects to the French competition authorities.

374 Finally, De'Longhi is wrong in claiming that the fact that the Referral Decision is based on Article 9(2)(a) of Regulation No 4064/89 precludes the French competition authorities from approving the concentration on the basis of the 'failing firm' doctrine.

375 Admittedly, in order to make a referral on the basis of Article 9(2)(a), the Commission must find that the concentration in question threatens to create or strengthen a dominant position. However, in approving the concentration on the basis of the 'failing firm' doctrine, the French competition authorities must have found, in accordance with the case-law of the Court of Justice (*France and Others* v *Commission*, cited above, paragraph 110), that, with respect to its effects on the relevant markets in France, that concentration was not the cause of the threatened creation or strengthening of a dominant position.

376 However, as pointed out in connection with the objection of admissibility raised by the Commission, the purpose of a referral decision is not to rule on the substantive compatibility of the concentration but to refer that assessment to the national authorities requesting the referral so that they may, pursuant to point (b) of the first subparagraph of Article 9(3), rule in accordance with their national law. By adopting the Referral Decision, the Commission terminated the procedure applying Regulation No 4064/89 with respect to the aspects of the concentration which are the subject of the referral and transferred exclusive competence to assess those aspects to the French competition authorities.

377 Therefore, when examining the conditions for referral under Article 9(2)(a), the Commission cannot, without depriving point (b) of the first subparagraph of

Article 9(3) of its substance, conduct an examination of the compatibility of the concentration in such a way as to bind the national authorities in regard to their substantive findings but must merely establish whether, prima facie, on the basis of the evidence available to it at the time when it assesses the merits of the request for referral, the concentration whose referral is requested threatens to create or strengthen a dominant position on the relevant markets.

378 In the present case, neither the applicant nor De'Longhi disputes that the concentration threatened to create or strengthen a dominant position on the relevant markets in France. Likewise, in justifying the referral, the French authorities, in their request for referral, explained at length why the concentration threatened to create or strengthen a dominant position on those markets,.

379 As has already been held in connection with the consideration of the first and second pleas, the applicant cannot therefore complain that, in recital 41 of the Referral Decision, the Commission concluded, on the basis of the evidence available to it when assessing the merits of the request for referral, that, prima facie, such a threat existed. Since the purpose of the examination carried out by the French competition authorities was different from that of the Commission's examination, it is irrelevant that, following the in-depth examination subsequently carried out on the basis of national law, those authorities came to the conclusion that the concentration was not the cause of that threat.

380 It is true that, in light of the facts of the present case and, in particular, the tenor of the French competition authorities' decision of 8 July 2002, it may, in order to avoid contradictory decisions, prove desirable for Regulation No 4064/89 to impose more restrictive obligations on Member States which have requested and been granted a referral. However, as has already been held in connection with the first and second pleas, it is not for the Court to act in place of the legislator in order to remedy any loopholes in the referral system established by Article 9 of that regulation.

381 Consequently, as matters currently stand, the Court of First Instance cannot but find that, in the event of a partial referral to the national authorities, the risk that their decision will be inconsistent, or even irreconcilable, with the decision adopted by the Commission is inherent in the referral system established by Article 9 of Regulation No 4064/89.

382 Accordingly, the applicant cannot complain that the Commission is unable to intervene in the decision-making process of the national authorities.

383 If the Member State concerned should fail to comply with its obligations under Article 10 EC and Article 9(6) and (8) of Regulation No 4064/89, the Commission can at best decide, if necessary, to bring an action under Article 226 EC against that Member State. Individuals may challenge the national authorities' decision on the referral in accordance with the domestic remedies provided for by national law.

384 It follows from all the above considerations that the third plea must be rejected.

(c) The fourth plea alleging infringement of Article 253 EC or, alternatively, of the principle of proper administration

Arguments of the parties

385 The applicant, supported by De'Longhi, submits that, by failing to give any statement of reasons as to why the Commission agreed to the referral to the French authorities, the Commission has infringed Article 253 EC or, in the alternative, the principle of proper administration.

386 In the applicant's view, given that the practice of not publishing Article 9(3) and 9(4) decisions makes it considerably more difficult for interested parties (both notifying parties and their competitors) to avail themselves of adequate judicial protection against such decisions, the Commission should have offered some compensation for the lack of clarity by providing a statement of the reasons in the decision approving the notified concentration to the extent to which it has not been referred, as well as in the press release concerning the Referral Decision.

387 The applicant observes that the lack of reasoning in the present case as to the referral issue deviates from the Commission's normal practice (see the press releases in Case COMP/M.2389 — *Shell/DEA* and Case COMP/M.2533 — *BP/E.ON*, IP/01/1222 and IP/01/1247, and in Case COMP/M.2706 — *Carnival Corporation/P & O Princess*, IP/02/552).

388 The Commission, supported by the French Republic and SEB, claims that this plea should be rejected.

Findings of the Court

389 According to the case-law, the purpose of the obligation to state reasons for an individual decision is to provide the party concerned with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged and to enable the Community

judicature to review the legality of the decision; the scope of that obligation depends on the nature of the act in question and on the context in which it was adopted (see, *inter alia*, Case T-49/95 *Van Megen Sports Group* v *Commission* [1996] ECR II-1799, paragraph 51).

390 According to the application, the applicant essentially seeks a declaration by the Court that reasons for the referral are not given in the Approval Decision to the requisite legal standard.

391 However, since the reasons for a measure depend on the nature of that measure, it must be held that, as the purpose of the Approval Decision was not to refer the examination of the concentration to the national authorities under Article 9 of Regulation No 4064/89, compliance with Article 253 EC did not require the Commission to set out in the Approval Decision its reasons for the Referral Decision. That is all the more true in that, although Article 9(1) of Regulation No 4064/89 does not provide for the notification of referral decisions to third parties, there was nothing to preclude the applicant from requesting from the Commission a non-confidential version of the Referral Decision for the purposes of bringing the present action. At the hearing, the applicant referred, without contradiction by the Commission, to a letter showing that such a request was made.

392 As regards the alleged failure to state the reasons for the referral in the press release concerning the concentration, it is sufficient to state that such a failure is irrelevant since the applicant does not claim that that press release contained the Referral Decision. Since the press release concerning the concentration did not contain a decision which can be the subject of an application for annulment under Article 230 EC, it cannot be complained that it did not contain a statement of reasons for the contested measure.

393 It must therefore be examined whether there is an adequate statement of reasons for the Referral Decision, which was produced by the Commission at the Court's request. Indeed, the applicant stated at the hearing that, having regard to the decision made in connection with the measures of organisation of procedure, its plea is to be understood in that sense.

394 In that regard, it should be observed that the Referral Decision was adopted on the basis of Article 9(2)(a) of Regulation No 4064/89. It has already been found above, in connection with the first and second pleas, that, for a concentration to be the subject of a referral under that article, two conditions must be satisfied. First, the concentration must threaten to create or strengthen a dominant position as a result of which effective competition will be significantly impeded on a market within that Member State. Second, that market must present all the characteristics of a distinct market.

395 It must therefore be held that, in order to comply with the obligation to state reasons laid down in Article 253 EC, a referral decision adopted under Article 9(2)(a) of Regulation No 4064/89 must contain a sufficient and relevant indication of the factors taken into consideration in establishing that there is a threat of the creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded on a market within the Member State concerned, and that there is a distinct market.

396 With respect to the first condition, it must be observed that the Referral Decision clearly states, in recitals 27 to 41, the reasons for the Commission's conclusion that, prima facie, the concentration threatens to create a dominant position as a result of which effective competition would be significantly impeded on the markets for the sale of small electrical household appliances in France. Those reasons are connected with the fact that, on the relevant markets in France, the

new entity will be of unrivalled size (recitals 29 to 32), will have an unrivalled range of products (recitals 33 to 35) and an unrivalled portfolio of trade marks (recitals 36 to 38), and that current and potential competition is inadequate (recitals 39 to 41).

397 With respect to the second condition, it must also be observed that the reasons for the Commission's conclusion that the relevant markets in France are distinct national markets are clearly stated in recital 22 of the Referral Decision. According to that recital, the Commission found that 'a large number of the customers and competitors of the parties clearly state that there are national markets for small electrical household appliances, particularly in view of the fact that (i) market shares vary considerably both as between Member States and product categories, (ii) market penetration of the trade marks differs greatly according to the market, (iii) prices may vary significantly as between national markets and also follow different trends, (iv) commercial and marketing policies are set nationally in order to take account of the peculiarities and preferences of the consumers, which vary from Member State to Member State, (v) logistic structures are national, (vi) distribution structures are national and the relative importance of the distribution channels (supermarket distribution, specialised chains, department stores...) varies greatly from Member State to Member State, and (vii) customer/supplier relationships are forged principally on a national basis, even where internationally established supermarket distributors are concerned'.

398 Accordingly, it must be concluded that adequate reasons were given for the Referral Decision.

399 As regards the alleged infringement of the principle of proper administration, in so far as it relates to a complaint that the Commission failed to state reasons, it has already been held above that adequate reasons were given for the Referral Decision. In so far as the applicant, by that allegation, seeks to raise an independent substantive plea, it is sufficient to point out that that allegation is not substantiated in the application and that it must therefore be rejected.

400 The fourth plea must therefore be rejected.

401 It follows from all the above considerations that the claim for annulment of the Referral Decision must be dismissed in its entirety.

Costs

402 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay, in addition to its own costs, those of the Commission and of SEB, as applied for in their pleadings.

403 In accordance with the third subparagraph of Article 87(4) of the Rules of Procedure, De'Longhi must be ordered to bear its own costs.

404 According to the first subparagraph of Article 87(4) of the Rules of Procedure, the Member States which intervened in the proceedings are to bear their own costs. The French Republic must therefore bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to bear its own costs and to pay those incurred by the Commission and SEB;**

3. **Orders De'Longhi to bear its own costs;**

4. **Orders the French Republic to bear its own costs.**

Lenaerts Azizi Jaeger

Delivered in open court in Luxembourg on 3 April 2003.

H. Jung
Registrar

K. Lenaerts
President