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

In Case T-114/02,

BaByliss SA, established in Montrouge (France), represented by J.-P. Gunther, lawyer,

applicant,

supported by

De'Longhi SpA, established in Trévise (Italy), represented by M. Merola, D. Domenicucci and I. van Schendel, lawyers,

intervener,

* Language of the case: French.

Commission of the European Communities, represented by V. Superti, K. Wiedner and F. Lelièvre, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

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

intervener,

APPLICATION for the annulment of the Commission's Decision SG (2002) D/228078 of 8 January 2002 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),

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

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

Registrar: J. Palacio González, Principal 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 with a Community dimension 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 Regulation No 4064/89 and under Regulation 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 a Member State where the 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.

Facts

I — *The undertakings concerned*

11 The application in the present case, made by BaByliss SA (hereinafter also referred to as 'the applicant'), seeks the annulment of the Commission's decision approving, subject to conditions, the concentration between SEB and Moulinex.

12 The applicant is a French company, controlled by the American group Conair, which specialises in the manufacture and marketing, under the trade mark BaByliss, of small electrical household appliances known as 'beauty aids' (for example, hair-dryers, heated hair curlers and brushes, clippers, female epilation and body care appliances). The Conair group manufactures all types of small electrical household appliances (kitchen, beauty, cleaning) in the United States and throughout the world, mainly under the trade marks Conair, BaByliss, Interplak, Forfex, Cuisinart, Revlon and Vidal Sassoon.

13 SEB is a French company active worldwide in the development, production and marketing of small electrical household appliances. It markets its products in more than 120 countries 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). The categories of products marketed by SEB under the various trade marks are cooking appliances (mini-ovens, deep friers, toasters, informal meals), machines for making hot drinks (electric filter coffee machines, espresso machines, kettles), food mixers, irons and ironing stations, personal care appliances (epilation, hairdressing, shaving, etc.), vacuum cleaners, domestic heating and ventilation appliances and kitchen utensils.

14 Moulinex is also a French company active worldwide in the development, production and marketing of small electrical household appliances. It markets the same categories of products as SEB under two international trade marks (Moulinex and Krups) and one local trade mark (Swan in the United Kingdom). Moulinex also markets microwave ovens.

II — *National proceedings*

15 On 7 September 2001 bankruptcy proceedings were initiated against the Moulinex group 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 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 the 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 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 a letter of 25 September 2001 to the administrators of Moulinex, BaByliss, with a view to expanding its presence in the sector of small electrical household appliances in France and throughout the world, submitted an offer to acquire Krups' worldwide business, including plant, equipment, stocks, industrial property rights and distribution networks.

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

III — *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 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 In response to the notice, BaByliss informed the Commission, by letters of 27 and 29 November 2001, of its concern regarding the proposed concentration, in view of the considerable anti-competitive effects of the closer relations between SEB and Moulinex in the sector which BaByliss envisaged entering very shortly. In that connection BaByliss observed that it was positioning itself as a potential competitor of SEB-Moulinex in the sector of small electrical household appliances and, in particular, the sector of small kitchen equipment, in which it

was expanding under the trade mark Cuisinart. By letter of 29 November 2001, annexed to the letter of the same date, BaByliss sent the Commission a proposal for a total purchase, including the entire workforce and assets of Moulinex in France, together with a business plan for Cuisinart ('*Cuisinart Strategy France*') dated November 2001.

23 By letter of 30 November 2001, BaByliss replied to the questionnaire sent by the Commission to the competitors on 27 November 2001.

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

25 The applicant's representatives had a meeting with the Commission concerning the proposed concentration on the same day.

26 By letter of 6 December 2001, BaByliss informed the Commission of its reservations regarding the possibility that the Commission might refer the whole or part of the case to the national competition authorities if they so requested.

27 On 7 December 2001 the French competition authorities requested the Commission to refer 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.

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

29 On 20 December 2001 BaByliss submitted to the Commission its observations concerning the market shares which SEB-Moulinex would have in the categories of products examined by the Commission as a result of the concentration.

30 By letter of 21 December 2001 BaByliss replied to a questionnaire, sent by the Commission on 20 December 2001, concerning the commitments of the parties to the concentration.

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

32 On 28 December 2001 the applicant submitted an offer for the purchase of part of Moulinex.

33 On 3 January 2002 BaByliss gave additional replies to the questionnaire, sent by the Commission on 20 December 2001, concerning the commitments of the parties to the concentration. The applicant reaffirmed its interest in acquiring all or part of Moulinex assets. It also repeated its concern regarding its position and the dominant position of SEB-Moulinex which would result from the concentration in relation to a certain number of categories of small electrical household appliances in the main European countries.

34 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 ('EEA') ('the contested decision').

35 However, the contested decision does not deal with the French market as, on the same day, the Commission acceded to the French authorities' request for a referral of part of the case.

36 On 8 July 2002 the French Minister for the Economy authorised the concentration, without imposing commitments, on the basis of the 'failing firm doctrine'.

The contested decision

I — *The relevant product markets*

37 Paragraph 16 of the contested 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.

38 The Commission considers that each category of small electrical household appliances can constitute a distinct product market (paragraph 25 of the contested decision). 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. 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.

II — *The relevant geographical markets*

39 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 contested decision).

III — *Importance of the trade marks*

40 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 contested decision).

41 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 contested

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 contested decision).

IV — *Competition analysis*

42 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 contested decision).

43 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 contested decision). With respect to the geographical markets examined in the contested 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 SEB would be strengthened by the addition of Moulinex 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 several trade marks, whereas operators such as Philips, Braun or Taurus have only one single trade mark (paragraphs 43 and 45 to 47 of the contested 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 contested decision);

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

44 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 contested 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.

45 On the other hand, the Commission concluded that the 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 contested decision).

V — *Commitments of the parties to the concentration*

46 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.

47 Initially, the commitments submitted by the parties to the concentration on 5 December 2001 envisaged a withdrawal from the entire European Economic Area for a period of two years of 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 contested decision).

48 On 18 December 2001 the parties therefore 'improved their proposal so as to make it practicable and effective' (paragraph 135 of the contested 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.

49 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 contested decision).

50 According to the contested 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 contested decision).

51 The contested decision summarises the commitments accepted by the Commission as follows:

'129 In each of those States, the SEB group will grant to a third party an exclusive licence to use the trade mark Moulinex, covering the sale of all 13 categories of small electrical household appliances.

130 According to the commitments, the licence will be granted to one or more third parties for a period of five years. During the term of the licence and for a further period of three years following its expiry, SEB will be prohibited from marketing any products for domestic use under the trade

mark Moulinex in the States concerned. Furthermore, the SEB group undertakes not to market the models of the Moulinex range under a different trade mark in the countries concerned for as long as the licensee chooses to obtain its supplies from SEB or to benefit from an industrial property licence.

131 The purpose of that licence is to authorise the use of the trade mark Moulinex with the aim of enabling the licensee to establish or strengthen its own trade mark on the relevant geographical market. For that purpose, during the licence period, the licensee will be authorised to use the Moulinex trade mark alone or together with its own trade mark and, subsequently, to change from "co-branding" to its own trade mark at any time. SEB will have the power to ensure that the Moulinex logotype is respected by the licensee or licensees.

132 The licensee or licensees will be free to choose the manner of the provision of supplies for all of the products and for all the countries concerned. If they so wish, they may require SEB to enter [into] a supply contract in respect of all or part of the licence period and for all or some of the product categories covered. Such supply should correspond to 65% of sales under the trade mark Moulinex in 2000. It should be noted that SEB nevertheless proposes to impose on the German licensee a supply obligation in respect of food mixers. SEB justifies this exception by reference to the need to maintain the workforce of the production units in Germany which it acquired following the judgment of the Tribunal de Commerce, Nanterre.

133 Moreover, to the extent required by a licensee, SEB undertakes to grant a licence covering the industrial property rights (designs, models, patents and know-how) relating to one or more Moulinex models to enable the licensee either to manufacture the models in question itself or to subcontract the manufacture to a third party of its choice.

134 The SEB group undertakes to nominate an agent whose initial task it will be, in particular, to ensure the satisfactory fulfilment of its commitments. SEB has undertaken to entire into the trade mark licence agreements provided for in the commitments within a period of [...] from the date of receipt of the Commission's authorisation. If, after expiry of that period, SEB has not entered into all or any of the agreements provided for by the commitments, the agent will be responsible for finding one or more licensees and for concluding those agreements within a period of... The choice of licensees will be subject to approval by the Commission.'

52 The Commission considers that those commitments will lead to a significant reduction in the overlap of market shares arising from the notified concentration. It states that it is only that resulting from sales under the Krups trade mark which will not be eliminated. However, according to the Commission, the increased market share linked to the Krups trade mark is likely to give rise to competition problems only on the espresso machine markets and informal meals market in Portugal (paragraph 139 of the contested decision).

53 In the Commission's view, the proposed commitments will enable the conditions for effective competition to be restored on a lasting basis. The five-year period envisaged for the licence will enable the licensee to induce the migration of Moulinex products to its own brand with limited losses to SEB when it is in a position to reintroduce the Moulinex brand to the relevant markets. In that respect, the Commission points out that the average lifetime of small electrical household products is approximately three years. According to the Commission, the migration to the licensee's own trade mark is facilitated all the more since the licensee will be the sole beneficiary of the Moulinex trade mark in respect of all small electrical household products in the geographical zone concerned (paragraph 140 of the contested decision).

54 The Commission considers that the extension of the exclusive licence commitments to all small electrical household products and thus to products in respect of

which the Commission had no serious doubts is necessary to ensure the efficiency and viability of those remedies. If those licences had covered only a limited number of products, the licensee would have seen its room for manœuvre to effect re-branding severely reduced since the trade mark Moulinex would have been used by two competing entities in the countries concerned, namely SEB and the holder of the licence limited to certain products (paragraph 141 of the contested decision).

55 Moreover, the Commission observes that the licensee will be able to produce Moulinex products itself if it so wishes, whilst SEB can be required to provide it with new models which it develops for the Moulinex product range in the countries not covered by the commitments (paragraph 142 of the contested decision).

56 Finally, the Commission points out that, according to the commitments, the licensee or licensees must be 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 markets concerned. The commitments also provide that the licensee or licensees must have their own trade mark which is capable of being associated with the trade mark Moulinex (paragraph 144 of the contested decision).

57 The Commission therefore considers (paragraph 146 of the contested decision) that the commitments proposed by the parties are sufficient to overcome the doubts as to the compatibility of the concentration with the common market in those nine countries on condition that the parties fulfil the following commitments:

'(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;

(f) the commitment to enter into exclusive trade mark licensing agreements for the nine countries in question within the period specified in sections 1(h) and 2(e)(iv) of the commitments;

(g) the commitment relating to approval of the licensee or licensees by the Commission, as provided for in section 1(i) of the commitments, and

(h) compliance with any suggestion useful for the fulfilment of the commitments or the performance of his/its task which may be made by the representative as provided for in section 2(e)(ii) of the commitments'.

58 The details of the commitments offered by SEB are set out in the annex to the contested decision.

59 In Section 2(g) of the annex 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.'

VI — *State aid*

60 In reply to the submissions of certain third parties complaining that SEB is receiving State aid from the French authorities in connection with its proposed takeover, the Commission finds, in paragraph 10 of the contested decision, that, upon a preliminary examination of the scheme drawn up by the French authorities, it does not appear that the State intervention envisaged in connection with the court-supervised reorganisation proceedings is a measure which will benefit SEB. Therefore the Commission considers that its effect should not be taken into account in examining the proposed concentration under Regulation No 4064/89.

Procedure and forms of order sought by the parties

61 The applicant brought the present action by application lodged at the Registry of the Court of First Instance on 15 April 2002. By a separate document of the same date, the applicant applied for the case to be dealt with by means of the expedited procedure provided for by Article 76a of the Rules of Procedure of the Court of First Instance.

62 By letter of 30 April 2002, the Commission informed the Court that it had no objection to the application for expedited proceedings. However, the Commission submitted that the applicant had not shown that it was individually concerned by the contested decision.

63 By letter of 8 May 2002, the Registrar of the Court of First Instance informed the defendant of the grant of its request for extension of the time-limit for lodging its

defence until 24 June 2002. In order not to delay the proceedings, the Registrar also requested the defendant to raise any questions of admissibility together with its defence on the substance of the case.

64 By way of a procedural organisation measure, the Registrar requested the applicant, by letter of 17 June 2002, to reply to a number of written questions by 28 June 2002.

65 On 24 June 2002 the Commission lodged its defence containing its objections to the admissibility of the application and, in the alternative, its defence on the substance of the case.

66 The applicant lodged its replies to the Court's questions on 28 June 2002.

67 By decision of 2 July 2002, the Court (Third Chamber) granted the application for the expedited procedure provided for by Article 76a of the Rules of Procedure.

68 On 18 July 2002 the applicant, in compliance with the Registrar's request, lodged its observations on admissibility in reply to the Commission's statement of defence.

69 By application lodged at the Registry of the Court on 19 July 2002, SEB requested leave to intervene in support of the forms of order sought by the Commission. By application lodged at the Registry of the Court on 29 July 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 16 September 2002. At their respective requests, SEB and De'Longhi were granted leave to lodge a statement in intervention and, for the second, to submit certain documents cited in its application for leave to intervene.

70 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.

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

72 The applicant, supported by De'Longhi, claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

73 The Commission contends that the Court should:

— dismiss the application as inadmissible or, in the alternative, unfounded;

— order the applicant to pay the costs.

74 SEB contends that the Court should:

— dismiss the application as inadmissible or, in the alternative, unfounded;

— order the applicant to pay the costs.

Admissibility

I — *Arguments of the parties*

75 The applicant, supported by De'Longhi, submits that the contested decision is of direct and individual concern to it within the meaning of Article 230 EC. BaByliss is a new entrant to the market in small electrical cooking appliances and is therefore positioning itself as a direct competitor of SEB and Moulinex. In addition, the applicant points out that it took an active part in the administrative procedure leading to the adoption of the contested decision.

76 The Commission contends that the contested decision is not of individual concern to the applicant.

77 The Commission observes, first that the mere fact that BaByliss reacted spontaneously to the publication in the *Official Journal of the European Communities*, as provided for by Article 4(3) of Regulation No 4064/89, of the notice relating to the proposed concentration, by contacting the Commission, is not sufficient to show that the contested decision is of individual concern to BaByliss. It has not shown in any way that the contested decision affects it by reason of certain attributes peculiar to itself or by reason of a factual situation which distinguishes it individually in the same way as SEB.

78 The Commission notes that several undertakings, like the applicant, took an active part in the procedure. The fact that an undertaking submitted observations does not of itself prove that the undertaking is individually concerned. The careful examination of concentrations necessitated regular contact with a number of persons involved in the sector concerned.

79 Secondly, the Commission points out that, pursuant to article 2 of the applicant's articles of association, 'the company has the following objects: all operations of production, processing, representation, importation and export, wholesale trading, wholesale trading in small quantities and retail trading in all articles and goods relating in particular to hair-styling and beauty, perfumery and gift goods', whereas the concentration authorised by the contested decision relates to the sector of small electrical household appliances, which has no connection with 'hair-styling, beauty, perfumery and gift goods'.

80 Third, the Commission observes that the applicant describes itself as a 'new entrant' to the market in small electrical kitchen appliances but that, by its own admission, it had not brought onto the market any electrical household appliance either at the date of the contested decision or the date of instituting its action. BaByliss also describes itself as a 'potential competitor'. The Commission adds that, although the applicant announced that it would launch such products

'officially' on the market on 15 May 2002, it has not produced any documentary evidence to support that announcement.

81 Fourth, the Commission contends that the products marketed by BaByliss, a company established in France, could not be said to compete directly with the appliances sold by SEB on the geographical markets in respect of which the Commission has expressed serious doubts, as it did not give an opinion on the situation in the French market, which was to be examined by the French competition authorities.

82 Fifth, the Commission maintains that the applicant is wrong in seeking to rely on the '*Air France* judgments'. The applicant's situation differs completely from that of Air France. In the judgment in Case T-2/93 *Air France* v *Commission* [1994] ECR II-323, the Court found, first, that the competition situation on the markets concerned had been assessed by the Commission by taking account primarily of the situation of Air France (paragraph 45 of the judgment), which was the only serious competitor of the undertakings participating in the concentration, whereas the applicant is totally absent from the markets affected by the concentration. The Commission adds that the Court noted that Air France had been obliged, pursuant to an agreement between it, the French Government and the Commission, to give up the whole of its interest in TAT (paragraph 46 of the judgment) whereas, in the present case, BaByliss cannot plead an agreement or decision of any kind with an equivalent effect which would show that its *de facto* situation distinguishes it individually in the same way as SEB. The Commission observes that, in Case T-3/93 *Air France* v *Commission* [1994] ECR II-121, Air France was the main competitor of British Airways whereas, in the present case, BaByliss is only one company among several others which regards itself as a (potential) competitor of SEB.

83 Finally, the Commission wishes to point out that the new interpretation of Article 230 EC given by the Court in the judgment in Case T-177/01 *Jégo-Quéré*

SA v *Commission* [2002] ECR II-2365, paragraph 51, does not render the application admissible because, first, the contested decision is an individual decision without general effect and, secondly, the contested decision in no way restricts the rights of the applicant (which is not present in the markets affected by the concentration) and imposes no obligations on it. The applicant's legal situation is not affected in a manner which is both definite and immediate.

84 SEB argues that the contested decision is not of individual concern to the applicant. On this point, SEB observes that the applicant could itself, just like SEB, have submitted a genuine, concrete offer in the framework of the court-supervised administration if it had really been interested in acquiring all or some of Moulinex assets. However, according to SEB, the applicant's first offer for the acquisition of Moulinex was not genuine and was found unacceptable by the Tribunal de Commerce, Nanterre, whereas the subsequent offers were made after the concentration and only aimed to call into question the sale plan proposed by SEB. It adds that the applicant showed no interest whatever in obtaining the licence for the Moulinex trade mark, although such licence could have enabled the applicant, with regard to the development strategy it mentions, to enter the relevant markets and establish itself there permanently and effectively.

85 SEB adds that, to this day, BaByliss products have not been marketed on any of the geographical markets concerned by the contested decision, not even in France, where the applicant's activity has been limited to a presentation in a restaurant in Lyons in May 2002. SEB points out that the applicant is not mentioned by the Commission in its competition analysis, whether as an actual or potential competitor.

86 Finally, SEB notes that the applicant did not participate in the detailed investigation conducted by the rapporteurs of the French Competition Council and was not even present or represented at the hearing before the Council.

II — *Findings of the Court*

87 Under 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'.

88 The applicant is not one of the parties to the concentration and the contested decision is not addressed to it. Therefore it is necessary to ascertain whether it is directly and individually concerned.

89 It cannot be denied that the effect is direct. As the contested decision permits the proposed operation to be put into effect immediately, it is such as to bring about an immediate change in the situation in the markets concerned, depending solely on the wishes of the parties (see the judgment in Case T-3/93 *Air France* v *Commission*, cited above, paragraph 80).

90 Consequently the Court must determine whether the decision is also of individual concern to the applicant.

91 It has consistently been held that persons other than the addressees of decisions 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 (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107).

92 In this connection, the Court finds that, first, regarding participation in the procedure, it is common ground that the applicant, in response to the publication provided for by Article 4(3) of Regulation No 4064/89, informed the Commission, by letters of 27, 29 and 30 November 2001 and 6, 20, 21 and 28 December 2001, of its observations concerning the consequences of the concentration in question on the competition situation in the relevant markets and on its own situation. Furthermore, the Commission heard the applicant at a meeting on 5 December 2001 and in a telephone conference on 4 January 2002 with the officials in charge of the examination of the proposed concentration.

93 Moreover, on those occasions BaByliss raised, in substance, the same objections as those in its application to the Court. They concerned mainly the assessment of the effects of the concentration on the different geographical markets and the relevant product markets and, in particular, the situation of BaByliss, as well as the appraisal of the effectiveness of the commitments proposed by SEB to mitigate the competition problems created by the acquisition of Moulinex.

94 Finally, it must be observed that the applicant's letters to the Commission are not merely a unilateral step, uninvited by the Commission, but that the Commission asked the applicant to submit its observations on the commitments proposed by the parties to the concentration.

95 It follows that the applicant actively participated in the procedure. Although, as the Commission rightly points out, mere participation is in itself not sufficient to show that the decision is of individual concern to the applicant, particularly in the field of concentrations, the careful examination of which requires regular contact with numerous undertakings, nevertheless active participation in the administrative procedure is a factor regularly taken into account by case-law in competition matters, including in the more specific area of the control of

concentrations, to establish, in conjunction with other specific circumstances, the admissibility of the action (Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391, paragraphs 24 and 25; Joined Cases C-68/94 and C-30/95 *France* v *Commission* [1998] ECR I-1375, paragraph 54, and Case T-2/93 *Air France* v *Commission,* cited above, paragraph 44).

96 Secondly, regarding the applicant's status of competitor, BaByliss asserted, and it was not disputed by the Commission or SEB, that it is one of the main operators active in the markets for small electrical household appliances known as 'beauty aids' or personal care products (for example, hair-dryers, heated hair curlers and brushes, clippers, female epilation appliances and personal care appliances, etc.).

97 According to paragraph 16 of the contested decision, the economic sector affected by the concentration is that of the sale of small electrical household appliances, which can be divided into 13 product categories, namely the 11 categories of kitchenware, irons and ironing stations, and the category of personal care appliances. It follows that market for the latter category is affected by the concentration in issue, as stated in paragraph 16 of the contested decision. Neither the Commission nor SEB has denied that the applicant is one of the main competitors or operators in the market for beauty products or personal care appliances.

98 It must also be noted that the commitments likewise relate to all 13 categories of small electrical household appliances, including beauty products and personal care appliances.

99 Furthermore, although the applicant was not, at the date of adoption of the contested decision or the date of its action, directly present in any of the 12 other markets affected by the concentration, it has contended that it is at least a

potential competitor in so far as it is at present entering the European market for small electrical household appliances.

100 The Commission and SEB have not denied the admissibility of an action brought by a potential competitor where, as in the present case, there are oligopolistic markets characterised by substantial barriers to entry arising from strong brand loyalty and by the difficulty of access to retail trading (see, to that effect, Case T-290/94 *Kaysersberg* v *Commission* [1997] ECR II-2137).

101 On the other hand, the Commission and SEB observe that the claim that the applicant is a potential competitor was not proved or supported by cogent evidence. However, in its replies to the Court's written questions and in its observations on the objection of inadmissibility, the applicant contends that, strengthened by its experience in the American market, in early 2001 it began to implement its strategy of entering the European market for small electrical household appliances under the trade mark Cuisinart, and more particularly the market segments of mini-ovens, toasters, espresso machines, food blenders and mixers. It claims that this is shown by the following facts: the first study of the European market for small electrical household appliances (February 2001), the technical study on adaptation of the voltage of Cuisinart products (February-August 2001), the three-year partnership agreement with Paul Bocuse (October 2001) and the trade shows with Paul Bocuse in Orlando and Chicago presenting Cuisinart products (September 2001 and May 2002), finalisation of the strategy and 2002 budget for launching Cuisinart in Europe (November 2001), negotiation with the main French customers on listing the Cuisinart trade mark (December 2001-May 2002), official launch in the French press (planned for March 2002 but ultimately postponed) and, finally, on 16 May 2002, the 'official date for the launch of Cuisinart in France at Paul Bocuse's establishment in Lyon, in the presence of fifty invited guests'. BaByliss also stated that it was considering eventually entering the market segments of electric filter coffee machines and espresso machines, and also that of deep friers.

102 The fact, emphasised by the Commission and SEB, that the applicant's actual entry into the markets affected by the concentration was deferred several times,

by comparison with its announcements, is not a sufficient reason for concluding that BaByliss cannot be regarded as a potential competitor. The mere fact it takes longer than planned to enter the market does not mean that such entry will not take place, particularly since, as the Commission recognises in paragraph 24 of the contested decision, 'the cost and time necessary for entering a new product market may be considerable, having regard to the characteristics of the market', that 'to enter a new product market, a competitor, whether present or not in other neighbouring markets or the product market in question in another geographical area, must ensure that he will have sufficient outlets and therefore a sufficient sales volume [and for that] he will have to have his products listed by retailers and get his brand known by ultimate consumers, which takes a certain time and involves considerable marketing and advertising costs'.

103 It also follows that, even before BaByliss products are actually put on sale in the markets, the applicant found itself in direct competition with SEB-Moulinex for the listing of its products by the main distributors. On this point the applicant added that demonstration tests are planned in 'a certain number of selected shops' at Auchan and Monoprix from October 2002. To that extent BaByliss appears to be an actual competitor of the parties to the concentration in all the markets in small electrical household appliances which it is preparing to enter shortly under the Cuisinart trade mark. Likewise the applicant observed — and it was not disputed — that personal care products and kitchenware belong in the same department in all customers' stores, that the same buyers list the products and that their purchasing policies are linked, with the result that the total turnover for those categories is taken into account in common targets for discounts based on overall turnover.

104 Although, as the Commission points out, the applicant's business plan dated November 2001 apparently envisages, at least in the short time, entering only the French market, which is not covered by the contested decision, the applicant has

explained that the BaByliss group's strategy was to launch the Cuisinart brand on the French market first in order to gain experience in marketing the products and to concentrate large investments where the group's organisation as a whole is strong and that the group hoped to use successful penetration of the French market as a basis for expansion into other Member States later on.

105 It must also be noted that BaByliss is wholly owned by Conair, a company incorporated under American law, which is active in all segments of the small electrical household appliances market (kitchenware, beauty and cleaning products) in the United States and worldwide, mainly under the BaByliss, Conair and Revlon brands.

106 Although BaByliss is not situated in an affected market for the purpose of Regulation No 4064/89, its position in the market for personal care appliances and the business and experience of its parent Conair provide it with a sufficient basis to justify the description of 'potential' competitor and to facilitate its entry into the small electrical household appliances market.

107 Finally, regarding the Commission's argument concerning the applicant's objects, it is sufficient to note that BaByliss has not confined its activity to the sector of hairstyling appliances and beauty products, which is shown by the use of the words 'in particular' in defining its objects.

108 Third, with a view to its plan to enter the European small electrical household appliances market, BaByliss offered on several occasions to acquire Moulinex or, at least, some of its assets.

109 Accordingly on 25 September 2001 the applicant made a first offer of a partial acquisition, in respect of the entire assets of Krups (intellectual property rights, plant and equipment, factory in Mexico, stocks, distribution network) for a price of EUR 100 million.

110 SEB contends that this offer cannot distinguish the applicant because it was inadmissible and was not even considered by the Tribunal de Commerce, Nanterre.

111 In this connection the applicant claimed that it was not able to submit a full offer for the entire assets and personnel of Moulinex because it was not given access to any financial information whatever on the company in spite of written requests to that effect. Only SEB was in a position to make a full valuation of Moulinex factories and to submit to the administrators a fuller offer to purchase Moulinex.

112 De'Longhi likewise wrote to the Commission on 3 December 2001 complaining of the lack of transparency in the procedure for selling Moulinex, observing as follows:

'SEB formulated its offer as a partial acquisition, limited to certain production factories of Moulinex and the associated activities, but then obtained consent to the acquisition of moulds and other production tools used for activities which were not being transferred... without any change in the proposed price. In the same way, SEB obtained consent in practice to use the Moulinex brand for all its products without offering anything in exchange, in spite of the value of the brand, which is the European leader in the sector in question... This explains the uncertainty surrounding the details of the sale when expressions of interest were

submitted. This situation resulted in most of SEB's competitors not making an offer, and explains the reasons why the terms and conditions of the transaction were not made public or became public only very recently, after the contract had been awarded.'

113 SEB denied these allegations. It observed that, as it was not a matter of a court-supervised liquidation, only offers aiming at a reconstruction of the company could be submitted and only three offers for the acquisition of all or some of Moulinex assets were submitted to the administrators within the time-limits of the reconstruction procedure, namely the offers of Euroland, Société Participation Industrielle and the SEB group. The first two offers were deemed inadmissible by the Tribunal de Commerce, Nanterre, while the other expressions of interest received by the administrators related, in essence, only to the Krups brand. These different expressions of interest, particularly that of BaByliss, which did not relate to the Krups shares but only to some of its assets, were, according to SEB, very restrictive and were not consistent with a reconstruction plan because they did not entail the acquisition of any of Moulinex industrial sites or the takeover of any jobs and were therefore inadmissible. In those circumstances the Tribunal de Commerce is said to have decided that the offer 'submitted by the SEB group was therefore in reality the only one subsisting'. SEB points out that, in the appeal against that judgment, the Cour d'Appel, Versailles, dismissed all the complaints concerning the procedure followed by the administrators, even though BaByliss in particular, which had intervened voluntarily in the procedure, had claimed that 'the speed and undue haste in the purchase did not enable the interested companies, in particular Euroland and BaByliss, to examine the file and draw up, in normal conditions and within a sufficient period, a continuation plan for the former and a transfer plan for the latter'.

114 In this connection it must be observed that domestic classifications are irrelevant to the assessment of an activity from the viewpoint of Community law (Case T-128/98 *Aéroports de Paris* v *Commission* [2000] ECR II-3929, paragraph 128). Furthermore, the finding that the applicant's offer was inadmissible under French

law because it was not consistent with a reconstruction plan by way of transfer does not alter the fact that, by means of the offer, the applicant expressed its interest, as from 25 September 2001, in acquiring at least a part of Moulinex.

115 Subsequently, the applicant continued to express interest in Moulinex by making three additional offers to purchase all or part of it, namely:

— an offer dated 29 November 2001 for the total acquisition of Moulinex, comprising all workforces in France, totalling approximately 5 500 persons, and the assets of Moulinex, including stocks, for a token price of one euro; the offer was notified to the Commission in the framework of its examination of the concentration in question, to the Directorate-General for Competition, Consumer Affairs and the Prevention of Fraud and to the representative of the French Minister for the Economy;

— an offer dated 28 December 2001 for the partial acquisition of Moulinex: this new offer was for the acquisition of the worldwide Krups activities, its production facilities and the personnel attached to them, for a sum to be fixed according to the area of the fixed assets concerned; this offer was submitted to the Commission in the framework of its examination of the concentration in question and transmitted to the French authorities;

— an offer dated 15 February 2002 to purchase certain assets of Moulinex: BaByliss sent to its administrators a new offer to acquire Moulinex, including the assets not acquired by SEB and consisting in the Alençon, Bayeux and Falaise sites and all the equipment for the production of microwave ovens; the purchase price offered by BaByliss was EUR 150 000.

116 Even if these offers did not meet the prescribed conditions or were not sent to the correct authorities for dealing with them or were drawn up after the concentration and even, in the case of the offer of 15 February 2002, after the contested decision, they nevertheless show the applicant's sustained and continuous interest from 25 September 2001 in acquiring Moulinex or certain of its assets.

117 For all those reasons it is clear that the concentration between SEB and Moulinex is of direct and individual concern to the applicant and that its action for the annulment of the contested decision is admissible.

The substance of the case

118 The applicant puts forward four pleas in law in support of its action for annulment. The first claims that there was a breach of essential procedural requirements in that the Commission accepted the belated submission of commitments by SEB. By the second plea, the applicant contends that the Commission erred in law in authorising the concentration at the end of phase I, without opening phase II. The third plea alleges that the decision is vitiated by a manifest error of assessment in that the commitments are insufficient to overcome the competition problems. By the fourth plea, the applicant contends that the Commission erred in law in failing to consider whether the nominal price paid by SEB for the acquisition of Moulinex and the financial aid provided by the French State were not such as to strengthen SEB's position.

I — *First plea: breach of essential procedural requirements in that the Commission accepted the belated submission of commitments by SEB*

Arguments of the parties

119 The applicant argues that the contested decision is formally defective in that it authorised the concentration in question on the basis of commitments submitted by SEB after the expiry of the prescribed period of three weeks from the date of receipt of the notification.

120 The applicant observes that, pursuant to Article 18(1) of Regulation No 447/98, 'commitments [in the course of phase I] shall be submitted to the Commission within not more than three weeks from the date of receipt of the notification'. The applicant also cited paragraph 37 of the Remedies Notice:

'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.'

121 The applicant claims that, in the present case, the Commission breached Article 18 of Regulation No 447/98 and paragraph 37 of the Remedies Notice by accepting new commitments by SEB more than ten days after the prescribed three-week period.

122 On 5 December 2001, the deadline for the submission of commitments, SEB proposed to the Commission a commitment to discontinue the sale of certain categories of products with the Moulinex trade mark for a period of two years throughout the EEA (paragraph 135 of the contested decision). The Commission itself considered that such a commitment did not resolve the competition problems created by the concentration. In that connection, it is symptomatic that the Commission did not deem it necessary to conduct a market test to assess the effectiveness of such commitments.

123 The applicant observes that it was not until 18 December 2001, namely five weeks after the notification of the concentration, that SEB submitted new commitments, consisting in the grant to a third party of an exclusive licence to use the Moulinex mark for three years in respect of all the product categories affected by the concentration. The applicant adds that this second proposal was itself the subject of a third proposal which entailed substantial modifications on the day before the adoption of the contested decision and led to the solution finally adopted by the Commission (paragraphs 129 to 134 of the contested decision).

124 According to the applicant, it therefore appears the second and third proposals submitted by SEB differed fundamentally in nature, effect and duration from SEB's original proposal. Therefore in no way could they be regarded as a mere improvement of the original commitments, within the meaning of the Remedies Notice, but constituted new commitments. Consequently at that stage of the procedure, the Commission ought to have decided to open phase II.

125 The applicant points out, by way of comparison, that in the case which led to the Commission decision of 14 March 2000 declaring a concentration to be incompatible with the common market and the functioning of the EEA Agreement (Case No COMP/M.1672 — *Volvo/Scania*) (OJ 2001 L 143, p. 74, at paragraphs 359 and 362), Volvo had submitted a first proposal for

commitments within the period laid down for that purpose (phase II, in that case) and had then put forward a new proposal 15 days later. The Commission refused to consider the second set of commitments on the ground that the new proposal contained nothing which Volvo could not have included in a commitment submitted within the three-month period.

126 The Commission maintains that there is no foundation for the claim that it breached essential procedural requirements in accepting the late submission of commitments by SEB.

Findings of the Court

127 It must be observed that 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 contested decision on 8 January 2002.

128 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 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 contested 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.

129 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.'

130 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.

131 However, it is undisputed that the initial version of the commitments is not that which was finally accepted by the Commission in the contested decision. According to recital 135 of the contested 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.

132 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.

133 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.

134 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.

135 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.

136 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.

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

138 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'.

139 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 proposed 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.

140 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.

141 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.

142 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.

143 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).

144 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.'

145 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 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 initial version of the commitments for the purposes of paragraph 37 of the Remedies Notice.

146 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.

147 Moreover, in the present case, the commitments provide, in Section 1(c), that SEB is to abstain from using the Moulinex trade mark for a period of three years after expiry of the licence agreements. In addition, the second subparagraph of Section 1(a) provides that the licensees are entitled to stop using the Moulinex trade mark at any time during the term of the licence for the purpose of migrating definitively to their own trade mark. In accordance with those two provisions, the Moulinex trade mark will be withdrawn from the market for a period of at least three years and, at least in theory, of eight years at most. It follows that, contrary to what the applicant claims, the final version of the commitments is 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 reinforces such non-use of the Moulinex mark by SEB by compelling SEB to grant a licence. For that reason also, the final version of the commitments is an 'improvement' as compared with the initial version.

148 Furthermore, even though third parties 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 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 an exclusive licence for 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.

149 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 reasonably, and in any case without manifest error, 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.

150 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.

151 Consequently, the first plea must be dismissed in its entirety.

II — *Second plea: the Commission erred in law in authorising the concentration without opening phase II*

Arguments of the parties

152 The applicant contends that Commission erred in law in not initiating phase II on the basis of Article 6(1)(c) of Regulation No 4064/89 when the conditions for authorisation on the completion of phase I had not been fulfilled because the commitments submitted by SEB did not clearly rule out serious doubts as to the compatibility of the concentration with the common market.

153 The applicant observes that the Remedies Notice provides that 'commitments submitted to the Commission in phase I must be sufficient to clearly rule out serious doubts' as to the compatibility of the concentration with the common market. In particular, commitments offered during phase I can lead to authorisation without the initiation of phase II only where:

— the competition problems created by the concentration are easily identifiable;

— the commitments are sufficient clearly to remove all serious doubts and are therefore designed to provide a straightforward answer to a readily identifiable competition concern;

— the commitments are presented as an 'immediate response' to the result of the Commission's consultations with the operators present in the market and the parties.

154 Accordingly, the Commission concludes as follows in the Remedies Notice:

'Commitments in phase I can only be accepted in certain types of situation. The competition problem needs to be so straightforward and the remedies so clear-cut that it is not necessary to enter into an in-depth investigation.'

155 The applicant adds that, in the case of *Volvo/Scania*, cited above, the Commission rejected proposed commitments submitted by the parties to the concentration after finding as follows:

'It is not possible to conclude that the new proposal in an obvious and clear-cut way would remove all the identified competition concerns. The complexity of the new proposals would have made it impossible, in the short time remaining before the expiry of the deadline under Article 10(3) of the Merger Regulation, for the Commission to evaluate them effectively. Further investigation would have been called for, and it would also have been necessary to seek the views of interested third parties pursuant to the relevant provisions of the Merger Regulation.'

156 For the reasons given above, the applicant considers that the Commission was not entitled, without erring in law, to authorise the concentration at the end of phase

I because, according to the applicant, the Commission could not have been sufficiently certain, at the end of that phase alone, that the commitments removed all doubt as to the compatibility of the concentration with the common market.

157 Three factors show that the Commission was not in a position, at the end of phase I, to determine with the requisite certainty that the commitments were sufficient to resolve all the competition problems created by the concentration.

158 First, the applicant states that, to its knowledge, in the past the Commission has never authorised a concentration on the sole basis of commitments concerning a trade mark licence, such commitments having always been used by the Commission to accompany or supplement other remedies such as the sale of assets. On this point the applicant observes that the Commission itself recommends, in paragraph 16 of the Remedies Notice, that 'where the competition problem results from horizontal overlap, the most appropriate business has to be divested'. According to the applicant, the Commission did not have at its disposal the experience to enable it to determine with sufficient certainty whether a mere commitment relating to a trade mark licence would clearly resolve the identified competition problems.

159 Second, the applicant claims that the Commission could not have had sufficient information regarding the effectiveness of the commitments. According to the applicant, unlike a straightforward commitment to divest, the effects of which can easily be assessed by the Commission, the effectiveness of a commitment to licence the use of a trade mark is, by its nature, more difficult to evaluate in so far as it depends on several factors such as the duration of the licence, the duration of the subsequent surrender of the mark and the exact scope of the licence. Furthermore, the fact that the licences for the Moulinex mark may, in the scheme of commitments proposed by the Commission, be granted to different undertakings, depending on the products and countries concerned, was likely to

complicate further the assessment of the effect of those commitments. To that extent, the applicant considers that the Commission was not in a position, without conducting an in-depth examination, to assess with sufficient precision whether the third-party licensee or licensees would actually be able to act as a real counterbalance to SEB-Moulinex on the day after the concentration, in respect of each of the product ranges and each country concerned.

160 Third, the applicant observes that the questionnaire for assessing the effectiveness of the modified version of the commitments submitted by SEB was addressed to interested third parties on 20 December 2001, a reply being required by 21 December 2001. However, in the applicant's opinion, the very short time allowed for a reply prevented the third parties in question from giving a precise and detailed opinion regarding the foreseeable effects of the proposed commitments. The applicant admits that a very short time-limit for a reply may be accepted in certain cases involving commitments the effects of which can easily be assessed, such as the divesture of assets. On the other hand, where the commitments are complex and, furthermore, uncommon, a period of one day can hardly be regarded as sufficient to enable third parties to give a detailed opinion.

161 The Commission denies that it erred in law in deciding to authorise the concentration at the end of phase I without initiating the in-depth procedure.

Findings of the Court

162 First of all, in so far as the applicant contends that the Commission erred in law by not initiating phase II on the ground that the commitments submitted by SEB were not sufficient clearly to remove all serious doubts, the applicant is calling into question the economic assessment which led the Commission to accept the

commitments proposed by SEB. Consequently this plea is the same as the third plea claiming manifest error of assessment of the capacity of the commitments to resolve the competition problems. Therefore this aspect of the present plea will be examined in connection with the third plea.

163 The eighth recital in the preamble to Regulation No 1310/97 states that phase I remedies can only be accepted 'where the competition problem is readily identifiable and can easily be remedied'. Likewise, paragraph 37 of the Remedies Notice repeats that 'phase I remedies are designed to provide a straightforward answer to a readily identifiable competition concern'.

164 In the present case it must be noted that, regarding the nature of the competition problems arising, the applicant has not identified any competition problems other than those identified by the Commission in the contested decision.

165 Furthermore, it must be said that the Commission's analysis of competition is prudent. Contrary to the assertions of the notifying parties in the course of the administrative procedure, who took the view that the geographical dimension of the markets was worldwide, the Commission found, at the end of paragraph 30 of the contested decision, that 'a national definition of the relevant markets must be regarded as having the greatest credibility at the end of the phase I examination'. Likewise, to assess the competitive position of the new entity on completion of the concentration, the Commission aggregated the market shares of SEB and Moulinex on the assumption that Moulinex would not lose sales, whereas the context of the acquisition was likely to lead to such losses and it is not disputed that the marketing of certain Moulinex models had been discontinued. Accordingly in paragraph 42 of the contested decision the Commission observed that it could not be ruled out, 'at least on the conclusion of phase I of the examination, that the combined entity will be able to restore the competitive capacity of Moulinex to the level before the commencement of the reorganisation proceedings'.

166 It must therefore be accepted that the Commission accurately identified the competition problems created by the concentration in question.

167 The applicant adduces three grounds to show that the Commission could not have been sufficiently certain that the proposed commitments would remove the doubts as to the compatibility of the concentration and that it therefore erred in law in authorising the concentration at the end of phase I. The said grounds are, first, the nature of the commitments, second, the Commission's lack of information for assessing the effectiveness of the commitments and, third, the period allowed to third parties for submitting observations on the commitments.

168 First, regarding the nature of the proposed commitments, they consist in the conclusion of exclusive licensing agreements for the Moulinex trade mark in nine Member States, covering all of the 13 relevant products for a term of five years and a commitment by the SEB group, for the term of the licensing agreement and three years after it expires, to refrain from marketing any products under the Moulinex mark.

169 Neither Regulation No 4064/89 nor the Remedies Notice expressly stipulate what kind of commitments can or must be accepted on the completion of phase II or in the framework of phase I. As Regulation No 4064/89 aims to prevent the creation or strengthening of market structures as a result of which effective competition in the common market would be significantly impeded, the proposed commitments must be such as to permit the Commission to conclude that the concentration in question will not create or strengthen a dominant position. In that connection there is no material difference between the commitments made in

phase I and those in phase II although, as an in-depth market study is not carried out in phase I, the former must not only permit such a conclusion, but must also be sufficient to rule out clearly any serious doubt on that point.

170 Although a sale of assets is often the most suitable corrective measure for easily remedying a competition problem, particularly in the case of horizontal overlap, the possibility cannot in principle be ruled out that a licence agreement may be suitable for remedying identified competition problems. Thus in the judgment in Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraph 319, the Court observed that 'the possibility cannot automatically be ruled out that commitments which are *prima facie* behavioural, for instance not to use a trade mark for a certain period, or to make part of the production capacity of the entity arising from the concentration available to third-party competitors or, more generally, to grant access to essential facilities on non-discriminatory terms, may themselves also be capable of preventing the emergence or strengthening of a dominant position'.

171 The applicant's observation that the Commission has never in the past authorised a concentration on the sole basis of commitments concerning a trade mark licence is irrelevant. If the commitments proposed by SEB are capable of effectively overcoming the identified competition problems, the Commission cannot be criticized for accepting them merely because it has never before authorised a concentration on such a basis. This question, which relates to the substance of the commitments, will be examined in connection with the plea that the commitments are insufficient.

172 It is also clear from the file that, during the administrative procedure, several third parties, including De'Longhi, suggested to the Commission that a licensing agreement might, under certain circumstances, be sufficient to overcome the competition problems identified in the present case (see paragraph 149 above).

173 It is common ground that trade marks are of vital importance in the sector affected by the concentration and are one of the main factors in the final consumers' choice. In addition, the offers to purchase Moulinex related almost exclusively to that group's trade marks rather than the production units, the applicant itself expressing its primary interest in acquiring the Krups trade mark. It is not denied in the present case that a transfer of tangible assets would have had only a marginal effect on the structure of competition. As for requiring the transfer of intangible assets in the form of trade mark rights, that would have amounted in substance to partially prohibiting the concentration, which would have been contrary to the principle of proportionality if commitments relating to a trade mark licence were likely to prevent the creation or strengthening of a dominant position held by SEB-Moulinex.

174 The applicant has not shown that the Commission was not in a position to determine whether the third-party licensee or licensees would be able to act as a genuine counterweight to SEB-Moulinex. In this connection it must be observed that, on the contrary, the Commission included, in the final version of the commitments, a paragraph on the status of the licensee and required the licence holder or holders to be submitted to it for approval, also requiring them to be viable and independent and to be in possession of the competence necessary to provide active and effective competition on the market concerned.

175 Finally, contrary to the applicant's allegation, it is clear from the commitments proposed by SEB that there cannot be more than one licensee in one country, as Section 1(a) of the commitments expressly provides that the licence is exclusive in each of the Member States concerned and Section 1(c) provides that the licence will be for all small electrical household appliances and that neither the licensee nor SEB will be able to use the Moulinex trade mark for other products.

176 Second, with regard to the complaint that the Commission could not have had enough information concerning the effectiveness of the commitments, it is sufficient to note that, although the effectiveness of a trade mark licence depends on several factors which are more difficult to assess than a sale of assets, it cannot

automatically be ruled out that the Commission will be able to assess the relevant parameters in the course of phase I.

177 Moreover, the Commission took into account precisely all the criteria cited by the applicant and was able to test them in the market. As a result of its own examination and the replies given by the third parties who were asked, the Commission was in a position to better identify the shortcomings of the commitments originally proposed and to make the necessary improvements to them with regard to the duration of the licence, the duration of the subsequent surrender of the trade mark and the exact scope of the licence. Accordingly the final version of the commitments includes in particular the following provisions:

— two-year extension of the term of the licence agreement (originally proposed for three years) and of the duration of the obligation to refrain from competing thereafter (originally one year) (subparagraph 1 of section 1(c) of the commitments);

— extension of the licence agreements to all the relevant products and an obligation for SEB not to market any products at all (even those not concerned) under the Moulinex trade mark in the nine Member States concerned (section 1(a) and second subparagraph of section 1(c) of the commitments);

— deletion of the obligation for licensees to obtain supplies of certain products concerned from SEB (subject to the special case of Germany) (section 1(d) of the commitments);

— obligation of prospective licensees to be currently present on the market or potentially capable of entering it (section 1(g) of the commitments).

178 In those circumstances, the commitments cannot be considered to be of such an extent and complexity that the Commission found it impossible to determine with the requisite degree of certainty that effective competition would be restored in the market, because the final version of the commitments reflects in large measure the objections of the third parties. For the same reason, the commitments accepted by the Commission were sufficiently specific to enable the Commission to assess all the details.

179 Third, regarding the time allowed to third parties to submit their comments, it must be observed that, in paragraph 34 of the Remedies Notice, the Commission provides as follows:

'34. In order to form the basis of a decision pursuant to Article 6(2), proposals for commitments must meet the following requirements:

(a) they shall be submitted in due time, at the latest on the last day of the three-week period;

...

At the same time as submitting the commitments, the parties need to supply a non-confidential version of the commitments, for purposes of market testing.'

180 The applicant complains that its observations on the modified version of the commitments which it received on 20 December 2001 had to be submitted by 21 December 2001. As the Commission points out, it is clear from the file that there is no factual basis for this complaint as the Commission's letter expressly states that the period allowed would expire on 2 January 2002, not 21 December 2001. It follows that the third parties, of whom the applicant was one, had 12 days in which to lodge their observations on the modified version of the commitments, which was manifestly more than sufficient, particularly in view of the need for speed in the procedure for appraising concentrations. Accordingly, in the judgment in the case of *Kaysersberg* v *Commission*, cited above, the Court upheld a period of 24 hours granted to third parties in which to submit comments on the new version of the commitments in question. It must also be observed that, although the applicant complains of the time allowed in which to comment on the last proposed commitments, it does not deny that it was able to lodge written comments on the modified version of the commitments in spite of the short period allowed. Finally, the applicant has not put forward any considerations to show how a longer period would have enabled it to produce evidence likely to change the contested decision. On this point it is relevant to note that the applicant's objections before the Court are substantially the same as those raised in the course of the administrative procedure. Therefore it must be concluded that the Commission adopted the contested decision in full knowledge of the facts, after profitably consulting third parties on the effectiveness of the proposed measures for overcoming the identified problems of competition.

181 It follows that neither the competition problems in question nor the nature of the commitments proposed by SEB nor the period allowed to third parties were such as to prevent the Commission from concluding that the serious doubts could be removed on the completion of phase I.

182 It follows that the plea that the Commission erred in law in not initiating phase II must be dismissed.

III — *Third plea: manifest error of assessment in that the commitments were insufficient to overcome the competition problems*

183 The applicant maintains that the contested decision is vitiated by a manifest error of assessment in that the commitments entered into by SEB are insufficient to overcome the competition problems created by the concentration.

184 This plea is divided into five limbs. The applicant considers that there was a manifest error of assessment by the Commission in so far as:

— the commitment to grant a trade mark licence is not by nature capable of overcoming the competition problems created by the concentration;

— the commitments are of insufficient duration;

— the commitment to obtain supplies in respect of the German market and the conditions attached to the option for all licensees to obtain supplies will have the effect of strengthening the position of SEB-Moulinex;

— the fact that the Commission agreed that the same trade mark could be used by different undertakings in the European Union may give rise to collusion between SEB-Moulinex and the third-party licensee or licensees;

— no commitment is imposed with regard to markets which nevertheless have serious competition problems.

185 De'Longhi contends, moreover, that the commitments bring about a sharing of the market in the Moulinex trade mark.

First limb: a commitment to grant a trade mark licence is not by nature capable of remedying the competition problems caused by the concentration

A — Arguments of the parties

186 The applicant considers that the commitment to grant a trade mark licence is not by nature capable of remedying the competition problems in the present case. A mere commitment to licence a trade mark does not offset the negative effects of a market share of approximately 40% of the market for small electrical household appliances as a whole, outside France.

187 The applicant notes that, in the Remedies Notice, the Commission itself observes that:

— where the competition problem results from horizontal overlap, the most appropriate business has to be divested (paragraph 16);

— in exceptional cases, a divestiture package including only brands and supporting production assets may be sufficient to create the conditions for effective competition. In such circumstances, however, 'the Commission would have to be convinced that the buyer could integrate these assets effectively and immediately' (paragraph 18).

188 The applicant adds that, on the other hand, in the Notice the Commission does not anticipate that a trade mark licence alone can overcome problems of horizontal overlap. The Commission had never previously imposed, in the form of a commitment, a measure involving a trade mark licence unaccompanied by other remedies, such as the divestiture of brands and businesses, divestiture of production capacity, the transfer of part of the sales and administrative personnel and the workforce attached to the industrial site sold (see, for example, Commission Decision 96/435/EC of 16 January 1996 relating to a proceeding pursuant to Regulation No 4064/89 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case No IV/M.623 *Kimberly-Clark/Scott*) (OJ 1996 L 183, p. 1)).

189 As an example, the applicant refers to the Commission Decision of 27 July 2001 declaring a concentration to be compatible with the common market (Case No IV/M.2337 — *Nestlé/Ralston Purina*, OJ 2001 C 239, p. 8), in which the Commission required commitments for the divestiture of brands so as to eliminate the horizontal overlap of the parties' businesses and to give the new

entity a market share equivalent to that held by Ralston Purina prior to the operation. In addition, the Commission had required the divestiture of all products in the range covered by the commitments so as to enable the purchaser of the brand to avoid indirect competition by Nestlé/Ralston Purina. The Commission had decided on similar measures in the case of *Kimberly-Clark/Scott*, cited above.

190 The Commission denies that a commitment to grant a trade mark licence cannot remedy the competition problems created by the concentration.

B — Findings of the Court

191 First of all, as observed in connection with the previous plea, it cannot automatically be ruled out that a commitment which is behavioural, such as one to grant a trade mark licence, may be capable of remedying the competition problems created by a concentration and the relevant question is not whether the Commission has already accepted concentrations on the sole basis of commitments to grant a trade mark licence, but whether such commitments were, in the present case, capable of preventing the emergence or strengthening of a dominant position.

192 On this point it is common ground that trade marks are the most important factor in competition on the relevant markets. Furthermore, many producers have chosen to outsource all or part of their production and to retain only the brands, sales forces and marketing teams.

193 It is likewise not disputed that, since the average life of small electrical household appliances is approximately three years, a trade mark licence for a term of five

years accompanied by a commitment by SEB not to market any such appliances under the Moulinex trade mark for a further three years is likely to enable the licensees to induce customers of Moulinex products to migrate to their own brand. This is all the more true in so far as, according to the commitments, the licensee or licensees must be viable, independent and in possession of the competence necessary to provide effective competition on the market concerned and, in any case, must be approved by the Commission.

194 It must also be observed that the grant of a trade mark licence is a remedy which was envisaged and asked for by third parties. Consequently this remedy appeared to be appropriate for remedying the competition problems in the present case.

195 It follows that, leaving aside the question whether the commitment is of a sufficient duration, which will be considered below, the commitments relating to a trade mark licence offered by SEB are capable of remedying the competition problems arising from the concentration concerned.

196 This conclusion is not called into question by the examples cited by the applicant. First, several of the applicant's allegations are mistaken in fact. Thus the average market shares of SEB-Moulinex in the sector of small electrical household appliances in Europe are less than 30% and are therefore not 40%. Likewise, in the case of *Nestlé/Ralston Purina*, the Commission did not require the divestiture of brands for the Spanish markets, but accepted, as one of two options, commitments whereby the parties agreed to grant licences for the brands for a total of approximately eight years (in two stages), which made it possible to establish the new brand on the market (paragraph 68 of the said decision). Secondly, in any case, the applicant has not shown that the markets and the problems created by those concentrations possessed characteristics fundamentally similar to those in the present case. The fact, assuming it to be proven, that the Commission considered that commitments relating only to trade mark licences

were not such as to overcome the competition problems caused by a particular concentration does not mean that such commitments are not sufficient to eliminate the risks of creating or strengthening a dominant position that arise from another concentration on a different market with different characteristics.

Second limb: manifest error of assessment by the Commission in accepting commitments of insufficient duration

A — Arguments of the parties

197 The applicant submits that the commitments accepted by the Commission are of insufficient duration. According to the applicant, the restoration of effective competition requires that the purchaser of the Moulinex brand should have the resources to develop the brands concerned and has an inducement to do so. In the contested decision (paragraph 36), the Commission itself stated 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'. According to BaByliss, this position is justified by the fact that, in a sector where the technological characteristics of products are not a factor which determines the purchase of the product by the consumer, the brand image plays an essential part in gaining customer loyalty.

198 In that context, public awareness of brands is one of the main elements of the markets concerned and keeping such awareness at a high level requires substantial investment in advertising in order to overcome consumer habits and the obstacles connected with the reputation of well-established manufacturers. In

the applicant's opinion, such investment can pay for itself only over a very long period and to the extent that the profits from the investment accrue to the investor. Consequently, whereas firms already active in the market may content themselves with relatively modest advertising expenditure aimed at maintaining an image which has already been created, the situation is different for a new entrant, particularly where a powerful group has very well-known brands.

199 The applicant claims that the economic literature shows specifically that a reasonable manufacturer systematically underinvests if he can expect only a partial return on his investment. Therefore a purchaser who does not own the brands and is in the position of investing in order to increase awareness of them, knowing at the same time that he will ultimately have to return them to a competitor, would have no incentive whatever to maintain or develop the brands. This leads to a serious weakening of the brands he has purchased. The duration of the licence and of the period of non-use which must follow it are therefore decisive for the effectiveness of the commitment.

200 As an example, the applicant notes that, in the *Kimberly-Clark/Scott* case, cited above, where the entity created by the concentration was the leader in the toilet tissue market in the United Kingdom and Ireland, with an aggregate market share of between 50 and 60%, the Commission required the conclusion of a licence agreement for the trade marks concerned for a total of 15 years.

201 Commission decision C (2001) 3014 final of 10 October 2001 declaring a concentration to be incompatible with the common market and the functioning of the EEA Agreement (Case No COMP/M.2238 — *Schneider-Legrand*) expressly approved that approach as follows:

'The Commission's investigation has confirmed the disadvantage of not owning one's own brand from the beginning and shows that a purchaser would need a

long period (approximately seven years) to complete successfully the substitution of the proposed brand. At the same time, the Commission's investigation shows that a purchaser would have to be protected by commitments not to re-enter the markets concerned under the original brand for a period of more than ten years.'

202 The applicant considers that the factors mentioned by the Commission to show the inadequacy of the commitments proposed in the *Schneider-Legrand* case are directly applicable to the present case.

203 Therefore, according to the applicant, the Commission manifestly erred in its assessment by finding, in the present case, that a commitment to grant a trade mark licence for a term of five years, combined with a commitment by SEB not to use the Moulinex brand for a further three years 'will enable the licensee to induce the migration of Moulinex products to its own brand with limited losses to SEB when the latter is in a position to reintroduce the Moulinex brand to the relevant markets'.

204 The Commission, supported by SEB, denies that it erred manifestly in its assessment in accepting commitments of an allegedly insufficient duration.

B — Findings of the Court

205 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 use immediately 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.

206 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.

207 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.

208 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.

209 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 reintroduce the Moulinex trade mark easily 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 contested decision are sufficient — but whether the licensees will be able to establish or strengthen their own position as effective competitors of SEB.

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

211 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 product categories in question and other household appliances not included in those product ranges, such as vacuum cleaners and microwave ovens.

212 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.

213 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.

214 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 automatically 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.

215 Moreover, in recital 140 of the contested 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.

216 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.

217 The Commission correctly 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, Whirlpool successfully migrated

from the Philips trade mark to the Whirlpool 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 continued to be present and was maintained by Philips on adjacent markets. The Commission also observed, by way of comparison, that in markets for similar products Dyson became the leader in the British market for vacuum cleaners in less than five years, Colgate gained a significant share of the French market for electric toothbrushes in one year and Moulinex, originally absent from the electric kitchen appliances sector (informal meals), succeeded in five years in gaining a market share of between 5 and 15% in the various European countries.

218 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.

219 Contrary to the applicant's submission, far from systematically underinvesting by reason of not being the owner of the brand, the licensee will, on the contrary, be encouraged to invest strongly in the development of his own brand, of which he will be the owner, after benefiting initially from the support of the Moulinex brand to launch or strengthen it. As the purpose of the commitments is not to use the Moulinex trade mark for a period of five years but to enable migration to take place from the Moulinex mark to others, the licensee or licensees will have every incentive to invest in their own brand so as to prolong the benefits of using the Moulinex brand during the first years. Consequently, the period of association of the two brands is only a necessary stage in the transition to the licensee's own brand. Therefore the return on the investment will continue long after the eight years laid down by the commitments and will not stop on the date when it will be possible for SEB to reuse the Moulinex brand.

220 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.

221 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 contested 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.

222 In light of those circumstances, it must be concluded that there was no manifest error of assessment by the Commission in finding that the duration of the commitments is sufficient 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.

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

224 This conclusion is not called into question by the two decisions cited by the applicant. The characteristics of the two markets concerned in the cases of *Kimberly-Clark/Scott* and *Schneider/Legrand* are not comparable to the markets in question in the present case so that, as stated above, the comparison claimed by the applicant is irrelevant.

225 In the *Kimberly-Clark/Scott* case, the long duration of the commitments (licence for a maximum of 10 years with a five-year period of non-use) was justified, according to the Commission (and not disputed by Kimberly-Clark), because the introduction of a new brand on the market in toilet paper, kitchen towels and paper tissues was particularly difficult in so far as there were only two significant brands (Kleenex and Andrex), while the others were hardly promoted and had little customer loyalty. In the present case, by contrast, there are established brands to which customers of the Moulinex brands can migrate.

226 Likewise, in the *Schneider/Legrand* case — apart from the fact that the Commission's decision was annulled by the Court — the parties' proposed offer of an option to use several trade marks for three years had been rejected because the market test had shown that a purchaser would need about seven years to complete the proposed trade mark substitution, the lifetime of 'low-voltage' electrical appliances being very long, whereas that of small electrical household appliances is short. In addition, Schneider proposed that the trade mark, on the same national market, be split and used by Schneider and the licensee whereas in the present case there will be no Moulinex brand products from two different companies on one and the same market as the commitments provide for an exclusive licence and a subsequent prohibition on using the Moulinex mark.

Third limb: the commitment to provide supplies on the German market and the conditions attached to the option for all licensees to obtain supplies will have the effect of strengthening the position of SEB-Moulinex

A — Arguments of the parties

227 The applicant contends that, regarding food mixers in Germany, the two-year commitment of the Moulinex mark licensee to obtain supplies of all appliances in that category from SEB, equivalent to 65% of the sales of products in that category by Moulinex in 2000, is such as to strengthen further the position of SEB-Moulinex in the German market.

228 First, the applicant claims that such a commitment gives SEB-Moulinex a guaranteed outlet for its products. To that extent, it would enable SEB-Moulinex to benefit from greater economies of scale and would thus contribute to reducing its marginal production costs.

229 Second, the applicant considers that the fact that SEB agrees to supply the licensee on the average internal transfer terms within the SEB group, between the industrial companies and the marketing subsidiaries, in the territory or territories concerned, will prevent the licensee from using less costly sources of supply which it may identify. Therefore the licensee would be able to compete with SEB on prices only by manipulating the level of its margin.

230 Third, the applicant considers that this measure is likely to take away any incentive for the licensee to offer technologically innovative products in so far as it will enable SEB, the market leader, to determine the technical standards of the different products, thus eliminating any competition in relation to product characteristics.

231 Fourth and last, the applicant considers that this measure is not essential to the licensee's business. In particular, it takes the view that merely giving the licensee an option to obtain supplies from SEB, as proposed for the other countries, would have been sufficient to enable it to carry on its business even if it did not have the necessary production capacity.

232 Therefore the applicant concludes that there was a manifest error of assessment by the Commission in accepting a commitment likely to lead to the strengthening of the position of SEB-Moulinex on the German market.

233 Alternatively, the applicant observes that the aspects of the commitment relating to obtaining supplies from SEB-Moulinex could lead to greater restraint of price competition in the market segments concerned.

234 First, the applicant notes that the commitment gives the licensee the option of obtaining supplies from SEB-Moulinex for one or more of the products or countries concerned. However, should the licensee wish to obtain supplies from SEB for Moulinex products, such supply should correspond to 65% of sales under the Moulinex brand in 2000 (paragraph 132 of the contested decision). In the applicant's opinion, such an obligation gives SEB a guaranteed outlet, but takes away the licensee's freedom to choose its sources of supply.

235 Second, the applicant claims that compelling the licensee to obtain supplies from SEB-Moulinex equivalent to a minimum of 65% of sales by Moulinex in 2000 may lead to uniformity in the selling prices of SEB-Moulinex and those of the licensee for the products in question. According to the applicant, the licensee will in effect share in the entire production costs of SEB-Moulinex and probably for a very significant proportion of its total requirements for the product concerned. Such a degree of similarity in cost structures could lead to automatic or collusive alignment of the selling prices of the products concerned in so far as price competition will be possible only by means of commercialisation costs and the level of the licensee's margin. The applicant adds that the more concentrated the markets situated downstream of the market for selling the finished products, the greater the risks of collusive behaviour. The Commission had expressly referred of the existence of such risks in the Guidelines on the applicability of Article 81 EC to horizontal cooperation agreements (OJ 2001 C 3, p. 2).

236 The Commission denies that the commitment to obtain supplies on the German market will have the effect of strengthening the position of SEB-Moulinex in the German market.

B — Findings of the Court

237 Essentially the applicant objects, first, to the obligation imposed on the German licensee with regard to obtaining supplies of food mixers and, second, the option of all licensees in the nine Member States to conclude a supply contract for any of the products covered by the decision.

238 Regarding the obligation concerning supplies imposed on the licensee in Germany, it must be observed, first, that, according to the decision, which is not challenged by the applicant on this point, the purpose of that commitment is to maintain production at the sites in question so as to preserve jobs.

239 Second, the obligation relates to a single product, food mixers, in a single country for a limited period of two years. Furthermore, the Commission did not find that SEB-Moulinex has a dominant position on the market for food mixers in Germany, the new entity having a market share of only 20 to 30%. It must also be observed that the obligation to obtain supplies relates to only 65% of Moulinex sales in 2000, so that it is still open to the licensee to obtain supplies from a third party or to make the product concerned itself as regards its other sales. Consequently technological innovation will not be impeded in so far as there is nothing to prevent the licensee from developing its own products to complement those purchased from SEB with a view to replacing the appliances supplied by SEB, taking account of the short duration of the commitment in question.

240 Finally, SEB's commitment to sell to the licensee at a supply price equal to the industrial cost price plus general costs, far from affecting the licensee's ability to compete, ensures that he is given an advantageous price. In any case, contrary to the applicant's submissions, SEB is not a competitor of the licensee who has the obligation to obtain supplies of Moulinex products because, by reason of the commitments, SEB cannot sell any Moulinex product on the German market for the duration of the licence and for three years after it expires.

241 It follows that, contrary to the applicant's argument, the limited obligation concerning the obtaining of supplies, as provided for by the commitment, does not have the effect of strengthening the position of SEB-Moulinex or of rendering the licence less effective.

242 Regarding the complaint concerning the obtaining of supplies from SEB for markets other than that of food mixers in Germany, this is not an obligation on the part of the licensees, but merely an option which they are free to exercise in accordance with their interests. As for the fact that, if they exercise the option, they must purchase certain minimum quantities, this is not such as to render the provision objectionable.

243 It follows that the applicant's complaint must be dismissed.

Fourth limb: the fact that the Commission agreed that the Moulinex trade mark could be used by different undertakings in different States of the European Union may give rise to collusion between SEB-Moulinex and the licensee or licensees

A — Arguments of the parties

244 According to the applicant, the fact that the Commission agreed that the same trade mark could be used by different undertakings in the European Union is liable to give rise to collusion between SEB-Moulinex and the licensee or licensees.

245 The applicant considers that the use of a single trade mark cannot be split across the territory of the Member States without setting up a system for coordinating sales, marketing and advertising and without endangering the durability of the mark itself. This approach was formulated very explicitly by the French Minister

for the Economy in the case of *Pernod-Ricard/Coca-Cola* (decree of 24 November 1999 on the proposed acquisition by Coca-Cola of assets of the Pernod-Ricard group relating to Orangina brand beverages) and upheld by the French Conseil d'État (judgment of 6 October 2000, *Société Pernod-Ricard*). Likewise, the Commission has traditionally stressed that it is necessary to coordinate the sales and marketing approaches on markets which are very close to each other (the *Schneider/Legrand* decision, cited above, paragraph 796).

246 In the present case, the applicant observes that, in the contested decision, the Commission did not envisage the possibility of collusion arising from the fact that trade mark licences could be granted to different undertakings in different countries and for different products.

247 The Commission contends that the applicant's complaint is unfounded.

B — Findings of the Court

248 It is common ground that the markets for small electrical household appliances have a national dimension. As stated in paragraph 27 of the contested decision, the 'characteristics' of products may vary between the Member States on account of the peculiarities and preferences of consumers; customer/supplier relationships are forged principally on a national basis; most makers of well-known brands have their own local sales organisation in each Member State, and distribution structures are national.

249 Therefore the Commission correctly took the view that one and the same trade mark may be used by different operators in different Member States, each having its own marketing and advertising organisation and strategy and its own sales organisation, and that a licensee would be able to manage the Moulinex brand independently of SEB and to develop its own brand without the need for coordination with SEB or the other licensees.

250 Furthermore, SEB will not be able to grant a licence to another licensee for the same territory or use the Moulinex mark itself in that territory. Consequently there would be no reason to coordinate competition policy in relation to the Moulinex mark. In addition, the choice of licensees will require the Commission's consent. Finally, in any case, the Commission will be in a position to ensure that the risks of the coordination of policy between licensees mentioned by the applicant are removed.

251 It follows that the applicant's objection is unfounded.

252 This conclusion is not called into question by the cases cited by the applicant since the characteristics of the markets concerned in each case are completely different. In the *Pernod-Ricard/Coca-Cola* case, it was not shown that the licensee was independent, whereas in the present case the licensee will have to be independent in order to be approved by the Commission. Moreover, according to the Conseil d'État, the two markets for non-alcoholic carbonated drinks, 'away from home' and 'dietary', were not partitioned in France and the two markets in question were markets in neighbouring products, not geographically distinct markets, as in the present case, with national dimensions and characteristics. Consequently, the risk of coordination between the licensee and the Coca-Cola company was far from being ruled out, particularly as the proprietor of the trade mark continued to carry out the quality control of the products, packaging and

advertising. That situation is not therefore comparable with the concentration in question because the different national markets are distinct and the licensees will be free to carry out the quality control of products, packaging and advertising and will be able to develop their own brand in their own interest.

253 It follows that the fourth limb of this plea is unfounded.

Fifth limb: the Commission authorised the concentration without commitments relating to markets with serious competition problems

A — Arguments of the parties

254 The applicant complains that the Commission required no commitments whatever relating to markets with serious competition problems. For example, no commitment was required with regard to the Italian market although, on the completion of the concentration, SEB-Moulinex held a share of 65-75% of the market in electric kettles and 40-50% of the market in informal meals and food mixers. Likewise, the applicant observes that, in Norway, on the completion of the concentration, Moulinex held a 55-65% share of the market in deep friers, espresso machines and informal meals, and 70-80% of the market in mini-ovens.

255 According to the applicant, the situation was also found to be problematical in the British, Irish, Spanish, Finnish and Norwegian markets.

256 The applicant considers that the commitments required by the Commission are not sufficient to remedy the competition problems created by the concentration.

257 By way of comparison, the applicant observes that an equivalent market share in other segments gave rise to the imposition of commitments by the Commission. In Portugal a commitment had been required although SEB-Moulinex had, on the completion of the concentration, a 65-75% share of the market in mini-ovens, informal meals and food mixers, and 40-50% of the market in coffee machines and deep friers. Furthermore, the Commission had required commitments in market segments where the new entity held a smaller market share.

258 In reply to a written question from the Court asking the applicant to give details of its complaints concerning the British, Irish, Spanish, Finnish and Norwegian markets, it states as follows.

259 Regarding Spain, the applicant observes that the concentration gave SEB-Moulinex a market share exceeding 35% or even 40% in four markets for small electrical household appliances. The Commission had nevertheless concluded, on completing its examination, that the concentration on the Spanish market was compatible in observing that:

— the entity would not be able to act anti-competitively in so far as it would be faced by significant competitors;

— any attempt at anti-competitive conduct on the relevant markets would be penalised by smaller purchases of SEB-Moulinex products on markets other than those in electric kettles and portable ovens, where the new entity would obtain between 85 and 95% of its turnover.

260 The applicant submits that the Commission has not shown that there are no serious doubts as to the compatibility of the concentration with the common market, which would obviate the imposition of commitments in that country, in so far as:

— in each of the Member States mainly examined by the contested decision (Portugal, Belgium, Netherlands, Greece), the Commission concluded that there were serious doubts which would necessitate the imposition of commitments and based that view on the value represented by the markets where SEB-Moulinex had an aggregate market share of more than 40% as a proportion of the total value of all markets in the kitchen appliance range (Portugal, Belgium, Netherlands, Greece) — therefore the Commission was able to establish that in Belgium, for example, the six markets where SEB-Moulinex had a market share exceeding 40% on the day before the concentration represented in aggregate 44% of the value of all of the kitchen appliance markets concerned;

— regarding Greece in particular, the Commission required commitments from SEB in spite of the fact that the four markets where SEB-Moulinex held an aggregate market share of over 40% represented 24% of the value of all the kitchen appliance markets.

261 Therefore, according to the applicant, regarding Spain, the Commission could not conclude that there was no risk of anti-competitive behaviour by SEB-Moulinex in the markets concerned without measuring exactly the value

represented by the markets where SEB-Moulinex had a market share of more than 40% in Spain in comparison with all markets in the kitchen appliance range. However, in its examination, the Commission had measured the share represented by only two of the markets where SEB-Moulinex had a significant position (the markets in electric kettles and portable ovens), as a proportion of the total turnover of SEB-Moulinex in all the kitchen appliance markets. Consequently the Commission's assessment was erroneous in so far as its calculations had not taken account of the turnover accounted for by the markets in food mixers and informal meals, although the share of SEB-Moulinex in those markets was 55-65% and 35-45% respectively.

262 For all those reasons, the applicant considers that the Commission was not justified in concluding, solely on the basis of the data set out in the contested decision, that the implementation of the SEB-Moulinex concentration raised no serious doubt as to its compatibility with the common market in Spain, and in ruling out the imposition of commitments in that country.

263 According to the applicant, these submissions apply, *mutatis mutandis*, to the competition situation on the Finnish market. The Commission had not measured the value represented by the markets where SEB-Moulinex had an aggregate market share of more than 40% as a proportion of the total value of all markets in the kitchen appliance range. Furthermore, the Commission had merely appraised the competition situation on the toaster market and concluded that there was no serious risk to competition on the markets concerned in Finland, without taking account of the existence of three other product markets where SEB-Moulinex had a market share exceeding 40% on the day before the concentration (mini-ovens 35-45%, espresso machines 40-50%, and barbecues/grills 40-50%). In addition, the Commission had not observed (which it did in its examination of the Greek market) that the new entity also had a strong position on the food mixer market in Finland (30-40%).

264 With regard to Italy, the applicant observes that the same arguments can be raised against the Commission's examination of the competition situation in that Member State. According to the applicant, although the Commission had referred to the value represented by the electric kettle and informal meals markets in Italy in comparison with value of the entire kitchen appliance market, it had failed to take account of the food mixer market where SEB-Moulinex had a market share of 40-50%. According to the applicant, the Commission was therefore not justified in concluding that the concentration raised no serious doubts as to compatibility with the common market in Italy.

265 Regarding the United Kingdom and Ireland, the applicant considers that the Commission did not apply to the British market all the relative value and/or turnover criteria which it used in its examination of competition in the other countries. The Commission thus failed to measure the extent of the risks caused by the concentration on the British and Irish markets. It merely applied the 40% appraisal threshold, noted the existence of one competitor holding a market share of 15-25% and the existence of a limited overlap of business, and found on that basis that there were no risks to competition, but in no way assessed the impact on competition of the significant combined market shares of SEB-Moulinex in the deep frier market (30-40%), the steamer market (30-40%) and the irons market (35-45%) on the completion of the concentration.

266 The Commission denies the applicant's assertion that no commitment at all was obtained with regard to markets with serious competition problems.

267 The Commission observes first, that, contrary to what the applicant says, it is clear from paragraph 137 of the contested decision that SEB 'perfected its commitments by extending the licence to use the trade mark to cover all small household electrical appliances for... Norway'.

268 Secondly, regarding the Italian market, the Commission considers that the applicant cannot use the entity's shares of the markets for food mixers, informal meals and kettles as the sole basis for concluding that commitments were necessary. Regard should be had to all the relevant factors for determining whether the concentration would create or strengthen a dominant position in the common market. In the food mixer market, three significant competitors were in a position to confront the new entity. Likewise, as the decision showed, the parties' positions in the market in informal meals and kettles in Italy had to be put into perspective in so far as some of their competitors had large shares of several other markets in products such as portable ovens, deep friers and espresso machines. The Commission considers that any attempt at anti-competitive conduct on the markets in informal meals and electric kettles would be penalised by smaller purchases of SEB and Moulinex products on the other markets.

269 Furthermore, the situation in those markets, which was particularly questioned by the applicant, was totally different from that in Portugal in so far as in the Portuguese market the new entity held market shares of over 40% in ten of eleven product categories. The new entity had acquired unrivalled strength in Portugal in practically all the relevant product markets, which had not been countered by other producers or by the distributors.

270 Finally, the applicant's argument that the Commission had ignored the competition problems in the British, Irish, Spanish, Finnish and Norwegian markets is inadmissible under Article 44(1)(c) of the Rules of Procedure because the argument is not accompanied by the slightest explanation or statement of reasons.

271 In reply to the Court's written questions, the Commission sets out first, its reasons for concluding that the existence of serious doubts in Portugal, Greece, Belgium, the Netherlands, Germany, Austria, Denmark, Sweden and Norway

justified the imposition of commitments covering all the product markets in those nine countries, and that it was not necessary to impose commitments covering Italy, Spain, the United Kingdom, Ireland and Finland as no serious doubts were found in relation to those countries.

272 Before setting out its reasoning in four stages, the Commission notes that, in conducting its examination, it proceeded on the basis of its past decisions and the information concerning the functioning of the market which it obtained in the course of its investigation.

273 Accordingly, the Commission found that two factors are essential for competition in the markets in question: the possession of a recognised brand (paragraph 36 of the contested decision) and access to retailer customers (see, for example, paragraph 35 of the contested decision), which are the same for all product categories.

274 Regarding the first factor, the Commission refers to decision 98/602/EC of 15 October 1997 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case No IV/M.938-Guinness/Grand Metropolitan) (OJ 1998 L 288, p. 24), in which it observed that 'the holder of a portfolio of dominant brands may have a number of advantages' and that, in particular, 'he has a stronger position vis-à-vis his customers because he can offer them a range of products and it represents a higher proportion of his turnover' (paragraph 38 *et seq.* of the decision). Paragraph 41 of the decision explains that 'the importance of these advantages and their potential effect on the competition structure of the market depend on several factors, namely: the fact that the holder of the portfolio has brand number one or one or more dominant brands in a given market; the market shares of the different brands, particularly in relation to those of competing products; the

relative importance of the markets of which the parties hold shares and of the important brands in all the product markets covered by the portfolio; the number of markets in which the portfolio holder has a number one brand or a dominant brand'.

275 The distributors' negotiating strength is said to be the second important factor for competition in the market in question. On this point, SEB had stated that 'any attempt [by it] to increase its prices for the different product lines... for which its theoretical market share exceeds 35% is likely to entail retaliation by trade buyers in respect of other product lines in small electrical household appliances, such retaliation being all the more damaging in that it would then affect two thirds of the sales of small electrical household appliances'.

276 In arriving at the conclusion that it was unnecessary to impose commitments covering Italy, Spain, the United Kingdom, Ireland and Finland, the Commission took account of four factors arising from identification of the competition conditions peculiar to the concentration in question.

277 The first factor concerned ascertaining the markets where the new entity has market shares of more than 40%. The second aimed to determine whether there was a significant overlap between the parties in the relevant product market (see paragraphs 86 to 88, 90 to 92, 95, 97, 98, 101, 102, 107, 110, 111, 113, 121 and 123 of the contested decision). The third factor consisted in determining the position of the merged entity in relation to its competitors (see paragraphs 87, 92, 96 to 98, 101, 102, 105, 107, 110, 111, 113, 116, 119 and 123 of the contested decision). Finally, the last factor was a matter of determining the size of the relevant product market as a proportion of the total sales of the combined entity and, correspondingly, the opportunities for retaliation by distributors (see paragraphs 83, 97, 101, 102, 105, 110, 116, 119 and 123 of the contested

decision). The Commission explains that, when examining competition, it was found necessary to take account of the last-mentioned factor, known as the 'range effect', because the same brands and the same intermediate customers are present in all the product markets of the same country.

278 Taking into account the different criteria mentioned above, the Commission found that the concentration raised serious doubts as to compatibility with the common market in Portugal, the Netherlands, Belgium and Greece in relation to all products. As regards the first factor, the Commission observed that the new entity had market shares of over 40% for most of the products in the range (paragraphs 48, 55, 63 and 72 of the contested decision). The Commission went on to find (paragraph 83 *et seq.* of the contested decision) that the markets where the entity had shares exceeding 40% represented more than 50% of the total sales of the combined entity. The Commission concluded that, in those conditions, the range effects added further to the strength which the parties could have in the markets in question. That is why the Commission imposed commitments covering all the product markets of those countries.

279 As the first criterion was not fulfilled in relation to the other countries, the Commission considered whether the concentration entailed a significant overlap between the parties in the relevant product markets. The Commission began by finding that there were no serious doubts in relation to the product markets where the overlap was minimal because the concentration would not make a perceptible change in the competition situation. This applied to Finland in relation to portable ovens (paragraph 87 of the decision), Germany in relation to informal meals (paragraph 88), Finland, Norway and Sweden in relation to the market for espresso machines (paragraph 90). In the market for informal meals and food mixers in Spain the overlaps were very slight. In that connection the Commission took account of parties' combined position in relation to their competitors. For example, on the food mixer market in Italy, the combined entity eliminated only the fourth largest manufacturer in the market. In the absence of a significant overlap between the parties and taking account of the competitors' strong position (Braun 10-20%, Philips 10-20%, De'Longhi 0-10%), the Commission considered that the concentration raised no serious doubts in that market (paragraph 121 of the contested decision).

280 For the same countries, the Commission then sought to determine which were the countries where the concentration would have an impact in terms of range effect which would materially change the relative strength of SEB-Moulinex and demand. To do this, the Commission evaluated the size of the relevant product market or markets affected by the concentration in relation to the total sales of the combined entity in the same country. Where the ratio between the relative strengths was small, namely less than 10%, the Commission considered that the capacity of retailer customers for retaliation was not modified by the concentration and was at a sufficient level to cause the range effect to operate to their advantage. In that connection, the Commission had naturally taken account of the fact that retailer customers had at their disposal alternative offers on the national market (see paragraphs 116, 119, 122 and 123 of the contested decision). On the other hand, the Commission had expressed serious doubts concerning all markets where the concentration would entail a significant change in the parties' position in relation to demand.

281 In particular, regarding the markets for electric kettles and informal meals in Italy, the Commission had found that, in view of the small proportion of turnover represented by those product markets for the merged entity and the fact that retailer customers could seek alternative well-known brands, the concentration could not raise serious doubts (paragraphs 115 to 117 and 121 to 124 of the contested decision).

282 In reply to the Court's question whether the Commission's conclusion concerning Italy would have been different if, to determine the retailers' capacity to 'punish' potential anti-competitive conduct by SEB-Moulinex, the food mixer market had been aggregated with the markets for kettles and informal meals, the Commission observes that aggregating the three markets is quite unjustified and that, in any case, even if it had been necessary to do so, the Commission's conclusion would have been the same.

283 With regard to Italy, the markets for kettles and informal meals each represented 0-10% of the value of the whole 'kitchen category' of small electrical household

appliances. The informal meals markets represented 0-10% of the same category, and the food mixer market represented 25-35% of it. Consequently those three product markets together represented 30-40% of the value of the whole 'kitchen category' of small electrical household appliances in Italy.

284 Because of the strength of competitors such as Braun, Philips and De'Longhi in the food mixer market, there was no possibility, according to the Commission, of the concentration leading to the creation or strengthening of a dominant position. Furthermore, because of weakness in the food mixer market, the aggregation of SEB-Moulinex's share of that market with its shares of the kettles and informal meals markets was not justified.

285 In any case, the Commission adds that it would not have reached a different conclusion having regard to the particular characteristics of the Italian market. There are two strong, long-standing manufacturers (see paragraph 123 of the contested decision): Saeco, the world leader in espresso machines, holding 60-70% of the Italian market, and De'Longhi, the leader in four product markets, namely portable ovens, deep friers, toasters and barbecue/grills. Those four markets together represented 30-40% of the total value of the 'kitchen category' of small electrical household appliances in Italy.

286 However, the Commission adds that any deterrent effect which can be brought to bear by retailer customers depends largely on the value represented by the product markets where SEB-Moulinex has a market share of at least 40% as a proportion of SEB-Moulinex's total sales. Accordingly, paragraph 123 of the contested decision states that '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 [which] would render unprofitable any price increase by the parties'.

287 The Commission adds that account must be taken not only of the competition pressure from existing competitors in the market in question, but also the potential pressure from manufacturers in neighbouring markets. For example, in the Italian food mixer market, the strong presence of the existing competitors Braun, Philips and De'Longhi, limits the strength of the new entity. Moreover, Saeco could enter that product market at any time because of its decisive weight in the neighbouring markets.

288 Regarding the possibility, not originally contemplated by the Commission, of interference with competition by means of a price reduction, the Commission considers that this question must be examined from the viewpoint of practices seeking to keep other manufacturers out of the market, as the different products affected by the concentration are 'independent or substitute products' and, therefore, a temporary price reduction could cause certain competitors to leave the market or prevent new ones from entering it, particularly as manufacturers are aiming at the same intermediate level of demand, namely retailers, for all the products concerned.

289 In reply to the Court's question on this point, the Commission stated that nothing had been revealed during its investigation which suggested that the concentration in question would lead to such practices. A company could consider taking such action only if it were able to finance long-term prices below marginal cost, in the belief that that would lead to the elimination of competitors.

290 However, there was nothing to indicate that SEB was financially stronger than its competitors or that its marginal costs were lower. Moreover, a competitor driven out of the market could return if prices recovered to a level which made trading viable once again because the competitor would still have its brand, which was an essential element for competition in the small electrical household appliances market.

291 The Commission goes on to assert that it is not certain that a reduction in prices would be sufficient to prevent the entry of new competitors such as the applicant, which considers that its market shares could reach...% in... with trading commencing in 2002 (paragraphs 7 and 11 of its observations to the Court dated 28 June 2002 and 25 July 2002).

292 Finally, the Commission submits that a supplier who embarks on a price-cutting policy which has the effect of driving competitors away is influenced by the behaviour of distributors. The incentive which a supplier could have in adopting such a policy would be reduced in so far as the shelf prices of small electrical household appliances would be determined by the distributors, who could, if suppliers reduced their prices, continue to charge the same retail prices and thus obtain an additional profit at the expense of their suppliers.

293 Consequently the Commission states that it limited its examination to the immediate and definite effects of the concentration and took no account of the later and less certain effects in the present case, such as exclusion practices.

294 Regarding the possibility that retailers determine the ultimate consumers' choice of the relevant products, the Commission begins by observing that the market test showed that consumers had a clear preference for well-known brands, even though, first, they are more expensive than unknown brands and, second, as mentioned above, access to distribution was an essential condition for competing in the relevant markets.

295 During its investigations, the Commission was able to identify the determining characteristics of relations between manufacturers and retailers and, thereby, the power of retailers to determine consumer choice.

296 The Commission stresses the importance of product listing policies, whereby distributors avoid competing with each other with the same models and seek specific references so that consumers do not compare too strictly the selling prices of different shops.

297 The Commission adds that the applicant, in its reply of 30 November 2001 to the Commission's questions, states in paragraph 11 that 'a good product with a good price/quality ratio has no chance of being present in the market if distributors do not list it'.

298 Accordingly, retailers determined consumer choice both by their capacity to influence product listing and to decide on selling prices and promotions of the products sold.

B — Findings of the Court

1. Admissibility

299 The applicant submits that the Commission authorised the concentration without commitments as to markets with serious competition problems.

300 The Commission and SEB consider that this plea, as put forward by the applicant in response to the Court's written questions and at the hearing, is inadmissible under the first subparagraph of Article 48(2) of the Rules of Procedure, which provides that no new plea in law may be introduced in the course of proceedings,

and Article 44(1)(c), which provides that an application instituting proceedings must state the subject-matter of the proceedings and contain a summary of the pleas in law on which the application is based, in order to respect the rights of defence.

301 On this point it must be observed, first, that the application contains the express plea that the Commission authorised the concentration without commitments as to markets with serious competition problems. As the first subparagraph of Article 48(2) of the Rules of Procedure prohibits only the introduction of new pleas in law, the objection of inadmissibility must be dismissed.

302 With regard to the Italian markets, the Commission replied to the merits of this plea in its defence, without raising any objection as to admissibility.

303 However, in its replies to the Court's written questions, the Commission argued that, regarding Italy and, all the more, the other countries where the Commission did not impose commitments, the applicant has not criticized the Commission's reasoning that retailers would be able to penalise any attempt at anti-competitive conduct.

304 Although it must be admitted that the submissions in the application were brief, in particular concerning the British, Irish, Spanish, Finnish and Norwegian markets, regarding which the applicant merely stated that problematic situations had also been found there, nevertheless the applicant's arguments, in its replies to the Court's written questions asking for details of the nature of its complaints and during the hearing, cannot be deemed a new inadmissible plea, but only as matters capable of supporting the plea relied upon in the application. This finding applies also to the submissions concerning the Italian markets.

305 Second, the objection based on Article 44(1)(c) of the Rules of Procedure must also be dismissed because, in conformity with that provision, a summary of the plea in law is given in the application. Furthermore, the purpose of that provision is to secure respect for the rights of defence. It must be said that the Commission was fully enabled to reply to the applicant's complaints on that point. In particular, in its statement of defence the Commission had already set out its argument that it was unnecessary to impose commitments in respect of the Italian markets on the ground that any attempt at anti-competitive conduct by SEB-Moulinex would be penalised by smaller purchases of SEB-Moulinex products on the other markets in Italy. The Commission was also asked by the Court to give written replies to a number of questions on those complaints. Finally, at the hearing, the Commission was once again able to set out in detail the substance of its position on this point.

306 Third, in so far as the Commission complained that the Court itself raised a new plea, because it was not raised by the applicant, it is sufficient to observe that the plea concerning the lack of commitments in countries with competition problems was indeed formulated by the applicant in its application. It was only in response to the Commission's arguments in its defence that the Court found it necessary to ask a number of written questions, by way of measures of organisation of procedure provided for by Article 64 of the Rules of Procedure, in order to clarify the respective arguments of each of the parties. Furthermore, in that connection it must be observed that in Case C-252/96 P *Parliament* v *Gutiérrez de Quijano y Lloréns* [1998] ECR I-7421, paragraph 30, the Court of Justice held that from a straightforward reading of the first subparagraph of Article 48(2) of the Rules of Procedure in the context of Title 2, Chapter 1, of those Rules, which is entitled 'Written Procedure', it is clear that this is a rule which applies to the parties and not the Court of First Instance.

307 It follows that the plea concerning the lack of commitments in relation to markets with serious competition problems is admissible, also in so far as it relates to the Spanish, British, Irish, Finnish and Norwegian markets.

2. Substance

308 First of all, in the contested decision the Commission found that the concentration raised serious doubts with regard to certain product markets in Portugal, Greece, Belgium, the Netherlands, Germany, Austria, Denmark, Sweden and Norway (paragraph 128 of the contested decision). Consequently the Commission required commitments in those countries.

309 Second, according to the contested decision, the Commission found that the geographical markets in question are national (paragraph 30) and took the view that each of the 13 product categories is a distinct market (paragraphs 17 to 25 of the contested decision). It follows that the competition situation must, at least initially, be examined in relation to each market separately, both in geographical terms and in terms of products. However, the exclusive licences for the Moulinex trade mark provided for by the commitments in each of those nine Member States still cover all 13 product markets, although serious doubts were expressed only in respect of one or two product markets. The Commission rightly found, in paragraph 141 of the contested decision, that the extension of the exclusive licence commitments to all small electrical household products and thus to products in respect of which the Commission has no serious doubts is necessary to ensure the efficiency and viability of the remedies provided for by the commitments, because the same mark cannot be held simultaneously on the same geographical market by two different undertakings.

310 It follows that the finding that the concentration raised serious doubts on a single product market of one country was sufficient to require a commitment for all the product markets of the country in question. Accordingly, paragraphs 113, 114 and 128 of the contested decision show that commitments were imposed in Sweden although the Commission considered that the concentration raised serious doubts only on the deep friers market in Sweden.

311 On the other hand, regarding the markets in Italy, Spain, the United Kingdom, Ireland and Finland, the Commission found that the concentration changes competition conditions only marginally and therefore it did not require commitments covering those countries.

312 The applicant contends, in essence, that serious competition problems arose on certain markets in Norway, Italy, Spain, the United Kingdom, Ireland and Finland and that, in conformity with the investigation of the competition situation which it had carried out in the Member States affected by the commitments, the Commission ought also to have imposed commitments concerning those markets.

313 In reply to the Court's written questions, the Commission explained that it had carried out its investigation taking account of four factors flowing from the identification of the competition conditions peculiar to the concentration in question, namely:

— in which markets does the new entity have market shares of more than 40%;

— is there a significant overlap between the parties on the relevant product market;

— what is the position of the merged entity in relation to its competitors;

— what is the size of the relevant product market by comparison with the total sales of the combined entity and, correspondingly, to what extent are distributors able to apply counter pressure ('the range effect')?

314 Before considering whether this four-stage examination serves to rule out any serious doubts in respect of each of the geographical markets for which it did not impose commitments, it is necessary to ascertain whether the Commission actually used such an examination in the decision in order to assess the effects of the concentration on the different markets.

(a) The four stages of the examination

— The dominance threshold of 40%

315 It is clear from the contested decision, in particular paragraphs 44, 48, 55, 56, 63, 72 and 83, that, in conformity with the first stage mentioned by the Commission in its replies to the Court's questions, the entire examination of the competition situation in the decision is based on the consideration that a market share of 40% was a sign of dominance. Where the combined entity SEB-Moulinex attained or exceeded the 40% market share threshold in a product market, it had to be concluded that, subject to examination of the three other factors, it had a dominant position and that commitments would be required. The Commission, as it stated in its replies to the Court's questions, even found that a dominant position existed in the food mixer market in Greece although SEB-Moulinex had a market share of only 39%. Furthermore, it appears from paragraphs 55, 58, 62

and 128 of the contested decision, that the Commission considered that the concentration raised serious doubts on the toaster market in Belgium although the parties only had a market share of 20-30% and had to face competition from Philips, which had a market share of 25-35%.

— No significant overlap

316 According to the explanation given by the Commission in its reply to the Court's written questions, the Commission then considered whether, for the markets where the new entity's market share was more than 40%, there was a significant overlap between the parties on the relevant product markets. The Commission observed that, when it found that there was no overlap or only a minimal overlap, it ruled out serious doubts for the relevant product market on the ground that the concentration caused no perceptible change in the competition situation.

317 As it stated in its reply to the Court's written questions, the absence of a significant overlap led the Commission to rule out serious doubts for a number of product markets where the overlap was minimal [(see, in particular, the portable ovens market in Finland (paragraph 87 of the contested decision), the informal meals market in Germany (paragraph 88 of the contested decision), the espresso machines market in Norway and Sweden (paragraph 90 of the contested decision)].

318 The absence of any significant overlap between the parties is, as the Commission correctly points out, such as to rule out serious doubts even for the product markets in which the entity has a market share of more than 40% because, in that case, the dominant position is not being created or strengthened by the concentration, but is already in existence.

319 However, two qualifications are called for.

320 First, even where the overlap is slight, the concentration entails strengthening of the dominant position and therefore serious doubts can be ruled out only where the overlap is really insignificant.

321 On this point, the decision merely indicates the market shares within a 10% bracket. Although it may be true that there is no significant overlap where a market share is close to 0%, the same cannot be true where it is close to 10% and in that case it would have to be found that a dominant position is being created or strengthened. Consequently the decision does not enable the Court to review the legality of that decision. Furthermore, although the Court, in its written questions, expressly requested the Commission to state the exact market share of SEB -Moulinex in the markets for kettles and informal meals in Italy, the Commission confined itself, in its replies, to reproducing the figures within a 10% bracket given in the decision.

322 The impossibility of carrying out an effective review of the decision follows from the findings of the decision itself because the facts it contains are too vague. The fact that one of the parties to the concentration had a market share of 0-10% is taken by the Commission as a basis for finding sometimes that there are no serious doubts on the ground that there is no significant overlap, and sometimes for finding that there are such doubts.

323 This applies, in particular, to the food mixer market in Greece, where the new entity had a combined market share slightly below the dominance threshold (39%, see paragraph 72 of the contested decision and the reply to the Court's questions). The Commission did not rule out serious doubts in spite of an overlap

varying between 0 and 10%, Moulinex's market share for the products in question being 30-40% and that of SEB only 0-10% (see the table annexed to the contested decision).

324 Likewise the Commission found that there were serious doubts in relation to the irons market in the Netherlands, where the parties to the concentration had a combined market share of 40-50% with an overlap of 0-10% for Moulinex.

325 On other product markets where the combined entity had a market share of 40-50%, the Commission also found that the concentration raised serious doubts in spite of the fact that one of the parties held a market share of only 0-10%. This applies, in particular, to the barbecues market in Germany (paragraph 97), where the parties will also face major competitors, including Severin, with a market share of 25-35%, the markets for irons and ironing stations in Belgium (paragraphs 55, 56 and 59 of the contested decision), and the markets for deep friers, toasters and electric coffee machines in Portugal (paragraphs 48, 49 and 54 of the contested decision).

326 On the other hand, while the absence of significant overlap is a valid reason for ruling out serious doubts when the Commission is at first examining competition in an individual product market, there are no grounds for taking that factor into account when carrying out a more general examination of all the product markets of a particular country.

327 Moreover on several occasions the Commission relied on the fact that one of the parties to a concentration held strong positions in markets where the other party

was weak, and vice-versa, to conclude that the concentration raised serious doubts. For example, with regard to Greece, the Commission observes as follows in paragraph 73 of the contested decision:

'The parties had very large market shares (30-40% and 20-30%) simultaneously only in the market for sandwich and waffle makers. Therefore the effect of the concentration is to add to Moulinex's position in espresso machines significant dominating positions in the markets for deep friers, kettles, sandwich makers and food mixers.'

— The position of the merged entity in relation to competitors

328 The Commission states that it went on to take account of the joint position of the parties to the concentration in relation to their competitors and so concluded that the concentration raised no serious doubts.

329 In this connection it must be observed, first, that as the dominance threshold used by the decision is 40%, the mere finding that the combined entity would face competitors on a product market does not mean that the concentration does not raise doubts in relation to that market. The presence of competitors is likely to modify, or even eliminate, the combined entity's dominant position only if those competitors hold a strong position which acts as a genuine counterweight.

330 Secondly, the markets in question are markets with a rather oligopolistic structure and several undertakings have both an extensive product range and a pan-European presence. They are, as mentioned in paragraph 32 of the contested

decision, essentially companies such as SEB, Moulinex, Philips, Bosch, Braun and De'Longhi. Therefore the presence in a given market of one or other of those competitors does not appear of itself to justify the conclusion that the concentration raises no doubts in relation to that market. The same applies to undertakings which either have a wide product range but are present only in some countries (Taurus in Spain and Morphy in the United Kingdom), or have a limited number of products (Saeco for espresso machines).

331 It is also clear from the contested decision that, in almost all the markets where the Commission found that the concentration raised serious doubts, it nevertheless noted the presence of one or more of those competitors.

332 It follows that the presence of one or other of those competitors in markets where the combined entity held a market share of 40% or more was not, of itself, such as to rule out serious doubts and it could have had that effect only if the competitors had sufficiently large market shares to constitute a genuine counterweight to the position of SEB-Moulinex and thus eliminate those doubts.

333 On this point the Commission also found that there were serious doubts in relation to several markets where the competitors of the parties to the concentration held significant market shares.

334 Accordingly in the deep friers market in Greece, the Commission did not rule out serious doubts as to the compatibility of the concentration although the main competitor of the parties to the concentration, De'Longhi, held a market share of 35-45%, which was not only a very large share, but even equal to that of SEB-Moulinex (paragraph 72 of the contested decision).

335 Likewise the Commission found that there were serious doubts in relation to the market for irons and ironing stations in the Netherlands although SEB-Moulinex, which held a market share of 40-50% (paragraph 63 of the contested decision) was faced with competition from Philips with a share of 35-45% (paragraph 67).

336 The Commission also refused to rule out serious doubts in spite of the presence of competitors with large shares of the markets for kettles and irons in Belgium. In the former market, the new entity held a share of 35-45% (paragraph 55 of the contested decision), and the main competitor, Braun, had 20-30% (paragraph 58). In the latter, the new entity's share was 40-50% (paragraph 55) and the main competitor, Philips, held 25-35% (paragraph 59).

337 Finally, in the toasters market in Belgium, where the main competitor, Philips, held a 25-35% share (paragraph 58 of the contested decision), the Commission did not rule out serious doubts concerning the compatibility of the concentration although the new entity itself held a market share of only 20-30% (paragraph 55), namely a share not only considerably below the dominance threshold fixed by the Commission, but also less than that of its main competitor.

338 It follows that, according to the Commission's analysis in the contested decision, the presence of competitors, even where they held quite substantial market shares, was not considered in principle to rule out a finding that the concentration raised serious doubts.

— The range effect

339 First of all, it must be observed that each product market constitutes a distinct market. It follows that the competition conditions in each product market in each Member State must, in principle, be appraised independently of the conditions in each or all of the other markets. With regard to the nine Member States covered by the commitments, although the Commission sometimes fleshed out its assessment with observations concerning the global situation in all the product markets of a given geographical market, it always began by finding serious doubts as to certain product markets by appraising each product market separately.

340 Accordingly, in the case of Portugal, Greece, the Netherlands and Belgium, the Commission, after finding serious doubts as to a number of product markets, added that, in view of the combination of significant positions of dominance, the parties to the concentration would be able to extend their strong market position to all the other product markets (paragraphs 54, 62, 71 and 82 of the contested decision).

341 According to paragraph 83 of the contested decision, the risk of creating market power over the entire product range can be ruled out where the product markets in which the combined entity has a market share exceeding 40% do not represent more than 35% of the parties' aggregate turnover. However, this distinction between countries where the combined entity would be able to extend its market power to all the product markets and those countries where the concentration raises serious doubts in relation to only some product markets, or even only one (as in the case of Sweden), appears in actual fact to be irrelevant because, as stated above, the same commitments were required in both cases.

342 It is, however, not an absolute rule that different product markets constitute distinct markets and it may be found necessary to modify the assessment of a particular product market in the light of the competition situation in all other product markets of the Member State concerned.

343 In the present case there was all the more justification for taking the overall competition situation into account because it is common ground that the brand is the most important competition factor in the markets concerned and the reputation of the brand is to the advantage of all the products carrying it. Likewise, in order to assess an undertaking's competition position, the Commission may have to take into account its portfolio of brands or the fact that it has large market shares in numerous product markets ('the portfolio effect').

344 In the present case the Commission took the portfolio effect into account. Throughout the contested decision, except in the discussion concerning the countries not covered by the commitments, the Commission pointed out that the strength of the combined entity was accentuated by a unique portfolio of brands (whereas its competitors had only a single brand), by a strong presence on numerous markets and by the juxtaposition of the respective positions of SEB and Moulinex.

345 Accordingly, paragraph 52 of the contested decision reads as follows: 'in view of the importance, discussed above, of brands in this type of market, the weight of the parties in almost all the markets in question and the new entity's product range and brand portfolio, it is unlikely that competitors will be able to challenge the parties' positions and bring to bear sufficient competition pressure on the new entity'.

346 It must be observed that the portfolio effect operates not only in relation to consumers and competitors, but also, and above all, retailers. The Commission explains, in paragraph 53 of the contested decision, that 'the same applies to retailers who, in spite of their theoretical negotiating strength (using the threat of de-listing, for example), will not be able to discipline the parties' conduct in response to a price rise'; that 'the brand portfolio and the uniformly strong presence of the new entity in all the relevant product markets will be such that the new entity will be able to deter retailers from resisting a price rise, for example, by the threat of de-listing brands of the new entity'; that 'the combined entity could, for example, offer combined discounts or as a threshold' and that 'likewise, the predominant position of the SEB and Moulinex brands will make it difficult for a retailer to dispense with them on its shelves'. These observations, which arose in the examination of Portuguese markets, are also reproduced in connection with the markets in Belgium (paragraphs 60 and 61 of the contested decision), the Netherlands (paragraphs 69 and 70) and Greece (paragraphs 80 and 81). Furthermore, as the Commission was led to conclude, because of the portfolio effect, that the new entity SEB-Moulinex would be able to extend its market power to all the product markets of those four countries, even though it had market shares below the 40% threshold, the portfolio effect is all the more likely to confirm that the concentration raises serious doubts in respect of markets where the new entity has shares exceeding 40%.

347 In its past decisions, the Commission had already pointed out the need to take the portfolio effect into account to determine the true market strength of an undertaking. For example, in the *Guinness/Grand Metropolitan* decision cited above, the Commission had explained that the holder of a portfolio of dominant brands may have a number of advantages and that, in particular, he has a stronger position vis-à-vis his customers because he can offer them a range of products which represents a higher proportion of their turnover.

348 In its observations addressed to the Commission (Annex 2 to the letter of 3 December 2001), De'Longhi drew the Commission's attention to the risks

arising from the concentration, within the same industrial group, of all the main brands and a complete range of products. It stated as follows:

'The aspect which causes most concern to De'Longhi is the relationship which will exist, after the concentration, between SEB-Moulinex and the major distributors, taking into account the increased negotiating strength which the buyer will have in markets where it will hold a dominant position. That strength will be all the greater thanks to the complete range of products and brands which it will have as a result of the concentration... There is no doubt that SEB-Moulinex will considerably extend its portfolio of products in such way that it will be able, in some cases, to provide a complete range, which will create detrimental effects, particularly with regard to distribution channels'.

349 In its replies to the Court's written questions, the Commission stated that the presence of the same brands and the same intermediate customers in all the product markets of one and the same country necessarily entailed taking account of range effects when examining competition. According to the Commission, where the concentration helps to give the parties strong positions in product markets which in total represent a marginal part of their turnover, the entity resulting from the concentration will not be induced to make use of its strength in those markets because the retaliation which it must expect in other product markets, where it does not have a position of strength, represents lost profits considerably greater than the gains which it could expect in the markets where it has a strong position. Where the sales of the combined entity in the dominated markets represented less than 10% of the entity's total sales in the same country, the Commission stated, in its pleadings before the Court and in the course of the hearing, that it considered that the retailers' capacity for retaliation was not affected by the concentration and was at a sufficient level to cause the range effect to operate in their favour. By that the Commission means that any attempt at anti-competitive conduct by SEB-Moulinex on the markets where the combined entity holds a dominant position would be penalised by smaller purchases by retailers of SEB and Moulinex products on the other markets.

350 According to the Commission, the range effect rules out serious doubts only if the turnover of the parties to the concentration in the dominated product markets represents only a marginal portion of their total turnover in the same country. The Commission fixed at a maximum of 10% the marginal portion of turnover in the dominated markets above which the range effect can no longer operate. The 10% figure is not disputed. Accordingly in paragraph 123 of the contested decision the Commission explained that any attempt at anti-competitive conduct in the kettles and informal meals markets in Italy, where the parties hold combined market shares of 65-75% and 40-50% respectively, would be penalised by smaller purchases of SEB and Moulinex products on the other markets in Italy where the combined entity obtains 90-100% of its turnover, which means that the dominated markets account for only 0-10% of their turnover. Regarding Spain and Finland, the Commission found, in paragraphs 116 and 119 of the contested decision respectively, that the entity obtained 85-95% of its turnover in the non-dominated markets, which means that the dominated markets account for 5-15% of their turnover, or slightly more than 10%. However, in its replies to the Court's written questions, the Commission expressly confirmed that where the ratio between sales on the dominated markets and total sales in the same country was low, namely less than 10%, it considered that retailers could use their capacity for retaliation. At the hearing the Commission once again confirmed the maximum limit of 10% up to which, in its opinion, the range effect could operate.

351 The abovementioned 10% of turnover which permits the range effect to operate must not be confused with the portion under 35% mentioned in paragraph 83 of the contested decision, which relates to the different question of the level above which the portion of turnover obtained on the dominated markets is of such an amount that the parties would be able to extend their market power to all the other markets of the country concerned. In paragraph 83, the Commission found that, where the relative shares of the parties' combined turnover on the dominated markets was below 35%, it was possible to rule out serious doubts as to the creation of a market power over the entire product range for those countries and therefore all that remained was to examine individual product markets. Apart from the fact that, as mentioned above, this question does not appear to be relevant in the present case, because the same commitments were imposed independently, whether the parties have market power in a single

product market or in all the product markets of the country concerned, it must not be confused with the question whether retailers are able to penalise the parties to the concentration if they attempt to abuse their dominant position on certain markets. Whereas the 35% figure is the limit above which the Commission considered that there was a risk of extending the dominant position to all the product markets of a country, the 10% figure is the limit below which the parties' dominance on a product market is, according to the Commission, jeopardised by the possibility of retaliation by retailers.

352 The range effect, as applied by the Commission in the present case, calls for the following observations.

353 To begin with, as the Commission considered that each product market constitutes a distinct market, the competition situation must in principle be examined market by market. Therefore although, as indicated above, it may be necessary to refine the examination of competition in one product market by means of data relating to other product markets or even other countries, the fact remains that the principle is that each market is to be assessed independently and any exception to or modification of that principle must be based on specific and consistent evidence showing the existence of such interactions.

354 First, whereas the concept of portfolio effect aims to assess the true competition situation of an entity resulting from the concentration and, as the case may be, to conclude that it has a dominant position in spite of a market share which does not in itself give rise to a dominant position, by taking into account not only the aggregate market shares of the parties, but also the additional market strength arising from the fact that the new entity owns a large number of brands and is present in numerous markets, the range effect as used by the Commission to

justify the absence of serious doubts in the countries not covered by the commitments seeks, on the contrary, to put into perspective the strength of the entity resulting from the concentration and thus to rule out a finding of a dominant position to which the aggregation of market shares leads.

355 It is common ground that the two parties to the concentration each had strong positions in numerous markets and owned several well-known brands. In addition to resulting in the aggregation of market shares, the concentration had the effect of enlarging the brand portfolio and the number of markets where SEB and Moulinex were present, thus enhancing their market power, particularly in relation to retailers. The Commission observed in several passages of the contested decision that the strong positions they already held before the concentration in numerous product markets were strengthened further by the contribution of market shares and brands in several other markets (paragraphs 46, 47, 50 to 52, 56, 60, 69, 73, et seq.).

356 Second, the Commission has not established to the requisite legal standard the allegation that any attempt at anti-competitive conduct in the dominated markets would be penalised by smaller purchases of SEB-Moulinex products in the other markets.

357 As De'Longhi contended at the hearing, the situation envisaged by the Commission of a conflict between SEB-Moulinex and the retailers is no more plausible than that of an agreement between them to maximise their respective interests.

358 Moreover, the Commission has not even shown how its underlying assumption, namely a price increase by SEB-Moulinex, necessarily affects the retailers' interests and thereby induces them to penalise SEB-Moulinex.

359 When questioned by the Court on the economic principles underlying the 'range effect' factor, the Commission admitted that it had no economic study available to it on the subject. Apart from a reference to the *Guinness/Grand Metropolitan* decision which, as stated above, applies the very different concept of the portfolio effect, the Commission in reality merely pointed out that this argument had been put forward by the parties to the concentration in their notification.

360 In addition, the Commission considered only the possibility of a price rise by SEB-Moulinex. However, the latter is capable of other types of anti-competitive behaviour. In particular, the concentration will enable SEB-Moulinex to make economies of scale and implement various rationalisation measures, thus generating a reduction in costs of which it could take advantage to reduce prices or allow retailers a bigger margin in order to increase its market share. Likewise SEB-Moulinex could induce retailers to de-list its competitors.

361 Moreover, the assertion that retailers can penalise SEB-Moulinex in the event of a price rise is based on the unproven assumption that the retailers determine the choice of ultimate consumers. As the retailers' function is to resell to consumers the products which they buy, the possibility of their penalising SEB-Moulinex by reducing their purchases of SEB-Moulinex products in other markets must be qualified, particularly as the brand is the primary factor of choice in competition in the markets in question.

362 Third, the range effect as defined by the Commission, in so far as it consists in the assumption that retailers will be able to penalise any anti-competitive conduct by the new entity, amounts rather to saying that retailers will be able to prevent SEB-Moulinex from abusing its position, than to proving that the combined entity will not have a dominant position. Regulation No 4064/89 aims to prohibit the creation or strengthening of a dominant position, not the abuse of one.

363 It follows that the Commission has not established to the requisite legal standard the correctness of its theory of the range effect, which it has used to justify the absence of serious doubts in countries not covered by the commitments.

364 However, even assuming that the Commission was able to use the theory as a basis for finding that there were no serious doubts in certain markets notwithstanding the entity's strong position in those markets, on the ground that they represented only a small proportion of all the markets concerned, account ought to have been taken in any case of all the markets where the parties held a dominant position, in particular those where SEB-Moulinex had a market share exceeding 40% but in relation to which the Commission ruled out serious doubts on the ground that there was no significant overlap in the parties' market shares.

365 Even if the concentration does not create or perceptibly strengthen the dominant position held by one of the parties before the concentration, the new entity nevertheless has a dominant position in those markets. The absence of overlap does not dispose of the dominant position. Therefore it cannot be concluded that a retailer will be able to penalise the entity created by the merger of two undertakings, each with a monopoly over one half of the relevant markets.

(b) The countries not covered by the commitments

366 It is now necessary to consider whether, in the light of the foregoing observations, the Commission's reasons are capable of justifying its finding that the concentration did not raise serious doubts regarding the relevant product markets in Italy, Spain, Finland, the United Kingdom and Ireland or whether, as the applicant contends, the Commission should not have approved the concentration without imposing commitments in relation to those geographical markets.

367 As stated in paragraph 315 above, the existence, in a distinct geographical market, of a single relevant product market in which the concentration raised serious doubts was sufficient, according to the contested decision, to entail the automatic imposition of commitments in relation to all the relevant product markets in that geographical market.

— Norway

368 The applicant's complaint is based on a misunderstanding of the contested decision because that decision concludes precisely that there are serious doubts on certain product markets concerned in Norway and therefore provides that the commitments are to cover Norway also (paragraph 137 of the contested decision).

369 On this point, therefore, the plea is manifestly unfounded in fact and must be dismissed.

— Spain

370 According to paragraph 115 of the contested decision, the combined market shares of the parties to the concentration in Spain are 40-50% (SEB 5 to 15%) for kettles and 75-85% (SEB 0 to 10%) for portable ovens.

371 However, in paragraph 116 of the contested decision, the Commission concluded that these very strong positions would not enable the new entity to engage in anti-competitive conduct. That conclusion is based solely on the ground that, 'as competitors such as De'Longhi, Taurus, Bosch and Philips have significant positions in numerous product markets, including the two relevant product markets... 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', so that 'any 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'.

372 It follows that, in this geographical market, the Commission ruled out any serious doubts on the basis of two factors, namely the position of the merged entity in relation to its competitors and, secondly, the range effect.

373 First, regarding the position of the merged entity in relation to its competitors, contrary to the Commission's assertion, on the kettles market many competitors,

such as De'Longhi, Taurus, Bosch and Philips, cannot have significant positions because SEB-Moulinex has market shares of 75-85%. Consequently the competitive pressure on SEB-Moulinex arises from either only one competitor with a market share of 20% at the most, which is almost one quarter of that of the parties to the concentration, or from several competitors whose market shares must be very small and, in any case, of minimal significance in comparison with those of the parties. Therefore in no product market, not even in the countries covered by the commitments, does the new entity have a position as strong as its position in the portable ovens market in Spain.

374 In the present case, therefore, the Commission has not shown any particular reason why, in spite of the parties having market shares of 40-50% (SEB 5-15%) for kettles and 75-85% (SEB 0-10%) for portable ovens, the concentration did not give rise to serious doubts.

375 Secondly, for the reasons given in paragraphs 364 and 365 above, the range effect did not justify ruling out serious doubts.

376 In any case, even if it is accepted, as the Commission argues in paragraph 116 of the contested decision and in its replies to the Court's written questions, that the range effect justified ruling out serious doubts where, in a given geographical market, the turnover of SEB-Moulinex on the relevant product markets where the combined entity had a market share above 40% was below 10% of its total turnover on all the relevant product markets in that geographical market, the Commission did not show, either in the contested decision or before the Court, that that was the case in Spain.

377 Admittedly, it is clear from paragraph 116 of the contested decision that the kettles and portable ovens markets in Spain accounted for not more than 5-15% of the combined entity's total turnover on all the relevant product markets in Spain. However, according to paragraphs 88 and 92 of the contested decision, the new entity also had a share of more than 40% of the informal meals and food mixers markets. Table no. 2, compiled by the Commission in reply to the Court's questions, shows that the markets where SEB-Moulinex had a share above 40%, including the informal meals and food mixers markets, accounted for 25-35% of their total sales in Spain. Consequently, for the reasons given in paragraphs 364 and 365 above, the Commission ought to have taken account of those markets to assess the possibility of penalisation by retailers.

378 Furthermore, SEB-Moulinex has a market share exceeding 40% in no less than four relevant product markets in Spain. In paragraph 43 of the contested decision, the Commission stated that the concentration's effects on competition could be listed in four categories, namely France, where the concentration had been referred to the national authorities, the countries where the concentration would change competition conditions only marginally, the countries where it raised serious doubts in only some product markets and, finally, the four countries (Portugal, Greece, Belgium and the Netherlands) where it led to a combination of market shares at sometimes high levels in respect of many of the product categories in question, so that the parties would be able to extend their market power to all the other relevant markets. However, SEB-Moulinex has a market share exceeding 40% in no less than four product markets in Spain, that is to say, as many product markets as in Greece, which however is one of the countries in respect of which the Commission considered that the concentration raised serious doubts in a large number of markets.

379 Finally, as De'Longhi and the applicant correctly observed at the hearing, the Commission refrained from examining the portfolio effect induced by the concentration and, in particular, the fact that the concentration enabled the

strong positions of SEB on the kettle, informal meals and iron markets to build onto those of Moulinex on the toaster, coffee machine, portable oven and food mixer markets. Likewise, the contested decision does not explain why the fact that the new entity will hold, because of the concentration, an array of four brands is not such as to strengthen its market power whereas the Commission took care on numerous occasions to point out, with regard to the geographical markets covered by the commitments, that SEB-Moulinex has two brands whereas its competitors have only one.

380 It follows that the factors found in paragraphs 115 and 116 of the contested decision did not justify the Commission in ruling out serious doubts as to the kettle and portable oven markets in Spain.

— Finland

381 According to paragraph 118 of the contested decision, the combined market share of the parties to the concentration is 45-55% of the Finnish toaster market. Although this is above the 40% threshold, the Commission considered that the concentration raised no serious doubts in that country because, in view of the presence of competitors such as Philips and Bosch, any attempt at anti-competitive conduct on that market would be likely to be penalized by smaller purchases of SEB-Moulinex products on the other markets where the combined entity achieves 85-95% of its turnover.

382 It follows that, in that geographical market, it is only by applying the range effect that the Commission found that the concentration raised no serious doubts in respect of the toaster market in Finland. However, for the reasons given in paragraphs 364 and 365 above, the range effect did not justify ruling out serious doubts.

383 In any case, even if it is accepted, as the Commission argues in paragraph 119 of the contested decision and in its replies to the Court's written questions, that the range effect justified ruling out serious doubts where, in a given geographical market, the turnover of SEB-Moulinex on the relevant product markets where the combined entity had a market share above 40% was below 10% of its total turnover on all the relevant product markets in that geographical market, the Commission did not show, either in the contested decision or before the Court, that that was the case in Finland.

384 Although, according to paragraph 119 of the contested decision, the toaster market accounted for only 5-15% of the new entity's turnover on all the relevant product markets in Finland, it nevertheless also had a share of over 40% in the Finnish markets for espresso machines (40-50%), portable ovens (35-45%) and barbecues (40-50%) (paragraphs 87, 90 and 91 of the contested decision). Table no. 2, compiled by the Commission in reply to the Court's questions, shows that the markets where SEB-Moulinex had a share above 40%, including the espresso machine, portable oven and barbecue markets, accounted for 10-20% of their total sales in Finland. Consequently, for the reasons given in paragraphs 364 and 365 above, the Commission ought to have taken account of those markets to assess the possibility of penalisation by retailers.

385 Moreover, SEB-Moulinex has a market share exceeding 40% in no less than four relevant product markets in Finland, that is to say, as many product markets as in Greece, which is one of the countries in respect of which the Commission considered that the concentration raised serious doubts in a large number of markets.

386 Finally, as De'Longhi and the applicant correctly observed at the hearing, the Commission refrained from examining the portfolio effect induced by the concentration and, in particular, the fact that the concentration enabled the

strong positions of SEB on the barbecue and toaster markets to build onto those of Moulinex on the toaster, coffee machine, espresso machine, portable oven and food mixer markets. Likewise, the decision does not explain why the fact that the new entity will hold, because of the concentration, an array of four brands is not such as to strengthen its market position, whereas the Commission took care on numerous occasions to point out, with regard to the geographical markets covered by the commitments, that SEB-Moulinex has two brands whereas its competitors have only one.

387 It follows that the factors specified in paragraphs 87, 90, 91 and 118 to 120 of the contested decision did not justify the Commission in ruling out serious doubts in respect of the portable oven, espresso machine, barbecue and toaster markets in Finland.

— Italy

388 According to paragraphs 121 to 124 of the contested decision, in Italy the new entity will have a market share exceeding 40% in three product markets, namely food mixers, informal meals and kettles.

389 With regard to, first, the food mixer market, the Commission found, in paragraph 121 of the contested decision, that the parties' combined market shares were 40-50% (SEB 0-10%), that there would be competition from Braun (10-20%), Philips (0-10%) and De'Longhi (0-10%) and concluded that the concentration would have little impact on competition in eliminating the fourth largest undertaking from the market.

390 It follows that only one of the factors referred to by the Commission led it to rule out serious doubts in Italy, namely, the merged entity's market position in relation to competitors.

391 However, for the reasons given in paragraph 329 above, unless it is shown that those competitors held such a strong position as to create a genuine counterweight to SEB-Moulinex, the fact that the latter was confronted by three competitors was in itself irrelevant in a market where the leader had a market share of 40-50%.

392 In the present case, two of the three competitors mentioned in the food mixer market, namely Philips and De'Longhi, held only marginal positions of 0-10%. The third, Braun, had a more representative market share of 10-20%, but this was between one quarter and one half of the share of the new entity. In contrast, regarding the new entity's position in Portugal, the Commission found, in paragraph 51 of the contested decision, that serious doubts were raised by the fact that the parties to the concentration were market leaders with shares at least twice the size of that of their nearest competitor.

393 Likewise, the assertion that the concentration would have little effect on competition in eliminating the fourth largest undertaking from the market does not appear convincing. In actual fact, SEB had only a small market share (0-10%), like two of Moulinex's other competitors, Philips and De'Longhi. Only Braun had a larger, although modest, market share. Therefore the elimination of the fourth competitor does not have substantially different effects from those which would have resulted from the elimination of the second or third competitor.

394 Therefore the factor specified in paragraph 121 of the contested decision did not justify the Commission in ruling out serious doubts in relation to the food mixer market in Italy.

395 Secondly, regarding the informal meals market, in paragraph 122 of the contested decision the Commission found that the combined share of the parties to the concentration was 40-50% (Moulinex 0-10%), while Philips, the only competitor identified by the parties, had 0-10%. With regard to the kettle market, in the same paragraph the Commission found that the combined share of the parties to the concentration was 65-75% (Moulinex 15-25%), while De'Longhi, Philips and Braun all had 0-10%. However, in paragraph 123 of the contested decision, the Commission found that, as the kettle and informal meals markets each represented only 0-5% of the value of the whole 'kitchen' range of small electrical household appliances, retailers would 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 realised 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. Consequently, the Commission concluded that the concentration raised no serious doubts in relation to those markets.

396 It follows that, on that market, the Commission ruled out serious doubts solely on the basis of the range effect. It is true that, in paragraph 122 of the contested decision, the Commission mentioned the position of the merged entity in relation to its competitors. However, that consideration did not lead the Commission to rule out serious doubts in respect of the markets concerned. Moreover, the Commission was not justified in relying on that factor. Regarding the informal meals market, in contrast to the food mixers market, the Commission identified only one competitor, not three. Furthermore, on the basis of the figures in the contested decision, the possibility cannot be ruled out that the concentration brings together the two leading undertakings in the market because Moulinex and Philips both had a share of 0-10%. Regarding the kettles market, the factors

mentioned in the contested decision do not appear to justify the absence of serious doubts in so far as, although there are three competitors, the concentration brings together the two leading undertakings in the market, which will have a market share of 65-75%, namely almost three quarters of the market.

397 With regard to the range effect, the reasons why it prevented the Commission from ruling out serious doubts are given in paragraphs 364 and 365 above. In that connection the fact, emphasised by the Commission, that in Italy De'Longhi was the leader in four other relevant product markets and that Saeco held 60-70% of the espresso machine market is irrelevant. By definition, the fact that SEB-Moulinex did not have a market share exceeding 40% outside the food mixer, informal meals and kettle markets must mean that other manufacturers were likely to have strong positions in those markets.

398 In any case, even if it is accepted, as the Commission argues in paragraph 123 of the contested decision and in its replies to the Court's written questions, that the range effect justified ruling out serious doubts where, in a given geographical market, the turnover of SEB-Moulinex on the relevant product markets where the combined entity had a market share above 40% was below 10% of its total turnover on all the relevant product markets in that geographical market, the Commission did not show, either in the contested decision or before the Court, that that was the case in Italy.

399 Admittedly, it is clear from paragraph 123 of the contested decision that the informal meals and kettles markets in Italy accounted for not more than 0-10% of the combined entity's total turnover on all the relevant product markets in Italy. However, according to paragraph 121 of the contested decision, the new entity also had a share of more than 40% of the food mixer market. Table no. 2,

compiled by the Commission in reply to the Court's questions, shows that the markets where SEB-Moulinex had a share above 40%, including the food mixer market, accounted for 25-35% (and even 30-40%, according to the Commission's reply to the Court's written question) of their total sales in Italy. Apart from the fact that, for the reasons given above, the Commission could not rule out serious doubts on that product market solely on the basis of the criterion referred to in paragraph 121 of the contested decision, it ought to have taken account of that market, as stated above, to assess the possibility of penalisation by retailers because the new entity had a share of that market exceeding 40%.

400 Finally, as De'Longhi and the applicant correctly observed at the hearing, the Commission refrained from examining the portfolio effect induced by the concentration and, in particular, the fact that the concentration enabled the strong positions of SEB on the kettles, informal meals, barbecues and irons markets to build onto those of Moulinex on the coffee machines, kettles, steamers and food mixer markets. Likewise, the decision does not explain why the fact that the new entity will hold, because of the concentration, an array of four brands is not such as to strengthen its market power whereas the Commission took care on numerous occasions to point out, with regard to the geographical markets covered by the commitments, that SEB-Moulinex has two brands whereas its competitors have only one.

401 For those reasons it must be concluded that the factor referred to in paragraph 123 of the contested decision did not justify the Commission in ruling out serious doubts in relation to the informal meals and kettles markets in Italy.

402 Therefore the plea is well founded so far as Italy is concerned.

— United Kingdom and Ireland

403 In paragraphs 125 and 126 of the contested decision the Commission states that the parties to the concentration have a combined market share of 35-45% of the irons and ironing stations market in the United Kingdom and Ireland. Table No. 2, supplied by the Commission, shows that the said market share exceeds 40%. However, in the contested decision, the Commission concluded that the concentration raised no serious doubts in the United Kingdom and Ireland because, first, it changed only 'marginally the competition conditions with a small addition of market share' (additional 0-5%) and, second, 'the parties to the concentration will be faced by Philips in particular (market share 15-25%)'.

404 It follows that, in that geographical market, the Commission ruled out serious doubts by reason of two factors, namely, first, the absence of significant overlap and, second, the merged entity's position in relation to its competitors.

405 Regarding first, the absence of significant overlap, because the figures are vague the Court cannot verify whether this factor justified ruling out serious doubts. However, although the additional market share is small, it is nevertheless sufficient to result in a market share exceeding the dominance threshold of 40% used in the decision.

406 Secondly, as to the merged entity's position in relation to its competitors, Philips is one of four manufacturers named in paragraph 32 of the contested decision as having both a broad range of products in the small electrical household appliances sector and a pan-European presence, and therefore its presence in the market in question is not of particular significance. Similarly, as stated above, it is

inconceivable that a producer with a market share of approximately 40% would not have competitors.

407 In addition, although the Commission stressed the small additional market share for irons and ironing stations, it did not, as the applicant correctly points out, examine the impact on competition of the significant combined shares of SEB-Moulinex in numerous other markets, in particular the deep friers market (where SEB's share rises from 15-25% to 30-40%), the steamers market (where SEB's share rises from 25-35% to 35-40%), the informal meals market (where SEB's share rises from 15-25% to 25-35%) and the espresso machines market (where SEB's share rises from 0-10% to 20-30%). Although the new entity does not attain the dominance threshold in any of these markets, which therefore do not give rise to serious doubts, this significant strength in several markets is capable, having regard to the portfolio effect described above, of reinforcing the dominance which the entity already has on the irons and ironing stations market.

408 Finally, as the applicant correctly observes, the Commission did not apply to the relevant geographical market the relative turnover criterion which it used in its examination of the competition situation in the other geographical markets at the stage of applying the range effect. Whereas the Commission (wrongly) ruled out serious doubts in relation to the relevant product markets in Italy, Spain and Finland, on the ground that those markets where SEB-Moulinex held a dominant position accounted for less than 10% of their total turnover in all the product markets concerned in those geographical markets, the Commission drew no conclusion from the fact that the irons and ironing stations market accounted for 35-40% of their total turnover in the relevant product markets in the United Kingdom and Ireland.

409 Finally, as De'Longhi and the applicant correctly observed at the hearing, the Commission refrained from examining the portfolio effect induced by the concentration and, in particular, the fact that the concentration enabled the

strong positions of SEB on the deep frier, portable oven, informal meals, steamer and irons markets to be built onto those of Moulinex on the deep frier, espresso machine and food mixer markets. Likewise, the contested decision does not explain why the fact that the new entity will own, because of the concentration, an array of five brands is not such as to strengthen its market power whereas the Commission took care on numerous occasions to point out, with regard to the geographical markets covered by the commitments, that SEB-Moulinex has two brands whereas its competitors have only one.

410 For those reasons, it must be concluded that the factors set out in paragraphs 125 and 126 of the contested decision did not justify the Commission in ruling out serious doubts as to the irons and ironing stations market in the United Kingdom and Ireland.

(c) Conclusion

411 Therefore the contested decision must be annulled in relation to the markets in Italy, Spain, Finland, the United Kingdom and Ireland.

The plea that the commitments bring about a sharing of the market for the Moulinex trade mark

A — Arguments of the parties

412 At the hearing De'Longhi claimed, for the first time, that the commitments accepted in the contested decision result in a sharing of the market with regard to

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

413 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 it is prohibited by Article 81(1).

414 As De'Longhi drew the Commission's attention to this problem in the course of the administrative procedure, it considers that the Commission ought to have ascertained whether the commitments gave rise to doubts in that connection.

415 The Commission, supported by France and SEB, contends that De'Longhi's submissions should be dismissed.

B — Findings of the Court

416 In contending that the commitments result in sharing of the market with regard to the Moulinex trade mark, De'Longhi is raising a plea which was not raised by the applicant.

417 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, 37; 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).

418 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 alleging that the commitments lead to market sharing. Consequently, the present plea raised by De'Longhi must be dismissed as inadmissible.

419 In any event, even if it were admissible (*quod non*), the plea raised by De'Longhi would be unfounded.

420 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'.

421 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 and Canal* + v *Commission* [2002] ECR I-4825, paragraph 85).

422 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).

423 Second, it should be noted that, even if, as De'Longhi 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 5/69 *Völk* [1969] ECR 295, paragraph 7; Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 85, and Case C-306/96 *Javico* [1998] ECR I-1983, paragraph 17).

424 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 of customers of products with the Moulinex trade mark to their own trade marks, so that the licensees' marks can compete effectively with 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 and Eisele* v *Commission* [1982] ECR 2015, paragraph 57, and Case 262/81 *Coditel* [1982] ECR 3381, paragraph 15).

425 It follows that De'Longhi's complaint that the commitments result in market sharing is inadmissible and, in any case, unfounded.

IV — *Fourth plea in law: the Commission erred in law in failing to consider whether the nominal price paid by SEB for the acquisition of Moulinex and the financial aid provided by the French State were not such as to strengthen SEB's position in the markets concerned, to the detriment of competitors*

Arguments of the parties

426 The applicant submits that the Commission erred in law in failing to consider whether the nominal price paid by SEB for the acquisition of Moulinex and the financial aid provided by the French State were not such as to strengthen SEB's position in the markets concerned, to the detriment of competitors.

427 The applicant states that, in the contested decision, the Commission merely observed, without giving details, that it did not appear, from a preliminary examination of the scheme provided for by the French authorities, that the government assistance envisaged in connection with the court-supervised reorganisation proceedings was a measure which would benefit SEB. In the applicant's opinion, the nominal price paid by SEB was manifestly such as to permit the strengthening of the new entity's position on completion of the transaction.

428 In this connection the applicant observes that, in the judgment in Case T-156/98 *RJB Mining* v *Commission* [2001] ECR II-337, the Court annulled the Commission's decision because the Commission failed to consider whether, and to what extent, the new entity's market power could be increased by the nominal acquisition price. Therefore it was incumbent on the Commission to determine whether the acquisition price was such as to strengthen the new entity's position on completion of the transaction, regardless of whether the financial arrangements could be described as aid within the meaning of the Treaty.

429 In the present case, the applicant contends, first, that the Commission was fully informed of the financial conditions of SEB's acquisition plan. In particular, it knew of the obvious disproportion between Moulinex's acquisition price (EUR 15 million) and the true value of the assets acquired (estimated at more than EUR 850 million). The Commission was also aware of the reason for the disproportion, in particular the fact that the French Government had agreed to accept responsibility for redundancy payments, thus reducing Moulinex's debts and enabling SEB, first, to acquire the company at a price which in no way reflected its true value and, second, to have additional funds available for strengthening its market position further.

430 By way of comparison, the applicant notes that:

— it originally made an acquisition offer of EUR 100 million for the assets of Krups alone (namely, an amount almost seven times more than that offered by SEB for the whole of the Krups and Moulinex businesses;

— by letter of 29 November 2001, it submitted to the Commission an offer which included taking over all Moulinex employees, adding that, if the

desired objective of profitability could not be attained, it might reduce the workforce. In the negotiations it transpired that the redundancy of the 3 600 employees not taken over by SEB was likely to entail a total charge of approximately EUR 175 million;

— it submitted to the administrators of Moulinex an offer to purchase for EUR 150 000 the assets of Moulinex not acquired by SEB.

431 The applicant considers that the particularly advantageous financial conditions for the acquisition of Moulinex by SEB enabled the latter to benefit from synergies arising from an external expansion without the associated costs. The measures taken by the French authorities clearly benefited SEB in so far as they enabled it to use for its business activity the financial resources which it would normally have had to allocate to the acquisition of Moulinex.

432 Therefore the applicant considers that it was incumbent on the Commission to determine whether the financial conditions for acquiring Moulinex were in themselves, directly or indirectly, capable of strengthening the market position of the new entity SEB-Moulinex, and it was not even necessary to establish whether the financial contribution by the government constituted State aid within the meaning of the Treaty.

433 According to the applicant, it follows that the Commission erred in law in confining itself to a 'preliminary examination' of the impact of the financial measures taken by the French Government and in concluding, on the basis of a superficial study, that 'the government assistance envisaged in connection with the court-supervised reorganisation proceedings' had not benefited SEB.

434 The Commission contends that the plea is manifestly totally unfounded.

Findings of the Court

435 In substance, the applicant raises two objections. It complains that the Commission did not consider whether SEB had strengthened its position, first, by paying only a nominal acquisition price and, second, because the French Government had agreed to accept responsibility for redundancy payments.

436 First of all, it must be observed that the price paid by SEB was assessed by the Tribunal de Commerce, Nanterre, in the context of the court-supervised reorganisation proceedings and cannot be challenged. On the basis of the criteria of French law, it took the view that SEB's offer was in the best interest of the creditors.

437 Secondly, the applicant has in no way shown that the price paid by SEB was nominal. At the most, the applicant points to the balance sheet value of Moulinex's assets in 2000 which were acquired by SEB, and the applicant's own offers.

438 However, first, to determine the true value of an undertaking is a complex calculation which also entails subjective appraisals, and the value shown in the balance sheet is not necessarily the true value or the acquisition value. In particular, Moulinex's acquisition value at the end of 2001,when it was faced with liquidation, cannot be considered to be the same as the acquisition value indicated by the consolidated accounts published by Moulinex almost two years earlier.

439 Secondly, the applicant's offers do not at all show that the price offered by SEB was nominal. The applicant offered prices of EUR 100 million, EUR 1 and EUR 150 000. The first offer was for the Krups trade mark rights alone and expressly excluded all liabilities. Therefore it cannot be taken into account for appraising SEB's acquisition offer. Furthermore, the amounts vary considerably according to what was included in the offer and the applicant does not even specify which of the offers relates to the same assets as those acquired by SEB, nor how the applicant's offers can determine the value of the Moulinex assets acquired by SEB. Therefore no appraisal could be made of the price of EUR 15 million paid by SEB to acquire Moulinex.

440 Regarding the complaint that the French Government's acceptance of responsibility for redundancy payments enabled SEB to acquire Moulinex without having to meet all its debts, it must be observed, first, that, contrary to the situation in the case of *RJB Mining* v *Commission*, cited above, upon which the applicant relies, the Commission asked the French authorities, by letters of 27 September and 9 November 2001, for information concerning any action by the French Republic in connection with the petition for voluntary liquidation and the acquisition of the Moulinex group. Second, the French Republic replied, by a note of 16 November 2001, that no State assistance to the Moulinex group was being considered and that only redeployment measures of direct benefit to employees were envisaged. Moreover, the file does not show that the French Government made redundancy payments and the applicant has produced no evidence that the French Republic paid debts for which SEB was liable. The Commission observed (and it was not denied) that it would have been absurd for the French Republic to make redundancy payments because in France all undertakings are required by law to take out insurance against the risk of non-payment of sums payable under contracts of employment in the event of a court-supervised reconstruction so that, in the case of insolvency, redundancy payments would have had to be made by the insurers and not the French Republic. In any case, according to the Commission and the French Republic, any potential State assistance does not relate to the assets acquired by SEB and therefore has no effect at all on their value. This is not denied by the applicant.

441 Finally, the Commission cannot be required to conduct a State aid procedure in connection with every concentration procedure, which must be completed within strict time-limits. Although the Court annulled the Commission's decision in the judgment in *RJB Mining* v *Commission*, cited above, on the ground that the Commission had not considered whether the level of the purchase price was such as to strengthen the new entity's position, this was by reason of the particular circumstances of that case, where the purchase price itself had been notified as aid by the German authorities. That situation cannot be compared with a concentration of two private companies, such as that in the present case.

442 It follows that this plea in law is unfounded.

Costs

443 Under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that each party bear its own costs. In the present case, as both the applicant and the Commission have failed on several heads, each must be ordered to bear its own costs.

444 SEB and De'Longhi, interveners, are ordered to bear their own costs pursuant to the third subparagraph of Article 87(4).

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Annuls, in relation to the markets in Italy, Spain, Finland, the United Kingdom and Ireland, Commission Decision SG (2002) D/228078 of 8 January 2002 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);**

2. **Dismisses the remainder of the application;**

3. **Orders the applicant and the Commission to bear their own costs;**

4. **Orders SEB SA and De'Longhi SpA to bear their own costs.**

Lenaerts Azizi Jaeger

Delivered in open court in Luxembourg on 3 April 2003.

H. Jung

Registrar

K. Lenaerts

President

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