MERGERS (KITCHEN GOODS): THE SEB / MOULINEX CASE

Subject: Mergers
Trade marks
Referrals (to Member States' competition authorities)
Commitments (sc undertakings) (by parties to merger)
Procedure
"Individual concern"

Industry: Small electrical kitchen goods
(Implications for all industries)

Parties: Babyliss
Philips
Commission

Source: Judgments of the Court of First Instance in Cases T-114/02 and T-119/02 (*BaByliss v Commission, Philips v Commission*)

(Note. This is an interesting case, involving a detailed consideration of the procedure for the approval of mergers and acquisitions under the Mergers Regulation. On the substantive law, there are some important observations on the licensing of trade marks, while on procedural matters there is guidance on the meaning of "individual concern", on the rules governing the offering of commitments or undertakings by the parties and on the circumstances in which cases may be referred by the Commission to the competition authorities of the Member States. In the judgment itself a distinction is rightly made between the Commission's Approval Decision and its Referral Decision. The former is the Decision in which the Commission formally approved the merger; the latter is the Decision in which the Commission formally referred some aspects of the merger to the French authorities. Throughout the judgment, the Court refers to the "commitments" of the parties. This should be taken to mean the undertakings given or offered by the parties as a means of helping to make the merger more acceptable from the point of view of the Commission's competition concerns.

Since the Court's judgment is extremely long and circumstantial, the report which follows comprises the following elements:

- *the Court's short statement about its judgment,*
- *the Commission's comments on the judgment and*
- *some extracts from the judgment.)*

Court Statement (CJE/03/293, dated April 2003)

The court of first instance for the most part confirms the Commission's decision approving the merger between Seb and Moulinex. Nevertheless the Court annuls the decision insofar as it concerns the markets in those countries not subject to the conditions imposed by the Commission in approving that merger.

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

To dispel serious doubts aroused by the merger in relation to competition, the Commission's decision was subjected to certain commitments, notably:
a) that SEB must grant third parties an exclusive licence to the mark Moulinex for a period of 5 years in 9 member States of the European Economic area (Germany, Austria, Belgium, Denmark, Greece, Norway, the Netherlands, Portugal and Sweden) in order to permit those paries to use that mark with their own mark (co-branding) and
b) that SEB must abstain from using the mark Moulinex for three years following the expiry of these licences.

The final version of these undertakings was proposed by SEB and Moulinex only after the expiry of the time period laid down by the Merger Regulation (three weeks after the notification of the concentration). However, the Commission approved the merger without imposing any commitments [sc conditions, or "without requiring any undertakings"] in regard to the Spanish, Italian, Finnish, British and Irish markets.

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

BaByliss, a French company, which wished to acquire some of the activities of Moulinex and position itself as a potential competitor on the market for small household electical appliances brought a case before the Court of First Instance against the decision of the Commission. In addition, Philips, a Dutch company and a direct competitor of SEB, brought a case before the Court of First Instance requesting the annulment of the merger decision. Philips also contested the referral to the French authorities.

The Court's evaluation

Expiry of the time limit

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

The commitments

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

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

However, the Court annuls the decision insofar as it concerns the markets in the countries not covered by the commitments. According to the Commission, if in these countries, the total turnover of the combined SEB-Moulinex on the markets where they would have a dominant position, only represented a small amount of their total turnover, retailers would be able to punish any attempt at anti-competitive behaviour by SEB-Moulinex on other markets (product range effect). The Court rejects this justification. In this respect, it notes, particularly, that the Commission omitted to take account of the entirety of the markets dominated by SEB-Moulinex, in particular those in which there was no significant overlap. These circumstances could effectively dismiss fears of the creation or reinforcement of a dominant position on the markets concerned, but the Commission should have taken into consideration the total turnover for these markets to verify the possibility of a product range effect.

The decision to refer to the French authorities

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

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

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

Commission Statement (IP/03/491, dated 3 April 2003)

The Commission welcomes the CFI ruling in the SEB/Moulinex case. The Court of First Instance has, the Commission points out, confirmed several aspects of the European merger control with respect to:

- remedies negotiation,
- referral to Member States and
- the taking into account of portfolio effects by the Commission

The latter refers to the fact that a merger can have anti-competitive effects by combining several brands.

In January 2002, the Commission approved the acquisition by SEB of Moulinex, which had filed for bankruptcy, on condition that SEB grants a 5-year exclusive license for the Moulinex brand in the nine Member States where competition problems had been identified (Portugal, Greece, Belgium, the Netherlands, Germany, Austria, Denmark, Sweden and Norway). SEB submitted an application to grant such a licence to Benrubi for Greece and to Saeco for the eight other countries. The Commission approved these two companies as licencees on 31 October 2002. In addition, in January 2002, the Commission referred the French part of the concentration to the French authorities which had asked for it as France was the centre of gravity of the case.

SEB and Moulinex sell a large number of small electrical appliances including deep fryers, mini-ovens, toasters, waffle makers, rice and steam cookers, appliances for 'pierrade', 'fondue' and 'raclette', and coffeemakers, blenders, mixers and irons. These products are marketed under the Krups, Tefal, Calor, Rowenta and Swan brands, as well as under the Moulinex and SEB brands.

The Philips and Babyliss appeals

Philips and Babyliss both brought actions before the Court of First Instance (CFI) seeking the annulment of Commission Decisions in the Seb/Moulinex case. Philips challenged the referral decision of the French part of the transaction to France and the conditional clearance for all European Union countries except France. Babyliss challenged only the clearance decision.

In rejecting Philips' appeal against the Commission decision to refer the French part of the operation to the French competition authorities, the CFI considered that the Commission has a certain discretionary power to grant a request for referral submitted by a Member State under Article 9 of the Merger Regulation.

In upholding the main part of the conditional clearance decision of the Commission, the CFI confirmed notably the competitive analysis of the Commission in particular the examination of portfolio effects. It is the first time that the CFI has taken a position on this theory, which has been used several times in the past by the Commission, in particular in the Guiness/GrandMet case. The CFI considers that, in assessing the competitive position of a company, the Commission may have to take into account the portfolio of brands held by this company or the fact that it holds strong positions on numerous affected product markets.

The Court also indicated that the Commission did not sufficiently establish that the concentration was not creating competition concerns for the five other Member States (Italy, Spain, Finland, the United Kingdom and Ireland), in particular with regard to the examination of range effects. The Commission will carefully examine this aspect of the Court decision and will draw the necessary consequences.

The Court also considered that the procedural approach adopted by the Commission when negotiating remedies was compatible with Community law. The judgment of the Court clarifies in particular the conditions under which remedies can be modified during the first phase and upholds re-branding as a remedy to competition concerns identified on markets where brands are of a paramount importance.

Extracts from the Judgment

Territorial effects of trade mark licensing

215. It is clear from Article 2(1) of Regulation 4064/89 that when, in the course of examining the compatibility of a concentration with the common market, the Commission is appraising whether the concentration creates or strengthens a dominant position within the meaning of Article 2(2), it must "take into account the need to maintain and develop effective competition within the common market in view of, among other things, the structure of the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community".

216. It is therefore correct that, as De'Longhi submits, the Commission cannot, when applying Regulation 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) of the EC Treaty (which, in reference to Article 83, constitutes one of the legal bases for Regulation 4064/89: see Case T-251/00, *Lagardère v Commission*, paragraph 85).

217. However, in the present case, it must be observed, first, that the last subparagraph of Section 1(c) of the commitments provides that "the licensee or

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

218. Second, it should be noted that, even if, as the applicant maintains, the clause at issue had to be interpreted as prohibiting the licensees from exporting products bearing the Moulinex trade mark to other Member States, De'Longhi has not shown how, in the present case, that clause would be contrary to Article 81(1). De'Longhi does not explain how, having regard to the national dimension of the relevant product markets and the absence of significant parallel imports between the Member States, the clause at issue might appreciably restrict competition on the relevant market in the Community or significantly affect trade between the Member States within the meaning of Article 81(1). It is settled case-law that even an agreement imposing absolute territorial protection may escape the prohibition laid down in Article 81(1) if it affects the market only insignificantly (Case C-306/96, *Javico*, paragraph 17; Joined Cases 100/80 to 103/80, *Musique Diffusion Française and Others v Commission*, paragraph 85; and Case 5/69, *Völk v Vervaecke*, paragraph 7).

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

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

Individual concern

291. Persons other than the addressees of a decision can claim to be individually concerned only if that decision affects them by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee (see, *inter alia*, Case 25/62, *Plaumann v Commission* and Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, paragraph 36).

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

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

294. That argument cannot be upheld.

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

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

297. Since the Referral Decision deprives the applicant of the opportunity to challenge before the Court of First Instance assessments which it would have

been entitled to challenge had the referral not been made, it must be held that the Referral Decision individually affects the applicant in the same way as it would have been affected by the Approval Decision had the referral not been made (see, by analogy, Case C-68/95 *T. Port*, paragraph 59).

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

[Paragraphs 320ff deal with the question of Article 9 referrals to Member States]

Reasons for Decision

389. According to the case-law, the purpose of the obligation to state reasons for an individual decision is to provide the party concerned with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged and to enable the Community judicature to review the legality of the decision; the scope of that obligation depends on the nature of the act in question and on the context in which it was adopted (see, inter alia, Case T-49/95, *Van Megen Sports Group v Commission*, paragraph 51). ■

The Mirabelier case

The Commission has welcomed a decision adopted by the Court of First Instance on the appeal brought by Pétrolessence, a French company which owns the motorway food chain Le Mirabelier and which applied for the purchase of some of the 70 motorway petrol-stations in France that TotalFinaElf had committed to divest as a condition for clearance of its merger in 2000. The Commission had refused the candidature of Le Mirabelier after having concluded that it would not be in a position to exert competitive pressure on TotalFinaElf on motorways. However, the Commission approved the Carrefour, Agip and Avia proposals. The opening of Carrefour petrol stations on French motorways has exerted a pressure on fuel prices for car drivers using the French motorways. In rejecting this appeal, the CFI had, for the first time, the opportunity to clarify the margin of appreciation of the Commission when assessing a candidate purchaser for assets to be divested as a condition for clearance of a merger. In particular, the CFI clearly confirmed that the Commission had to reject such candidatures when it appeared that purchasers, even if they were profitable companies, would not be able to meet the objective of the remedies, namely, to allow the maintenance of effective competition on the market in question.

A report on this case will appear in a future issue if it appears to raise additional legal issues.