DEVELOPMENTS

Schneider Electric SA v. Commission: Regarding the Non-contractual Liability of the Commission the Decision of the Court of First Instance is Consistent with Precedent

By Margherita Poto[*]

A. The Facts

The question before the Court of First Instance concerned the legitimacy of the Commission's decision on a merger of two French companies incorporated under French law, Schneider Electric SA (hereafter Schneider SA) and Legrand SA (hereafter Legrand). On 16 February 2001 Schneider SA and Legrand, in accordance with the requirements on Regulation of mergers, notified the Commission of Schneider's proposal to make a public offer in respect to all the shares in Legrand held by the public. The judgment of the Court of First Instance can be considered an important step in the development of the European Commission's liability, particularly in respect to the Commission's liability in its role as watchdog of the common market. The judgment puts flesh on the skeletal set of existing principles concerning the liability of the European Community, and contributes to the creation of a systematic approach to the case law.

The Commission asked for further information, which essentially suspended the 4 month term provided for the validity of the procedure. Schneider SA challenged the Commission's decision in the Court of Appeal of Paris. Consequently, some modifications were made to the public offer. Nevertheless, on 10 October 2001 the Commission decided that the merger infringed the rules of the common market.[1]

---

[*] Dr. in Public Law, University of Pavia, Italy. Lecturer in Public law, Università del Piemonte Orientale, Faculty of Economics. I would like to thank Camilla Neema for her support and Jane Murungi for helpful remarks. All mistakes remain mine. Email: margherita.poto@unito.it.

[1] *See* "Whereas No. 782": "OVERALL CONCLUSION (782) For the reasons set out above, the Commission has come to the conclusion that the notified transaction would create a dominant position with the effect of significantly restricting effective competition on the following markets: the markets in moulded case circuit breakers, miniature circuit breakers and cabinets for distribution boards in Italy; the markets in miniature circuit breakers, earth leakage protection and enclosures for final panelboards in Denmark, Spain, Italy and Portugal; the markets in mains connection circuit breakers in France and Portugal; the market in cable trays in the United Kingdom; the market in sockets and switches in Greece; the market in weatherproof wiring accessories in Spain; the market in fixing and connecting equipment in France; the market in transformation equipment in France; the market in control and signalling units

https://doi.org/10.1017/S2071832200006313 Published online by Cambridge University Press

Because the prohibition decision was made after Schneider SA's offer was finalized, the Commission sent Schneider SA a second statement of objections on 24 October 2001, in which it stated the Commission's intent to adopt a decision under Article 8 (4) of Regulation No. 4064/89 ordering the separation of Schneider SA and Legrand. Having had access to the file on 31 October and 5 November 2001, Schneider SA replied to the statement of objections of 24 October 2001 with a document dated 7 November 2001. Schneider SA and the Commission held their first meeting on 14 November 2001. Schneider SA then put forward its view at a hearing held on 26 November 2001. In response to a request made by Schneider SA, the Commission adopted a decision on 4 December 2001 which authorized Schneider SA, on the basis of Article 7 (4) of Regulation No. 4064/89, to exercise their voting rights attached to their shares held in Legrand through a trustee appointed by Schneider SA, and subject to conditions laid down in an agreement approved by the Commission.

On 10 December 2001, Schneider SA and the trustee entered into an agreement for the appointment of the trustee. Schneider SA brought an action for annulment of the prohibition decision by application lodged at the Court Registry on 13 December 2001 (Case T-310/01). On 10 January 2002, following an application made on 17 December 2001, the Commission granted Schneider SA access to its case-files in the procedure relating to the separation of the two firms that were parties to the merger. On 30 January 2002 ("the divestiture decision") under Article 8 (4) of Regulation No. 4064/89, the Commission ordered Schneider SA to divest itself of the Legrand group. The divestiture decision set out the conditions pursuant to which the two firms were to be separated. In particular, the decision prohibited Schneider SA from entering into discrete transactions to divest itself without the Commission's prior approval, it prohibited any subsequent transfer of certain portions of Legrand's businesses back to Schneider SA and, finally, required Schneider SA to implement the divestment within a certain period.

Schneider SA subsequently appealed to the Court of First Instance (CFI). On 22 October 2002, the Court annulled the incompatibility decision, which had declared the merger incompatible with the rules of the common market,[2] and stating that the annulment necessarily rendered the subsequent divestiture decision illegal.

---

in France". 2994/275/EC Commission Decision of 10 October 2001 declaring a concentration to be incompatible with the common market – Council Regulation (EEC) No 4064/89 (Cesa Comp/M. 2283 – Schneider/Legrand) (Notified under document number C (2001) 3014), in 2004 O.J. (L 101) 1-133.

[2] Case T-77/02, Schneider Electric SA v. European Commission, 2002 E.C.R. II-4201 (Schneider II). The same day, the Court of First Instance decided also on the case arising on 13 December 2001 (Case T-310/01 [Schneider I]), annulling the decision on separation: Case T-310/01, Schneider Electric SA v. Commission of European Community, 2002 E.C.R. II-4071. For a casenote *see*, J. Steenbergen,

At this point, the Commission published in the *Official Journal of the European Communities* a notice concerning the resumption of the control procedure in respect of the merger.[3] The notice stipulated that, pursuant to Article 10(5) of Regulation No. 4064/89, the time-limits of the examination of the concentration would start again on 23 October 2002, the day after delivery of the judgment annulling the prohibition decision in Case T-310/01. The Commission also stated that, following a preliminary examination, the transaction could fall within the scope of Regulation No. 4064/89, but that the final decision on this point was reserved by the Commission. The Commission invited interested third parties to submit any observations on the transaction. By letter dated 13 November 2002, the Commission informed Schneider SA that the transaction could affect competition on the French sectoral markets due to the overlapping of significant market shares of Schneider SA and Legrand, the end of competition between them, the scope of trade marks held by the firms concerned, the power over wholesalers of the entity formed by Schneider SA and Legrand, and the fact that it would be impossible for any competitor to substitute itself for the competitive pressure that Legrand exercised before the transaction was completed. In reply to the Commission's letter, Schneider SA submitted to the Commission a proposal for corrective measures aimed at removing the overlap in the businesses of Schneider SA and Legrand in the affected French sectoral markets. The Commission undertook a market survey of Schneider SA's competitors and customers to test the effect of the proposed corrective measures. The deadline for reply to the questionnaires sent as part of that survey was fixed as 22 November 2002. Schneider SA replied with another letter to the Commission a few days after, pointing out to the Commission that, given the lack of a market-by-market examination of the effects of the transaction, the nature and scope of the objections put forward by the Commission in its letter of 13 November 2002 remained imprecise and in no way indicated the existence of any anti-competitive effect on the affected markets. Furthermore, the Commission's general arguments were shown to be unfounded. Schneider SA therefore claimed that the Commission's objections should be dismissed. During this same time period, Schneider SA submitted new proposals to supplement its corrective measures. By judgment of 29 November 2002, handed down in interlocutory proceedings on appeal from a decision of the Tribunal de Commerce de Nanterre (Nanterre Commercial Court) in an application for interim measures, the Cour d'Appel de Versailles (Versailles Appeal Court) held that the transfer proposals put forward by Schneider SA had not been submitted for prior approval by Legrand's Chairman. Such a failure was contrary to the provisions of paragraph 1.7 of the letter of 12 January 2001 referred to earlier in this case report. The Cour

---

Schneider/Legrand – Early Conclusions for Merger Control and its Review by the European Court of First Instance, EUROPÄISCHES WETTBEWERBSRECHT IM UMBRUCH 271 (2004).

[3] 2002 O.J. (C 279) 22.

d'Appel therefore ordered Schneider SA to withdraw the transfer proposals that Legrand's Chairman had not approved.

By letter of 29 November 2002, the Commission informed Schneider SA that the corrective measures proposed were not sufficient to remove all the competition problems associated with the merger. The Commission maintained continuing doubts about the viability and autonomy of the businesses transferred, and that the corrective measures suggested by Schneider SA were not capable of establishing a competitive force that could stand up to the position of the entity formed by Schneider SA and Legrand. By letter of 2 December 2002 Schneider SA accused the Commission of casting doubt on the viability and ability of the proposed corrective measures to ensure that the competitive position of the affected French markets was maintained. The divestiture decision set out the conditions pursuant to which the two firms were to be separated. In particular, the decision prohibited Schneider SA from entering into discrete transactions to divest itself without the Commission's prior approval, it prohibited any subsequent transfer of certain portions of Legrand's businesses back to Schneider SA and, finally, required Schneider SA to implement the divestment within a certain period.

According to Schneider SA, because of the advanced stage reached in the procedure, the Commission's stance made further debate unrealistic. Consequently, in order to end the uncertainty to which Schneider SA and Legrand regarded themselves as having been held captive for over a year, Schneider SA informed the Commission that it had decided to proceed with the sale of Legrand to a defined consortium. By fax dated 3 December 2002, Schneider SA confirmed to the Commission that it had decided to proceed with the sale of Legrand to the consortium. Schneider SA stated that, under the terms of the sale contract dated 26 July 2002, it did not need to take any action to complete the sale and therefore completion of the sale would take place on 10 December 2002. By letter of 4 December 2002, the Commission confirmed to Schneider SA that their proposals for corrective measures did not remove the serious doubts raised by the Commission regarding the compatibility of the merger with the common market, because of its effect on several French sectoral markets. The Commission therefore declared that it would initiate the detailed examination phase of the transaction under Article 6(1)(c) of Regulation No. 4064/89. On 10 December 2002, Schneider SA transferred its shares in Legrand to the Wendel/KKR consortium. Since Schneider SA no longer controlled Legrand and the control procedure in respect of the transaction had therefore become devoid of purpose, the Commission informed Schneider SA, by letter dated 13 December 2002, of the closure of that procedure. Schneider SA

brought the action before the Court of First Instance on 10 February 2003 (Case T-48/03). The Court dismissed the application in its entirety as inadmissible.[4]

By application lodged on 10 October 2003 and registered as Case T-351/03, Schneider SA brought an action seeking compensation for losses suffered as a result of the unlawfulness formally established by the Court in *Schneider I*, the effects of which had been aggravated by irregularities in the administrative procedure resumed by the Commission following the judgments in *Schneider I* and *Schneider II*, so that Schneider SA claimed that the European Commission breached Article 288 of the EU Treaty, which provides for the liability of the European Community in the event of negligence of European Institutions.[5]

Art. 288, para 2° states that "In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties."

The Court, considering the direct link in the chain of causality between the act of the Commission and the damage complained of by Schneider SA, stated :

> 288. Il existe […] un lien de causalité suffisamment étroit pour ouvrir un droit à indemnisation entre l'illégalité commise et deux types de préjudice supportés par la requérante. Le premier correspond aux frais encourus par l'entreprise pour participer à la reprise de la procédure de contrôle de l'opération après les annulations prononcées par le Tribunal le 22 octobre 2002. Le second correspond à la réduction du prix de cession qu'a dû consentir Schneider au repreneur des actifs de Legrand pour obtenir un report de l'effet de cette cession à une date telle que les procédures juridictionnelles alors en cours devant

[4] Case T-48/03, Schneider Electric SA v. European Commission, 2006 E.C.R. II-111 (order), for casenotes *see*, B. Cheynel, *Concentration, Phase d'examen approfondi*, REVUE LAMY DE LA CONCURRENCE. DROIT, ECONOMIE, REGULATION 55 (2006) ; F. Zivy, *Suite de l'affaire Schneider : dans le mesure où Schneider a abandonné d'elle –même son projet d'acquérir Legrand, la décision ultérieure de la Commission à ce propos n'a pas lui faire grief*, 2, CONCURRENCES: REVUE DES DROITS DE LA CONCURRENCE, 135 (2006).

[5] *See* N. Petit and M. Rato, *The Commission's Non Contractual Liability in the Field of Merger Control – Don't Use a Hammer When you Need a Screwdriver* (30 June 2007), *available at* http://www.globalcompetitionpolicy.org/index.php?&id=503&action=907.

> le juge communautaire ne soient pas privées de leur objet avant d'avoir abouti.

The damages, according to the Court of First Instance, are twofold ("deau types de prejudice supportés par la requérante"): first, the losses that came from the CFI's judgment on 22 October 2002 ("frais encourus par l'entreprise pour participer à la reprise de la procédure de contrôle de l'opération après les annulations prononcées par le Tribunal le 22 octobre 2002 »); second, the corrective measures with which Schneider SA had to comply (« réduction du prix de cession qu'a dû consentir Schneider au repreneur des actifs de Legrand pour obtenir un report de l'effet de cette cession à une date telle que les procédures juridictionnelles alors en cours »). It is possible therefore to find all the basic liability requirements: the unlawfulness of an act ("illégalité commise"), the fact of damage ("droit à l'indemnisation"), and the existence of a direct link in the chain of causality between the wrongful act and the damage complained of ("lien de causalité suffisamment étroit").[6]

Once an action for damages has been declared admissible, the Court must go into the substance of the case. In the absence of codified conditions governing non-contractual liability, the Court has developed a sort of "mantra" on the basic requirements for liability which is repeated with slight variations in all cases concerning an action for damages.[7]

---

[6] *See* C-308/87, Grifoni v. Euratom, 1994 E.C.R. I-753: "The Court has consistently held that the Community's non-contractual liability and the right to compensation for damage suffered depend on the coincidence of a set of conditions as regards the *unlawfulness* of the acts alleged against the institution, the fact of *damage*, and the existence of a *direct link* in the chain of *causality* between the wrongful act and the damage complained of."

[7] The expression is used by C. U. Schousboe, *The Concept of Damage as an Element of the Non-contractual Liability of the European Community*, *available at* http://www.rettid.dk/artikler/2003.afh-3.pdf. *See* T. C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 451 (4th ed. 1998).

B. The Legal Framework

The Court interprets Council Regulation EEC No. 4064 of 21 December 1989,[8] as modified by Regulation No. 1310 of 30 June 1997[9] together with the provisions of the Articles 81 and 82 of ECT.

In particular, Art. 2, paragraphs 1 and 3, provides:

> 1. Concentrations [mergers] within the scope of this Regulation shall be appraised in accordance with the following provisions with a view to establishing whether or not they are compatible with the common market. […] 3. A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.

Article 4 of regulation No. 4064/1989 requires that the parties acquiring control or joint control of another firm notify the Commission of the merger. Where the Commission finds that a merger fulfils the criteria defined in Article 2 mentioned above, it shall issue a decision declaring that it is incompatible with the common market.

It is worth mentioning that these provisions have been recently framed in a new Regulation, the *Council Regulation (EC) No. 139/2004 of 20 January 2004 on the Control of Concentrations [Mergers] between Undertakings* (the "EC Merger Regulation") No. 139/2004, the provisions of which expressly substitute the previous Regulations.[10] The first "whereas" of the Ruling states as follows: "Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings has been substantially amended. Since further amendments are made, it should be recast in the interest of clarity."

The proceeding that the Commission follows is then regulated by Article 6 on the examination of the notification and initiation of proceedings:

---

[8] 1998 O.J. (L 395) 1.

[9] 1997 O.J. (L 180) 1.

[10] 2004 O.J. (L 024) 1-22. *See* Article 26.

> The Commission shall examine the notification as soon as it is received. (a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision. (b) Where it finds that the concentration notified, although falling with the scope of this Regulation, does not raise serious doubts as to its incompatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market. A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration […].

An interesting aspect concerns the delimitation of the discretionary powers of the Commission. In particular:

> Whereas" 26 states: "[a]' significant impediment to effective competition generally results from the creation or strengthening of a dominant position. With a view to preserving the guidance that may be drawn from the past judgments of the European courts and Commission decisions pursuant to Regulation (EEC) No. 4064, while at the same time maintaining consistency with the standards of competitive harm which have been applied by the Commission and the Community courts regarding the compatibility of concentration with the common market, this Regulation should accordingly establish the principle that a concentration with a Community dimension which would significantly impede effective competition, in the common market or in a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position, is to be declared incompatible with the common market.

This statement highlights the importance of defining the range of possibilities the Commission has to assess a merger as well as the necessity for transparency in the Commission's actions. In this regard, it is useful to mention "Whereas" 28 and 29:

> (28) In order to clarify and explain the Commission's appraisal of concentrations under this Regulation, it is appropriate for the Commission to publish guidance which should provide a sound economic framework for the assessment of concentrations with a view to determining whether or not they may be declared compatible with the common market. (29) In order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned. It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. The Commission should publish guidance on the conditions under which it may take efficiencies into account in the assessment of a concentration.[11]

The recognition of limits to the powers of the Commission relies on proof that its conduct can be examined and eventually declared unlawful by judicial review. Article 2, par. 2, enumerates the criteria the Commission must follow: "A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market." Consequently, it follows that a concentration that would significantly impede effective competition in the common market shall be declared incompatible with the common market. This criteria represents the borders that

[11] See "Whereas No. 28 and 29" Reg. n. 4064/89.

limit the Commission's actions. Through this criteria, the Tribunal can evaluate whether the Commission's conduct has been negligent or not.

C. Invocation of Liability Under Art. 288 of the Treaty Establishing the European Community (TEC): The Case Law

As mentioned above, the non-contractual liability of the European institutions and their servants is governed by Article 288 of the TEC, which reads: "In the case of non contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage of its institutions of by its servants in the performance of their duties."

The issue of the non-contractual liability of the Community has been extensively considered in the case law.

One of the first judgments concerning the liability of the Commission was pronounced by the Court of Justice on 29 September 1982 in the case of *Oleifici Mediterranei v. Economic European Community*, C-26/81. On this occasion the Court affirmed that: "[i]t should be recalled at the outset that […] for the Community to incur liability, the applicant must prove the unlawfulness of the conduct alleged against the institution concerned, the fact of damage and the existence of a causal link between the conduct and the damaged complained of."[12] The Commission's

[12] See par. 16 of the judgment: Case C-26/81, SA Oleifici Mediterranei v. EEC, 1982 E.C.R. 3057. The judgment recalls the case law. See Joined Cases 5, 7, 13 A 24/66, E. Kampffmeyer et al. v. Commission CEE, in 1967 E.C.R. 288 (the Commission was declared liable but there was not a systematic framework of non-contractual liability). *See also* Case T-267/94, Oleifici Italiani Spa v. Commission, 1997 E.C.R. II-1239 (also mentioning the principle of protection of legitimate expectations). See, for example, paragraph 27 of the *Spa* decision: "[…] The principle of protection of legitimate expectations requires steps to be taken to avoid the economic interests of traders who have made major investments and have definitively undertaken, vis-à-vis the public authorities, to carry out particular operations, being injured as a result of the entry into force of rules whose adoption was not foreseeable." *See also* Case T-175/94, International Procurement Services v. Commission, 1996 E.C.R. II-179, par. 44; Case T- 336/94, Efisol SA v. Commission, 1996 E.C.R. II-546, par. 30; Case T-383/00, Beamglow Ldt v. European Parliament et al., 2005 E.C.R. II-5459, par. 95 ("It is settled case law that in order for the Community to incur non-contractual liability under the second paragraph of Article 288 EC for unlawful conduct of its institutions a number of conditions must be satisfied: the institutions' conduct must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct and the damage pleaded."); Joined Cases T-198/95; T-171/96; T-230/97; T-174/98 and T-225/99, Comafrica SpA et al. v. Commission C, 2001 E.C.R. I-3408, par.134; Court of First Instance, Third Chamber, 17 October 2002, n. 180, 10, *Foro Amm. CdS* 2306 (2002); Court of First Instance, Fourth Chamber, 24 April 2002, n. 220, Ellliniki Viomichania Opion AE European Community Council, *Riv. dir. internaz. priv. e proc.* 1104 (2002); Court of First Instance, Second Chamber, 15 January 2003, n. 377, *Philips Morris International Inc. v. Commission*, 1, *Foro Amm. CdS* 14 (2003); Court of First Instance, Fifth Chamber, 6 March, 2003, n. 57, Banan Kompaniet AB et al. v. European Community Council, 4, *Foro It.* 573 (IV) (2003). On the causal link see, in particular, Case T-178/98, Fresh Marine SA v. Commission, 2000 E.C.R. II-3331, par. 118 ("There is a causal link for the purposes of Article 215 of the Treaty where there is a direct causal nexus

liability cannot therefore be invoked if it is not possible to prove its unlawful conduct. The requirement of "*unlawfulness*" is one of the hardest conditions to satisfy and it is the condition that has undergone the most extensive interpretation. To establish unlawfulness, it is necessary to differentiate between liability for legislative and administrative acts. A legislative community act has been held to be unlawful when it infringes a superior rule of law for the protection of the individual. A superior rule of law may be a rule in the TEC itself, but various Courts have also held that principles like the protection of legitimate expectations, proportionality, and fundamental rights[13] to be superior rules of law for the protection of the individual.[14]

In theory, liability for administrative acts, acts where the administration applies general rules in individual cases or otherwise exercises its powers in an individual manner, only requires proof of damage, causation, and illegality. Scholars believe that this still leaves open the precise meaning of illegality. "It is possible to list a variety of errors which *might* lead to liability […], but the mere proof of such an error will not always ensure success in a damages action." [15]

The decisive test for determining whether a serious breach of a rule of law has occurred is whether the Community institution concerned manifestly and gravely disregarded the limits of its powers.

Noteworthy in this regard is the Judgment of the European Court of Justice of 10 October 2003 in *Commission v. Fresh Marine*:

> 25) Community law confers a right to reparation where three conditions are met, the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently

---

between the fault committed by the institution concerned and the injury pleaded, the burden of proof of which rests on the applicant […]. The community cannot be held liable for any damage other than that which is sufficiently direct consequence of the misconduct of the institution concerned […]"); Case C-308/87, Grifoni v. European Community for Atomic Energy , 1990 E.C.R. I-1203, par. 6.

[13] *See* Case 5/71 Zuckerfabrik Schöppenstedt v. Counc. 1971 E.C.R. 975 ("in cases involving measures of economic policy, the breach of the superior rule of law has to be *sufficiently serious*.").

[14] *See* Case C-352/98, Bergaderm e Goupil v. Commission, 2000 E.C.R. I-5291, par. 42; Case C-237/98 P, Dorsch Consult Ingenieursellschaft mbH v. Council UE and Commission, 2000 E.C.R. I-2938, par. 17; Case C-146/91, Koinopraxia Enópraxia Georgikón Synetairismón Diacheiríseos Enchorín Proïónton Syn. PE (KYDEP) v. Commission, 1995 E.C.R. I-4199, par. 19.

[15] *See* Case C-285/05, Holcim (Deutschland) AG v. Commission, 2007 E.C.R. I-1347, par. 47 and 50.

> serious; and there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties. 26) As regards the second condition, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where that institution has only considerably reduced, or even no, discretion, […]. 27) Therefore, the determining factor in deciding whether there has been such an infringement is not the general or individual nature of the act in question but the discretion available to the institution concerned.[16]

This means that if the law provides narrow limits to the Commission's discretionary power, the infringement of that law must be regarded as a sufficiently serious breach of a rule of Community law, one which satisfies one of the conditions for incurring non-contractual liability by the Community. Therefore, the criterion for establishing whether there has been a breach of a rule of law or not is not the nature of the act, but an examination of the discretionary power of the Institution that has taken the act.

In the judgment here scrutinized from 11 July 2007 (*Schneider SA v. Commission*) the Court of First Instance insisted on this aspect, stating that there is a breach of a rule of the Community in instances of manifest and grave disregard for the limits on discretionary power.

The Commission therefore has wide discretionary power when it has to evaluate the compatibility of the firms' actions with the common market.[17] In this regard, the Court of First Instance stated that the Commission did not examine with due diligence the impact of the merger on the national markets of the different Member States. Here the Court examined the decision of the Commission through the lens

---

[16] Case C-472/00, Commission v. Fresh Marine, 2003 E.C.R. I-5647, par. 25-27; Case T-178/98, Fresh Marine v. Commission, 2000 E.C.R. II-3331. *See also* Case T-170/00, Förde-Reederei GmbH v. Council and Commission, 2000 E.C.R. I-239, par. 37. These three conditions are the same requested for the liability of Member States in case of breach of Community Law. *See* Joined Cases 6 and 9/90, Francovich and Bonifaci v. Italy, 1, GIUR. IT. 1169 (1992). *See also* Joined Cases C-46/93 and C-48/93, Brasserie du pecheur SA, 2, GIUR. IT., 145 (1997).

[17] See, in particular, paragraph 125 of the judgment.

of the limits to its discretion, so that the limits themselves may be considered an indispensable instrument for judicial review.[18] It is clear that the provisions of the Regulation No. 139/2004, as well as all the rules stipulating the duties to the European Institutions, are a potential source of liability of the Community. The more detailed the rules, the easier the task of the Courts.

The second requirement for the Commission's liability is loss. To help the Court determine whether the loss is certain, applicants are required under Art. 46(1)c of the Rules of Procedure of the European Court of Justice to make their application precise as to the alleged wrongful conduct and the nature of the damage sustained. In other words, the injury has to be certain, specific and quantifiable.[19]

For the loss to be recoverable, it must concern the applicant in a specific and individualized way. According to Art. 288 (2), the burden of proof lies with the claimant. The claimant must produce evidence establishing the existence and size of the loss. According to Art. 45 of the Rules of Procedure of the European Court of Justice, "The Court, after hearing the Advocate General, shall prescribe the measures of inquiry that it considers appropriate by means of an order setting out the facts to be proved." In this regard, the Court of First Instance quantifies the exact monetary value of the damage:

> […] Il s'ensuit que le montant de l'indemnité due à la requérante […] devra être réévalué jusqu'à la date du prononcé de l'arrêt portant liquidation du dommage, puis majoré d'intérêts moratoires à compter de cette dernière date et jusqu'à complet paiement. 346 Le taux d'intérêt à appliquer est calculé sur la base des taux fixés par la Banque centrale européenne pour les opérations principales de refinancement, successivement applicables pendant chacune des deux périodes.

That is to say, that the recovery of costs must be calculated from the date of the damage to the judgment ordering the Community to make good the damage, together with the interests calculated by the European Central Bank.[20]

---

[18] It is worth mentioning that the judicial review of the Court is expressly stated in Article 9, paragraph, Regulation n. 139/2004. "In accordance with the relevant provisions of the Treaty, any Member State may appeal to the Court of justice, and in particular request the application of Article 243 of the Treaty, for the purpose of applying its national competition law".

[19] *See* Schousboe, *supra* note 7, at 11.

[20] Paras. n. 345 and 346 of the judgment.

The final requirement for the Commission's liability is causality. In order to consider someone responsible for a certain act (whether by act or omission), it is fundamental to prove that an obligation was violated and that harm resulted from the violation.[21]

The Court here stated that the causal link was sufficiently established and the damages were a direct consequence to the illegitimate conduct.[22] In particular, the link of causality was based on the premise of the violation of the right to participate. Schneider SA wasn't allowed to participate in the decision of incompatibility. The Commission should have given Schneider SA the opportunity to propose corrective measures in order to get the examination of the situation once again:

> "la Commission devait mettre Schneider à même de faire utilement valoir sa défense à l'encontre des griefs que la Commission avait retenus à propos de chacun des marchés sectoriels français du matériel électrique basse tension affectés par l'opération et, le cas échéant, de proposer des mesures correctives susceptibles d'y répondre, de façon à obtenir, éventuellement au terme du réexamen de l'opération, une décision constatant la compatibilité de l'opération. "[23]

The three conditions of the non-contractual liability mantra were, therefore, found to be fulfilled. This led the Court to hold the Commission liable for the damages caused by its unlawful conduct. Apart from the final statement that the judicial costs had to be shared, "in cauda venenum,"[24] this was not a surprising decision.

This would seem, at least, to provide a good reason for the applicants to appeal the judgment.

---

[21] A.G. Toth, *The Concepts of Damage and Causality as Elements of Non-contractual Liability, in* THE ACTION FOR DAMAGES IN COMMUNITY LAW 179 (Heukels & McDonnell eds., 1997). Recently, see Case 331/05, Internationaler Hilfsfonds eV v. Commission EC, 2007 E.C.R (not yet published).

[22] As mentioned above, the Court came to the following conclusion, at para 288 of the judgment: "Il existe en revanche un lien de causalité suffisamment étroit pour ouvrir un droit à indemnisation entre l'illégalité commise et deux types e préjudice supportés par la requérante."

[23] Para. 270 of the judgment. *See also* Case C-104/89 DEP J.M. Mulder and Others v. Council of the European Union and Commission of the European Communities, 2004 E.C.R. I-1.

[24] "The poison is in the tail."