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Schneider Electric SA v. Commission of the European Communities: The Cost of Stifling European Community Mergers

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Schneider Electric SA v. Commission of the European Communities

THE COST OF STIFLING EUROPEAN COMMUNITY MERGERS

INTRODUCTION

The European Court of First Instance (“CFI” or “Court”) made history on July 11, 2007 when it announced its ruling in *Schneider Electric SA v. Commission*.¹ In this unprecedented ruling, the Court awarded damages to Schneider Electric, a French electrical component manufacturing company, in its suit against the European Commission (“Commission”).² Never before has a European Community³ court⁴

¹ Case T-351/03, *Schneider Elec. SA v. Comm’n*, 2007 E.C.R. II-2237, available at <http://curia.europa.eu/jurispg/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-351/03> (click on the second “T-351/03” from the top).

² *Id.* The European Commission is the executive branch of the European Community and acts much like its counterpart in the United States federal government. See IVO VAN BAELE & JEAN-FRANÇOIS BELLIS, *COMPETITION LAW OF THE EUROPEAN COMMUNITY* 7 (Kluwer Law International 2005). The Commission is charged with two primary duties. See *id.* The first is to make sure that the nations with membership in the Community and internal Community institutions comply with the terms of the Community’s founding treaty. The Commission also makes sure that the Member States and Community bodies comply with directives, regulations, and the decisions of Community institutions. The Commission’s second major function is to propose legislation to the main legislative body of the Community, the European Council. *Id.*

The remainder of this Note will discuss only the Commission’s activities in European merger regulation. The Commission is involved in a variety of aspects of merger control. *Id.* at 7-8. Initially, companies that have negotiated a concentration deal between themselves are required to give notice to the Commission that they have reached an agreement to merge. See *id.* at 2-3. The Commission then has the power to investigate these proposed mergers (as well as those mergers that have already occurred without proper notice). See *id.* at 7-8. The Commission will then issue a decision as to whether the merger may go forward or whether such a merger would frustrate effective competition in Europe’s Common Market. *Id.* The Commission also has the ability to impose fines on companies that do not comply with Community competition law or Commission orders, and in some instances, the Commission may even order companies that have already merged to separate. See *id.* at 8. Additionally, the Commission ensures that the Community coordinates its regulation efforts with other nations. *Id.* The Commission also takes a proactive role in the process by proposing legislation pertaining to merger control and competition law generally to the legislative arm of the Community, the European Council of Ministers, and by promulgating its own regulations. *Id.*

³ This Note refers to the European Community, rather than to the European Union, because this Note discusses Europe’s integrated economy, which unlike Europe’s unified security and political systems, is subject to judicial review. RALPH H. FOLSOM, *PRINCIPLES OF EUROPEAN UNION LAW* 19 (2005).

⁴ There are two primary courts comprising the judicial branch of the European Community. See VAN BAELE & BELLIS, *supra* note 2, at 15-17. The Court of First Instance (“CFI”) is a court of specific jurisdiction, and one of the primary areas of jurisdiction the Court is responsible

ordered the Commission to pay damages to compensate a corporation for losses it sustained following a Commission decision to prohibit a merger. Court followers called the decision “scandalous,” “shocking,” and “against the grain of the jurisprudence established by the court.”⁵ Other observers worried that the decision could have dire consequences for the Commission’s budget and future decision-making far beyond this case.⁶ These onlookers worried that *Schneider* would incentivize other companies whose merger plans had been thwarted to sue the Commission, and that the extraordinary precedent set by *Schneider* would compel the Court to rule in their favor.⁷ As often is said when a ruling establishes a new cause of action or remedy, critics of the decision argued that *Schneider* would open the proverbial floodgates of litigation.⁸

This Note dispels the notion that the *Schneider* ruling will have such expansive or far-reaching consequences and argues that the precedent *Schneider* set is far from “extraordinary.” Indeed, by exploring recent amendments to the Community merger control regulations and the European Court of Justice’s (ECJ’s) and CFI’s own jurisprudence in the field of mergers and competition law,⁹ this Note concludes that the *Schneider* decision is consistent with the overall direction the courts have taken in the past.

Part I of this Note briefly traces the history of European competition law from its fledgling roots in the Coal and Steel Community to the comprehensive rules and procedures characterizing modern competition law in the current European Community.¹⁰ Part II provides the factual and procedural history that precipitated the CFI’s decision in *Schneider*. Part III argues that although *Schneider* marks the first time the Court has ordered the Commission to pay damages for improperly blocking a merger, the CFI’s holding is actually very narrow

for is merger control. *Id.* at 15-16. The CFI, as its name suggests, is the first court to which companies or individuals may appeal a Commission decision to prohibit or permit a merger. *Id.* at 16. The second court of the Community is the European Court of Justice. *Id.* at 17. Until 1989, the Court of Justice was the only Community court. *See id.* In 1989, the CFI was created to ease the Court of Justice’s case load. *See id.* at 16-17. Since that time, the Court of Justice’s predominant role in merger control has been that of an appeals court. *See id.* at 17. However, parties to a competition law action before the CFI can appeal rulings to the Court of Justice on points of law only, which leaves a great deal of the judicial review of merger regulation to the CFI. *Id.*

⁵ Eubusiness.com, *Court Orders EU Regulators to Pay Damages in Landmark Case* (Jul. 11, 2007), http://www.eubusiness.com/news_live/1184158801.64/.

⁶ Roger Blitz et al., *EU to Pay Damages Over Veto of Merger Deal*, FIN. TIMES (London), July 12, 2007, at 7. Critics of the decision seemed to suggest that the *Schneider* decision would leave the Commission vulnerable to additional court orders requiring monetary compensation, and that if this were to occur, the Commission’s budget would be stretched beyond repair. Commentators also seem to indicate that *Schneider* will force the Commission to review and perhaps amend the procedures it follows in reaching a final conclusion on a merger. *See id.*

⁷ *See id.*

⁸ *See id.*

⁹ Competition law is the area of law commonly referred to as antitrust law in the United States. FOLSOM, *supra* note 3, at 280.

¹⁰ The Coal and Steel Community was formed by the 1951 Treaty of Paris and was the original predecessor to modern European integration embodied in the European Union. *Id.* at 3.

and unlikely to have sweeping implications in the future. Part III also argues that the ruling is in line with the Court's trend toward reigning in the Commission's merger control powers. Additionally, this section argues that the decision conforms with the overall objective of Community merger control law, which is to encourage mergers in order for Europe to compete economically with the United States and Japan. Finally, Part IV explores the Commission's pending appeal of the CFI's *Schneider* ruling currently before the Court of Justice, and recommends that the Court uphold the decision in order to continue to clearly define the Commission's powers when it opposes mergers, particularly in light of the Commission's increased regulatory powers under recent amendments to merger regulations.

The CFI's disposition in *Schneider* was a significant development in European competition law; the ruling was the first of its kind. However, if viewed in light of the CFI and Court of Justice's ("Community Courts" or "Courts") ongoing attempts to reassert themselves and reverse early deference to the Commission, along with the Courts' overall goal of promoting European economic competitiveness, *Schneider* is more of a baby step than a giant leap. If, as the evidence suggests, the Community tribunals are attempting to reign in the power of the Commission, then the Court of Justice should uphold the CFI's ruling on appeal and thereby ensure the Commission will approach merger regulation in line with the competitive objectives of the European Community.

I. EUROPEAN COMMUNITY COMPETITION LAW: A BRIEF HISTORY

The foundations of European Community competition law can be found in Articles 65 and 66 of the 1951 Treaty of Paris, which formed the original European Coal and Steel Community.¹¹ However, the treaty's application to mergers and acquisitions has been a more recent phenomenon.¹² Prior to 1968, the Community actively encouraged mergers as a mechanism for competing with larger markets in America and Japan.¹³ In fact, in 1965, the Commission issued a memorandum to the governments of the Member States of the Community recommending that the national governments encourage "regional concentration" in order to promote efficiency and thereby increase the Community's

¹¹ See Treaty Establishing the European Coal and Steel Community, arts. 65-66, Apr. 18, 1951, 261 U.N.T.S. 140 (expired July 23, 2002) (establishing a framework for competition regulation in the Coal and Steel Community). The Coal and Steel Community Treaty was the first step toward European integration. FOLSOM, *supra* note 3, at 3. After the devastation Europe experienced during World War II, European integration was viewed as a way to ensure that this level of destruction would never happen again. See *id.* at 2-3. By integrating the European coal and steel industries, the predominate materials necessary to manufacture war supplies, the European nations determined that waging war against each other would be impossible. *Id.*

¹² See FOLSOM, *supra* note 3, at 282-84.

¹³ *Id.* at 329.

ability to compete with larger markets.¹⁴ The result was little regulation or control of the private industries engaging in consolidation.¹⁵ Not surprisingly, a "European merger boom" took place throughout the following decade.¹⁶

This boom came to an abrupt halt with the proposed merger of Continental Can, a German manufacturer of meat and fish tins, with a Dutch meat and fish can manufacturer.¹⁷ During the "merger boom," studies began to show industrial concentrations were increasing throughout the Community.¹⁸ In response, the Commission attempted to prohibit the merger between the German and Dutch manufacturers because it determined that such a merger would have allowed Continental Can to create and potentially abuse a dominant position in the market for processed meat and fish containers.¹⁹ Continental Can appealed this decision to the Court of Justice,²⁰ arguing that the Commission had no authority to block a proposed merger.²¹ Although Articles 81 and 82 of the Treaty Establishing the European Community ("EC Treaty")²² authorized competition regulation, the EC Treaty does not authorize the Commission to regulate mergers explicitly.²³ Nevertheless, the Court read Article 82 in light of Articles 2 and 3 of the EC Treaty,²⁴ which identify achieving a "high degree of competitiveness

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 329-30.

²⁰ The Court of First Instance had not yet been created as the initial court to appeal a blocked merger. See VAN BAELE & BELLIS, *supra* note 2, at 17.

²¹ FOLSOM, *supra* note 3, at 330.

²² See Treaty Establishing the European Community, arts. 82-83 (formerly arts. 85-86), Dec. 24, 2002, 2002 O.J. (C 325) 33 [hereinafter EC Treaty]. The Treaty of Rome was renamed the Treaty Establishing the European Community and amended in 1993. FOLSOM, *supra* note 3, at 6-7. Subsequently, the Amsterdam Treaty made significant changes to the EC Treaty, including renumbering the articles. All subsequent references to EC Treaty articles will cite only to the current article.

²³ Article 81 of the EC Treaty declares that all commercial agreements that have as their "object or effect the prevention, restriction or distortion of competition within the common market . . ." are prohibited. EC Treaty, *supra* note 22, art. 81. Article 82 prohibits abuses of a "dominant position within the common market . . ." *Id.* art. 82.

²⁴ FOLSOM, *supra* note 3, at 330; see also EC Treaty, *supra* note 22, arts. 2-3. Article 2 of the treaty states:

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, . . . [and] a high degree of competitiveness and convergence of economic performance . . . among Member States.

Id. art. 2. Article 3 of the treaty states:

For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein: . . . (b) a

and convergence of economic performance”²⁵ and developing a system “ensuring that competition in the internal market is not distorted”²⁶ as Community goals.²⁷ The Court found that the Commission was authorized to approve and prohibit proposed mergers because in doing so, the Commission was enforcing the anti-competitive prohibitions of Articles 81 and 82.²⁸ The foundations of the Commission’s current authority to authorize and prohibit concentrations with potential to impact the Community economy were laid with this ruling in *Continental Can*.

Following the Court of Justice’s decision in *Continental Can*, the Commission submitted a proposed merger control regime to the European Council of Ministers (“the Council”)²⁹ for ratification.³⁰ Nearly twenty years passed before the Council acted.³¹ Finally, in 1989, the Council approved Regulation 4064/89 (“Merger Regulation” or “the Regulation”), which, upon taking effect in 1990, granted the Commission the *exclusive* power to regulate proposed concentrations that are “incompatible with the common market.”³²

Article 1 of the Regulation set the scope of the Commission’s authority by mandating that the provisions set forth in the Regulation apply to all “concentrations with a community dimension.”³³ Article 1 further stated that a concentration has a community dimension when the combined turnover for all companies involved is €5 billion worldwide, or where each of at least two of the companies involved has a turnover of €250 million within the Community.³⁴ Article 3 then stated that a concentration will arise where there is a merger between two or more independent entities, or where a person or group of people who control

common commercial policy; . . . (g) a system ensuring that competition in the internal market is not distorted; (h) the approximation of the laws of Member States to the extent required for the functioning of the common market; . . . (m) the strengthening of the competitiveness of Community industry; . . . [and] (t) a contribution to the strengthening of consumer protection

Id. art. 3.

²⁵ EC Treaty, *supra* note 22, art. 2.

²⁶ *Id.* art. 3.

²⁷ *Id.* art. 2-3; *see also*, FOLSOM, *supra* note 3, at 330.

²⁸ *Id.* at 330-31.

²⁹ The European Council of Ministers is the primary legislative arm of the Community. VAN BAEL & BELLIS, *supra* note 2, at 12. The Council is composed of delegates from each Member State. *Id.*

³⁰ FOLSOM, *supra* note 3, at 331.

³¹ *Id.*

³² Council Regulation 4064/89, art. 2, 1989 O.J. (L 257) 90 (EC) [hereinafter Merger Regulation]; *see also* FOLSOM, *supra* note 3, at 331. In 1997, the Regulation was amended to expand the scope of the Commission’s authority. *Id.*; *see also* Council Regulation 1310/97, 1997 O.J. (L 180) 1, 1-6 (EC). In 2004, the Community institutions significantly amended the Merger Regulation. FOLSOM, *supra* note 3, at 331; *see also* Council Regulation 139/2004, 2004 O.J. (L 24) 1, 1-3 (EC).

³³ Merger Regulation, *supra* note 32, art. 1.

³⁴ *Id.*

one entity purchase assets or control of another entity.³⁵ The article further established criteria for determining whether joint ventures fell under the scope of the Regulation, as well as other circumstances in which a concentration may or may not arise.³⁶

Despite its authority to regulate mergers, throughout the first year the Merger Regulation was in effect, the Commission essentially acted as rubber stamp for merger proposals.³⁷ It was not until 1991 that the Commission issued its first decision blocking a merger under the Merger Regulation.³⁸ In that case, a French company named Aeropostale SNI and an Italian company known as Alenia e Selenia Spa attempted to merge with Dehaviland, a Canadian subsidiary of Boeing.³⁹ The Commission effectively stopped the merger, relying on its own factual determinations that if the merger were allowed, the parties to the agreement would establish a dominant market position in a specific segment of the commuter airplane manufacturing industry.⁴⁰ The Commission found that the parties to the proposed merger would control fifty percent of the world market for such aircraft and sixty-five percent of the Community market for the planes.⁴¹

Following this initial prohibition of the Dehaviland merger, the Commission issued decisions throughout the 1990s and early 2000s opposing a string of high-profile mergers.⁴² However, by this time many of the parties involved in these highly publicized business deals began to appeal the Commission's negative decisions to the CFI.⁴³ Just as the Commission had recently taken an active role in prohibiting mergers, the Courts too began to assert themselves. In 2002, for the first time, the CFI⁴⁴ overruled the Commission's decision in a merger prohibition

³⁵ *Id.* art. 3.

³⁶ *Id.*

³⁷ See FOLSOM, *supra* note 3, at 336.

³⁸ *Id.*; see also Commission Decision IV/M.053, 1991 O.J. (L 334) 61 (EC).

³⁹ Commission Decision IV/M.053, *supra* note 38, 42-43.

⁴⁰ *Id.* at 60.

⁴¹ *Id.* at 49-50.

⁴² See generally, e.g., Commission Decision COMP/M.2416, 2001 O.J. (L 43) 13 (declaring the proposed merger of Tetra Laval with Sidel incompatible with the common market); Commission Decision COMP/M.2283, 2001 O.J. (L 101) 1 (declaring the merger between Schneider Electric and Legrand incompatible with the common market); Commission Decision COMP/M.2220, 2001 O.J. (L 48) 1 (declaring the proposed merger between General Electric and Honeywell incompatible with the common market); Commission Decision COMP/M.1741, 2000 O.J. (L 300) 1 (declaring the proposed merger between MCI Worldcom and Sprint incompatible with the common market); Commission Decision IV/M.1524, 1999 O.J. (L 93) 1 (declaring the proposed merger between AirTours and First Choice Holidays incompatible with the common market).

⁴³ See generally, e.g., Case T-5/02, Tetra Laval BV v. Comm'n, 2002 E.C.R. II-4381 (appealing the Commission's decision to oppose a merger between Tetra Laval and Sidel); Case T-342/99, Airtours plc v. Comm'n, 2002 E.C.R. II-2585 (appealing the Commission's decision to oppose a merger between Airtours and First Choice).

⁴⁴ Remember that at this point, the CFI has been convened to help ease the Court of Justice's caseload in particular areas, most notably that of competition law and merger regulation. VAN BAELE & BELLIS, *supra* note 2, at 16-17.

case.⁴⁵ The CFI invalidated the Commission's order prohibiting an Airtours/First Choice Holiday merger.⁴⁶ The Court determined that the Commission had not met its burden to provide evidence sufficient to prohibit a merger between the parties.⁴⁷ Later that year, the CFI issued rulings in the initial proceedings of the *Schneider* case and the *Tetra Laval* case, holding that the Commission needed to have credible evidence of a dominant market position to block a merger.⁴⁸

Each of these decisions exemplify the Courts' unwillingness to rubber-stamp the Commission's efforts to stymie mergers. They each can be viewed as efforts by the Courts to reign in the Commission's exclusive authority in the merger control area and to create a system of review and Commission accountability. These decisions further demonstrate the Court's influence in the area of merger regulation; each led to significant reforms in how the Commission regulates concentrations. Lastly, these cases reinforce the Community's objective to encourage mergers and thus allow Europe to compete on the world economic stage. This tension between the Commission and the Courts on issues of competition law is fully illustrated in the *Schneider* cases, as the next section explores in detail.

II. FACTS AND PROCEDURAL BACKGROUND OF *SCHNEIDER*

The procedural background of *Schneider* is composed of three separate and distinct legal determinations: the Commission decision prohibiting the merger; *Schneider*'s appeal of this decision to the CFI; and *Schneider*'s subsequent suit against the Commission, which was also brought before the CFI. This section explains each of these legal proceedings leading up to the CFI's July 11, 2007 decision.

A. *The Commission's Decision*

On January 15, 2001, *Schneider Electric*⁴⁹ announced its intent to acquire control of *Legrand*⁵⁰ by buying *Legrand*'s shares on the French stock market.⁵¹ In order to comply with Article 4 of the Merger

⁴⁵ FOLSOM, *supra* note 3, at 338.

⁴⁶ *Id.*; see also *infra* Part III.A.2.

⁴⁷ FOLSOM, *supra* note 3, at 338; see also *infra* Part III.A.2.

⁴⁸ FOLSOM, *supra* note 3, at 338.

⁴⁹ *Schneider Electric* is a French firm engaged in the production and sale of electric equipment. Commission Decision COMP/M.2283, 2004 O.J. (L 101) 1, 1 (EC) ("Schneider Electric . . . is the parent company of a group whose business is in the production and sale of products and systems in the electricity distribution, industrial control and automation sectors. It is active worldwide.").

⁵⁰ *Legrand* is also a French company engaged in the production of component parts for electrical systems. *Id.* ("Legrand . . . is the parent company of a group whose business is in the production and sale of low-voltage switchgear and accessories. It is active worldwide.").

⁵¹ *Id.*

Regulation, Schneider formally notified the Commission of this proposed merger on February 16, 2001.⁵²

To reiterate, the Merger Regulation authorizes the Commission to act on “concentrations with a Community dimension.”⁵³ In a March 30, 2001 decision, the Commission determined that Schneider’s proposed acquisition of Legrand fell within the scope of this definition and thereby commenced an investigation into whether the merger was compatible with the Community’s common market.⁵⁴ On July 25, 2001—after the Commission determined that an investigation was necessary, but prior to issuing a decision on the matter—the period for the public bidding closed, which left Schneider holding 98.1% of Legrand’s stock.⁵⁵ Under Article 7(1) of the Merger Regulation, parties are prohibited from going forward with a merger while awaiting the Commission’s decision regarding the impact of a merger’s competitive effects.⁵⁶ However, Article 7(3) provides an exception when the Commission has been notified of the merger and the acquisition is to be implemented by a public bid.⁵⁷ Pursuant to this exception in Article 7(3) of the Merger Regulation, Schneider and Legrand, after notifying the Commission, essentially completed the merger by public bid allowing Schneider to buy virtually all of Legrand’s stock before the Commission issued its decision.⁵⁸

On October 10, 2001, following Schneider’s acquisition of Legrand, the Commission issued a decision.⁵⁹ In a comprehensive ruling,

⁵² *Id.*

⁵³ Merger Regulation, *supra* note 32, art. 1.

⁵⁴ Commission Decision COMP/M.2283, 2004 O.J. (L 101) 1, 2 (EC).

⁵⁵ *Id.*

⁵⁶ Merger Regulation, *supra* note 32, art. 7(1) (“A concentration . . . shall not be put into effect . . . until it has been declared compatible with the common market.”); *see also* FOLSOM, *supra* note 3, at 334-35.

⁵⁷ Merger Regulation, *supra* note 32, art. 7(2) (“Paragraph 1 shall not prevent the implementation of a public bid . . . [which has been] notified to the Commission pursuant to Article 4, [provided that] the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission under to paragraph 3.”).

⁵⁸ *See supra* note 55 and accompanying text.

⁵⁹ Commission Decision COMP/M.2283, 2004 O.J. (L 101) 1, 2 (EC). Under the Merger Regulation, the Commission has four months from the date of announcing its intention to investigate the proposed merger to approve or prohibit the actions. Merger Regulation, *supra* note 32, art. 10(3). However, in this case the Commission issued its decision well after the mandated four months. Under Article 10 of the Merger Regulation, once the Commission adopts the decision to investigate a notified merger, it can order parties to provide the Commission with information under Article 11 of the Regulation. *Id.* art. 10(4). If the parties fail to provide the requisite information, the mandate that the Commission must complete its review within four months is effectively suspended. *See id.* art. 11(5). In this case, both Legrand and Schneider failed to comply with the Commission’s information requests. Therefore, the Commission was free to issue its decision after the four month deadline had passed. It is important to note, however, that had Schneider and Legrand heeded the Commission’s request in a timely fashion, the Commission would have been compelled to issue the decision within the four month deadline. The Commission would likely have issued a decision prior to the July 25, 2001 closing of the public offer, thereby eliminating the need for a second divestiture decision. *See* Commission Decision COMP/M.2283, 2004 O.J. (L 101) 1, 2 (EC); *see also* Merger Regulation, *supra* note 32, art. 11(5) (“Where a person, an undertaking or an association of

the Commission reasoned that the effects of the merger would be felt most intensely in the Community's low-voltage electrical component sector because that was the focus of at least half of Schneider's business and the totality of Legrand's business.⁶⁰ Ultimately, the Commission found that the merger would "lead to the creation or strengthening of dominant positions with the effect of significantly restricting effective competition."⁶¹ The Commission further found that each of Schneider's proposals to mitigate the anti-competitive effects of the merger were inadequate.⁶² Therefore, the Commission concluded that the "notified merger [was] incompatible with the common market"⁶³

In the majority of its cases, the Commission closes a case by issuing a decision, and either party is free to appeal the decision to the CFI. However, because Schneider had been permitted to buy Legrand's stock under the public offering exception of the Merger Regulation while the Commission's decision was pending, the merger had already effectively taken place.⁶⁴ Therefore, it was necessary for the Commission to issue a second determination on January 30, 2002 ordering a separation of Schneider and Legrand.⁶⁵

B. *Schneider's Appeal to the CFI*

On December 13, 2001, prior to the Commission's order of divestiture,⁶⁶ Schneider brought an action before the CFI to annul the

undertakings does not provide the information requested within the period fixed by the Commission or provides incomplete information, the Commission shall by decision require the information to be provided. The decision shall specify what information is required, fix an appropriate period within which it is to be supplied and state the penalties provided for in Articles 14 (1) (b) and 15 (1) (a) and the right to have the decision reviewed by the Court of Justice."). Schneider later raised this issue in its appeal of the Commission's decision to the CFI. However, the Court ultimately rejected Schneider's argument and found that the Commission was legally empowered to issue its decision acting beyond the four month deadline. Case T-310/01, *Schneider Elec. SA v. Comm'n*, 2002 E.C.R. II-4071, II-4105.

⁶⁰ Specifically, the Commission determined that businesses involving the manufacture and sales of "low-voltage switchboards," "cable trays and busbar trunking," and "electrical equipment downstream of the final panelboard" would be most seriously effected. Commission Decision COMP/M.2283, 2004 O.J. (L 101) 2, 3 (EC).

⁶¹ *Id.* at 131.

⁶² *Id.* Once Schneider learned of the Commission's concerns regarding the merger, it proposed several options to mitigate the strengthening of its market position. For example, Schneider proposed to transfer one of its exclusive distribution contracts to another company. *Id.* at 128. Schneider also proposed to divest itself of two of its subsidiary companies. *Id.* at 127. Each of these proposals were struck down. *Id.* at 127-28. The Commission also rejected Schneider's attempts to salvage the merger by eliminating various segments of its or its subsidiary's businesses. *See e.g., id.* at 129-30.

⁶³ *Id.* at 131.

⁶⁴ *See supra* notes 53-58 and accompanying text.

⁶⁵ Commission Decision COMP/M.2283, 2004 O.J. (L 101) 134, 144.

⁶⁶ When the Commission issues a divestiture decision it is ordering that the merger be undone. In this case, the order to divest meant that Schneider was compelled to sell its controlling interest in Legrand either on the open market or by a deal negotiated with another buyer. Schneider chose the latter course of action. Case T-351/03, *Schneider Elec. SA v. Comm'n*, 2007 E.C.R. II-2237, ¶ 54, available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?>

Commission's decision declaring the merger incompatible with the common market.⁶⁷ Schneider based its appeal on several procedural irregularities during the pendency of the proceedings, including the Commission's decision to grant itself an extension of four months to issue a decision on the merger.⁶⁸ Schneider also contended that the Commission had violated the company's rights of defense.⁶⁹ Schneider's rights of defense claim focused on Article 13 of the Merger Regulation, under which the Commission is required to produce a "statement of objections" to the proposed merger, thereby allowing the parties a fair opportunity to defend or mitigate the proposal.⁷⁰ In its appeal, Schneider charged that the list of objections that the Commission provided did not include the same objections that the Commission ultimately relied on in its finding that the merger would impede competition in the common market.⁷¹

After appealing the Commission's decision, but before the CFI had issued its ruling, Schneider entered into an agreement with Wendel/KKR ("Wendel").⁷² The July 26, 2002 agreement stated that Wendel would buy the Legrand stock from Schneider should the Commission prevail in Schneider's appeal.⁷³ Under the agreement, Wendel would pay far less to acquire the stock from Schneider than the market rate Schneider had originally paid.⁷⁴ While this would result in a serious economic blow to Schneider if the CFI ruled against its appeal,⁷⁵ Schneider presumably projected the loss of the sale to Wendel to be less than the loss it would sustain by selling the Legrand stock on the open market. The parties also agreed that the contract would expire on December 10, 2002 if not executed prior to that date.⁷⁶

On October 22, 2002, the CFI issued its decision, ultimately finding for Schneider and annulling the Commission's decision to prohibit the merger.⁷⁷ However, the Court rejected Schneider's argument that the Commission had illegally issued a decision after four months had

lang=EN&Submit=rechercher&numaff=T-351/03 (click on the second "T-351/03" from the top).

⁶⁷ See generally Case T-310/01, *Schneider Elec. SA v. Comm'n*, 2002 E.C.R. II-4071.

⁶⁸ See *supra* note 59 and accompanying text; see also *Schneider*, 2002 E.C.R. at II-4098-99.

⁶⁹ *Schneider*, 2002 E.C.R. at II-4097-98.

⁷⁰ Merger Regulation, *supra* note 32, art. 13.

⁷¹ See *Schneider*, 2002 E.C.R. at II-4094. This is important because the list of objections that the Commission provides to parties to a merger are used as guidelines by those parties to propose solutions that would mitigate the Commission's concerns regarding anti-competitive practices. Thus, in this case, Schneider based its mitigating proposals (that were ultimately rejected by the Commission as ineffective to reduce the anti-competitive nature of the merger) on the list of objections the Commission provided. See FOLSOM, *supra* note 3, at 291.

⁷² Press Release, Court of First Instance, *Schneider Must Be Partially Compensated for Loss Sustained as a Result of the Illegal Prohibition of its Merger with Legrand* (July 11, 2007) [hereinafter *Schneider Press Release*].

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Schneider Elec. SA v. Comm'n*, 2002 E.C.R. II-4071, II-4196.

passed, as well as Schneider's plea that under Article 10(6) of the Merger Regulation, as a result of the Commission's inaction within the requisite four month time period, the merger should have been declared compatible with the common market automatically.⁷⁸

In the central holding of the case, the Court determined that the Commission had violated Schneider's rights of defense.⁷⁹ In making this determination, the CFI focused on the fact that when the Commission issued its decision in 2001, it concluded that a merger between Schneider and Legrand would lead to "buttressing," or unduly strengthening Schneider's competitive influence⁸⁰ in a specific sector of France's regional electrical component market.⁸¹ However, the Commission had not previously included this "buttressing" objection in the list of objections it was required to make available to Schneider pursuant to Article 13 of the Merger Regulation.⁸² Unaware of these additional hurdles to the Commission's approval of the merger, Schneider was thus unable to thoroughly propose solutions that may have mitigated the Commission's concerns.⁸³ As a result, the CFI concluded that the Commission interfered with Schneider's rights of defense.⁸⁴

Schneider also brought a second action against the Commission.⁸⁵ In this second action, Schneider sought to annul the Commission's follow-up decision ordering Schneider to divest itself of Legrand stock.⁸⁶ Not surprisingly, the Court again ruled in favor in Schneider and annulled the Commission's order to divest.⁸⁷

⁷⁸ *Id.* at II-4081.

⁷⁹ *Id.* at II-4195-96.

⁸⁰ Specifically, the Court accepted Schneider's argument that the Commission relied heavily on its determination that the merger would impermissibly strengthen Schneider's dominant position in the French electrical panelboard sector in making its decision. *Id.* at II-4186-87. When the Commission issued its list of objections, it focused on the dominant position that would result from the merger in several geographical areas but did not focus on France. *Id.* Furthermore, the list did not mention this dominant position with regard to panelboards. *Id.* The Court found that this discrepancy was enough to deprive Schneider of its right to offer a relevant defense to the charge or to propose solutions to the Commission's concerns. *Id.*

⁸¹ Schneider Press Release, *supra* note 72.

⁸² *Schneider*, 2002 E.C.R. at II-4186-87.

⁸³ *Id.*

⁸⁴ *Id.* at II-4186-97. In basing its ruling on the violation of Schneider's rights of defense, the CFI focused on Schneider's inability to adequately defend against objections to the merger:

The effect of those irregularities [referring to the discrepancies between the Commission listed objections and those it relied on in the decision] is all the more serious, because, as the Commission stated several times at the hearing, remedies are the only means of preventing a concentration falling under Article 2(3) of Regulation No 4064/89 from being declared incompatible.

Id. at II-4196.

⁸⁵ See generally Case T-77/02, *Schneider Elec. SA v. Comm'n*, 2002 E.C.R. II-4201.

⁸⁶ *Id.* at II-4211.

⁸⁷ *Id.* at II-4215.

C. *How Schneider Won the Case and Lost Over €1 Billion*

Immediately following the CFI's annulment of its prior decisions, the Commission resumed its investigation into the Schneider/Legrand merger.⁸⁸ Despite the Court's ruling, the Commission continued to express to Schneider that the merger may still be incompatible with the common market because it would allow Schneider to corner such a large segment of the electrical component market and thereby potentially stifle competition that is beneficial to consumers.⁸⁹ As a result of the Commission's persistent position that the merger may continue to run afoul of the common market, and no evidence that the Commission was nearing completion of its revised determination, Schneider executed its agreement with Wendel.⁹⁰ This deal, which took place on December 10, 2002, just before the opportunity was about to expire, caused Schneider to sell its shares of Legrand stock to Wendel at a loss of over €1 billion.⁹¹ However, if Schneider had let the deal with Wendel expire and the Commission then issued another decision against the merger forcing Schneider to sell its Legrand stock at the market rate, Schneider would have risked even greater losses. On December 13, 2002, just days after Schneider executed the agreement with Wendel, the Commission closed its investigation into the Schneider/Legrand merger without issuing another decision.⁹²

D. *Schneider's Suit for Damages*

Seeking to recoup the losses from the deal with Wendel, Schneider filed suit in 2003 against the Commission once again in the CFI.⁹³ Schneider argued that it was entitled to damages because the Commission illegally prohibited its merger with Legrand supporting its claim with specific reference to the CFI's prior holding that Schneider's rights of defense relating to the buttressing objection had been violated.⁹⁴

⁸⁸ Article 10(5) of the Merger Regulation provides that once the court has annulled a decision of the Commission, in effect the clock is reset, and the Commission is given a fresh start to re-investigate the merger. Merger Regulation, *supra* note 32, art. 10. In its plea before the Court, Schneider argued that giving this provision effect when the Court determined that the Commission's decision was issued illegally would be inequitable since it would give the party who had acted inappropriately further opportunity to do so. *Schneider I*, 2002 E.C.R. at II-4106. Schneider raised this argument in conjunction with its argument that the Commission had illegally issued a decision beyond the four month deadline. *Id.* However, as the Court ruled that the Commission had acted within the appropriate time period, it did not address the issue further. *Id.*

⁸⁹ See Schneider Press Release, *supra* note 72.

⁹⁰ Case T-351/03, *Schneider Elec. SA v. Comm'n*, 2007 E.C.R. II-2237, ¶ 54, available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-351/03> (click on the second "T-351/03" from the top).

⁹¹ Schneider Press Release, *supra* note 72.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Schneider*, 2007 E.C.R. ¶ 127; see also notes 80-85 and accompanying text.

Schneider also argued that there were other procedural defects in the merger control procedure.⁹⁵

On July 11, 2007, the Court issued its decision.⁹⁶ The Court accepted Schneider's buttressing and rights of defense argument, but like before, rejected the idea that the merger control procedure was flawed.⁹⁷ The Court ordered the Commission to pay Schneider's expenses related to the re-opening of the investigation following the CFI's 2002 annulment of the Commission's non-compatibility finding.⁹⁸ In finding non-contractual (tort) liability on the part of the Commission, the Court thus ruled that the Commission's violation of Schneider's rights of defense met the high bar for tort liability by a European Community institution, namely that the violation was (1) unlawful conduct, and (2) a "grave and manifest disregard of the limits of [the Commission's] powers of assessment."⁹⁹

In calculating damages, the Court went further than it had in past decisions. The Court ordered the Commission to pay two-thirds of the loss sustained by Schneider when it sold its shares of Legrand to Wendel.¹⁰⁰ In determining the extent of the Commission's liability, the Court also ruled that Schneider should not be allowed recover the full amount of its loss from the divestiture to Wendel because, in buying the stock in the first place, it had assumed the risk that the merger would be declared incompatible with the common market and therefore must bear one-third of the loss.¹⁰¹ In effect, the Court ruled that a breach of Schneider's rights of defense, of which there was prima facie evidence from the 2002 ruling, was an illegal act so serious that it could be considered a "grave and manifest disregard of the limits of the [Commission's] power."¹⁰²

Less than a month later, the Commission issued a press release stating its intention to appeal Schneider's award to the Court of Justice.¹⁰³ The Commission also questioned whether its breach of Schneider's rights of defense in the case was serious enough to withstand the standard for tort liability.¹⁰⁴ Currently, the appeal is still pending.

⁹⁵ Schneider Press Release, *supra* note 72; see also Case T-310/01, Schneider Elec. SA v. Comm'n, 2002 E.C.R. II-4071, II-4098-99 (Schneider argued that the Commission should not have been allowed extra time to make its determination and that there were serious analytical errors in the Commission's assessment of the effect the merger would have on the common market.); *Schneider*, 2007 E.C.R. ¶¶ 160, 225, 238.

⁹⁶ See generally *Schneider*, 2007 E.C.R. II-2237.

⁹⁷ Schneider Press Release, *supra* note 72; see also *Schneider*, 2007 E.C.R. ¶ 167.

⁹⁸ *Schneider*, 2007 E.C.R. at Interlocutory Judgment ¶ 1.

⁹⁹ Schneider Press Release, *supra* note 72; see also *Schneider*, 2007 E.C. R. ¶ 115.

¹⁰⁰ *Id.* at Interlocutory Judgment ¶ 1.

¹⁰¹ Schneider Press Release, *supra* note 72.

¹⁰² *Id.*

¹⁰³ Press Release, European Commission, Commission to Appeal to Court of Justice Against Judgment of Court of First Instance in Case T-315/03 Schneider Electric v. Commission (August 6, 2007).

¹⁰⁴ *Id.*

III. *SCHNEIDER*: A DEPARTURE FROM THE COURTS' JURISPRUDENCE?

An examination of the CFI and the Court of Justice's merger control jurisprudence reveals that the Courts have been guided by two overarching goals. First, the Courts, in particular the CFI, have been guided by the desire to provide an effective check on the exclusive and seemingly unlimited power of the Commission in the area of merger regulation. This goal has gained increasing importance in light of the 2004 amendments to the Merger Regulation. Second, the Courts have attempted to promote a founding goal of European integration, namely to create a stronger economic force to compete with the United States and Japan.¹⁰⁵ Mergers can lead to efficiency and increased capital, and the Courts' merger control jurisprudence takes this into account. The CFI's decision in *Schneider* is remarkable not only for the fact that it opens the door for other companies to sue for damages when the Commission illegally blocks their mergers, but for the fact that by adding a layer of judicial review, *Schneider* was the next logical step in a progression of decisions limiting the Commission's "exclusive" control over mergers. *Schneider* is equally important for reaffirming the Courts' commitment to promoting mergers as a way to increase Europe's role as a major economic player on the world stage. It therefore seems that the CFI's decision in *Schneider* is neither "scandalous" nor "against the grain of the jurisprudence established by the court"¹⁰⁶ when the Courts' record is viewed in light of the two overarching goals of providing an effective check against Commission power and promoting European economic dominance by encouraging efficient mergers.

A. *Checks and Balances*

In determining why the CFI and Court of Justice's decision-making has been guided by the desire to reign in the Commission's power, it is helpful to describe exactly the scope of authority the Commission has in controlling mergers. The main source of the Commission's authority is the Merger Regulation, which was enacted under the authority of Articles 81 and 82 of the EC Treaty.¹⁰⁷

¹⁰⁵ FOLSOM, *supra* note 3, at 329.

¹⁰⁶ Eubusiness.com, *supra* note 5 (quoting competition expert) (internal quotation marks omitted).

¹⁰⁷ EC Treaty, *supra* note 22, art. 81-82. Article 81 states that any action by either Member States or private entities which has the effect of "prevent[ing], restrict[ing] or distort[ing] competition" within the Community is prohibited, while Article 82 provides that any abuse of a "dominant position within the common market" is prohibited. *Id.*

1. The Commission's Powers to Regulate Mergers

The Commission plays "the preponderant role in the development and enforcement of EC competition law"¹⁰⁸ and enjoys tremendous power to investigate concentrations.¹⁰⁹ Beginning in 1962, the Commission was granted investigative powers under Regulation 17.¹¹⁰ These powers included the ability to require parties proposing a merger to provide information requested by the Commission and to "submit to on-the-spot investigations,"¹¹¹ as well as charge fines or issue injunctions against a proposed merger.¹¹²

Regulation 17, which was enacted in 1962 before the merger booms of the 1970s,¹¹³ was just the beginning of the Commission's authority to regulate in this area. As mentioned above, it was not until the original Merger Regulation of 1990 was enacted that the Commission had exclusive jurisdiction over concentration control.¹¹⁴ This exclusivity is somewhat of an anomaly within the European Community where institutions are compelled to share power with each other in almost every other aspect of law-making.¹¹⁵ For example, most Community legislation is proposed by the Commission and passed by the Council of Ministers, which may or may not have to consult with the European Parliament,¹¹⁶ depending on the subject matter of the legislation.¹¹⁷

The Merger Regulation grants the Commission the sole authority to determine whether the proposed concentration falls within the scope of

¹⁰⁸ VAN BAELE & BELLIS, *supra* note 2, at 7. Additionally, "[i]t is clear . . . that the Commission is at the core of the development of EC competition policy and that it enjoys broad powers. . . . [T]he Commission acts in various instances as legislator, as prosecutor and as decision-maker." *Id.* at 12.

¹⁰⁹ See Tony Reeves & Ninette Dodoo, *Standard of Proof and Standards of Judicial Review in European Commission Merger Law*, 29 FORDHAM INT'L L.J. 1034, 1035-36 (2006). Commenting on the broad range of the Commission's authority to regulate mergers, Reeves and Dodoo remarked:

[T]he Commission not only enjoys wide investigative powers, akin to those of a public prosecutor, it also is the sole arbiter, in the first instance, of whether the merger is anticompetitive or not, and has the power to enforce its decisions by imposing fines, other conditions, or ultimately, by prohibiting the merger from taking place.

Id.

¹¹⁰ Council Regulation 17/62, 1962 O.J. (L 13) 204. Regulation 17 was replaced by Regulation 1/2003 on May 1, 2004. VAN BAELE & BELLIS, *supra* note 2, at 8. Under the new regulation, "the Commission's powers of investigation have been retained and in some cases increased." *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See *supra* notes 15-16 and accompanying text.

¹¹⁴ See generally Merger Regulation, *supra* note 32 (laying out the standards and procedures that the Commission is to use in regulating mergers); see also FOLSOM, *supra* note 3, at 331; see *supra* note 32 and accompanying text.

¹¹⁵ See FOLSOM, *supra* note 3, at 31-32.

¹¹⁶ The Parliament is the Community's other legislative body. *Id.* at 32-33.

¹¹⁷ *Id.* at 31-32.

its authority.¹¹⁸ If it so determines, the Commission has the power to regulate the merger proposal, including the power to suspend the parties from going forward with their plans.¹¹⁹ This authority can have a significant impact in a market economy where a deal may be advantageous to one or both parties one day but not the next. Most significantly, Article 8 grants the Commission decision-making power, declaring that the Commission is the sole arbiter of whether the proposed concentration is "incompatible with the common market."¹²⁰ Article 11 grants the Commission far-reaching investigative powers, allowing the Commission to "obtain all necessary information from the Governments and competent authorities of the Member States, from . . . persons . . . and from undertakings and associations of undertakings."¹²¹ Under Article 12, the Commission even has the power to compel the governments of Member States to initiate investigations upon request of the Commission.¹²²

The real teeth of the regulation is in Article 13, which details the express powers of the Commission to investigate the merger proposals. Under this article, the Commission is authorized to "examine the books and other business records"¹²³ of the undertaking, "take or demand copies of or extracts from the books and business records,"¹²⁴ "ask for oral explanations on the spot,"¹²⁵ and "enter any premises, land and means of transport of undertakings."¹²⁶ Article 14 outlines the fines that the Commission may impose for failure to comply with these demands.¹²⁷

These investigative powers give the Commission a great deal of unchecked power because the Commission "may request all information it considers necessary."¹²⁸ This is particularly troubling in light of the fact that the Commission does not recognize traditional attorney-client privileges.¹²⁹ Communications between corporations and their in-house counsel are not protected by the privilege.¹³⁰ The same is true for communications between a corporation and an attorney who is not licensed to practice law in the European Community.¹³¹ This may have particularly dire consequences for North American companies seeking to become involved in a merger with a Community corporation.

¹¹⁸ Merger Regulation, *supra* note 32, art. 6.

¹¹⁹ *Id.* art. 7.

¹²⁰ *Id.* art. 8(3).

¹²¹ *Id.* art. 11(1).

¹²² *Id.* art. 12(1).

¹²³ *Id.* art. 13(1)(a).

¹²⁴ *Id.* art. 13(1)(b).

¹²⁵ *Id.* art. 13(1)(c).

¹²⁶ *Id.* art. 13(1)(d).

¹²⁷ *Id.* art. 14.

¹²⁸ FOLSOM, *supra* note 3, at 288 (emphasis added).

¹²⁹ *See id.* at 289-90.

¹³⁰ *Id.*

¹³¹ *Id.*

The Commission's investigative powers further derogate from the due process norms found in the democratic traditions of the Member States. Most notably, the parties to a proposed merger have "limited rights to notice and hearing."¹³² Additionally, the parties have no access to the information that the Commission has collected from them.¹³³

The only check on the Commission's tremendous investigative powers is the judicial review of the Commission's decisions provided by the CFI and Court of Justice.¹³⁴ As the Community celebrated the tenth anniversary of the first Merger Regulation in 2000, the need for more effective judicial control to check the Commission's seemingly unlimited authority was a central theme throughout the anniversary celebrations.¹³⁵ The noted European competition scholar Sir Christopher Bellamy remarked that "[i]f there is a gap in the present system where there is some room for improvement, it is in effective judicial control in merger cases."¹³⁶ For the past decade, both the CFI and the Court of Justice had been effectively, if subtly, circumscribing the Commission's dominance in merger control. In 2002, two years after Sir Bellamy's remarks, the CFI heeded his call by overturning a high profile series of Commission decisions prohibiting mergers, including the first *Schneider* case.¹³⁷

2. The Courts' Effort to Limit the Scope of the Commission's Merger Control

The CFI has consistently adhered to its twin objectives of curbing Commission power and promoting European economic growth through protection of the merger process. It has done so in a variety of ways, from providing procedural mechanisms to allow a greater number of parties to challenge a Commission decision, to overturning a series of Commission decisions resulting in a greater movement for reform of the merger regulation process. A review of the CFI and Court of Justice's responses to the Commission's merger decisions in 2002 sets the *Schneider* decisions firmly in line with the Courts' progression of asserting judicial review and promoting the Community's economic goals.

¹³² *Id.* at 289.

¹³³ *Id.*

¹³⁴ VAN BAELE & BELLIS, *supra* note 2, at 12.

¹³⁵ See Rachel Brandenburger & Thomas Janssens, *European Merger Control: Do the Checks and Balances Need to be Re-Set?*, in ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE, INTERNATIONAL ANTITRUST LAW AND POLICY, 135, 175 (Barry Hawk ed., 2002).

¹³⁶ *Id.*

¹³⁷ VAN BAELE & BELLIS, *supra* note 2, at 16.

a. Airtours, Tetra Laval, and Schneider

The three blockbuster competition law judgments that the CFI issued in 2002 were *Airtours PLC v. Commission*,¹³⁸ *Tetra Laval v. Commission*,¹³⁹ and *Schneider Electric SA v. Commission*.¹⁴⁰ In these three cases, each decided in quick succession, the CFI annulled the Commission's prohibition of the proposed merger and demonstrated that the Court was willing to provide a heightened level of judicial review in order to curb the Commission's alleged infringement of the concentrations' rights.¹⁴¹

In *Airtours*, the Commission prohibited a merger between Airtours, a British company engaged in the sale and operation of vacation packages, and First Choice, another British vacation company, and one of Airtours' competitors.¹⁴² Before *Airtours*, the Commission prohibited only those mergers that would result in leaving only two major competing businesses in a given sector.¹⁴³ *Airtours* was a departure from this practice because the Commission prevented a merger which would have left three major competing companies in a market where there had previously been four.¹⁴⁴ The Commission determined that since the three remaining competitors would have held over 80% of the market in package vacations in the United Kingdom,¹⁴⁵ it would be nearly impossible for a new business to enter the market, and there would be an incentive for the three remaining players to collude to keep prices high.¹⁴⁶ Therefore, the Commission determined that the proposed merger would have created a "dominant position" in the "short-haul foreign package holidays" sector of the United Kingdom's economy and determined accordingly that the merger was incompatible with the common

¹³⁸ Case T-342/99, 2002 E.C.R. II-2585.

¹³⁹ Case T-5/02, 2002 E.C.R. II-4381.

¹⁴⁰ Case T-310/01, 2002 E.C.R. II-4071.

¹⁴¹ See VAN BAELE & BELLIS, *supra* note 2, at 12. *Tetra Laval*, the 2002 ruling in *Schneider*, and *Airtours* are commonly cited as examples of the CFI's willingness to closely examine the Commission's merger decisions.

In recent years, the Court of First Instance in particular has made it abundantly clear that the Commission does not have free reign, and the exercise of its discretion in the decision-making process has been subject to increasingly rigorous scrutiny by the European Courts. In several major cases, such as *Tetra Laval*, *Schneider Electric*, [and] *Airtours* . . . the Court of First Instance has imposed limits on the Commission's actions.

Id.

¹⁴² *Airtours*, 2002 E.C.R. at II-2593.

¹⁴³ VAN BAELE & BELLIS, *supra* note 2, at 823.

¹⁴⁴ *Id.*

¹⁴⁵ See VAN BAELE & BELLIS, *supra* note 2, at 824 (If the merger went through, Airtours/First Choice would have owned 34.4% of the market while the two remaining competitors, Thomas Cook, and Thomson would have held 20.4% and 30.7% of the market, respectively.).

¹⁴⁶ *Id.*

market.¹⁴⁷ Airtours appealed the Commission's decision to the CFI in December of 1999.¹⁴⁸

The Court ruled that the Commission had not provided enough evidence to support its contention that the merger would create a collectively dominant position in the United Kingdom.¹⁴⁹ More importantly, the CFI laid down three conditions that must be met before the Commission can block a merger on the basis that it would create or strengthen a dominant position.¹⁵⁰ First, in each case there must be "sufficient market transparency"¹⁵¹ such that each of the remaining competitors are able to determine whether their competitors are in fact adhering to any price fixing or common position that they may adopt.¹⁵² Second, the ability to maintain a common position between the competitors must be "sustainable over time."¹⁵³ In other words, members of the group who choose to engage in a collective course of action must have a sustainable enforcement mechanism to prevent other members of the group from derogating from that plan.¹⁵⁴ This deterrent is necessary because all members must stick to the common position for any of them to benefit.¹⁵⁵ Third, the collective position must be able to withstand new competitors entering the market and prevent consumers from reacting to price increases following the merger.¹⁵⁶

In *Airtours*, the Court found that the Commission had misinterpreted the facts at issue, and that these three factors were not present in the merger between Airtours and First Choice.¹⁵⁷ The CFI therefore annulled the Commission's decision.¹⁵⁸ In doing so, the CFI put an important check on the Commission's ability to prevent mergers. The Court also demonstrated that not only will it assess the Commission's legal procedure, but it will also scrutinize the facts that the Commission relied on and interpreted in its decision-making.

Following the favorable CFI decision, Airtours, like Schneider Electric would later do, filed an action against the Commission seeking damages for the losses the company sustained as a result of the merger prohibition.¹⁵⁹ This action was filed prior to the Court's most recent

¹⁴⁷ *Airtours*, 2002 E.C.R. at II-2595; see also C.J. COOK & C.S. KERSE, E.C. MERGER CONTROL 173 (2000).

¹⁴⁸ *Airtours*, 2002 E.C.R. at II-2595-96.

¹⁴⁹ *Id.* at II-2693.

¹⁵⁰ VAN BAELE & BELLIS, *supra* note 2, at 824.

¹⁵¹ *Airtours*, 2002 E.C.R. at II-2613.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ FOLSOM, *supra* note 3, at 338.

¹⁵⁵ *Id.* at II-2614.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at II-2693.

¹⁵⁸ *Id.*

¹⁵⁹ Case T-212/03, *MyTravel Group v. Comm'n*, 2003 O.J. (C 200) 28. Airtours is now known as MyTravel Plc. *Id.*

Schneider decision awarding damages, and was therefore not filed as a result of the favorable precedent set by the Court. However, it was often cited as an example of how the CFI's *Schneider* ruling would lead to opening the floodgates of litigation and would impose serious concerns for the Commission's budget. This argument was proven unfounded on September 9, 2008, when the CFI announced its decision in *MyTravel Group plc v. Commission*.¹⁶⁰ The Court dismissed MyTravel's (formerly Airtours's) claim for damages, finding that the Commission's errors, as established in *Airtours*, were not serious enough to establish the necessary elements of non-contractual liability.¹⁶¹ The CFI's decision was consistent with its ruling in *Schneider* because the basis for MyTravel's appeal was a misinterpretation of the facts, which is less serious than the Commission's infringement on rights of defense, and therefore did not constitute a "grave and manifest disregard of the limits of their powers of assessment," which is necessary for the finding of non-contractual liability.¹⁶²

Tetra Laval is the second of the major competition decisions the CFI issued in 2002 that circumscribed the Commission's authority. In this case, the Commission prohibited a merger between Tetra Laval SA, a French manufacturer of plastic food packaging, and Sidel SA, a French manufacturer also engaged in the manufacture of plastic packaging, particularly bottles.¹⁶³ The Commission ruled that the merger was incompatible with the common market because it would create and strengthen the merged entity's position in certain sectors of the plastic packaging market.¹⁶⁴

Tetra Laval appealed the Commission's decision to the CFI, where the decision was annulled.¹⁶⁵ As it did in *Airtours*, the CFI heightened the standard of proof required for the Commission to prohibit a conglomerate merger.¹⁶⁶ The CFI ruled that since the conglomerate type of merger is generally considered to be positive for the market, or at least neutral, the Commission was required to engage in "precise examination, supported by convincing evidence, of the circumstances which allegedly produce those [anti-competitive] effects."¹⁶⁷ The Court found that the Commission had not met its burden in the instant case, and annulled the decision.¹⁶⁸

¹⁶⁰ Case T-212/03, *MyTravel Group v. Comm'n*, 2008, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003A0212:EN:HTML>.

¹⁶¹ *Id.*

¹⁶² *Schneider* Press Release, *supra* note 72; see also EC Treaty, *supra* note 22, art. 288.

¹⁶³ Case T-5/02, *Tetra Laval v. Comm'n*, 2002 E.C.R. II-4381, II-4395-96.

¹⁶⁴ VAN BAEL & BELLIS, *supra* note 2, at 887.

¹⁶⁵ *Tetra Laval*, 2002 E.C.R. at II-4515.

¹⁶⁶ Reeves & Dodoo, *supra* note 109, at 1052-53.

¹⁶⁷ *Tetra Laval*, 2002 E.C.R. at II-4447.

¹⁶⁸ *Id.* at II-4513-14.

On appeal to the Court of Justice, the Commission argued that the CFI's standard imposed a burden that was impossible for the Commission to meet.¹⁶⁹ Nevertheless, the Court of Justice upheld the CFI's decision, although with somewhat softer language, holding that "[a] prospective analysis of the kind necessary in merger control must be carried out with great care since it does not entail examination of past events . . . or of current events, but rather a prediction of events which are more or less likely to occur."¹⁷⁰ Both the CFI's decision and the Court of Justice's affirmation of the decision further demonstrate the willingness of the Community Courts to subject the Commission to close scrutiny in the face of its strong investigative powers and exclusive competence to regulate mergers.¹⁷¹

As described above, in the CFI's 2002 *Schneider* ruling, the third of the 2002 merger restraint cases, the CFI ruled that by relying on objections in its final ruling that the Commission had not previously provided to *Schneider* when it issued its "list of objections," the Commission infringed upon *Schneider*'s rights of defense in that it deprived *Schneider* of the opportunity to introduce alternative proposals that may have saved the merger.¹⁷²

b. Other Important Decisions

Although *Airtours*, *Schneider*, and *Tetra Laval* are the three most commonly cited decisions illustrating the CFI's willingness to scrutinize and overturn Commission competition decisions, they are by no means the only ones. The following cases provide additional checks on the Commission's regulatory powers by both expanding standing to allow a greater number of parties to challenge a Commission decision and increasing the opportunities for the Courts to review the Commission's actions. These additional limits that the CFI and the Court of Justice have placed on the Commission's powers also reflect the Courts' efforts to

¹⁶⁹ Case C-12/03 P, *Comm'n v. Tetra Laval*, 2005 E.C.R. I-987, ¶ 148, available at <http://curia.europa.eu/en/content/juris/index.htm> (scroll two-thirds of the way down the page; follow "C-12/30 P" hyperlink; click on the second "C-12/03 P" from the top).

¹⁷⁰ *Id.* ¶¶ 42-43.

¹⁷¹ See *Reeves & Dodoo*, *supra* note 109, at 1054-55. The article discusses the language of the CFI and ECJ in *Tetra Laval*:

[T]he force of the central message which both the CFI and the ECJ delivered to the Commission [is]: in situations where the effect of a merger is not clearly anticompetitive, and in particular where that effect is only predicted to occur in the future, the Commission will need to have a particularly convincing case in order to withstand the Courts' scrutiny. This is not "because of a new or heightened legal standard of proof." It is simply the manifestation of a natural process of evolution, whereby the Courts respond to the increasing sophistication of competition law, economic theory and of the fact-finding resources available to the Commission.

Id.

¹⁷² See *supra* Part II.B. and accompanying text.

circumscribe the Commission's merger control powers even if they have not received the same degree of recognition in the media and scholarly literature.

The first and most fundamental way in which the Courts have limited the Commission's authority is in allowing virtually any party affected by a Commission decision to have standing to sue in court.¹⁷³ Article 230 of the EC Treaty expressly allows both the parties proposing the merger and individual Member States to challenge a Commission decision.¹⁷⁴ In addition, the Courts have allowed third parties to challenge the Commission's decisions before the Courts when they show that they have "direct concern" in the outcome of the case.¹⁷⁵ The Courts have been fairly lenient in determining who has direct concern, in effect allowing themselves to hear appeals by "any party that has been genuinely involved in the merger review procedure before the Commission and that is affected by its outcome"¹⁷⁶

For example, in *Air France v. Commission*, the CFI held that when a spokesman for Air France declared that a proposed merger had no Community dimension, the interests of Air France's competitors were affected, which then provided the competitors with standing to sue.¹⁷⁷ The Court reasoned that if the spokesman's statement was in fact true, the merger could be implemented immediately, whereas if the proposal involved a Community dimension, the merger would be subject to the Commission's review and would not take place until a determination was made, which included allowing competitors to be heard.¹⁷⁸

The CFI has also held that employees' representatives have standing to bring an action for annulment of a Commission decision.¹⁷⁹ In *Comité Central d'Entreprise de la Société Générale des Grandes Sources v. Commission*,¹⁸⁰ using a teleological approach, the Court ruled that since the Merger Regulation grants procedural rights to the representatives of employees of an undertaking, and the only juncture at which the Court is able to review an abuse of those rights is in a challenge of a Commission decision before the Court, the representatives of undertaking employees have standing to challenge a ruling of the Commission before the court.¹⁸¹

The CFI's willingness to broaden the scope of who is able to bring an action against a Commission decision allows for an increased

¹⁷³ Brandenburger & Janssens, *supra* note 135, at 176.

¹⁷⁴ EC Treaty, *supra* note 22, art. 230.

¹⁷⁵ Brandenburger & Janssens, *supra* note 135, at 176.

¹⁷⁶ *Id.* at 177.

¹⁷⁷ Case T-2/93, *Air France v. Comm'n*, 1994 E.C.R. II-323, II-341-42.

¹⁷⁸ *Id.*; see also VAN BAEL & BELLIS, *supra* note 2, at 899; Case T-114/02 *BaByliss v. Comm'n*, 2003 E.C.R. II-1279.

¹⁷⁹ Brandenburger & Janssens, *supra* note 135, at 176.

¹⁸⁰ Case T-96/92, 1995 E.C.R. II-1213.

¹⁸¹ *Id.* at II-1230.

number of challenges, which provide the Courts with more opportunities to reign in the Commission. By granting more parties the right to challenge the Commission's decisions, a greater number of cases will come before the Courts, and it follows that the Court will be able to offer necessary review in a greater number of cases. Furthermore, the threat that a third party such as a labor union or industry competitor could challenge the decision means that the Commission, to deter annulments of its decisions, will be more likely to ensure that the rights of all parties are respected and that any party with a "direct concern" in the outcome will at the very least have a chance to be heard.

3. The Commission's Powers Following the 2004 Amendments to the Merger Regulation

The Courts' 2002 high-profile annulment decisions emphasized the need to significantly reform the procedures utilized by the Commission for merger review.¹⁸² In response, the European Council, the principle Community institution responsible for promulgating legislation, enacted a new Merger Regulation which took effect on May 1, 2004.¹⁸³ One of the most striking features of the 2004 overhaul of the Merger Regulation is that it expands the roles of the individual Member States of the Community.¹⁸⁴ And while it is true that this marks an important departure from the previous merger regime, it is not indicative of the scope of the rest of the Regulation, which further strengthens the Commission's powers to regulate mergers.

First, the new Merger Regulation and corresponding Regulation on Procedure have given sharper teeth to the Commission's fact-finding abilities.¹⁸⁵ For instance, the regulations have increased the penalty for procedural violations to up to one percent of an undertaking's "total turnover" from the previous year.¹⁸⁶ A procedural violation can amount to nothing more than providing the Commission with "incorrect or misleading" information following a request from the administrative body.¹⁸⁷ The Regulation thus allows the Commission the ability to exact a serious financial penalty for a relatively insignificant or minor error on the part of the undertaking, as there does not appear to be a scienter

¹⁸² See, e.g., Case T-5/02, *Tetra Laval v. Comm'n*, 2002 E.C.R. II-4381; Case T-310/01, *Schneider Elec. SA v. Comm'n*, 2002 E.C.R. II-407; Case T-342/99, *Airtours v. Comm'n*, 2002 E.C.R. II-2585; see also *Reeves & Dodo*, *supra* note 109, at 1035 (referring to the year 2002 as "the Commission's *annus horribilis*").

¹⁸³ VAN BAEL & BELLIS, *supra* note 2, at 1.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 3.

¹⁸⁶ Council Regulation 139/2004, art.14(1), 2004 O.J. (L 24) 1, 15 (EC) [hereinafter 2004 Merger Regulation]; see also VAN BAEL & BELLIS, *supra* note 2, at 3.

¹⁸⁷ VAN BAEL & BELLIS, *supra* note 2, at 3.

requirement for the imposition of the fine.¹⁸⁸ Furthermore, it is unsettling that such a large fine could be imposed for actions that turn on potentially subjective determinations. It is in the discretion of the institution imposing the fine to determine whether or not the information it was provided with was “misleading,” a determination that is highly subjective. The 2004 Merger Regulation further compounds fears that penalties will be unjustly imposed by allowing the Commission to inflict further fines of up to five percent of an undertaking’s average daily turnover from the previous year for *every day* that it does not conform to the Commission’s procedural mandates.¹⁸⁹ Additionally, prior to the new amendments to the Regulation, it was possible to escape putative fines from accruing during the period of time the Commission took to investigate the effects the proposed merger would have on the common market so long as the parties involved notified the Commission of any agreement they had reached among themselves.¹⁹⁰ However, the new Regulation eliminated this safe harbor.¹⁹¹

The new Regulation has also augmented the Commission’s authority through increased inspection powers.¹⁹² The Regulation allows the Commission to inspect a corporate facility with or without giving notice.¹⁹³ More importantly, if the Commission can obtain a search warrant from a local court, it may inspect “private homes, motor vehicles and other personal property of the corporate directors, managers and staff.”¹⁹⁴

There is no offset to the Commission’s increased investigative powers under the 2004 amendments.¹⁹⁵ The fact that the Commission’s powers were increased in the new merger regime despite the Courts’ continuing efforts to provide an effective check on such power may have been a motivating factor for the CFI to take the next step in *Schneider*. In the face of expanding Commission power, the CFI may have been compelled to ensure that the Commission was reminded that the Court still intended to exercise ongoing scrutiny of the Commission’s decisions and impose strict judicial review. Perhaps by ordering the Commission to pay for its interference with a company’s rights of defense, the Court could ensure that the new power to the Commission under the 2004 Merger Regulation did not go to its head.¹⁹⁶

¹⁸⁸ See 2004 Merger Regulation, *supra* note 186, art. 14 (no requirement that the undertaking intend to act improperly for fines to be imposed).

¹⁸⁹ *Id.* art. 15(1); see also VAN BAELE & BELLIS, *supra* note 2, at 3.

¹⁹⁰ VAN BAELE & BELLIS, *supra* note 2, at 23.

¹⁹¹ *Id.*

¹⁹² *Id.* at 3.

¹⁹³ *Id.*

¹⁹⁴ FOLSOM, *supra* note 3, at 288.

¹⁹⁵ See VAN BAELE & BELLIS, *supra* note 2, at 3 (“It is worth noting that the strengthening of the Commission’s investigative powers has not coincided with any strengthening of the due process rights of companies under investigation.”).

¹⁹⁶ As legislation, the 2004 Merger Regulation should represent the goals of the Community to the same extent as judicial decisions. However, the Regulation seems to fly in the

B. Promoting Mergers and Europe's Competition with America and Japan

The other major goal that has guided the Community Courts in their merger control jurisprudence has been their position that mergers are fundamentally positive actions for the economy of the European Community.¹⁹⁷ According to this argument, mergers promote efficiency in industry and allow European businesses to compete with foreign markets.¹⁹⁸ In addition to curbing the exclusive jurisdiction of the Commission, the Courts have used their decisions to ensure that mergers continue to strengthen the Community economy.

This idea is the driving force behind the CFI's development and implementation of an expedited procedure to accelerate its review of Commission merger control decisions. Because mergers are market transactions, they are often highly susceptible to market fluctuations and changes in the economy. This reality, combined with the fact that the appeal of a Commission merger decision generally takes at least two years, means that in many cases mergers that were improperly prohibited by the Commission will ultimately be unsalvageable as originally conceived of, even with a favorable outcome in a proceeding before the Court.¹⁹⁹ In response to this problem, the CFI introduced an expedited procedure to "fast track" cases where there is a particular urgency.²⁰⁰ In

face of the Courts' line of cases circumscribing the role of the Commission. This conflict can be explained by the political situation surrounding merger regulation. The 2004 Regulation was passed by a legislature composed of representatives from Member States. Member States have traditionally been "wary of mergers" and have been particularly opposed to mergers affecting producer markets. Aditi Bagchi, *The Political Economy of Merger Regulation*, 53 AM. J. COMP. L. 1, 14-15 (2005). Member States wishing to protect their own regional businesses would naturally support an increased role for the Commission as a way to protect European-wide mergers which could threaten local industries. Although the Commission is made up of representatives from each Member State who pledge to act in the interest of the Community, the Commission's "expansive powers in the context of merger regulation hinge on its effective representation of individual member state interests, not the construction of a policy that subordinates those individual interests to a larger vision of the European [C]ommunity." *Id.* at 12. The 2004 Merger Regulation also contained measures which increase the role of national courts and regulators. *Id.* at 30. These features of the 2004 amendments made the Regulation politically expedient but not necessarily in the interest of European-wide integration.

¹⁹⁷ The original Community competition policy shared this goal. The Commission focused on prohibiting mergers that would impede the integration of a single market. VAN BAELE & BELLIS, *supra* note 2, at 22. Even the language of the Merger Regulation suggests as much, stating that a merger should be prohibited if it is "incompatible with the common market." Merger Regulation, *supra* note 32, art. 2.

¹⁹⁸ FOLSOM, *supra* note 3, at 329.

¹⁹⁹ Often the aim of filing an appeal is not to salvage the proposed transaction, but to create favorable precedent for a similar future transaction:

[T]he most that merging parties can, in practice, hope to attain through an application to the courts has been to overturn the Commission's findings, with a view to correcting the "record" for their future deals, rather than resurrecting the transaction that was prohibited by the Commission in the first place.

Brandenburger & Janssens, *supra* note 135, at 178.

²⁰⁰ *Id.* at 180 & n.219.

December of 2000, the CFI amended its Rules of Procedure to reduce the amount of time it takes to appeal a Commission decision from upwards of two years to around eight months.²⁰¹ Some of the important changes the amendment made were limiting the period of time third parties can intervene in a proceeding and authorizing the Court to do away with the practice of the parties trading a second round of pleadings if the Court determined the exchange was unnecessary.²⁰² The introduction of these measures, though certainly far from perfect (after all, the market can still change a great deal in eight months), further demonstrates the CFI's goal of encouraging mergers to take place where possible.

Aside from the procedural measures the CFI has put in place to further the goal of implementing mergers, in each of the cases mentioned above, there are elements of the decisions that highlight the Court's desire to ultimately effectuate more mergers. For instance, in *Airtours*, the Court raised the bar of what the Commission needs to prove to prohibit a merger.²⁰³ This not only has the effect of curbing the Commission's powers in this area, but also of ensuring that fewer mergers will be prohibited from being implemented.²⁰⁴ Similarly, in *Schneider*, in ruling that rights of defense must be respected and enforced, the Court relied heavily on the fact that had *Schneider* been aware of the Commission's actual objections to the merger, it may have been able to propose solutions and alleviating factors that the Commission would have found acceptable, and therefore the parties would have been able to go forward with the merger.

The same is true for the Court's most recent *Schneider* ruling. By allowing *Schneider* to collect damages, the Court has imposed yet another reason for the Commission to pause and consider all of the implications of its decisions before prohibiting a merger. The net result is sure to be more mergers passing the Commission's scrutiny.

²⁰¹ VAN BAEL & BELLIS, *supra* note 2, at 1165.

²⁰² *Id.*

²⁰³ See *supra* notes 150-156.

²⁰⁴ See Kevin Guerrero, *A New "Convincing Evidence" Standard in European Merger Review*, 72 U. CIN. L. REV. 249, 282 (2003). The standard articulated by the CFI in *Airtours* will lead to more mergers not only because it requires the Commission to meet a higher burden of proof, but also because it gives parties to a potential merger more bargaining power:

Airtours and its "convincing evidence" standard will also give the Commission pause before prohibiting mergers or seeking unreasonable divestitures or other remedies without extensive and compelling proof of a merger's tendency toward collective dominance.

The *Airtours* decision may embolden corporations in the United States and elsewhere to refuse to cooperate with the Commission in favor of court proceedings, or, at the very least, give them more bargaining power in negotiations with the Commission. The decision could quite possibly lead to an improved market for mergers and acquisitions in Europe, especially for transactions previously considered too risky before a more hard-nosed Commission.

CONCLUSION: THE COMMISSION'S APPEAL TO THE COURT OF JUSTICE

On August 6, 2007, the Commission announced its intent to appeal the CFI's July 11, 2007 ruling to the European Court of Justice.²⁰⁵ In its appeal, the Commission will argue that Schneider's damage award should be overturned on the grounds that the CFI's 2002 determination that the Commission infringed upon Schneider's defense rights, which predicated the current suit, was not a "sufficiently serious breach" of its obligations.²⁰⁶

Although the Court of Justice has not yet ruled on the Commission's appeal, there are several compelling reasons for it to uphold the CFI's decision. First, as a procedural matter, the Court of Justice's standard of review is somewhat limited. The Court of Justice can only review a decision of the CFI in merger control on points of law, not factual determinations.²⁰⁷ Therefore, the Court of Justice will have to consider that Schneider's rights of defense were interfered with as a factual matter. This established as true, it is hard to imagine more serious non-contractual liability than an abrogation of a party's rights of defense.

Second, leaving the damage award in place will provide an important check on the Commission's control over merger regulation. As mentioned above, this is an area of the law where the Commission exercises exclusive control with its decisions reviewable only by the European tribunals. The Court of Justice should continue to limit the Commission's power, particularly in light of the increasingly intrusive investigations the Commission is now authorized to conduct under the 2004 Merger Regulation.

Third, the Court of Justice should not be concerned by the argument that by affirming the CFI's decision the floodgates of litigation will open and risk bankrupting the Commission. The CFI's holding was narrow. It pertains to Schneider's rights of defense specific to that case, which are unlikely to be repeated in any future Commission decision. This point is clearly illustrated by the outcome of Airtours' suit for damages.²⁰⁸ In that case, the CFI demonstrated that it was not willing to award damages as compensation for the Commission's errors when such errors did not rise to the level of non-contractual liability.²⁰⁹ The *Schneider* ruling is predicated on rights of defense, and therefore did not provide convincing precedent in Airtours' suit because that suit was based on the Commission failing to meet its burden of proof. The CFI

²⁰⁵ Press Release, European Commission, Commission to Appeal to Court of Justice Against Judgment of Court of First Instance in Case T-315/03 *Schneider Electric v. Commission* (Aug. 6, 2007), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1213>.

²⁰⁶ *Id.*

²⁰⁷ EC Treaty, *supra* note 22, art. 225 ("Decisions given by the Court of First Instance under this paragraph may be subject to a right of appeal to the Court of Justice on points of law only . . .").

²⁰⁸ See *supra* notes 160-162 and accompanying text.

²⁰⁹ *Id.*

did not consider failure to meet the burden of proof a serious breach of the Commission's obligations.²¹⁰ Furthermore, Airtours filed its suit for damages before the CFI ruled in *Schneider*, and thus it was not influenced by the *Schneider* outcome to file its own suit.²¹¹

Fourth, the increased penalty provisions of the 2004 Merger Regulation should put to rest any fears about bankrupting the Commission. By giving the Commission the ability to impose fines of up to one percent of an undertaking's "total turnover" of the previous year for a mere procedural violation in the review process, the 2004 Merger Regulation has provided the Commission with a new source of revenue. The Regulation also allows the Commission to collect as much as five percent of the previous year's daily turnover if the information is not provided in a timely manner, further increasing the Commission's revenue-generating opportunities.²¹²

Finally, the Court of Justice should continue to be guided by the goal of European competition merger law to encourage as many mergers as possible without infringing on consumer benefits. The Commission's infringement of rights of defense, such as those perpetrated by the Commission against *Schneider*, blocks mergers that may otherwise have been salvaged—often at a substantial cost to the parties involved. The Court of Justice should continue to bear in mind the original guiding principle of competition law to support mergers when possible so that Europe can create an economy to rival the United States and Japan.²¹³

The Community Courts have consistently limited the extent of the Commission's exclusive control over merger regulation. However, there are still further reforms needed, particularly in light of the Commission's strengthened investigative powers under the 2004 amendments to the Merger Regulation.²¹⁴ In the most recent *Schneider* case, the Court took another step in circumscribing the Commission's power, but there is still more work to be done. Concerns relating to the lack of attorney-client privilege for in-house counsel and the on-the-spot interrogation of company employees still need to be addressed. The Courts have contributed to limits on the Commission's power to block mergers, and in order for this to continue, the Court of Justice should uphold the CFI's damages award on appeal.

Stacey Corr[†]

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² See *supra* Part III.A.3.

²¹³ FOLSOM, *supra* note 3, at 329.

²¹⁴ See *supra* Part III.A.3.

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