



THE ONLINE MAGAZINE FOR GLOBAL COMPETITION POLICY

Non-contractual liability of the European
Community in competition matters:
The aftermath of the CFI judgment of
11 July 2007 in Case T-351/03,
Schneider v. Commission

Aitor Montesa Lloreda

Court of First Instance

Non-contractual liability of the European Community in competition matters: The aftermath of the CFI judgment of 11 July 2007 in Case T-351/03, *Schneider v. Commission*

Aitor Montesa Lloreda*

I. Introduction

A. The importance of the *Schneider III* judgment

The recent European Court of First Instance (CFI) judgment of July 11, 2007 in Case T-351/03, *Schneider v. Commission*,¹ is the first EC judgment to grant a company damages for the losses it had suffered as a result of an illegal Commission decision prohibiting a merger.²

The judgment has been drafted as if it were just applying previous jurisprudence in liability matters. However, it is anything but conservative. It indeed represents a major step in European case law. *Schneider III* has made real a possibility which was only theoretical before: that the Commission can be held responsible for damages caused by its wrongful decisions in competition matters. In order to reach this solution, the CFI has

* This paper is an English translation of an article written in Spanish and published in DERECHO DE LA COMPETENCIA EUROPEO Y ESPAÑOL, CURSO DE INICIACIÓN VIII (Dykinson ed., Luis Ortiz Blanco y Reyes Martín de las Mulas, Madrid 2008). The author is référendaire at the European Court of First Instance (CFI) and European civil servant, attached to the European Commission's Directorate for Competition. The views expressed are personal to the author.

¹ Case T-351/03, *Schneider Electric SA v. European Commission*, CFI judgment of 11 July 2007 (not yet published) [hereinafter *Schneider III*].

² However, the first case in which a company asked the CFI to grant it damages on the basis of a Commission's merger prohibition decision is Case T-212/03, *MyTravel Group plc v. European Commission* (decision pending).

subtly adopted an approach that differs from the approach of the two recent *Holcim* judgments.³ These two judgments are, however, repeatedly invoked by *Schneider III* as authority.

Schneider III will most probably boost many further claims from companies affected by illegal Commission decisions in the antitrust and merger control fields. *Schneider III* may therefore be perceived by the Commission—wrongly or not—as a heavy burden, particularly in the framework of its merger control activity. This activity has only become more complex since the first merger regulation was adopted in 1989.

B. Purpose of the paper

This paper intends to review the conditions that must be met for a Commission decision to engage the Community liability in competition matters. These conditions have been analyzed especially in the two *Holcim* judgments and, then, in *Schneider III*. Therefore, these three judgments will be studied in detail. The paper will focus on the somehow difficult relation among the three of them. The paper will try to examine systematically their commonalities and, as necessary, their contradictions. Last, the paper will conclude that EC liability can be only engaged in pathological cases. This conclusion should represent an additional incentive for the Commission to embrace self-discipline and high professional and legal standards. However it does not entail a serious risk to the Commission's functionality in competition matters, which are indeed some of the Commission's most fundamental and complex activities.

³ Case T-28/03, *Holcim AG v. European Commission*, 2005 E.C.R. II-1357 [hereinafter *Holcim I*], which, on appeal, gave rise to Case C-282/05 P, *Holcim AG v. European Commission*, ECJ judgment of 19 April 2007 (not yet published) [hereinafter *Holcim II*].

C. General review of the Community non-contractual liability

The second indent of Article 288 EC, 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 existence of such a mechanism, aimed at correcting the consequences of administrative malfunction, is a condition of the Rule of Law and it is inherent to the establishment of a European Union to which member states have conferred important parts of their sovereignty.⁴

The European institutions may harm private parties in many ways. This harm may occur in particular in the fields of action in which the institutions develop a constant activity and, especially, in those in which they have large legislative or decision making powers. Two of these fields of action are antitrust enforcement and merger control. The Commission has been granted large powers in these two areas. Such powers are intended to ensure that rules aimed at preserving free and healthy competition in the market are respected.⁵ These large powers may have a direct and strong effect on the rights of the individuals and, if they are used against the law, they can cause damages that the Community may be obliged to correct.

In spite of the fact that the Commission's action in the fields of antitrust and merger control is an area which, at first sight, seems well-placed to give rise to a large number of claims for damages, there is little case law on the subject. A reason for such

⁴ In this sense, *see* Conclusions of Advocate General Roemer of July 14, 1961 in joint cases 9 & 12/60, *Vloeberghs SA v. High Authority*, 1961 E.C.R. 391, at 447. *See also* D. SIMON, *LE SYSTÈME JURIDIQUE COMMUNAUTAIRE* 578 (2001).

⁵ This paper will not deal with the Commission's activity in the field of state aid control, which is very different in nature from the antitrust and merger fields.

scarcity of cases might be that, until now, EC courts have made a very restrictive interpretation of the set of conditions which must be fulfilled for EC liability to be engaged. These conditions are, according to a well-established case law, the unlawfulness of the conduct alleged against the institution, the fact of damage, and the existence of a causal link between the conduct in question and the damage complained of.⁶ It is useful to analyze briefly each of these conditions before examining how they have been applied by the two *Holcim* judgments and *Schneider III*.

1. The unlawfulness of the conduct alleged against the institution

Article 288 EC does not specify what kind of conduct from a European institution can engage the liability of the Community. The text of this provision permits two interpretations. First, it could be admitted that any conduct having generated a damage that an individual is not obliged to bear might force the Community to make it good. This option would amount to admitting that EC liability can be engaged even if there is no fault or negligence on the Community's side. Second, it would be conceivable to make the grant of damages subject to a finding that the conduct complained of is illegal. The European courts, since very early, without excluding formally that the first interpretation could be valid in exceptional cases (and which so far have not taken place),⁷ have traditionally required that the harmful conduct be contrary to the law. This choice seems

⁶ Case 26/81, *SA Oleifici Mediterranei v. CEE*, 1982 E.C.R. 3057 [hereinafter *Oleifici*], at § 16 and Case T-336/94, *Efisol v. Commission*, 1996 E.C.R. II-1343, at § 30.

⁷ EC courts consider that in the event of the principle of Community liability for a lawful act being recognized in Community law, a precondition for such liability would in any event be the existence of "unusual" and "special damage" suffered by an individual. *See* Joint cases 9/71 & 11/71, *Compagnie d'approvisionnement & Grands Moulins de Paris v. European Commission*, 1972 E.C.R. 391, at §§ 45 & 46; Case 59/83, *Biovilac v. EEC*, 1984 E.C.R. 4057, at § 28; Case 267/82, *Développement SA & Clemessy v. European Commission*, 1986 E.C.R. 1907, at § 33, Case 81/86, *De Boer Buizen & Consejo v. European Commission*, 1987 E.C.R. 3677, at §§ 16 & 17; and Case C-237/98 P, *Dorsch Consult Ingenieuresellschaft contra Consejo v. European Commission*, 2000 E.C.R. I-04549, at § 18.

to favor administrative efficiency against the warranty that individuals will not be unfairly harmed by the Community.

But the case law does not only require that the person asking for damages prove that the European institution at stake has made something illegal. It also requires that the reason why such conduct is illegal be that it infringes a rule of law intended to confer rights on individuals and that the breach of that rule is sufficiently serious.⁸

A great deal of the complexity of liability litigation stems from the notion of “sufficiently serious” breach of a rule of law, which remains quite a vague concept after 50 years of case law. The European Court of Justice’s (ECJ) approach in this respect takes into account, among other elements, the complexity of the situation to be regulated, the difficulties in the application or interpretation of the texts, and more particularly, the margin of discretion available to the author of the act in question. However, 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 the institution in question has only considerably reduced, or even no, discretion, the mere infringement of Community law may amount to a sufficiently serious breach and, in that regard, the general or individual nature of the measure taken by the

⁸ This condition results particularly from Case C-352/98 P, *Bergaderm & Goupil v. Commission*, 2000 E.C.R. I-05291 A [hereinafter *Bergaderm*], at §§ 41 & 42. The ECJ reminded that the conditions under which the state may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances, since the protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage. Accordingly the ECJ held that 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 serious; and there must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties.

institution at stake is not a decisive criterion for identifying the limits of the discretion it enjoyed.⁹

2. The fact of damage and the existence of a causal link between the conduct in question and the damage complained of

It should be emphasized that the Community can only be obliged to repair the harm of a legitimate subjective right. The reparable harm includes the real damage suffered and the lost profit. The latter, though, must be demonstrated under strict conditions.¹⁰

In addition, the Community can only be held responsible for the damages that are directly drawn from the illegal conduct of the institution at stake.¹¹ This excludes reparation in cases where the damage has been caused by several authors and in cases where the victim is partially responsible of its own damage, as far of the part attributable to this party is concerned.¹²

II. A first practical application of the principles of Community liability in competition matters: The *Holcim* judgments

The facts that gave rise to these landmark rulings can be summarized as follows: Holcim AG, a German company producing construction materials, was created in 1997 as a result of a merger between two companies. These two companies had been considered

⁹ *Bergaderm*, *id.* at §§ 40 & 42-44.

¹⁰ Case 74/74, *CNTA v. European Commission*, 1975 E.C.R. 533.

¹¹ Joint cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 & 45/79, *Dumortier et al. v. Council*, 1979 E.C.R. 3091, at § 21 and Case T-333/01, *Meyer v. European Commission*, 2003 E.C.R. II-117, at § 32.

¹² In this sense, *see Oleifici*, *supra* note 6.

responsible of a breach of Article 81 EC by the so-called *Cement* decision.¹³ Accordingly, each of them had been condemned to pay a fine. Each of these two companies lodged an appeal against the *Cement* decision and decided to make use of a possibility granted to them by the Commission consisting on providing a bank guarantee as security for payment of the fine until such time as a judgment had been pronounced. The two guarantees were subject to a yearly fee the total cost of which was EUR 139,002.21.

In its judgment of March 15, 2000, *Cimenteries CBR and others v. Commission*, better known as the *Cement* judgment,¹⁴ the CFI annulled the *Cement* decision in so far as Holcim's predecessors were concerned and condemned the Commission to pay the costs. Then, Holcim's predecessors asked the Commission to reimburse the costs that they had to incur in order to constitute the two bank guarantees. The Commission refused to pay this sum on the grounds that the possibility to suspend the payment of the fine by constituting a bank guarantee had been just an option, and not an obligation, for the two companies. Accordingly, Holcim, as the successor of the two concerned companies, lodged an action for damages before the CFI.

The CFI was confronted with an interesting dilemma. It was clear that the Commission's condemnation of Holcim's predecessors was illegal, as the *Cement* judgment had concluded. It was also clear that Holcim's predecessors would not have constituted a bank guarantee if the Commission had not illegally imposed a fine on them.

¹³ Commission Decision 94/815/EC of 30 November 1994, relating to a proceeding under Article 85 EC in Cases IV/33.126 & 33.322, *Cement v. European Commission*, 1994 O.J. (L 343) 1.

¹⁴ Joint cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 & T-104/95, *CBR et al. v. European Commission*, 2000 E.C.R. II-491.

In those conditions, it would not appear too bold to consider that the Community should make good the damaged caused (i.e., the fees paid as a result of the constitution of the guarantee). However, the CFI could not disregard the fact that the Commission's activity in competition matters is a very complex task, often requiring difficult analyses which are open to several interpretations and a very complicated management of thousands of documents from which one should draw conclusions that are seldom self-evident. If any mistake on the Commission's side could engage an obligation of reparation—beyond the reimbursement of the unduly imposed fine and the corresponding legal interests—the very functioning of the institution at stake would be at great risk of practical paralysis.

It was probably on this basis that the CFI analyzed the unlawfulness of the Commission's conduct complained of. The CFI reminded that the *Cement* judgment had concluded that there was insufficient evidence to hold Holcim's predecessors responsible of the single violation of competition law that the *Cement* decision had attributed to them. The truth is that the *Cement* decision had correctly distinguished other breaches of competition law committed by a number of companies, but Holcim's predecessors had not been found responsible for any of these breaches.

The CFI considered that the classification of the conduct of the undertakings concerned as constituting or not constituting an infringement for the purposes of Article 81(1) EC fell within the scope of the simple application of the law on the basis of the elements of fact available to the Commission¹⁵ (i.e., an exercise of evidence appraisal).

¹⁵ *Holcim I*, *supra* note 3, at § 99.

The CFI's conclusion was indeed a simple one. In the absence of evidence against Holcim's predecessors, the Commission had no other choice than to exonerate them.

Accordingly, the CFI considered that, in those circumstances, the unlawfulness established in the Cement judgment (i.e., the wrong appraisal of the “insufficient” evidence against Holcim's predecessors), could amount in itself to a sufficiently serious breach of a rule of law in the sense of the *Bergaderm* judgment.

Should the CFI have stopped its reasoning there, it would have probably concluded that the illegality committed by the Commission was enough to engage the Community liability. However the CFI went a step further, perhaps considering that the traditional test for a sufficiently serious breach of a rule of law was not appropriate to review the Commission's activity in competition matters.

The CFI recalled that the system of rules which the ECJ has worked out with regard to non-contractual liability on the part of the Community must also induce the Community judicature to take into account, in addition to the discretion enjoyed by the institution concerned, in particular, the complexity of the situations to be regulated and also the difficulties in the application or interpretation of the texts.¹⁶ The CFI had thus identified a path that was worth exploring. It then decided to check to which point the situations that had to be regulated in the case having given rise to the *Cement* decision were complex. This could have an effect on the classification of the Commission's conduct as a serious breach of rule of law.

¹⁶ *Id.* at § 101.

The CFI's "complexity appraisal" was made on the basis of all elements relevant to the context of the *Cement* decision. In the first place, the CFI observed that the relevant Commission's procedure had lasted more than three years and affected national and international associations, many companies based in other countries, and most EC cement firms. The Commission was therefore obliged to retrieve a great deal of data.¹⁷ Secondly, the CFI took into account the structural complexity of the associations and agreements tackled by the *Cement* decision.¹⁸ Thirdly, the CFI noted that, as far as Holcim's predecessors were concerned, the Commission had to examine a very complex set of documentary evidence. The CFI observed in this respect that the *Cement* decision did not criticize the essential points of the Commission's case. The *Cement* decision had just contradicted the Commission's conclusions on a marginal part of the collusion that the *Cement* decision had identified. Furthermore, the *Cement* judgment had found that the Commission had information that Holcim's predecessors were implicated in a violation of Article 81 EC. The CFI found that it was just after a detailed analysis, and further to the parties' explanations, that the CFI could considered that information was insufficient to prove an infringement.¹⁹ Last, the CFI took account of the difficulties in applying the provisions of the EC Treaty in matters relating to cartels.²⁰

In the light of all of these elements, the CFI, without explaining the individual role that each of them should play, concluded that the case that had gave rise to the

¹⁷ *Id.* at § 103.

¹⁸ *Id.* at § 107.

¹⁹ *Id.* at §§ 108 & 113.

²⁰ *Id.* at § 115.

Cement decision was particularly complex.²¹ On those grounds, the CFI stated that the breach of Community law found in the *Cement* judgment concerning Holcim's predecessors was not sufficiently serious, which excluded the non-contractual liability of the Community.²²

With regard to this result, one could ask whether the CFI in *Holcim I* really considered whether the decisive criterion to find a sufficiently serious breach of Community law is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Rather, it seems that the CFI decided to give a greater importance to the complexity of the Commission's task. This point will be treated later in this paper, when analyzing the way the ECJ dealt with the issue on appeal.

Holcim I admits a second interpretation that, nonetheless, does not alter the essentials of the analysis above. This second interpretation is that the complexity of the Commission's task must not be assessed after analyzing the limits to the Commission's discretion, or in parallel to this, but at the same time. The complexity of the Commission's task would then be taken into account when appraising whether the Commission manifestly and gravely disregarded the limits on its discretion in a given case. The result would in any case be the same.

It is clear, in any event, that in the CFI's reasoning the complexity of the Commission's task is basically to identify a sufficiently serious breach. Nonetheless, in *Holcim I*, the CFI preferred to strengthen its judgment by concluding also that there was no causal link between the Commission's unlawful conduct and Holcim's alleged damage.

²¹ *Id.* at § 114.

²² *Id.* at §§ 116 & 118.

The CFI recalled that an undertaking which brings an action against a Commission decision imposing a fine on it has two possibilities. On the one hand, it can pay the fine on its becoming payable—together with default interest, should any such interest have accrued—and, eventually, apply for suspension of operation of the decision. On the other hand, if the Commission so allows, it can provide a bank guarantee as security for payment of the fine and default interest, in accordance with the conditions laid down by the Commission. The CFI concluded that, in those circumstances, the bank guarantee charges that Holcim's predecessors had to pay were not the direct consequence of the unlawfulness of the *Cement* decision, but the consequence of their own choice not to comply with the obligation to pay the fine within the period prescribed by the *Cement* decision by providing a bank guarantee. This conclusion excluded the existence of a causal link between the damage and the illegality committed.²³

It is worth noting that, in order to reach the conclusion above, the CFI dismissed Holcim's argument that the *Corus U.K. v. Commission* judgment²⁴ applied to the case at stake and that it required that Holcim were reimbursed the costs of the bank guarantee. That had been a clever argument put forward by Holcim's lawyers. In *Corus U.K. v. Commission*, the CFI had held that when the Commission has to reimburse a company the amount of a fine which was illegally imposed on it, it must also pay the company the default interests for the time it unduly disposed of the fine. Moreover, the CFI had rejected expressly that the fact that the company was deprived of the sum of the fine during that time was the result of its own decision to pay the fine instead of providing a

²³ *Id.* at §§ 122-24.

²⁴ Case T-171/99, *Corus UK v. Commission*, 2001 E.C.R. II-2967.

bank guarantee.²⁵ However, in *Holcim I* the CFI considered that the situation at stake was different from that of *Corus U.K. v. Commission*. The CFI emphasized that in *Corus U.K. v. Commission*, the CFI had concluded that the Commission had to pay default interests for the money which it illegally owned on the basis of the general principle of EC law prohibiting undue enrichment. However the Commission's failure to assume responsibility for the charges incurred in providing a bank guarantee did not entail, in the case at stake, any undue enrichment of the Community, since the bank guarantee charges were paid not to the Community but to a third party. Furthermore, the CFI held that if the Commission were to assume responsibility for those charges, *Holcim* would be placed in the situation in which it was before the contested decision, but at the prize that the Commission would be penalized by having to reimburse sums of which it did not have the benefit.²⁶

It is true that the underlying reasoning of *Corus U.K. v. Commission* was not fully applicable to the case having given rise to *Holcim I*. Nonetheless, from a material justice point of view, the solution regarding this point does not seem very solid. If a company has the legal right to constitute a bank guarantee in order to avoid the payment of a fine that should have never been imposed, then it seems difficult to defend that that very company should bear the financial burden of the bank guarantee at stake when, should it have paid the fine, it would have been reimbursed all eventual default interests.

Holcim I was perceived by the business community as a very restrictive judgment. The CFI was thought to be more sympathetic to the Commission's needs, as an

²⁵ *Id.* at § 57.

²⁶ *Holcim I*, *supra* note 3, at § 130.

administration devoted to a difficult task, than to the worries of companies facing the important powers of the Commission. The judgment, however, was hailed by the legal literature as the pragmatic solution that competition law needed.²⁷

Holcim was of course not pleased with this judgment and decided to lodge an appeal before the ECJ. The ECJ had thus the opportunity to express its views on the two very complex issues tackled by *Holcim I* (i.e., the characterization of the Commission's infringement as a sufficiently serious breach of a rule of law and the assessment concerning the existence of a causal link). However the ECJ decided to analyze only the first issue.

The ECJ held that the CFI was right in taking into account, in order to assess whether the Commission had committed a sufficiently serious breach of Community law, not only the Commission's discretion, but also the complexity of the facts and the difficulties in applying Community law.²⁸ Besides, the ECJ stated that the appraisal of such complexity is a matter of fact which is for the CFI alone to determine and may be discussed in the context of an appeal only where there has been distortion, which was not alleged in this case.²⁹

Accordingly, the ECJ concluded that Holcim had not been able to show that the CFI erred in law by holding that, in the case at stake, there was not a sufficiently serious breach of Community law, a breach which alone could have given rise to the non-contractual liability of the Community. As a result, in light of the cumulative nature of

²⁷ In this sense, see D. GERADIN & N. PETIT, DROIT DE LA CONCURRENCE ET RECOURS EN ANNULATION À L'ÈRE POST MODERNIZATION 31-32 (The Global Competition Law Centre, Working Papers Series 06/05, 2005), available at <http://www.coleurop.be/content/gclc/documents/GCLC%20WP%2006-05.pdf>.

²⁸ *Holcim II*, *supra* note 3, at § 51.

²⁹ *Id.* at §§ 53-55.

the conditions governing that liability, the ECJ held that that consideration sufficed to dismiss the appeal without having to rule on the plea in law relating to the existence of a causal link between the conduct of which the Commission was accused and the alleged damage, which arguably was the less convincing part of *Holcim I*.

A careful reading of *Holcim II* seems to confirm that the key factor in deciding whether a Commission's breach of a rule of law is capable to engage the Community liability is no longer whether the Commission has manifestly and gravely disregarded the limits on its discretion. Indeed in the absence of convincing evidence, the Commission has no discretion at all to hold a company responsible for a competition law infringement. The key factor would then be whether the Commission had incurred a "justifiable" mistake, in the light of the circumstances of the case and taking into account the complexity of the application of the rules at stake. Commission mistakes would then be classifiable in two categories: those that can be justified and those that cannot. And according to the standard applied in the *Holcim* judgments, one could anticipate that most Commission mistakes would belong to the first category.

It could even be held that the European courts believe that the Commission's activity in competition matters requires a special treatment in so far as the determination of Community liability is concerned.³⁰ Nonetheless, there are reasons to argue that the *Holcim* test also applies to matters other than competition. For instance, in a case concerning a claim for damages in which the allegedly illegal conduct of the Commission was the adoption of an administrative decision in an area of the common agricultural

³⁰ In this sense, see D. GERADIN & N. PETIT, *supra* note 27, at 31.

policy where the Commission's margin of discretion was very small, the CFI held that, in order to appraise whether the Commission had committed a sufficiently serious breach of Community law, it was necessary “to examine [...] whether the Commission has [...] committed a mistake which would not have been committed in similar circumstances by an administrative authority exercising ordinary care and diligence.”³¹

III. The *Schneider III* judgment

Schneider III follows the tracks of the two *Holcim* judgments and those on which the two *Holcim* judgments were based. In spite of this, *Schneider III* comes to a very different conclusion. This was, partially, due to the fact that the infringement committed by the Commission which was analyzed in *Schneider III* was very different in nature from the infringement committed by the Commission which was analyzed in *Holcim*. However, that element cannot explain by itself the solution adopted by *Schneider III* and one must therefore conclude that the CFI has subtly decided to follow a different approach in this judgment.

It is good, again, to remind the facts of this case. Schneider Electric and Legrand were, at the time, two major French industrial groups. Schneider was mainly active in three markets: power distribution, industrial control, and automation. Legrand was active in the market of electric equipments for low tension installations. Both companies agreed that Schneider was to take over Legrand through a public exchange share offer. On January 12, 2001, both companies signed a letter stating that the President of Legrand's Administration Council would be personally involved in all negotiations with the

³¹ Joint cases T-198/95, T-171/96, T-230/97, T-174/98 & T-225/99, *Comafrika & Dole Fresh v. European Commission*, 2001 E.C.R. II-01975 [hereinafter *Comafrika*], at § 138.

Commission and would have to agree to all commitments that could affect Legrand. The deal was formally notified to the Commission on February 16, 2001.

On August 3, 2001, the Commission sent Schneider a Statement of Objections (SO). The SO held that the takeover would create or reinforce a dominant position in a number of product markets. Schneider proposed several corrective measures—especially disinvestments—intended to meet and solve the Commission fears.

In August 2001, Schneider acquired 98 percent of Legrand's shares. It decided not wait for the Commission to finalize its merger assessment—as it was allowed by the rules then in force, even if it was unable to exercise its voting rights in the absence of a formal decision.

On October 10, 2001, the Commission took a decision forbidding the merger.³² It came to the conclusion that the merger could significantly impede effective competition in a number of French product markets as well as in a large number of product markets of different Member States. By means of a second decision of January 30, 2002, the Commission ordered Schneider to sell its shares in Legrand.³³

Schneider lodged an appeal before the CFI against each of these decisions and asked the CFI to adjudicate under the expedited procedure in accordance to Article 76(a) of the Rules of Procedure of the CFI. This request was granted. In relation to the second appeal, Schneider asked the CFI to take an interim measure suspending the Decision

³² Commission Decision 2004/275/CE in Case COMP/M.2283, Schneider-Legrand, 2004 O.J. (L 101) 1 [hereinafter *Prohibition Decision*].

³³ Order of the Commission dated 30 January 2002 in Case COMP/M.2283, Schneider-Legrand, 2004 O.J. (L 101) 1 [hereinafter *Decision ordering separation*].

ordering separation.³⁴ Such request was withdrawn on May 8, 2002, after the Commission prorogued Schneider's deadline to sell its shares in Legrand until February 5, 2003.

In spite of that, Schneider decided to be cautious and prepare Legrand's sale in anticipation of a possible reject of its appeals. On July 26, 2002, it concluded a sale agreement with the partnership Wendel/KKR. It was agreed that the sale would be implemented on December 10, 2002, at the latest.

In its judgment of October 22, 2002,³⁵ the CFI annulled the Prohibition Decision. Accordingly, the CFI also annulled the Decision ordering separation,³⁶ which could not be understood in the absence of the first one.

In substance, the CFI based its first judgment in two elements. First, it concluded that the Commission's analysis of the impact of the merger on the non-French markets was insufficient and contradictory. The CFI held that the Commission's analysis was vitiated by serious mistakes, omissions, and contradictions.³⁷ Second, the CFI concluded that the Commission had infringed Schneider's rights of defense in relation to its objections concerning the French product markets.

In this regard, the CFI stated that a prohibition decision did not need to be a copy of the SO. The CFI emphasized, though, that the SO must be clear enough so that the companies at stake are in possession of all relevant data for their defense before the

³⁴ Case T-77/02, *Schneider Electric SA v. European Commission*, 2002 E.C.R. II-4201 [hereinafter *Schneider II*]

³⁵ Case T-310/01, *Schneider Electric SA v. European Commission*, 2002 E.C.R. II-4071 [hereinafter *Schneider I*].

³⁶ See *Schneider II*, *supra* note 34.

³⁷ *Schneider I*, *supra* note 35, at § 404.

Commission takes a final decision.³⁸ The CFI highlighted that, in merger control procedures, the SO must let the notifying parties propose sufficient commitments, particularly proposals of disinvestments, in due time. But this statement requires some further explanation. In the CFI's view, the companies involved must be in a position to assess soon enough, given the time constraints of a merger procedure, to what extent commitments are needed in order to obtain an authorization.³⁹ The CFI stated that the respect of this requirement is particularly important whenever the Commission must conduct a prospective analysis such as that of a merger control procedure.⁴⁰

The CFI held that the SO had not explained clearly enough the way that the merger would have reinforced Schneider's position in a number of French product markets. The SO had indeed identified how Schneider's position would be strengthened in the markets where Schneider was already dominant. This would happen as a result of Schneider acquisition of Legrand's market share, that was Schneider's main, if not sole, competitor in those markets. In some other French product markets it was Legrand who was dominant and Schneider was its main competitor. Accordingly, the SO explained that, in those cases, it was Legrand's dominant position which would be reinforced as a result of the merger. But those were all the objections the SO contained. For that reason Schneider had proposed a commitment that in each product market in which it could be dominant, the merged entity would sell the activities of the weakest company, regardless of whether it was Schneider or Legrand.

³⁸ *Id.* at § 440.

³⁹ *Id.* at § 442.

⁴⁰ *Id.* at § 443.

The Prohibition Decision, however, considered that the above commitment could not solve the competition concerns identified in the SO. The reason for this conclusion was that the reinforcement of Schneider's dominant position was not just drawn from the mere addition of the market shares of Schneider and Legrand, but from the fact that before the merger, there was one company—Schneider—which was dominant in most French product markets and a second company—Legrand—which was dominant in the rest. However, as a result of the merger, even after the disinvestments proposed, one single company would be dominant in all relevant French product markets. This fact would, in the Commission's view, reinforce greatly the bargaining power of the merged entity with respect to its French clients, which were forced to buy simultaneously in all relevant product markets. The CFI concluded that the SO had not made any reference to this new way in which the two companies' dominant position would be reinforced as a result of the merger. In the CFI's view, this omission prevented Schneider from assessing properly the competition concerns that the notified merger raised in the Commission's opinion and from proposing adequate commitments. The CFI therefore concluded that Schneider's rights of defense had not been respected.⁴¹

The merger control procedure was reopened by the Commission after these two annulments. This new proceeding came to an end on December 13, 2002. The Commission still had persistent doubts regarding the ability of Schneider's commitments to make the merger compatible with the Common market. In view of that, Schneider lost any hope of having the deal authorized and decided to renounce to its acquisition. For

⁴¹ *Id.* at §§ 452 & 453.

that reason, on December 10, 2002, it decided to implement the sale agreement that it had concluded with Wendel/KKR.

It was at that point in time that Schneider decided to lodge a claim for damages before the CFI on the basis that the unlawful Prohibition Decision had inflicted serious damages upon it. In this sense, Schneider alleged that the Commission had committed two sufficiently serious infringements of a rule of law. Schneider held that the CFI itself had identified these two infringements in *Schneider I*. The first infringement was the fact that the Commission had carried out a deficient analysis of the effects that the merger would have in the non-French markets. The second infringement was, according to Schneider, the violation of its rights of defense in relation to the different French product markets. In addition, Schneider held that the Commission's behavior after the Prohibition Decision had reinforced the effect of the two previous infringements and therefore increased the damage it had suffered. In particular, Schneider blamed the Commission for having violated its right to be heard by an impartial authority, for not having correctly applied *Schneider I*, for having violated again its rights of defense, for having capriciously imposed as strict deadline for the separation of Schneider and Legrand, and for having used the tensions and disagreements which arose between Schneider and Legrand arbitrarily against Schneider after the first two decisions.

As for the damage and the casual link, Schneider held, in substance, that the only reason why the merger had not been possible was the two infringements on the Commission's side. It argued that this fact made Legrand lose substantial market value and prevented all synergies between the two companies from taking place.

In its judgment, the CFI quoted *Holcim II* to support its argument that 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.⁴² In a new quotation of *Holcim II*, the CFI emphasized that under the EC system of rules with regard to non-contractual liability on the part of the Community, EC courts must also take into account the complexity of the situations to be regulated.⁴³ The CFI made two additional remarks. On the one hand, it stated that a sufficiently serious breach can result from a breach of the general duty of diligence; it held that the rare *Grifoni* judgment⁴⁴ was an authority in this sense. On the other hand, the CFI held that a sufficiently serious breach can also result from a wrong application of the relevant substantive or procedural rules.⁴⁵

On these grounds, the CFI made a useful declaration of principles. It held that the Commission's ability to control mergers effectively in Europe would be seriously jeopardized if the concept of a sufficiently serious breach extended to all errors which, even being important, are not rare, because of their nature, to the usual behavior of an institution which must enforce competition rules, these rules being complex and subject to a large margin of discretion.⁴⁶ Perhaps this was the CFI's final interpretation of the test

⁴² *Schneider III*, *supra* note 1, at § 115.

⁴³ *Id.* at § 116.

⁴⁴ Case C-308/87, *Grifoni v. CEEA*, 1990 E.C.R. I-1203. The CFI's interpretation seems not to take into consideration that in the case that gave rise to *Grifoni*, the Commission had not just violated its duty to act in a diligent way, but had breached some very specific Italian rules in the field of security in the working place. It was this second breach which had, together with some other elements, the effect to cause an accident and injuries to an external worker in a building of the EURATOM placed in Ispra.

⁴⁵ *Schneider III*, *supra* note 1, at § 118.

⁴⁶ *Id.* at § 122.

that had been introduced by the two *Holcim* judgments and, even before, anticipated by *Comafrika and Dole Fresh v. Commission*.⁴⁷

The CFI stated in this respect that the breaches which, even regrettable, can be explained on the basis of the objective constraints that the Commission must bear cannot be considered as a sufficiently serious breach of EC law for liability purposes. The other side of the coin is that any mistake which cannot be justified in this way is capable of engaging the Community liability.⁴⁸ The CFI concluded that this thumb rule is a fair compromise between the large discretion of which the Commission must enjoy in the public interest and the protection of the individuals which are confronted with the consequences of inexcusable negligence and mistakes.⁴⁹

The CFI analyzed the infringements which Schneider reproached to the Commission in the light of the above principles. Regarding the fact that the Commission had committed several errors as far as its economic analysis was concerned, the CFI reminded that the Community liability is only engaged if the rule of law broken by the Commission grants rights to the individuals and it rejected that all rules which the Commission must respect in competition matters confer such rights.⁵⁰ In addition, the CFI pointed out that the complexity of the analysis that the Commission must carry out in this field of law can well explain the existence of errors, contradictions, and weak arguments. The CFI found that this was even more the case in merger control cases,

⁴⁷ *Comafrika*, *supra* note 31.

⁴⁸ *Schneider III*, *supra* note 1, at §§ 123 & 124.

⁴⁹ *Id.* at § 125.

⁵⁰ *Id.* at §§ 129-30.

which require a prospective analysis,⁵¹ and involve a larger discretion for the Commission.⁵²

Having said that, one could expect that the CFI was to assess whether the errors included in the Commission's economic analysis of the Prohibition Decision were of such a nature as to engage the Community liability. However, the CFI avoided that. It restricted its reasoning to a finding that the substantive errors identified in *Schneider I* had not had any impact in the Commission's finding that the merger was incompatible with the Common market. The CFI held that in the light of the facts of the case, the Commission could have not done anything but conclude that the merger would create a dominant position, at least, in the French product markets, which would suffice to hold that it was incompatible with the Common market.⁵³ Actually, if this part of the judgment is analyzed carefully, one discovers that the CFI is not so much making a statement about whether the Commission's mistakes were a sufficiently serious breach, but rather evaluating whether there was a causal link between the errors at stake and the alleged damages. This can create great confusion to an inattentive reader.

By means of an equally confusing, but still efficient method, the CFI rejected that the Commission's behavior subsequent to the Prohibition Decision, which was considered by *Schneider* to be illegal and to have increased its alleged damages, could constitute a sufficiently serious breach.

⁵¹ *Id.* at § 131.

⁵² *Id.* at § 132.

⁵³ *Id.* at §§ 134 & 135.

First, the CFI considered that Schneider had not proved that the Commission had decided to ratify its opposition to the merger before discussing any commitments in the framework of the second merger procedure.⁵⁴ It also held that, contrary to Schneider's view, the Commission could entrust the same case team with the second merger procedure.⁵⁵ Second, the CFI did not accept that the Commission had been too rigid as far as the conditions of separation of Schneider and Legrand were concerned. The CFI emphasized in this sense that such conditions were widely left to Schneider's will. Besides, Schneider was granted a sufficient deadline to implement the Decision ordering separation. In addition, that deadline was prorogued twice (i.e., every time that Schneider asked for it).⁵⁶

The CFI did not accept either Schneider's claim that the Commission had taken any undue profit from the disagreements arose between the merging parties.⁵⁷ It also rejected Schneider's argument that the Commission had abandoned its exclusive competence to control mergers by disregarding some of Schneider's commitments on the grounds that they were not accepted by Legrand. The CFI took into account that Legrand's agreement was necessary by virtue of a private contract according to the interpretation of a French court.⁵⁸

The CFI also rejected Schneider's claim that the Commission had not implemented *Schneider I* in good faith. The CFI found that the Commission had reopened

⁵⁴ *Id.* at § 168.

⁵⁵ *Id.* at §§ 185-86.

⁵⁶ *Id.* at §§ 202, 203 & 206.

⁵⁷ *Id.* at § 217.

⁵⁸ *Id.* at §§ 221-23.

the case, taking into account that the existence of serious competition concerns with regard to the French product markets had been expressly accepted by the *Schneider I* judgment.⁵⁹ Finally, the CFI did not agree that there had been a new violation of Schneider's rights of defense,⁶⁰ nor a wrong, disloyal, or discriminatory assessment of the new commitments proposed, particularly taking into account the great size that the merged entity would have reached in the French markets.⁶¹

In fact, the only sufficiently serious breach which the CFI found to exist was the violation of Schneider's rights of defense which had been identified in *Schneider I* and which had prevented Schneider from having any possibility of obtaining an authorization decision.⁶² This is, arguably, one of the most groundbreaking and controversial parts of the judgment.

Here, the CFI decided to make some further pedagogy on the role of an SO in a merger control proceeding. The CFI recalled that there is an absolute need that the final decision be completely coherent with the SO, this being a guarantee that the companies involved be able to react against the Commission's competition concerns, whether contesting them or proposing corrective measures. The CFI held that the right to be heard on those terms is a rule of law which confers rights on the individuals.⁶³

Next, the CFI explained that such a rule of law had been violated by the Commission since the SO was drafted in a way which did not let Schneider know that,

⁵⁹ In particular, *see id.* at § 236.

⁶⁰ *Id.* at §§ 239-42.

⁶¹ *Id.* at §§ 252-54.

⁶² *Id.* at § 139.

⁶³ *Id.* at §§ 145-51.

should it not propose commitments that made disappear any juxtaposition between its activities and those of Legrand's in the French product markets, it would not have a chance to have its deal authorized.⁶⁴ This explanation is a repetition of the finding that the CFI already made in *Schneider I*.

After that, the CFI broke ground in a surprisingly concise manner. It was in just two isolated points of a very difficult comprehension. The CFI concluded that, in this case, the violation of the right to be heard was a sufficient serious breach and, accordingly, it was of such a nature as to engage the Community liability. The only reason supporting this conclusion was that the violation of Schneider's right of defense could not be justified in this case on the basis of the specific conditions under which the Commission must work in matters relating to merger control.⁶⁵ This statement, in the absence of further explanations, seems to require some complicity from the reader before it can be accepted. The CFI tried to make it more convincing by contesting some of the arguments of the Commission's defense. The Commission had held that it deserved a lenient treatment because, in merger control matters, it was subject to a two-fold and difficult obligation. It had to make a very complex economic and legal assessment and it had to respect a strict and short deadline. However the CFI considered that these circumstances had little to do with the breach at stake. The CFI said that this breach was not an error of assessment, but a procedural flaw which had undermined Schneider's rights of defense. Besides, the CFI held that the breach at stake could have been avoided without any special difficulties. It held that preventing this error would not have required

⁶⁴ *Id.* at §§ 152 & 153.

⁶⁵ *Id.* at § 154.

any supplementary assessment which was beyond the Commission's reach for time reasons. The CFI finally stated that the breach at stake could not be attributed to a drafting error which could be compensated by an overall examination of the SO.⁶⁶

It is worth noting the succinct nature of the CFI's reasoning in this respect in comparison to the equivalent parts of the two *Holcim* judgments. These judgments had devoted considerable energy to assessing in depth the context in which an antitrust investigation is developed. It seems clear that the obstacles which the Commission must face in a merger control procedure are no less important than those which it must face in an antitrust procedure such as that at stake in *Holcim*. Besides, in the case at stake in *Holcim*, the Commission was not obliged to respect a strict deadline. It was not forced to make a prospective analysis either. Therefore, it can be questioned whether the CFI was not applying in this part of *Schneider III*, a standard different from that applied in the two *Holcim* judgments. This new standard could appear to give a lesser importance to the complexity of the Commission's task when verifying whether one of its mistakes is unjustifiable or not.

There is, however, an alternative point that may reconcile *Schneider III* and the two *Holcim* judgments. A possible solution would be to consider that the complexity of the Commission's work is less important when the mistakes that the EC courts need to qualify as justifiable or unjustifiable are procedural mistakes or, at least, breaches of the rights of defense. If this were the case, the Commission would have more reasons to fear its procedural shortfalls than its errors of assessment, which would engage the

⁶⁶ *Id.* at § 155.

Community liability in a smaller number of cases. That could actually be the correct interpretation of the *Schneider III* judgment.

If subsequent court cases adopted the above position, there would be a number of positive consequences. In particular, the Commission would be encouraged to conduct its competition cases under the strictest aspects of the law and under the concept of due process. However, it would be neither very fair nor realistic to be more demanding with the Commission in procedural matters than in substantive matters.

It does not seem wrong to hold that competition decisions are as complex from the procedural point of view than from the substantive point of view. In order to argue that competition cases are very complex for the Commission, the EC courts held *inter alia* in the two *Holcim* judgments that proving the existence of a cartel requires managing a huge number of data and documents. But, before adopting a merger prohibition decision, the Commission must carry out a number of procedural steps which do not require a less intense management of data and documents. This is particularly true in two instances. In the first instance, the Commission must conduct under important time constraints a complex exercise to access the files of the companies involved in the procedure. In most cases, this exercise cannot be carried out without previously undergoing a decision on a number of confidentially claims made by the companies which have submitted comments on the notified merger.

The second instance is the drafting of the SO. This document must contain, as *Schneider I* reminds, all necessary elements so that its addressees can properly prepare their defense, which is often not such a self-evident set of elements. In this sense it is

good to remember that Article 18 of the merger regulation, which was in force at the time of the procedure which was analyzed in *Schneider I*, states only that, before taking certain decisions, among which is the decision to prohibit a merger, the Commission must give the companies involved the opportunity of making known their views on the objections against them at every stage of the procedure up to the consultation of the Advisory Committee. It also states that the Commission shall base its decision only on objections on which the parties have been able to submit their observations. It may be possible to conclude from this obligation, as *Schneider I* does in quite a revolutionary manner, that the SO must include all information that the company involved needs in order to propose sufficient corrective measures. However, it seems difficult to argue that any mistake in this sense is unjustifiable, particularly if one takes into account that corrective measures might be extremely diverse in nature.

In a second stage, the CFI verified whether Schneider had proved that it had suffered damages as a result of the Commission's breach. The damage, which was mainly alleged by Schneider, was the financial loss from the sale of Legrand at a lower price than the price which Schneider had originally paid. The CFI pointed out that, in general, the damage to be imputed to the Commission cannot be drawn from a comparison between the situation created by the—illegal—prohibition decision and the situation which could have resulted from an authorization. The CFI held that it is necessary to analyze the real impact that the breach had.⁶⁷ In this respect, the CFI emphasized that the fact that, in *Schneider I*, it had found that the Commission had committed a violation

⁶⁷ *Id.* at 267-68.

which entailed that the Prohibition Decision should be annulled, did not necessarily mean that in the absence of such violation the merger would have been authorized.⁶⁸ Accordingly, the CFI held that it would not be sensible that any financial consequence Schneider incurred as a result of the failure of the operation be considered damages attributable to the Community.⁶⁹

The CFI recognized, though, that in the absence of the Commission's violation, Schneider would have had a serious chance to obtain an authorization. However, the CFI rejected that the loss of such opportunity should be repaired. The reason for this was that, according to the CFI, an authorization would have required disinvestments which were very difficult to evaluate. Accordingly, the CFI stated that it would be impossible to compare the situation resulting from the prohibition with the situation that would have taken place if those disinvestments had occurred.⁷⁰ In application of this strict test, the CFI concluded that there was no casual link between the alleged conduct and the violation attributable to the Commission. As a result, the CFI held that any reparation for the depreciation of Legrand's shares or for the impossibility to enjoy expected synergies, should be excluded.⁷¹ It is an open question whether a test like this one is not a test about the existence of the alleged damages but rather a test about the existence of a casual link between such damages and the violation at stake.

In any case, the CFI found that there was a link between the Commission's breach and the two damage claims invoked by Schneider in the alternative. These two damage

⁶⁸ *Id.* at § 269.

⁶⁹ *Id.* at § 278.

⁷⁰ *Id.* at §§ 279-85.

⁷¹ *Id.* at §§ 286 & 287.

claims were, on one hand, the costs which Schneider had to pay because of the opening of the second assessment of its merger and, on the other hand, the reduction of the value of Legrand to which it had to agree in its negotiations with Wendel/KKR in order to retain the option not to implement the sale should the Commission finally authorize the merger.

The judgment is clear and convincing concerning the first set of costs. The CFI concluded that if the Commission had not committed the identified violation, then the procedure would have come to an end by means of an authorization decision or by means of a prohibition decision. In both cases, it would not have been necessary to carry out a new assessment of the merger nor to incur any additional costs. It was for this reason that the CFI concluded that the Commission should reimburse these costs.⁷²

The judgment seems more complex and contestable with regard to the second set of costs—the amount of which is probably much more substantial than that of the first set of costs. The CFI considered that the agreement for the sale of Legrand was directly drawn from the Prohibition Decision. It also considered that Schneider was forced to conclude the sale agreement before knowing the result of the *Schneider I* judgment since, should this judgment be contrary to Schneider's interests, it would have had to sell Legrand within a very short deadline. In the CFI's view, this circumstance would have jeopardized Schneider's bargaining position and could have had an effect on the price finally obtained. For this reasons, the CFI concluded that Schneider had been forced to prepare the sale of Legrand while retaining the possibility not to implement that sale.⁷³

⁷² *Id.* at §§ 299-302.

⁷³ *Id.* at §§ 304-06.

The CFI observed that Schneider did not retain that possibility for free. On the contrary, it had to offer Legrand's acquirer an important discount in Legrand's price. The CFI concluded that this discount was sufficiently linked to the violation committed by the Commission.⁷⁴

As far as the damages are concerned, *Schneider III* was drafted on the assumption that the harm alleged was real. This seems a logical course of action since the existence of the two sets of costs alleged was notorious. In order to assess the amount of the main set of costs, the CFI ordered an expert's review to be conducted under Articles 65(d), 66(l), and 70 of the rules of procedure—a task that will be probably very complex and expensive in itself.

Finally, the CFI held that it was possible to consider that Schneider was partially responsible for the second set of costs. The CFI emphasized that it was Schneider's decision to buy Legrand's shares before obtaining the Commission's authorization and that in the context of a high-risk transaction, given that the deal was about a merger of the two sole main players within the French market.⁷⁵ The CFI considered that, in these circumstances, one-third of the damages suffered could be attributed to Schneider.⁷⁶

It is not easy to understand why, having accepted this argument, the CFI did not simply conclude that there was no causal link between the Prohibition Decision and the prejudice alleged by Schneider. The CFI could well have decided that the prejudice at stake was rather caused by Schneider's own imprudence. It was, after all, Schneider that

⁷⁴ *Id.* at §§ 314-17.

⁷⁵ *Id.* at §§ 328-33.

⁷⁶ *Id.* at § 334.

decided to implement before authorization an extreme transaction which would have created a national champion, if not a monopolist.

It is not easy either to understand why the CFI did not consider that one of the following three elements could break the casual link between the Commission's violation and the alleged prejudice. First, Schneider had sold Legrand well before its deadline. Second, Schneider had not even asked the Commission for a new prorogation of the deadline. Finally, Schneider decided to withdraw its request that the Decision ordering separation was suspended. However, *Schneider III* is under appeal⁷⁷ and it is expected that all these matters will be reviewed and may be clarified by the ECJ.

IV. Conclusion

The two *Holcim* judgments and *Schneider III* have set a regime of Community liability in competition matters which seems rather favorable for the Commission. The three judgments apply quite a restrictive test relating to the characterization of violations attributed to the Commission. They also embrace a restrictive test in relation to the casual link between those violations and the prejudices invoked by the individuals—an abstraction made by some of the parts of *Schneider III* mentioned in this paper.

In summary, it can be concluded that the Commission must not be too afraid of the financial consequences of the errors it may make in competition matters. Instead, it should be concerned only with the errors which seem difficult to justify with regard to the circumstances in which it must carry out its work. These errors would thus only happen in the pathological cases were the Commission had acted in a deliberate or negligent way.

⁷⁷ Case C-440/07, European Commission v. Schneider Electric SA (pending decision).

Strangely enough, as a consequence of the way in which this standard has been applied in *Schneider III*, the Commission could be exposed to higher risks in relation to procedural mistakes than in relation to substantive mistakes. This should encourage the Commission to be even more scrupulous in so far as due process is concerned. However, it could also have an undesirable side effect: The Commission could become an institution more worried about the formalities than the merits of its decisions. For this reason it seems advisable that in the future, the Community courts should take into account, and in a more realistic manner, the procedural difficulties the Commission must face when it carries out an investigation in competition matters or when it assesses the compatibility of a merger with the Common market.