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I. INTRODUCTION

With the judgment rendered on September 9, 2008, the Court of First Instance ("CFI") rejected the claims brought forward by the MyTravel Group (previously named Airtours) for compensation of the financial loss suffered as a consequence of the Commission's 1999 decision which prohibited the merger between Airtours and First Choice, Airtours' main competitor on the U.K. package holidays market.[1]

The *MyTravel* judgment confirms that in those areas where the Community institutions have a broader margin of discretion, as is the case with the Commission's substantive economic assessment in merger cases, there is very limited scope for damages actions under the rules on the Community non-contractual liability (art. 288 of the EC Treaty), to the extent it can be demonstrated that the errors committed by the Commission are on the whole excusable.

In this paper, the authors argue that following *MyTravel*, the prospects for success of damages' actions based on the Commission's noncontractual liability in merger cases

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[1]Court of First Instance, 9 September 2008, Case T-212/03, MyTravel v Commission. This judgment follows up the CFI's judgment of 6 June 2002, Case T-342/99, Airtours plc v Commission, in ECR 2002, II-2585, which annulled the Commission Decision of 22 September 1999, Case IV/M.1524, *Airtours/First Choice*, published in OJ L 93 of 13 April 2000, p. 1.

are very remote. It seems unlikely that the Commission may, in the future, commit completely unjustifiable errors of substantive assessment resulting in a "*grave and manifest disregard of the limits of its discretion*" and thus capable of triggering a "*serious breach of a law conferring rights to individuals*" within the meaning of art. 288 of the EC Treaty; all the more so in view of the progress which has been made in recent years in the understanding of the economic theories underlying merger control analysis and following the introduction of a number of additional "checks-and-balances" in the Commission's internal decision-making process.

What scope remains then for damages actions brought against the Commission in merger control cases? Aside from those quite implausible cases where the Commission would act with gross negligence or in a deliberately fraudulent way, based on *Schneider* III and conditional upon confirmation in appeal before the European Court of Justice ("ECJ"),[2] the Commission remains exposed to liability only in the event of violations of a party's rights of defense or other breaches of basic procedural duties which can be qualified as contrary to the duty of diligence resting on the institution.

II. THE CFI'S APPROACH IN *SCHNEIDER III*

The *MyTravel* case offered a good opportunity for the CFI to further clarify the conditions under which damages can be granted as a result of the Commission's

[2]Following the Commission's decision prohibiting the proposed concentration between Schneider Electric SA and Legrand SA (Case COMP/M.2283 – *Schneider/Legrand*, Decision of 10 October 2001, in OJ L 101 of 6 April 2004, p.1), the Court of First Instance ruled on three different occasions on appeals brought by Schneider: *Schneider I* – Annulment (Case T-310/01, 22 October 2002, *Schneider Electric SA v Commission*, in ECR 2002, II-4071), *Schneider II* – Divestiture (Case T-77/02, 22 October 2002, *Schneider Electric SA v Commission*, in ECR 2002, II-4201) and *Schneider III* – Damages (Case T-351/03, 11 July 2007, *Schneider Electric SA v Commission*, in ECR 2007, II-2237. The *Schneider III* judgment has been appealed by the Commission to the ECJ: Case C-440/07 P, application published in OJ C 22 of 26.01.2008, p.19).

wrongdoing in merger control scrutiny. What had remained unclear following *Schneider III* was the test to be applied to assess whether the Commission had committed a grave and manifest disregard of the limits to its discretion when assessing a merger.

In *Schneider III*, in line with established case law elaborated primarily in other areas of EC Law, the CFI reiterated once again the distinction between matters in which the Community institution enjoys a margin of administrative discretion and matters for which the relevant legislation attributes no or very limited discretion to the institution. The Court found that the Commission was liable pursuant to Article 288 of the EC Treaty for having violated the party's rights of defense, an area in which the Commission had no margins of discretion.[3]

However, concerning the several errors the Commission had committed with respect to its substantive economic analysis of the Schneider-Legrand merger, the CFI explained that the complexity of the analysis that the Commission must carry out in merger cases "*can well explain the existence of errors, inconsistencies and weak argument*" The errors could also be due to the time constraints imposed on the Commission by the EC Merger Regulation. In the CFI's opinion, such finding is even more substantiated in merger control cases which require a prospective analysis and thus involve wider discretion for the Commission.[4] The gravity of documentary or logical

[3]The CFI argued that the Commission has no discretion in relation to the parties' right of defenses, because the respect of procedural rules usually does not involve any particular technical difficulty nor requires complex analysis, and the disregard for the said rules cannot be justified by the particular constraints to which the Commission is subject. Case T-351/03 *Schneider Electric SA v Commission*, quoted, par. 149.

[4]*Schneider III*, quoted, para. 131.

inadequacy in such circumstances may therefore not always constitute a sufficient circumstance to cause the Community to incur liability.

However, in *Schneider III* the CFI did not take any position as to whether the errors committed by the Commission in its economic analysis, and identified by the same CFI in the *Schneider I* annulment judgment, could meet the test of the "*manifest and serious breach of a rule of law intended to confer rights on individuals*" for the purposes of Article 288 EC Treaty. This exclusion was based on the grounds that the substantive errors identified in *Schneider I* had not had any impact on the Commission's finding that the merger was incompatible with the common market. In other words, since for some of the markets affected by the transaction (namely those for electric low-voltage equipment in France) the merger would have been declared incompatible anyway, the errors committed in the substantive assessment of the impact of the transaction were irrelevant for the purpose of establishing the Commission's liability. [5]

III. THE ISSUES IN *MYTRAVEL*

After *Schneider III*, attention focused on the pending *MyTravel* judgment, all the more so given that in the *Airtours* annulment judgment the CFI had taken an extremely critical position vis-à-vis the Commission, having found that, "*far from basing its prospective analysis on cogent evidence*," the Commission had "*clearly*" committed a

[5]The Schneider-Legrand merger did indeed pose some difficult issues of assessment due to the complexity of the competitive dynamics in each of the national sector markets identified by the Commission. In its decision, the Commission had committed a series of errors in demonstrating the establishment of a dominant position by Schneider-Legrand, such as, *inter alia*, inconsistently referring to evidence of economic power of the merged entity on certain national sector markets irrespective of these markets being actually affected by the transaction, or wrongly assessing the level of concentration of wholesale distributors in the markets downstream to those concerned by the merger. In *Airtours/First Choice*, instead, the merger raised the difficult issue of the collective dominant position, an area where the Commission had not yet comprehensively and clearly defined its approach.

series of substantive errors as to factors "*fundamental*" to any assessment of whether a collective dominant position might be created.[6] In the subsequent *MyTravel* judgement on damages, the CFI was therefore expected to address more precisely the issue of whether and under what conditions errors of the administration pertaining to the substantive assessment of the case, that is to say errors committed in the very exercise of a discretionary power, can give rise to a right to compensation for the affected party.

IV. THE CFI'S JUDGMENT IN *MYTRAVEL*

A. Is there symmetry between the standard of proof in actions for annulment and actions for damages?

Relying on the findings which led the CFI to annul the Commission decision in *Airtours*, MyTravel based its action for damages first and foremost on the main argument that the standard of proof required to demonstrate the noncontractual liability of the Commission under Article 288 EC Treaty, and thus the right to compensation, had already been met in the annulment judgment, where the CFI had found substantive errors of assessment vitiating the Commission's reasoning. Because the errors were already "*sufficiently serious*" and it had been demonstrated without any doubts that the Commission failed to satisfy the standards expected from a reasonably competent institution exercising its specific functions, the applicant claimed it did not need to prove anything beyond the flaws already identified by the CFI in its annulment judgment in order to meet the test required under Article 288 EC.

[6] *Airtours v. Commission*, quoted above, para. 294; *MyTravel v. Commission*, quoted above, para 79.

The Commission contested the applicant's syllogism on the ground that a judgment of annulment cannot be relied on as conclusive proof in order to establish a sufficiently serious breach of a rule of law intended to confer rights on individuals. According to the Commission, to find a serious breach of law pursuant to Article 288 of the EC Treaty, the applicant is required to prove that the Community institution has completely disregarded the facts and the submitted evidence in manifest violation of its duty of diligence, while it is totally irrelevant for the purposes of the damages proceeding that it had interpreted such evidence erroneously. In this regard, even if in *Airtours* the CFI had disagreed with the Commission's assessment, documents submitted by the Commission in the proceeding for compensation of damages proved that, during the administrative proceeding, it had not failed to take into consideration the evidence put forward by the applicant to substantiate the claim that the concentration would not have given rise to a collective dominant position.

After reiterating that the Commission's discretion is highest in the substantive economic assessment and that inadequacies in the economic analysis are likely to occur in the control of concentrations because of the complexity of the situations (due to the prospective element involved) and the time constraints imposed on the institution—all arguments already known and fully developed in *Schneider II*—the CFI clarified that the key factor to be ascertained is 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.

To this end, the CFI first proceeds to check whether, with respect to the claims brought by the applicant to support the manifest error of the Commission in the merger assessment (namely, incorrect and incomplete appraisal of the demand growth data submitted by the applicant and failure to carry out a sound appraisal of market transparency, market share volatility, and demand volatility features), the evidence collected in the file could objectively support somehow the Commission's conclusions, irrespective of the inconsistencies displayed by the annulled decision. This is indeed the conclusion reached with respect to the debated issue of the "slow growth" of the market that, according to the CFI, was a circumstance corroborated by the evidence collected in the file, despite the fact the Commission had misinterpreted the documents quoted in its decision in support of this finding.

With respect then to the applicant's claims regarding the Commission's other errors (i.e. failure to carry out a sound appraisal of market transparency, market share volatility, and demand volatility features) the CFI limited itself to state that these errors were not sufficiently serious as the Commission had somewhat taken into consideration the evidence in the file when reaching its decision.

B. *Taken together, can a series of errors in the substantial merger assessment qualify as a "sufficiently serious" error for the purposes of art. 288 EC Treaty?*

MyTravel also claimed that in the administrative proceeding the Commission had committed a series of misconducts and mistakes that, if considered jointly, had a magnifying effect, thus reaching the threshold of the "serious sufficiently error"

necessary to trigger liability.

Conversely, according to the Commission, noncontractual liability can arise when the errors, individually considered, confirm that the Commission consistently took an erroneous pattern, thereby clearly indicating that the key elements underpinning the institution's substantive assessment had been seriously misrepresented.

The CFI rejected the applicant's claim that several errors committed by the Commission, considered as a whole, would meet the threshold required for the purpose of the liability. In particular, the CFI rejected the applicant's claim of an analogy with past case law in the public procurement sector, where the Commission had committed "*very different kind*" of errors as opposed to those established by the CFI in *Airtours.* [7] Indeed, according to the CFI, in *Scan Office Design* the Commission had committed several serious, nonjustifiable faults which resulted in the complete misrepresentation of the evidence in the file, thus triggering a right to compensation for the affected party.[8]

C. Does failure to adequately address last-minute commitment proposals entail a serious error if the commitments would not have changed the overall assessment of the merger?

Lastly, the CFI rejected the applicant's claim that the unlawful conduct by the Commission at the stage of analysis of the proposed commitments could qualify as a sufficiently serious breach of law for the purposes of noncontractual liability under art. 288. Here, the point raised by the applicant concerned the fact that the Commission had

[7]Court of First Instance, 28 November 2002, Case T-40/01, *Scan Office Design SA v Commission*, in ECR 2002, II-5043.

[8]See para 94 of the *MyTravel* judgment, quoted above.

failed to evaluate effectively the commitments submitted by Airtours towards the end of the investigation, although there were no objective constraints to prevent the Commission from duly examining those commitments. The Court found, on the basis of evidence brought forward by the Commission in the *MyTravel* proceeding, that the commitments had actually been internally discussed and informally discarded as insufficient to address the competition concerns. Hence, no serious and unjustifiable error could be identified in the Commission's conduct.

Again, the CFI's reasoning seems to suggest that, even if a procedural flaw might have occurred at the time of the assessment of the commitments, the documents in the file showed that Airtours' second set of commitments had been taken into consideration by the Commission.

V. CONCLUSIONS: WHAT IS LEFT FOR ACTIONS FOR DAMAGES IN MERGER CASES AFTER *MYTRAVEL*?

By confirming the line of reasoning already laid down in *Schneider III* (where the "justifiability test" had been spelled out with respect to the Commission's substantive assessment in merger control cases), the CFI's judgment in *My Travel* appears to have significantly limited the scope of damages actions against the Commission in the field of merger control.

Claims based on substantive errors committed by the Commission in the economic assessment of a merger seem highly unlikely to yield any positive results. The standard of proof required to demonstrate a "*sufficiently serious*" breach of law has been

set to such a high level that in most circumstances, even when the parties could rely on the annulment of the Commission decision (as in both *Schneider* and *MyTravel*), they would most probably lack the arguments required to convince the Court to grant damages based on the finding that the Commission conduct was not justifiable and in breach of the duty of diligence. According to the CFI, errors committed by the Commission in the substantive assessment of a merger are excusable if i) either the overall evidence of the file pointed *objectively* towards the same conclusions reached in the decision—irrespective of the inconsistencies and the inaccuracies contained in the decision, ii) —or it can be demonstrated that the Commission had somehow taken into account the evidence in the file and provided in the decision an explanation of its conclusions—despite the fact these conclusions are inconsistent with or not sufficiently corroborated by the findings of the investigation.

This means that noncontractual liability could arise only in exceptional cases where the Commission's decision totally misrepresents the evidence of the file to the point that the arguments put forward by the administration to support the conclusions do not withstand any reasonableness test. These cases appear indeed all the more implausible in view of the progress that the Commission has made in recent years in the understanding of the economic theories underlying merger control analysis (for instance the economic tests to prospectively assess the establishment of a collective dominant position as a result of a merger), as well as in the increased sophistication of its internal review process following the introduction of the Chief Competition Economist and other

"checks-and-balances" such as, in particular, the scrutiny panel.

All in all, it seems that successful actions for damages in the field of merger control will most likely remain confined to exceptional cases where the Commission is deemed to have breached certain procedural requirements or basic principles of due process such as the parties' rights of defense. Even in this area, though, possible revisions cannot be excluded. S*chneider III* has been appealed by the Commission,[9] and, according to some commentators, the CFI ruling may have been too harsh, having ruled out any form of gradation with respect to the errors that the Commission may commit when dealing with procedural issues in merger control proceedings. In the appeal to *Schneider III* the ECJ may therefore consider to review this point all the more now that its past case law[10] has already found that the complexity of the Commission's task in antitrust investigations might well justify procedural shortfalls.

[9]Case C-440/07 P. The *MyTravel III* judgment has instead not been appealed by any interested party.

[10]Court of Justice, 19 April 2007, Case C-282/05 P, *Holcim (Deutschland) AG v Commission*, in ECR 2007, I-2941. See the reconstruction offered by A. Montesa Lloreda, "*Non-contractual liability of the European Community in competition matters: the aftermath of the CFI judgment in Case T-351/03, Schneider v. Commission"* 2(1) GCP MAGAZINE, (Feb-08).