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CASE LAW

A BULLETPROOF VEST FOR THE COMMISSION? ASSESSING THE C.F.I.'S JUDGMENT IN *MYTRAVEL GROUP V. COMMISSION*

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In an important clarification of the rights of merger parties and the responsibilities of the European Commission ("the Commission") in merger review under the E.C. Merger Regulation (E.C.M.R.),[1] *the European Court of First Instance (C.F.I.) recently released its decision in* MyTravel Group v. Commission.[2] *At issue in* MyTravel *was the Commission's potential liability to merger parties under Article 288 E.C. Treaty for errors committed in reviewing a merger notified under the E.C.M.R.* MyTravel *represents an important victory for the Commission in that it grants the Commission a substantial degree of deference as to how it conducts merger reviews. The case may also represent a partial retrenchment of the C.F.I.'s 2007 decision to award damages against the Commission on similar grounds in* Schneider Electric v. Commission.[3]

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[1] Council Regulation 4064/89, On the Control of Concentrations Between Undertakings, 1989 O.J. (L 395) 1 (EEC) (corrected version at 1989 O.J. (L 257) 13 (EEC)). It should be noted that the *MyTravel* case, as it related to a merger originally notified to the Commission in April 1999, involved a consideration of the then-applicable Regulation 4064/89. The E.C.M.R. has, since May 1, 2004, been replaced by Council Regulation 139/2004, On the Control of Concentrations Between Undertakings (The EC Merger Regulation), 2004 O.J. (L 24) 1 (EC).

[2] Case T-212/03, MyTravel Group PLC v. Comm'n, 5 C.M.L.R. 21 (2008).

[3] Case T-351/03, Schneider Electric SA v. Comm'n, 4 C.M.L.R. 22 (2007). On September 24, 2007, the Commission filed an appeal against the C.F.I.'s decision. *See* Case C-440/07 P, Comm'n Appeal, 2008 O.J. (C 22) 19.

I. BACKGROUND

MyTravel's claim for damages is the latest chapter in its long-running battle with the Commission. In April 1999, Airtours (the former name of MyTravel) notified the Commission of its intended hostile takeover of a rival, First Choice PLC. Both companies were active in a range of vacationing markets, including package holidays, charter airlines, hotels, cruise vacations, and related services. The Commission reviewed the proposed acquisition and, after concluding that it would create a collective dominant position in the market for short-haul package holidays from the United Kingdom, blocked the transaction.[4] Airtours launched an immediate appeal to the C.F.I. and, in a landmark judgment, won annulment of the Commission's decision based on the "series of errors of assessment" committed by the Commission in its competitive assessment of the transaction.[5] In the aftermath of the *Annulment Decision*, the renamed MyTravel brought a claim for damages against the Commission, arguing that it was entitled to compensation for the Commission's flawed decision to prohibit the proposed takeover.[6] It is this latter action for damages which forms the subject matter of this Case Comment.

II. THE LEGAL FRAMEWORK

MyTravel based its claim for damages upon Article 288 E.C. Treaty, which governs the non-contractual liability of E.C. institutions for damages to third parties. Specifically, the second paragraph of Article 288 provides 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.

Since the inception of the E.E.C., Community institutions have faced many claims for damages and the corresponding body of case law is significant. It is now

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[4] Commission Decision 2000/276/EC, On Case IV/M.1524—Airtours/First Choice, 2000 O.J. (L 93) 1.

[5] Case T-342/99, Airtours v. Comm'n, 5 C.M.L.R. 317, ¶ 294 (2002) [hereinafter *Annulment Decision*]. Typical of many reactions, one noted commentator has described the C.F.I. as "merciless" in its "exposure of the Commission's erroneous assessment of the evidence before it." *See* RICHARD WHISH, COMPETITION LAW 538 (2005). The *Annulment Decision* has been the subject of significant academic commentary. *See also* Jurian Langer, *The* Airtours *Judgment: A Welcome Lecture on Oligopolies, Economics and Joint Dominance*, 10 COLUM. J. EUR. L. 105 (2003); Christoph Feddersen & Robert O'Donoghue, *Case T-342/99, Airtours plc v. Commission*, 39 COMMON MKT. L. REV. 1171 (2002); Sigrid Stroux, *Collective Dominance Under the Merger Regulation: A Serious Evidentiary Reprimand for the Commission*, 27 EUR. L. REV. 736 (2002); Alan Overd, *After the* Airtours *Appeal*, 23 EUR. COMPETITION L. REV. 375 (2002); Heiko Haupt, *Collective Dominance Under Article 82 EC and EC Merger Control in the Light of the Airtours Judgment*, 23 EUR. COMPETITION L. REV. 434 (2002); Ali Nikpay & Fred Houwen, *Tour de Force or a Little Local Turbulence? A Heretical View on the Airtours Judgment*, 24 EUR. COMPETITION L. REV. 193 (2003).

[6] MyTravel initially claimed £517.9 million in damages for lost profits from First Choice, loss of synergies, and transaction costs; it later amended this claim in favor of "an amount to be determined by the Court."

settled law[7] that an E.C. institution will incur non-contractual liability under Article 288 only where the following test is met: (1) the institution's conduct is determined to have been unlawful; (2) the applicant suffers actual damage; and (3) there is a causal link between the unlawful conduct and the damage suffered. If any one of these conditions is not established by the applicant, the claim must be dismissed in its entirety.[8]

Where the defendant's conduct takes the form of a legal measure, such as a Commission decision to block a proposed merger under the E.C.M.R., the applicant must further prove that the conduct constitutes "a sufficiently serious breach of a rule of law intended to confer rights on individuals."[9] The European Court of Justice (E.C.J.) has held that the "decisive criterion" in meeting this burden is "whether the Community institution concerned *manifestly and gravely disregarded the limits on its discretion*."[10]

In assessing this key question of whether the defendant institution has manifestly and gravely disregarded the limits on its discretion, the Community courts have considered the complexity of the markets or conduct regulated by the institution, any difficulties in the interpretation or application of legislation by the institution, and, in particular, the extent of the institution's discretion in its role as a decision-maker.[11] Generally speaking, the greater the margin of discretion afforded to the institution, the less likely its conduct will meet the "manifestly and gravely disregarded" test. Conversely, where the institution has little or no discretion, any breach of Community law may result in liability.[12] Similarly, where the institution violates substantive or procedural rules, or breaches a general obligation of diligence, liability will also likely be established.[13]

To summarize, the test for establishing non-contractual liability under Article 288 E.C. Treaty considers the following issues:

(1) Has the defendant institution engaged in unlawful conduct?

> If a legal measure, did the conduct constitute "a sufficiently serious breach of a rule of law intended to confer rights on individuals"?
>
> Is the rule of law in question one intended to confer rights on individuals?

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7 *See* Case 26/81, Oleifici Mediterranei v. EEC, 1982 E.C.R. 3057, ¶ 16. *See also* Case T-383/00, Beamglow v. Parl., 2005 E.C.R. II-5459, ¶ 95; *Schneider*, 4 C.M.L.R. 22, ¶ 113 (2007); *MyTravel*, 5 C.M.L.R. 21, ¶ 35 (2008).

8 Case C-146/91, KYDEP v. Counc. & Comm'n, 1994 E.C.R. I-4199, ¶ 81. *See also* Case T-170/00, Förde-Reederei v. Counc. & Comm'n, 2002 E.C.R. II-515, ¶ 37.

9 Case C-352/98 P, Laboratoires Pharmaceutiques Bergaderm SA v. Comm'n, 2000 E.C.R. I-5921, ¶ 42.

10 Case C-282/05 P, Holcim (Deutschland) AG v. Comm'n, 2007 E.C.R. I-2941, ¶ 47 (emphasis added).

11 *Id.* ¶¶ 47–50.

12 *Bergaderm*, 2000 E.C.R. I-5921, ¶ 44.

13 *See, e.g.*, Case C-308/87, Grifoni v. EAEC, 1990 E.C.R. I-1203, ¶¶ 13–14; Cases 5/66, 7/66, & 13/66–24/66, Kampffmeyer v. Comm'n, 1967 E.C.R. I-245, ¶¶ 262–63.

> If so, did the institution "manifestly and gravely disregard the limits on its discretion"?
>
> The court will consider the complexity of the markets or conduct regulated by the institution, any difficulties in interpretation or application of legislation, the extent of the institution's discretion, and any possible violation of substantive or procedural rules.
>
> (2) Has the applicant suffered actual damage?
>
> (3) Is there a causal link between the unlawful conduct and the damage suffered?

III. THE C.F.I. DECISION IN *MYTRAVEL*

The C.F.I. applied the above test to the facts before it in *MyTravel*. The court's analysis focused on whether or not the Commission's decision to block the proposed Airtours/First Choice merger satisfied the "unlawful conduct" prong of the test, with the applicant arguing that the Commission did not "satisfy the level of skill required" in merger control as it failed to properly apply the relevant law to determine whether the proposed merger would give rise to collective dominance in one or more markets.[14] In support of this contention, MyTravel cited several "tier one" failures in the Commission's analysis, and further argued that the presence of numerous "tier two" failures relating to the assessment of the evidence and the failure to prepare an adequate statement of reasons collectively established that the Commission had manifestly and gravely disregarded the limits on its discretion.[15]

A review of the "tier one" failures raised by MyTravel is interesting, as most of the alleged failures go straight to the heart of merger review analysis and effectively challenge the Commission's substantive analysis of the case. The failures cited by the applicant include: the Commission's failure to correctly define the competitive situation that would exist in the absence of the proposed merger (in effect, its failure to identify the proper counterfactual); the failure to apply the correct legal test for collective dominance; the failure to take account of recent fluctuations in the market shares of the players in the U.K. short-haul package holiday market; the Commission's refusal to consider the effects of demand volatility in its competitive analysis; the Commission's selective reliance on certain data to show low demand growth in the relevant market, despite data submitted by the applicant to the contrary; the Commission's failure to take account of the substantial product heterogeneity on the market, and the corresponding lack of market transparency (an essential element of collective dominance analysis); and the Commission's failure to identify a deterrent mechanism among the major players in the market (another key element of collective dominance).[16]

If many of the above arguments sound as though they more properly belong in an action for annulment of a Commission merger review decision, it is because they

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[14] *MyTravel*, 5 C.M.L.R. 21, ¶ 53 (2008).
[15] *Id.* ¶¶ 54–71.
[16] *Id.* ¶¶ 56–71.

do. This highlights an essential weakness in MyTravel's case: it continually attempted to rely on arguments successfully made in the *Annulment Decision* to support an award of damages. In fact, the applicant went so far as to positively argue that "a manifest error of assessment established in a judgment for annulment may be equated to a sufficiently serious breach of a rule of law intended to confer rights on individuals"[17]—effectively contending that annulment equals liability under Article 288 E.C. Treaty. However, as identified in Part II above, E.C. law has established a clear test for liability under Article 288, and conflating this standard with the test for annulment as MyTravel suggested raises serious policy concerns about the potential chilling effect on the merger review role of the Directorate-General for Competition (DG Competition). If every mistake made by DG Competition staff could lead to financial liability for the Commission, this would no doubt have a paralyzing effect on merger review in the European Community.

Recognizing this potential chilling effect, the Court noted that conflating the tests for annulment and liability would

> risk compromising the capacity of the Commission fully to function as regulator of competition . . . as a result of the *inhibiting effect* that the risk of having to bear the losses alleged by the undertakings concerned might have on the control of concentrations.[18]

Instead, in the Court's view, the right to damages will only arise where the institution's conduct is

> *manifestly contrary to the rule of law* and *seriously detrimental* to the interests of persons outside the institution and *cannot be justified* or accounted for by the *particular constraints* to which the staff of the institution, *operating normally*, are objectively subject.[19]

Having taken this view, the Court resisted the applicant's attempt to demonstrate a "manifest and grave disregard for discretion" (and thus liability) through several substantive errors in the Commission's economic analysis. Many of these arguments had been accepted by the C.F.I. in the *Annulment Decision*. MyTravel buttressed its arguments by citing several instances in which the Commission's flawed analysis stemmed, at least in part, from relying upon the submissions of customers, competitors, and First Choice, all of whom were opposed to the deal. The Commission presented a uniform response to each of these complaints, attempting to explain or justify its approach in each instance, and returning always to the same unifying theme of its defense, that "the fact that the Commission's analysis was not accepted by the Court is not sufficient to establish that the Commission was guilty of culpable misconduct or that it disregarded the evidence."[20]

Tactically, this argument appears very sound. The Commission avoided the burden of a *de facto* reverse onus by resisting the urge to engage in a detailed analysis of what legally constitutes a "manifest and grave" defect, and instead

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[17] *Id.* ¶ 31.

[18] *Id.* ¶ 42 (emphasis added).

[19] *Id.* ¶ 43 (emphasis added). The Court here is quoting, without citing, its earlier decision in *Schneider Electric*, 4 C.M.L.R. 22, ¶ 124 (2007).

[20] *MyTravel*, 5 C.M.L.R. 21, ¶ 71 (2008).

merely maintained that the applicant, on whom the burden of proof rests, had not proved sufficiently manifest and grave defects in the Commission's analysis. It supported this position effectively by reminding the Court of the policy rationale for its wide discretion in merger review, and the serious chilling effects that might occur should the applicant succeed.

The Commission's approach succeeded. Despite conceding that "the possibility cannot be ruled out in principle"[21] that errors of economic assessment could lead to liability under Article 288, the Court did not accept that the Commission's analysis was sufficiently flawed in this case. In reaching this decision, the Court highlighted three important considerations that should guide decisions in future cases.

(1) *Analytical complexity.* The Court noted that competition law involves "complex and difficult intellectual exercises" and the Commission's analysis "may inadvertently contain some inadequacies, such as approximations, inconsistencies, or indeed certain omissions."[22] Merger control can be considered particularly difficult, as it involves a prospective analysis. The Court described the case at hand as "especially complex," involving collective dominance concerns, a complex distribution model through travel agencies, and a variety of constituent product elements (air transport, accommodation) where "competition is practised more in relation to capacity than prices."[23] Presumably, one can infer that in simpler cases—e.g., unilateral effects analysis, mergers in commodity markets with transparent pricing, mature or declining markets—the Court would review any Commission errors more strictly.

(2) *Analytical discretion.* The Court confirmed that the Commission "enjoys a discretion in maintaining control over Community competition policy" and that "rigorously consistent and invariable practice in implementing the relevant rules cannot be expected of it."[24] The Commission also "enjoys a degree of latitude regarding the choice of the econometric instruments available to it" and "the choice of the appropriate approach to the study of any matter" so long as these choices are not "manifestly contrary to the accepted rules of economic discipline and are *applied consistently*."[25] How one is meant to reconcile the statements that the Commission "cannot be expected" to be rigorously consistent in implementing the rules, but must apply the rules "consistently," is entirely uncertain. However, the effect seems clear: analytical disagreements between the Commission and the lawyers and economists representing merger parties are matters for an annulment decision (where the Court was not at all reluctant to criticize the Commission's errors in this case), and not for a damages claim.

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[21] *Id.* ¶ 80. The court is paraphrasing, without citing, its decision in *Schneider Electric*, 4 C.M.L.R. 22, ¶ 129 (2007).

[22] *MyTravel*, 5 C.M.L.R. 21, ¶ 81 (2008).

[23] *Id.* ¶ 82.

[24] *Id.* ¶ 83.

[25] *Id.* (emphasis added). Again, all of the quotations in this paragraph are entirely consistent with the Court's approach in *Schneider Electric*, 4 C.M.L.R. 22, ¶ 132 (2007).

(3) *Time constraints.* The Court also highlighted the "difficulties of application" that arise as the Commission "must operate within a short time and subject to strict time-limits."[26]

Considering these factors, and emphasizing that a liability action is "by its nature more demanding" than an annulment proceeding, the Court rejected MyTravel's claim for damages based on the Commission's substantive errors of assessment. Setting a very high bar for future cases, the Court instructed MyTravel that, contrary to its claims, "*mere errors of assessment* and the *failure to put forward relevant evidence* . . . cannot of themselves be sufficient to give rise to a manifest and grave infringement."[27]

This is a striking conclusion, particularly where a proposed merger is blocked despite the Commission having "failed to put forward relevant evidence." In particular, the Court noted in this context several errors of which it had been highly critical in the *Annulment Decision*—including that the Commission "construed a document without having regard to its actual wording and overall purpose," that it "failed to take account of certain data within the file," and that it "failed to take into account a key factor [market transparency] for determining whether there is a collective dominant position."[28] Despite these significant errors, and the litany of other flaws cited by MyTravel, the Court concluded that the Commission's reasoning was "adopted following a careful examination of the information provided in the administrative procedure" and that there should be no liability where the Commission "is capable of explaining the reasons for which it could reasonably form the view that its assessments were well founded."[29]

What does this all mean? Effectively, the Commission's liability for errors of *substantive* assessment will be determined by examining the *process* it followed. So long as the Commission can show that it examined the information gathered in its investigation, followed a coherent procedure, and has some explanation for its conclusions, it is irrelevant to the question of damages whether the Commission's analysis was correct. "Getting it right" is less important than following a procedure by which one should *usually* "get it right." The result is a level of discretion and deference that the Commission will find reassuring.

This inherently procedural focus of the C.F.I.'s review in *MyTravel* dovetails well with its recent decision in *Schneider Electric*, in which the Court upheld the Commission's substantive assessment, despite various alleged errors, but nevertheless awarded the applicant damages based on a violation of its procedural rights.

[26] *MyTravel*, 5 C.M.L.R. 21, ¶¶ 81, 84 (2008).
[27] *Id.* ¶¶ 85–86 (emphasis added).
[28] *Id.* ¶¶ 86–88.
[29] *Id.* ¶¶ 87–88.

IV. CONTRASTING THE *SCHNEIDER ELECTRIC* DECISION

The *MyTravel* decision can be viewed as an entirely complementary bookend to the C.F.I.'s decision, one year prior, in *Schneider Electric*.[30] If anything, one suspects that at least part of the Court's rationale in the *MyTravel* case was to clearly delineate its holding in *Schneider Electric*—in which it imposed liability on the Commission for its handling of the Schneider Electric/Legrand merger review—in order to forestall future damages claims against the Commission. Importantly, while the Court did find the Commission liable for damages in *Schneider Electric*, it did so on the basis of procedural errors affecting Schneider's rights of defense. On the question of the Commission's substantive assessment of the proposed merger—the key issue at play in *MyTravel*—the Court's comments again suggested a very high threshold of review in the Commission's favor.

Most of the Court's analysis of the Commission's substantive assessment followed exactly the same approach as in the *MyTravel* case (as has been noted in several footnotes above). In particular, the Commission seems to have strenuously argued—and the Court accepted—the policy implications for E.C.M.R. merger review if damages were to be awarded against the Commission in any but the most egregious cases. The Court concluded that "a sufficiently serious breach of Community law . . . cannot be constituted by a failure to fulfill a legal obligation which, regrettable though it may be, can be explained by the objective constraints to which the institution and its officials are subject."[31] Instead, a higher threshold must be imposed in damages claims in order to allow for "protection of the room for manoeuvre and freedom of assessment which must, in the general interest, be enjoyed by the Community regulator of competition."[32]

In a moment of refreshing candor, the Court acknowledged that this standard effectively limits damages claims, with respect to the Commission's substantive assessment, to "flagrant and inexcusable misconduct."[33] Thus, while the general standard for non-contractual liability under Article 288 E.C. Treaty is one of "manifest and grave disregard" for the Community institution's discretion, in merger review cases the Court appears to be applying a more deferential ("flagrant and inexcusable misconduct") standard.

However, the Commission's adherence to the procedural standards of Community law was not similarly insulated from liability. In particular, the Court focused on the inadequacy of the Commission's statement of objections to the proposed merger, noting that it did not provide "sufficient clarity or precision"[34]

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[30] *Schneider Electric*, 4 C.M.L.R. 22 (2007). The case involved the proposed acquisition of Legrand SA by Schneider Electric SA, both leading French (and European) producers of electrical distribution equipment. Following an in-depth Phase II review, the Commission blocked the proposed transaction. Prior to the prohibition decision Schneider Electric had, with the Commission's knowledge, already acquired 98% of the Legrand shares in a public bid. Although the prohibition decision was annulled by the C.F.I. for procedural errors, the Commission maintained its opposition to the proposed merger, and Schneider Electric ultimately divested the acquired shares at a loss.

[31] *Id.* ¶ 123.

[32] *Id.* ¶ 125.

[33] *Id.* ¶ 125.

[34] *Id.* ¶ 57.

regarding its view that the transaction would strengthen Schneider's position vis-à-vis French distributors of low-voltage electrical equipment. This flaw in the statement of objections infringed Schneider's rights of defense in that: (1) Schneider was unable to fully assess the competition problems raised by the Commission; (2) Schneider was therefore unable to properly challenge the substance of the Commission's argument; and (3) Schneider was not afforded the opportunity to submit adequate remedy proposals to resolve the Commission's concerns.

These procedural flaws resulted in a breach of Schneider's rights of defense that was "neither justified nor accounted for by the particular constraints to which the Commission staff are objectively subject."[35] Furthermore, for the first time the Court gave no consideration to the Commission's oft-repeated argument that merger review is a complicated task, conducted under strict time constraints. Instead, it noted that this argument is "irrelevant, since the fact giving rise to the damage under consideration is not the analysis of the relevant markets," but instead relates to defects in the statement of objections that "cannot be attributed to a fortuitous or accidental drafting problem that could be compensated for by a reading of the statement of objections as a whole."[36]

As a result of these procedural concerns, the Court granted (in part) Schneider's claim for damages and appointed an expert to quantify the loss suffered by Schneider in respect of the additional transaction fees it incurred, and the reduction in the value of the Legrand shares it was forced to divest, due to the delay in the merger review process caused by the Commission's deficient statement of objections. Given that Schneider had initially claimed more than €1.6 billion in damages, the amount at issue may be substantial. The Commission has, meanwhile, launched an appeal of the C.F.I.'s decision.

V. CONCLUSIONS

In both the *MyTravel* and *Schneider Electric* decisions, the C.F.I. recognized the theoretical possibility of a party to a proposed merger successfully claiming damages against the Commission under Article 288 E.C. Treaty for errors made by the Commission in its competitive assessment. As both decisions make clear, however, the Court will apply the "manifest and grave disregard for discretion" test which lies at the heart of Article 288 in a manner that is very deferential to the Commission in competition law cases, and particularly in merger review cases. Analytical errors relating to market definition, competitive analysis, and even the correct economic methodology to be applied to market data and industry trends will not be sufficient to establish a claim for damages, even where the same factors have supported a successful annulment application.

Moreover, so long as the Commission has followed a rational and objective approach in examining the information before it and can credibly explain the conclusions it reached, errors made in its review will not normally be cause for liability. Instead, the Court will look for errors of assessment or behavior from the

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35. *Id.* ¶ 154.
36. *Id.* ¶ 155.

Commission case team that amount to "flagrant and inexcusable misconduct." In this author's view, the *MyTravel* and *Schneider Electric* cases have established a threshold that will be very difficult for applicants to meet and, in doing so, have preserved the essential "room to manoeuvre" required for the Commission to remain an effective regulator.

However, where the case involves errors of a procedural nature that may affect a party's rights of defense, the Court has demonstrated that it will closely scrutinize the Commission's conduct and will not hesitate to impose liability. The Court has thus sent a clear message to the Commission—if you intend to block a merger, you must clearly articulate all of the anti-competitive arguments in the statement of objections and allow the merger parties a fair opportunity to respond to these concerns or propose adequate remedies. So long as the Commission follows this advice, it appears that the *MyTravel* precedent will provide a bulletproof vest for the Commission in future Article 288 claims involving merger review.