Non-contractual liability of the Commission: some new hints in case law

Court of First Instance, 11 July 2007, Schneider Electric SA v Commission CE, T-351/03

ABSTRACT: The judgment of the Court of First Instance 11 July 2007 give the opportunity to comment the recent development of the European Commission's liability, in its role as watchdog of the common market, giving a contribute to frame the case law.

1. The facts

This judgment of the Court of First Instance can be considered an important step in the development of the European Commission's liability, in particular in the Commission's liability in respect of its role as watchdog of the common market. The judgment puts flesh to the skeletal set of existing principles concerning the liability of the European Community, and contributes to create a systematic asset of the case law.

The principal facts of the case were as follows. The question before the Court of First Instance concerned the legitimacy of a Commission's decision on a concentration of two French companies incorporated under French law, Schneider Electric SA (hereafter Schneider SA) and Legrand SA (hereafter 'Legrand'). On 16 February 2001 Schneider SA and Legrand, in accordance with the requirements on Regulation of on concentrations notified the Commission of Schneider's proposal to make a public offer in respect of all the shares in Legrand held by the public. The Commission asked for further information thereby essentially suspending the 4 months term provided for the validity of the procedure. Schneider SA challenged the Commission's decision in the Court of Appeal of Paris.

Consequently, some modifications were made to the public offer. Nevertheless, on 10 October 2001 the Commission decided that the operation infringed the common market rules (V. 782 whereas n. 2004/275/CE in www.europa.eu). As such a decision was bound to give rise to complaints Schneider SA appealed before the Court of First Instance.

The appeal was rejected and the Commission ordered the separation of the two companies. But Schneider SA persisted and further appealed to the Tribunal. On 22 October 2002 the Tribunal annulled the incompatibility decision declaring the concentration incompatible with the common market rules[1], and stated that the annulment necessarily rendered the divestiture decision illegal. After a long series of further complaints, Schneider SA appealed to the European Court of Justice (ECJ) in respect of the part of the Tribunal's judgment to reject Schneider SA's complaint concerning some steps of the Commission's procedure. This time, the ECJ's judgment was pro Commission[2]. Schneider SA at this point contended the European Commission has breached Article 288 of the EU Treaty which provides for the liability of the European Community in the event of negligence of European Institutions. At the end, the Commission was held liable for the damages caused to the applicants.

2. The legal framework.

The Court interprets the Council Regulation EEC n. 4064 of 21 December 1989[3], as modified by Regulation n. 1310 of 30 June 1997[4] together with the provisions of the Articles 81 and 82 of ECT.

In particular, Art. 2, paragraph 1 and 3, provides: "1. Concentrations within the scope of this Regulation shall be appraised in accordance with the following provisions with a view to establishing

[1] Court of First Instance, First Chamber, 22 October 2002, Schneider Electric SA c. Community, T-77/02, in *ECR*, 2002, II, 4071.
[2] Vide par. 77 of the Judgment.
[3] In O.J., 1989, L 395, 1.
[4] In O.J., 1997, L 180, 1.

whether or not they are compatible with the common market. [...] 3. A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market". Moreover, Article 4 of regulation n. 4064/1989 requires that the parties acquiring control or joint control of another undertaking to notify the concentration to the Commission. Where the Commission finds that a concentration fulfils the criteria defined in Article 2 above mentioned, it shall issue a decision declaring that the concentration is incompatible with the common market

It is worth mentioning that these provisions have been recently framed in a new Regulation, the "Council regulation (EC) no 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)", n. 139/2004 whose provisions expressly substitute the previous Regulations.[5]

The first considering of the Ruling states as follows: "Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings has been substantially amended. Since further amendments are made, it should recast in the interest of clarity".

The proceeding that the Commission has to follow is then regulated by Article 6 on the examination of the notification and initiation of proceedings. "The Commission shall examine the notification as soon as it is received. (a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision. (b) Where it finds that the concentration notified, although falling with the scope of this Regulation, does not raise serious doubts as to its incompatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market. A

[5] In *Official Journal* L024, 29/01/2004, 1-22. See Article 26 Reg. cit..

decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration [...]". Article 10 then provides the time limits for initiating proceedings and for the decisions.

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

This statement highlights the importance of defining the range of possibilities the Commission has to assess a concentration as well as the necessity for transparent in the Commission's actions. In this regard, it is useful to mention "Whereas" 28 and 29. "(28) In order to clarify and explain the Commission's appraisal of concentrations under this Regulation, it is appropriate for the Commission to publish guidance which should provide a sound economic framework for the assessment of concentrations with a view to determining whether or not they may be declared compatible with the common market. (29) In order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings

concerned. It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. The Commission should publish guidance on the conditions under which it may take efficiencies into account in the assessment of a concentration".

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

These criteria represent the borders which limit to the Commission's actions. Through them, the Tribunal can evaluate whether the Commission's conduct has been negligent or not.

3. Invocation of liability under Art. 288 EU Treaty: the case law.

The issue of the non contractual liability of the Community has been extensively considered in jurisprudence. One of the first judgements concerning the liability of the Commission was pronounced by the Court of Justice on 29 September 1982 in the case of Oleifici Mediterranei v Economic European Community, C-26/81. On this occasion the Court affirmed that: "[i]t should be recalled at the outset that [...] for the Community to incur liability, the applicant must prove

the unlawfulness of the conduct alleged against the institution concerned, the fact of damage and the existence of a causal link between the conduct and the damaged complained of."[6]. The Commission's liability cannot therefore be invoked if it is not possible to prove its unlawful conduct. In accordance with settled case law, when the alleged illegality concerns a legislative act, liability on the part of the Community is dependent upon a finding that there has been a beach of a superior rule of law for the protection of individuals[7].

[6] See par. 16 of the judgment: ECG, 29 September 1982, Case C-26/81, SA Oleifici Mediterranei v EEC, in *ECR*, 1982, 3057; in *Foro It.*, 1983, IV, 217, note L. DANIELE. The judgment recalls the case law: see ECG, July 1967, Joined Cases 5, 7, 13 A 24/66, E. Kampffmeyer et al. v Commission CEE, in *ECR,*1967, 288: here the Commission is declared liable but there is still not a systematic framework of non contractual liability. See also CFI, Fifth Chamber, 11 July, 1997, Oleifici Italiani Spa v Commission, Case T.267/94, in ECR, 1997, II-1239, where it is also mentioned the principle of protection of legitimate expectations. See par. 27: "[...] The principle of protection of legitimate expectations requires steps to be taken to avoid the economic interests of traders who have made major investments and have definitively undertaken, vis-à-vis the public authorities, to carry out particular operations, being injured as a result of the entry into force of rules whose adoption was not foreseeable". See also CFI, 11 July 1996, Case T-175/94, International Procurement Services v Commission, in *ECR*, 1996, II-179, par. 44; Id., First Chamber, Case T- 336/94, Efisol SA v Commission, in *ECR*, 1996, II-546, par. 30. CFI, Grand Chamber, 14 December 2005, Case T-383/00, Beamglow Ldt v European Parliament et al., in *ECR*, 2005, II-5459, par. 95: "It is settled case law that in order for the Community to incur non-contractual liability under the second paragraph of Article 288 EC for unlawful conduct of its institutions a number of conditions must be satisfied: the institutions' conduct must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct and the damage pleaded"; CFI Fifth Chamber, 12 July 2001 Joined Cases t-198/95; T-171/96; T-230/97; T-174/98 e T-225/99, Comafrica SpA et al. v Commission C, in *ECR*, 2001, I-3408, par.134; CFI, Third Chamber, 17 October 2002, n. 180, in *Foro Amm. CdS*, 2002, 2306; CFI, Fourth Chamber, 24 April 2002, n. 220, Ellliniki Viomichania Opion AE European Community Council, in *Riv. dir. internaz. priv. e proc.*, 2002, 1104; CFI, Second Chamber, 15 January 2003, n. 377, Philips Morris International Inc. v Commission, in *Foro Amm. CdS*, 2003, 14, CFI, Fifth Chamber, 6 March, 2003, n. 57, Banan Kompaniet AB et al. v European Community Council, in *Foro It.*, IV, 573, note AVANZINI. On the causal link see in particular CFI, Third Chamber, extended composition, 24 October 2000, Case T-178/98, Fresh Marine SA v Commission, in *ECR*, 2000, II-3331, par. 118: "There is a causal link for the purposes of Article 215 of the Treaty where there is a direct causal nexus between the fault committed by the institution concerned and the injury pleaded, the burden of proof of which rests on the applicant [...]. The community cannot be held liable for any damage other than that which is sufficiently direct consequence of the misconduct of the institution concerned [...]"; ECJ, Sixth Chamber 27 March 1990, Case C-308/87, Grifoni v European Community for Atomic Energy , in *ECR*, 1990, I-1203, par. 6.

[7] See ECJ, 4 July 2000, Case C-352/98, Bergaderm e Goupil v Commission, in *ECR,* 2000, I-5291, par. 42; ECJ, Fifth Chamber, 15 June 2000, Case C-237/98 P, Dorsch Consult Ingenieursellschaft mbH v Council UE and Commission, in *ECR*, 2000, I-2938, paragraph 17; Id., Fifth Chamber, 15 September 1994, Case C-146/91 Koinopraxia Enópraxia Georgikón Synetairismón Diacheiríseos Enchorín Proïónton Syn. PE (KYDEP), v Commission , in *ECR*, 1995, I-4199, paragraph 19.

The decisive test for finding that the requirement of a serious breach of a rule of law is fulfilled, is whether the Community institution concerned manifestly and gravely disregarded the limits of its powers [8].

In this regard, noteworthy is the Judgment of the European Court of Justice of 10 October 2003 in Commission v Fresh Marine. "25) Community law confers a right to reparation where three conditions are met, the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties. 26) As regards the second condition, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where that institution has only considerably reduced, or even no, discretion, [...]. 27) Therefore, the determining factor in deciding whether there has been such an infringement is not the general or individual nature of the act in question but the discretion available to the institution concerned"[9].
This means that if the law provides narrow limits to the Commission's discretionary power, the infringement of that law must be regarded as a sufficiently serious breach of a rule of Community law satisfying one of the conditions for the incurring of non-contractual liability by the Community.

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[8] See ECJ, 19 April 2007, Case C-285/05, Holcim (Deutschland) AG v Commission, in *ECR*, 2007, I-1347, paragraphs 47 e 50.
[9] ECJ, 10 October 2003, Case C-472/00, Commission v Fresh Marine, in *ECR*, 2003, I-5647, paragraphs 25-27. CFI, 24 October 2000, Case T-178/98, Fresh Marine v Commission, in *ECR*, 2000, II-3331. See also CFI, Second Chamber, 20 February 2002, Case T-170/00 Förde-Reederei GmbH v Council and Commission, in *ECR*, 2000, I-239, paragraph 37. These three conditions are the same requested for the liability of Member States in case of breach of Community Law. See ECJ, 19 November 1991, Joined Cases 6 e 9/90, Francovich and Bonifaci v Italy, in *Giur. It.*, 1992, I, 1, 1169. See also ECJ, 5 March 1996 Joined Cases C-46/93 e C-48/93) Brasserie du pecheur SA, in *Giur. It.*, 1997, I, 145; in *Resp. Civ e Prev.*, 1996, 1105.

Therefore, the criterion to indicate if there has been a breach of a rule of law is not the nature of the act, but an examination of the discretionary power of the Institution adopting that act.

In the judgement of 11 July 2007 (Schneider SA v Commission) the Court of First Instance insists on this aspect saying there is breach of a rule of the Community in case of manifest and grave disregard of the limits on discretionary power.

The Commission has therefore a wide discretionary power when it has to evaluate the compatibility of the companies' actions with the common market . In this regard, the Court of First Instance states that the Commission did not examine with due diligence the impact of the concentration on national markets of the different Member States. Here the Court examines the decision of the Commission through the lens of the limits to its discretion, so that the limits themselves may be considered an indispensable instrument for the judicial review . It is thus clear that the provisions of the Regulation n. 139/2004, as well as all the rules stipulating the duties to the European Institutions, are a potential source of liability of the Community. The more detailed the rules, the easier the task of the Courts.

In conclusion, the ECJ held the Commission liable for the damages caused to the applicants. But, in cauda venenum, the Court ordered costs to be shared.

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