

The Liability of the EU Institution after *Francovich*.*

The Liability of EU Institutions and the Liability of Member States.

The liability of EU institutions for breaches of EU law is not easily engaged.

The standard test of liability was laid down in *HNL v Council and Commission*¹ which gave full development to some ideas already present in *Zuckerfabrik Schöppenstedt*.² In *HNL* the Court of justice held that Community institutions can only exceptionally and in very special circumstances incur liability for legislative measures which are the result of choices of economic policy. *HNL* was a damages action arising from Council regulation 563/76/EEC on the compulsory purchase of skimmed milk powder held by intervention agencies for use in feeding stuffs. In a series of previous cases the regulation had been found to be void on the ground that it set the price of purchase at such a disproportionate level that it was equivalent to a discriminatory distribution of the burden of costs between the various agricultural sectors.³

The Court resisted the claim for damages remarking that:

4. The finding that a legislative measure as the regulation in question is null and void is however insufficient by itself for the Community to incur non-contractual liability for damages caused to individuals under the second paragraph of Article 215 of the EEC Treaty. The Court of justice has consistently stated that the Community does not incur liability on account of a legislative measure which involves choices of economic policy unless a sufficiently serious breach of a superior rule for the protection of the individual has occurred.

The sufficiently serious breach test was born. *HNL* stressed that that liability could only be an exceptional recurrence in relation to law making.⁴

In *Francovich*⁵ the Court of Justice held that ‘that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty’⁶.

This approach was affirmed in *Brasserie du pêcheur and Factortame III*⁷. During the proceeding the German government had claimed it was not for the Court of Justice to lay down remedies for breach of Community law. The Court was adamant in stating that ‘the existence and extent of State liability for damage ensuing as a result of a breach of obligations incumbent on the State by virtue of Community law are questions of Treaty interpretation which fall within the jurisdiction of the Court’⁸.

* Draft, all usual disclaimer apply.

¹ Joined cases 83 and 94/76, 4, 15 and 40/77 *Bayerische HNL Vermehrungsbetriebe GmbH & Co* [1978] ECR 1209.

² Case 5/71 *Zuckerfabrik Schöppenstedt* [1971] ECR 975, exp para 11.

³ Case 114/76, *Bela-Muhle*; Case 116/76, *Granaria*; joined cases 119 and 120/76, *Olmuhle Hamburg AG*, [1977] ECR 1211.

⁴ See para 5; generally T. Heukels and A. McDonnell ‘The Action for Damages in a Community Law Perspective: Introduction’ (Kluwer, The Hague, 1997), 5; case law was however scant and general inferences hard to draw: see the analysis by M.H. van der Woude ‘Liability for Administrative Acts under Article 215(2) EC’ in T. Heukels and A. McDonnell (eds.) *The Action for Damages in Community Law*, above, 109 ff.

⁵ Joined cases C-6/90 and C-9/90, *Francovich and Bonifaci* [1991] ECR I-5357.

⁶ Joined cases C-6/90 and C-9/90, *Francovich and Bonifaci* [1991] ECR I-5357, paragraph 35.

⁷ Joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport*, ex parte *Factortame Ltd and others* [1996] ECR I-1029.

⁸ Joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA and Factortame Ltd* [1996] ECR I-1029, Rec. 25.

Bridging the Gap between Member States' and EU Institutions' Liability.

In *Brasserie du pêcheur and Factortame III* the Court of Justice drew a first parallel between the conditions for liability of both European institutions and Member States. Building up on *Francovich*, the Court of justice had to lay down rules for liability actions following the breach of Community law by acts of national legislators. The most sensible approach was to rely on the conditions the Court itself had developed with reference to action for damages brought against Community institutions under then Art. 215 EC Treaty. This even more so since this provision refers to the 'the general principles common to the laws of the Member States' thus pointing to a potential benchmark against which to measure effective judicial protection. Homogeneity is however worth for itself. Indeed,

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. 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.⁹

The similar is to be matched with the similar. The Court of Justice, having recalled that the conditions of liability depend on the amount of discretion enjoyed by Community institutions in any given case, made clear that the national legislature 'does not systematically have a wide discretion when it acts in a field governed by Community law'¹⁰.

Homogeneity concerning damages actions against Community institutions and Member States is so important that the Court of Justice refers to precedents on Member States' liability when faced with actions against Community institutions. This was the case in *Bergaderm*¹¹; a liability action was brought against the Commission for having passed a regulation upholding product safety standards which were detrimental to *Bergaderm* and forced it to go bankrupt.

One contentious point was whether the conditions for liability were different in case of legislative rather than administrative acts. The Court held that what was central was the degree of discretion enjoyed rather than the nature of act¹²; in doing so it referred to *Brasserie du pêcheur and Factortame III* and to the homogeneity principle laid therein¹³. '*Bergaderm* unifies the conditions of liability. For a right to reparation against a national authority or a Community institution to arise, the conditions of liability are the same'¹⁴.

Liability and Review of Discretion.

⁹ Joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA and Factortame Ltd* [1996] ECR I-1029, Rec. 41.

¹⁰ Joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA and Factortame Ltd* [1996] ECR I-1029, Rec. 46; see also T. Tridimas, *supra* n. 43, at 322.

¹¹ Case C-352/98 P, *Laboratoires Pharmaceutiques Bergaderm SA* [2000] ECR I-5291.

¹² Case C-352/98 P, *Laboratoires Pharmaceutiques Bergaderm SA* [2000] ECR I-5291, Rec. 40 'The system of rules which the Court has worked out [...] takes into account, *inter alia*, the complexity of the situations to be regulated, 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 (Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 43)'

¹³ Case C-352/98 P, *Laboratoires Pharmaceutiques Bergaderm SA* [2000] ECR I-5291, Rec. 41 'The Court has stated 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. 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 (*Brasserie du Pêcheur and Factortame*, paragraph 42)'

¹⁴ T. Tridimas, 'Liability for Breach of Community Law', at. 325.

Bergaderm, taking stock from the developments concerning liability of Member States,¹⁵ acknowledged that what was really relevant was the margin of discretion rather than the legislative or administrative nature of the measure at issue.¹⁶

Discretion is a term of art in most European legal systems.¹⁷ In very general terms, discretion is the room for choice left to the decision maker by some higher ranking source/authority.¹⁸ Courts see that the decision maker stays within the boundaries of discretion. Discretion is thus a sort of residual concept: discretion is what is left outside of judicial control; the issue is whether and to what extent discretion is reviewed. In this context, judicial review can be considered the primary mechanism for ultimately determining whether an authority can avail of discretion and, if so, what the boundaries of that discretion are. National courts have devised distinctively different modes of judicial review – possibly applicable to different administrative or legislative measures – and consequently different understandings of discretion.¹⁹

Review of discretion by EU Courts has somewhat evolved in the past ten years,²⁰ following the well known *Tetra Laval* case.²¹ Summing up the developments in the approach to judicial review of competition decisions, it seems fair to say that at the doctrinal level the Court of justice rarely praise the need of judicial utmost self restraint. The redline not to be crossed is substitutive review.²² The intensity of review is different in case of factual findings, which – but further research would be needed – might coincide with simple (or pure) facts, which are amenable to full review, and complex factual assessments, which can be quashed in case of manifest error.²³

Simple facts are a matter for evidence, and the outcome depends on the allocation of the burden of proof. Manifest error quite often translates in insufficient reasons being provided for the assessment. Finally, the Court of justice usually practices a lot of self restraint as an appellate instance, in the end entrusting of the Court of first instance to give a hard look to the reasons given by the Commission, but staying ready to intervene when – like in *Bertelsmann* – it feels that the

¹⁵ Case C-352/98 P *Laboratoires Pharmaceutiques Bergaderm SA* [2000] ECR I-.

¹⁶ See paras 43 f. «As to the second condition, as regards both Community liability under Article 215 of the Treaty and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion [...]. Where the Member State or the institution in question has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach [...]».

¹⁷ According to J-M. WOEHLING ‘Le contrôle juridictionnel de l’administration en Europe de l’Ouest’ 6 (1994) REDP/ERPL 362 the review of discretion is the central question of administrative justice systems.

¹⁸ R. CARANTA, *On Discretion*, in S. PRECHAL AND B. VAN ROERMUND (eds.), *The Coherence of EU Law. The Search for Unity in Divergent Concepts*, Oxford, Oxford University Press, 2008, 185.

¹⁹ Various legal systems are analysed and compared in V. PARISIO (ed.) *Potere discrezionale e controllo giudiziario* (Milano, Giuffrè, 1998).

²⁰ See also R. CARANTA, *Evolving Patterns and Change in the EU Governance and their Consequences on Judicial Protection*, in R. CARANTA and A. GERBRANDY (eds), *Tradition and Change in European Administrative Law* (Groningen, Europa Law Publishing, 2011).

²¹ C-12/03 P *Commission v Tetra Laval BV* [2005] ECR I-987.

²² E.g. D. BAILEY ‘Standard of Proof in EC Merger Proceedings’ above fn, 845; for a different take see I.S. FORRESTER ‘Due process in EC competition cases’ above, fn; the Author focuses on antitrust measures rather than on merger decisions, and criticises what is perceived as an unduly hands-off approach to cases which however fall under the unlimited jurisdiction of European courts under Art. 261 TFEU; see also I.S. FORRESTER ‘A Bush in Need of Pruning: The Luxuriant Growth of Light judicial review’ in C-D. EHLERMANN AND M. MARQUIS (EDS) *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Oxford, Hart, 20).

²³ Following the opinion by Advocate general Tizzano in *Tetra Laval* (at 86), most authors distinguish between «the establishment of the factual substrate and the discretionary appraisal thereof» (e.g. A. MEIJ ‘Judicial Review in the EC Courts’ above fn, 12; M. SCHIMMEL AND R. WIDDERSHOVEN ‘Judicial Review after *Tetra Laval*’ above fn, 53); the problem with this different approach, it is submitted, is in actually being able to distinguish establishment from appraisal in factually complex situations (see again A. MEIJ ‘Judicial Review in the EC Courts’ above fn, at 15 and 19, and M. SCHIMMEL AND R. WIDDERSHOVEN ‘Judicial Review after *Tetra Laval*’ above in this fn, 61 ff.).

Court of first instance has fundamentally misunderstood the substance of the case it was called to decide.²⁴

This evolution was later confirmed in fight against terrorism cases. «The attitude of the EU courts has evolved from a deferential one in early cases before the CFI to a robust assertion of the right to judicial review in judgements following the ECJ's *Kadi* decision».²⁵

The tougher stance towards judicial review displayed by European courts in cases such as *Tetra Laval* and *Kadi* has so far failed to translate into easiest access to a remedy in damages.

A good case in point is *Schneider Electric SA and Legrand SA*, two French companies engaged in the production and sale of electrical products and systems notified the Commission of the intention of the former to acquire control of the latter through a public purchase offer of the latter's shares listed in the French market which was then launched. The Commission found that the merger had the effect to create a dominant position on a number of national market, France among them, and that the corrective measures proposed by Schneider were not such as to resolve the competition problems identified. Therefore, it ordered Schneider to divest from Legrand within a given term. The Court of First Instance annulled the incompatibility decision on the grounds of errors of analysis and errors in the assessment of the impact of the transaction on the national sectoral markets outside France, and breach of the rights of the defence vitiating the analysis of the impact of the transaction on the French sectoral markets and of the corrective measures proposed by Schneider because the statement of objection which had been notified failed to explain clearly the competition problems raised by the merger.²⁶ Consequently, it annulled the divestiture order.²⁷

Following the judgements, the Commission decided to recommence the investigation procedure, this time clearly informing the companies that the concentration was liable to undermine competition in the French sectoral markets, by reason of the significant overlapping of the market shares of Schneider and Legrand, the end of their long-standing rivalry, the importance of the brands owned by the Schneider-Legrand entity, its power over wholesalers and the inability of any competitor to replace the competitive pressure exerted by Legrand before the transaction was effected. Schneider proposed a number of corrective measure which were however considered to be insufficient by the Commission. At this point Schneider gave effect to a divestiture contract it had signed pending the decision on its annulment actions. The Commission closed the procedure, which had become devoid of purpose. Schneider anyway challenged the actions taken by the Commission following the first judgements, but the case were held to be inadmissible, the Court of Justice holding that, by opting to resume the investigation of the concentration in phase I, the Commission's intention was to draw the appropriate inferences from the *Schneider I* judgment, thus taking all necessary precautions to ensure that there was no possible breach of Schneider's rights of the defence.²⁸

Schneider sued the Commission for damages including inter alia the loss suffered by being compelled to divest from Legrand and extra costs linked to the participation to the renewed procedure following the annulment of the first decisions. It claimed that, over and above the illegality of the decisions taken, the Commission had been prejudicially hostile to the proposed merger. Relying on *Holcim*,²⁹ the Court of first instance recalled that the decisive criterion to establish a sufficiently serious breach is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion. The complexity of the situations to be regulated, difficulties in the application or interpretation of the legislation and, more particularly, the margin of discretion available to the author of the act in question are relevant in this context. Any breach

²⁴ Case C-413/06 P *Bertelsmann* [2008] ECR I-4951.

²⁵ C.C. MURPHY 'Fundamental Rights and Security' above fn, 304.

²⁶ Case T-310/01 *Schneider Electric v Commission* [2002] ECR II-4071.

²⁷ Case T-77/02 *Schneider Electric v Commission* [2002] ECR II-4201.

²⁸ Case C-188/06 P *Schneider Electric v Commission* [2007] ECR I-35, para 48; see also Case T-48/03 *Schneider Electric v Commission* [2006] ECR II-111.

²⁹ Case C-282/05 P *Holcim (Deutschland) v Commission* [2007] ECR I-2941.

may be considered sufficiently serious where the Community institution has only considerably reduced, or even no, discretion.³⁰ Referring to some old cases, the Court of first instance held that the same applies where the defendant institution breaches a general obligation of diligence or misapplies relevant substantive or procedural rules).³¹

The Court of first instance also address the argument raised by the Commission, according to which the possibility to incur in liability would substantially affect its capacity to deal with complex merger situations (the so called “chill effect” argument, so much loved by defendants all over the world). The Court chooses here a line of prudence. According to the Court,

It must be conceded that such an effect, contrary to the general Community interest, might arise if the concept of a serious breach of Community law were construed as comprising all errors or mistakes which, even if of some gravity, are not by their nature or extent alien to the normal conduct of an institution entrusted with the task of overseeing the application of competition rules, which are complex, delicate and subject to a considerable degree of discretion.

Therefore, a sufficiently serious breach of Community law, for the purposes of establishing the non-contractual liability of the Community, cannot be constituted by failure to fulfil 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 as a result of the provisions governing the control of concentrations.

On the other hand, the right to compensation for damage resulting from the conduct of the institution becomes available where such conduct takes the form of action 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, is objectively subject.³²

In the Court’s view, such a definition of the threshold for the establishment of non-contractual liability of the Community is conducive to protection of the room for manoeuvre and freedom of assessment which must, in the general interest, be enjoyed by the Community regulator of competition, both in its discretionary decisions and in its interpretation and application of the relevant provisions of primary and secondary Community law, without thereby leaving third parties to bear the consequences of flagrant and inexcusable misconduct.³³

On this basis, the Court assesses the merits of the claimant’s action. The judgement is negative concerning the errors, omissions and contradictions in the incompatibility decision established by the *Schneider I* judgment regarding the assessment of the impact of the transaction on national sectoral markets outside France. This is not so much because, as the Court maintains, the difficulties implied in the assessments demanded to the Commission are such that not any mistake may be conducive to liability,³⁴ or because (which is debatable, since it could led to cherry picking assessment methods best suited to a pre-defined end) the discretion vested into it means that rigorously consistent and invariable practice in implementing the relevant rules cannot be expected.³⁵ Both grounds are referred obiter, because, as the Court itself recognises, the negative

³⁰ *Schneider Electric v Commission* [2007] ECR I-2237, paras 115 ff.

³¹ Para 118; Case C-308/87 *Grifoni v EAEC* [1990] ECR I-1203, paras 13 and 14, and Joined Cases 5/66, 7/66 and 13/66 to 24/66 *Kampffmeyer and Others v Commission* [1967] ECR I-245, paras 262 f, are referred to.

³² Paras 122 ff.

³³ Para 125.

³⁴ Para 131.

³⁵ Para 132; the Court goes on claiming that the Commission 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, provided that those choices are not manifestly contrary to the accepted rules of economic discipline and are applied inconsistently (Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, paras 89 ff, upheld by Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, is referred to).

decisions could anyway be upheld on the basis of the objections concerning the French market.³⁶ According to the Court, the plaintiff also failed to substantiate its claims that the Commission was prejudicially against the merger, since its previous judgements had left unprejudiced the future merits of any decision and the Commission was therefore right to start again its investigations.³⁷

The Court of first instance was however ready to accept that, by insufficiently detailing the statement of objections, the Commission had committed a sufficiently grave enough breach to give rise to its liability. In its previous judgements, the Court had already held that the Commission's failure to properly lay down its objections to the merger amounted to an infringement of the right to defence.³⁸ It now remarks that this is «one of the fundamental rights guaranteed by the Community legal order in administrative procedures», which is of particular importance for the control of concentrations between undertakings.³⁹ This is a breach which cannot be excused: As the Court points out,

The defendant's argument as to the difficulty inherent in undertaking a complex market analysis under a very rigid time constraint is irrelevant, since the fact giving rise to the damage under consideration here is not the analysis of the relevant markets contained in the statement of objections or the incompatibility decision but the omission from the statement of objections of a reference which was of the essence as regards its consequences and from the operative part of the incompatibility decision, which did not involve any particular technical difficulty or call for any additional specific examination that could not be carried out for reasons of time and the absence of which 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.⁴⁰

As to the head of damages recoverable, the Court was ready to award Schneider the additional costs due to the necessity to take part in the reopened procedure.⁴¹ Concerning the loss linked to the divestiture decision, the Court stressed again that the mere fact of a breach of the rights of the defence affecting a decision declaring a merger of undertakings incompatible with the common market, cannot translate by itself in the conclusion that, in the absence of that breach, the notified concentration would have been declared compatible with the internal market.⁴² However, it held that the illegal decision taken in breach of the right to defence had in a way forced Schneider to enter a less than optimal divestiture agreement.⁴³ Considering, however, that Schneider should have known that the merger could be problematic, the loss incurred under this head is held to be recovered in the proportion of two thirds only.⁴⁴ Other heads of damages are considered not recoverable, most relevant of them the loss of the benefits from the synergies. According to the Court, even if in principle «Although not having a vested right to recognition of the compatibility of the transaction, the applicant might admittedly have had a meaningful chance of securing a favourable decision, and the forfeiture of that chance would amount to certain and compensatable

³⁶ Para 135.

³⁷ Paras 167 ff.

³⁸ Case T-310/01 *Schneider Electric v Commission* [2002] ECR II-4071, paras 454 ff.

³⁹ Para 149; the Court refers to Case C-269/90 *Technische Universität München* [1991] ECR I-5469, para 14.

⁴⁰ Para 155.

⁴¹ Paras 298 ff.

⁴² Para 266.

⁴³ See para 308: « It was therefore because the incompatibility decision was vitiated by two irregularities which could be perceived by Schneider as manifest irregularities and because it legitimately sought a lawful decision as to the compatibility of the transaction that Schneider found itself constrained both to negotiate and to conclude, on 26 July 2002, the agreement for the transfer of Legrand and to put back the effective date of that transfer to 10 December 2002».

⁴⁴ Paras 332 ff., the Court referring to the plaintiff's contribution to the loss.

loss»,⁴⁵ on the facts of the case, the objections to the merger were so strong that the plaintiff's case had to be considered too uncertain to amount to a serious chance.⁴⁶

On appeal, the Court of justice partly accepted the arguments raised by the Commission. Following the conclusions by Advocate general Luiz-Jarabo Colomer,⁴⁷ the Court ruled out the existence of a causal link between the illegal decision and the sale at the loss of Legrand. According to the Court, the “normal legal consequence” of annulment of the negative decision and the divestiture decision would have been that Schneider participated in the resumed in-depth investigation until its conclusion, which could as well have been negative.⁴⁸ Once again following the conclusions of the Advocate general⁴⁹, the Court left standing the judgement in so far as it found that drafting the statement of objection neither involved discretion nor it was particularly difficult,⁵⁰ and affirmed the gravity of the breach committed by the Commission⁵¹.

The limited satisfaction accorded to Schneider seems to follow very much from the formal nature of the breach imputed to the Commission. Time and again the Courts insist that the annulment judgement had left unprejudiced the merits of the question as to the compatibility of the merger with the common market, which was prima facie problematic, and the Court of first instance noted that even the expert appointed by the plaintiff was at odds in determining the nature and extent of the commitments necessary for the Commission to waive its objections.⁵² At the same time, the kind of the breach allows the claim not to founder against the proclaimed necessity to allow room for mistakes in the use of discretionary powers which do not sound in damages.⁵³

My Travel is quite a different story, since the breaches relevant there were all of a substantial nature. In 1999 Airtours plc, which has since been renamed MyTravel Group plc, announced its intention to acquire the whole of the issued share capital of First Choice plc, one of its competitors

⁴⁵ Para 280.

⁴⁶ Paras 282 ff.

⁴⁷ Paras 140 ff.; see particularly para 143: «On the other hand, the reduction in the sale price of Legrand offered to Wendel-KKR, although a result of those same negotiations, is not a consequence of the invalidity of the contested decision but is a matter of Schneider's own free choice in its dealings with its contractual partner. In this context, Schneider was in a rather uncomfortable position, because of the pressure it felt from the Commission to comply with the divestiture decision, but that pressure was only one of the factors affecting the final form of the agreement with Wendel-KKR»; the Advocate general also remarks that the choice to divest was motivated also by circumstances that had nothing to do with obstacles created by the Commission (see para 144).

⁴⁸ Paras 203 ff.

⁴⁹ As Advocate general Luiz-Jarabo Colomer rightly observed, «It is difficult to see how it could be otherwise, since the fact that the Commission is under time pressure in its handling of an investigation leading up to the statement of objections does not exempt it from taking proper care over the nature of its arguments, and in particular the critical ones, in order to comply with the requirements of Article 18 of the regulation. It was therefore reasonable for the Court of First Instance to take the view that a reference to the objection did not involve any particular technical difficulty or call for an additional specific examination» (para 101).

⁵⁰ See paras 130 ff: «In that regard, it must be held that the reference, in a statement of objections, to an objection such as that relating to the buttressing of market positions, does not require a comprehensive demonstration of the merits of the objection following an exhaustive economic analysis. Such a demonstration, which in the sphere of concentrations may indeed entail significant difficulties, must be completed only at the next stage of the procedure, in light, in particular, of the observations of the undertakings concerned, which have been duly informed of the existence of a competition problem by the statement of objections in order to ensure an effective exercise of their rights of defence. At the stage of the statement of objections, the Commission need merely set out, with sufficient clarity and precision, the problem of buttressing of market positions which may be an obstacle to a declaration that the concentration is compatible with the common market. In the light of those considerations, it must be held that the assessment of the Court of First Instance, according to which the formulation of the buttressing problem did not involve any particular technical difficulty, did not result from a distortion of the clear sense of the evidence before it».

⁵¹ Paras 163 ff.

⁵² See para 282: «However, as moreover is noted in the expert's report produced by Schneider relating to the determination of the alleged loss, it is difficult to determine the nature and amount of the divestiture which would have been necessary to render the transaction compatible with the common market and obtain the Commission's agreement that it should proceed. It is even more difficult to determine the impact on the total value of the assets held by the applicant of the transfers and transactions which those corrective measures would have involved».

⁵³ *Schneider Electric v Commission* [2007] ECR I-2237, para 125.

in the United Kingdom. At the same time, it notified the proposed concentration. The Commission found that the concentration gave rise to serious doubts as to its compatibility with the common market and decided to initiate a detailed investigation. It then sent the applicant a statement of objections setting out the reasons for which it took the preliminary view that the proposed concentration would create a collective dominant position on the United Kingdom short-haul foreign package holiday market. Airtours submitted a set of commitments which was held to be insufficient to assuage the doubts as to the proposed merger. A new set of commitments, but the Commission ostensibly took the view that they were late, refused an extension of the period for investigation, and declared the concentration incompatible with the common market. The decision was challenged by Airtours and annulled by the Court of first instance holding that the Commission, far from basing its prospective analysis on cogent evidence, had committed a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created; according to the judgement, the Commission had thus prohibited the concentration without having proved to the requisite legal standard that the concentration would give rise to a collective dominant position of the three major tour operators, such as significantly to impede effective competition in the relevant market.⁵⁴

The Commission did not appeal and My Travel sued it for damages. The Court of first instance started its “Preliminary considerations regarding the conditions governing the circumstances in which the non-contractual liability of the Community will arise”, by recalling the usual precedents.⁵⁵ The Court then states being common ground among the parties that «the concept of a sufficiently serious breach does not comprise all errors or mistakes which, even if of some gravity, are not incompatible with the normal conduct of an institution responsible for overseeing the application of competition rules, which are complex, delicate and subject to a considerable degree of discretion».⁵⁶ In a rising escalation, the Court then points out that the same applicant accepted that the fact that Commission’s decision had been annulled because, «far from being based on cogent evidence», it was «vitiating by a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created», – was not by itself enough to give rise to liability.⁵⁷ Any other position would mean, according to the Court, to equate the breaches which led to the annulment of the Commission’s decision to serious breaches, which «would risk compromising the capacity of the Commission fully to function as regulator of competition, a task entrusted to it by the EC Treaty, 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».⁵⁸ In a paragraph quite reminiscent of the first instance judgement in *Schneider*, the Court concluded that

Because of the need to have regard to such an effect, which is contrary to the general Community interest, a failure to fulfil 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 in the control of concentrations, cannot be held to constitute a breach of Community law which is sufficiently serious to give rise to the non-contractual liability of the Community. Conversely, the right to compensation for damage resulting from the conduct of the institution becomes available where such conduct takes the form of action manifestly contrary to the rule of law and seriously detrimental to the interests of persons outside the

⁵⁴ Case T-342/99 *Airtours v Commission* [2002] ECR II-2585, specifically at para 294.

⁵⁵ Paras 37 ff are built from both Case C-352/98 P *Bergaderm* [2000] ECR I-5291, and Case C-282/05 P *Holcim* [2007] ECR I-2941.

⁵⁶ Para 40.

⁵⁷ Para 41.

⁵⁸ Para 42.

institution and cannot be justified or accounted for by the particular constraints to which the staff of the institution, operating normally, are objectively subject.⁵⁹

On these fairly restrictive assumptions, the Court of first instance proceeded in the analysis as to existence of a sufficiently serious breach, distinguishing the stage of the Commission's assessment of the effects of the concentration on competition on the one hand and at the stage of the analysis of the commitments proposed during the administrative procedure on the other hand.⁶⁰ Concerning the first stage, the Court reiterates the very exceptional character of liability:

the economic analyses necessary for the characterisation in competition law, of a given situation or transaction involve generally, as regards both the facts and the reasoning based on the recital of the facts, complex and difficult intellectual exercises, which may inadvertently contain some inadequacies, such as approximations, inconsistencies, or indeed certain omissions. That applies all the more in the control of concentrations, in view in particular of the time constraints to which the institution is subject. It is important to point out that, for reasons of legal certainty connected with the need to enable economic operators to obtain a decision from the Commission as swiftly as possible in order to put their concentration into effect, the latter must operate within a short time and subject to strict time-limits. In cases where serious doubts arise as to the effects of the notified concentration on competition, the Commission has a period of only four months available to it in order to examine the concentration and to obtain the views of all concerned or interested parties.⁶¹

On this basis, the crassest shortcomings of the Commission's decision were excused by the Court of first instance. The Commission based its decision on an argument relating to low demand growth, but its assessment, according to the annulment judgement, was based on incomplete and incorrect appraisal of the data. Never mind, «the constraints imposed on the control of concentrations are such that the mere fact that the Commission construed a document without having regard to its actual wording and overall purpose, even though it decided to include it as a document crucial to its finding [...] is not sufficient to give rise to the non-contractual liability of the Community».⁶² The Court is ready to reach into the file of the administrative procedure to find evidence, not duly considered in the annulled decision, which could somehow justify the conclusions reached by the Commission.⁶³ Concerning another aspect relevant to establishing the possible formation of a collective dominant position, the Court is bound to avow that «it cannot be denied that the Commission failed in that context to take into account a key factor»; however, in its opinion, «while the conclusions reached by the Commission were not accepted by the Court, inasmuch as that reasoning was not sufficiently supported by evidence or was badly explained, the fact remains that that reasoning was adopted following a careful examination of the information

⁵⁹ Para 53, conflating paras 122 ff of *Schneider Electric v Commission* [2007] ECR I-2237.

⁶⁰ Para 51.

⁶¹ Para 81.

⁶² Para 87, which goes on in the same vein: «The same applies to the fact that the Commission failed to take account of certain data included in the file to which the document at issue here referred».

⁶³ Para 87: « In the present case, the Commission was in possession of evidence in the administrative file which allowed it reasonably to consider that growth would increase slowly in the years to come. The fact that the findings made in the *Airtours* decision were put in question by the Court falls within the dispute as to the lawfulness of that measure, in which the Court examined the legal and factual conclusions reached by the Commission in the light of the arguments put forward by the applicant in its action and the evidence relied on in that decision. That does not mean, however, that the Commission committed a manifest and grave infringement of its discretion in the control of concentrations, provided that – as in the present case – it is capable of explaining the reasons for which it could reasonably form the view that its assessments were well founded. It is clear, in that regard, from the administrative file, that the applicant itself had provided the Commission with data which envisaged a small yearly increase in demand for the period from 2000 to 2002».

provided in the administrative procedure». ⁶⁴ How failure to take into account a key factor can rhyme with a careful examination? It is of course the time constraints characterising the procedure! ⁶⁵ On this vein, all other numerous mistakes found by the annulment judgment are gingerly dismissed as not sufficiently serious to give rise to liability. ⁶⁶

To rule out liability, the Court of first instance bend itself to incredible verbal funambulism, pretending that

In the field of non-contractual liability, the possibility cannot be ruled out in principle that manifest and grave defects affecting the economic analysis which underlies a decision [...] which declares a concentration incompatible with the common market [...] could constitute breaches that are sufficiently serious to give rise to the non-contractual liability of the Community for the purposes of the case-law. ⁶⁷

In the case law, “manifest and grave” have been synonymous with “sufficiently serious”. ⁶⁸ Now the Court needs to change ‘breaches’ with ‘defects’ to pretend that manifest and grave mistakes not only do not automatically lead to liability, but that damages can be awarded only on the more exceptional circumstances. ⁶⁹ The paradoxical conclusion is that «The gravity of a documentary or logical inadequacy may, in such circumstances, not always constitute a sufficient circumstance to cause the Community to incur liability». ⁷⁰

The Court only apparently fails to explain which incredibly grave mistakes and inconsistencies could lead to liability. In truth, the Court is closing the door shut to this same possibility.

Conclusions.

It seems fair to say that after 20 years we are still waiting for a *Francovich* moment in the case law on the liability of EU institutions. Judicial review of measures taken by these institutions has indeed evolved, somewhat bridging the gap between the standard of review by EU courts and the standards widespread in many Member States.

Concerning liability, however, the same EU courts don't seem ready to exploit the disciplining power of damages action they found so relevant to bring in line recalcitrant Member States.

⁶⁴ Para 88.

⁶⁵ Para 88 again.

⁶⁶ Paras 90 ff.

⁶⁷ Para 80.

⁶⁸ See Case C-352/98 P *Bergaderm* [2000] ECR I-5291, and Case C-282/05 P *Holcim* [2007] ECR I-2941, para 43: «As to the second condition, as regards both Community liability under Article 215 of the Treaty and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion».

⁶⁹ See also paras 81 ff.

⁷⁰ Para 82.