eSAPIENCE CENTER FOR COMPETITION POLICY

VIEWPOINT:

The Commission's Non-Contractual Liability in the Field of Merger Control – Don't Use a Hammer When You Need a Screwdriver

Nicolas Petit & Miguel Rato

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The Commission's Non-Contractual Liability in the Field of Merger Control – Don't Use a Hammer When You Need a Screwdriver

By Nicolas Petit[*] and Miguel Rato[**]

Introduction

It has become conventional wisdom to view the rulings handed down by the Court of First Instance ("CFI") in *Airtours*, *Schneider*, *Tetra Laval* and *Impala* as unprecedented setbacks for the European Commission ("the Commission") that would usher in a new era of administrative accountability in the field of merger control.[1] However, several commentators still consider – and lament – that the Commission enjoys a *de facto* power of "life or death" over notified mergers, and that judgments striking down its decisions are unlikely to change much in practice.[2] Parties to a blocked merger generally abandon their projects following the Commission's decision, irrespective of the outcome of the actions they may subsequently bring before the European Community ("EC") Courts (e.g. the *Airtours/First Choice* or *Schneider/Legrand* mergers). Third parties – competitors or consumers – to an illegally approved merger have little prospect of inducing the Commission to unscramble a consummated transaction (e.g. the *Sony/BMG* merger).

This unsatisfactory state of affairs has led practitioners to explore other legal avenues to hold the Commission accountable for its mistakes. One such possible means of redress is to resort to Article 288 EC which provides that the EC shall "make good any damage caused by its institutions."[3] Where an EC institution such as the Commission is found liable for such damage, Article 235 EC grants the Community Courts jurisdiction to award compensation.[4] In light of the virulence of some of criticism directed at the Commission by the CFI in the *Airtours* and *Schneider/Legrand* judgments, the parties to those mergers initiated proceedings against the Commission, seeking compensation for the unlawful prohibition of their proposed mergers.[5]

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[*] PhD. Associate at Howrey LLP, Brussels and Research Fellow, University of Liège.
[**] Associate at Howrey LLP, Brussels and former *référendaire* at the Court of First Instance of the European Communities.

[1] See Case T-342/99, *Airtours v. Commission*, [2002] E.C.R. II-258; Case T-310/01, *Schneider Electric v. Commission*, [2007] E.C.R. II-4071; Case T-5/02, *Tetra Laval v. Commission*, [2002] E.C.R. II-4381; Case T-464/04, *Impala v. Commission*, [2006] E.C.R. II-2289.

[2] See, e.g., E. BARBIER DE LA SERRE, Accelerated and Expedited Procedure before the EC Courts: A Review of the Practice, (2006) 43(3) *Common Market Law Review*, 783.

[3] Article 288(2) EC provides: "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."

[4] Article 235 EC provides: "The Court of Justice shall have jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 288."

[5] Request, Case T-212/03, *MyTravel v. Commission*; Request, Case T-351/03, *Schneider Electric v. Commission*.

These actions drew enthusiastic reactions from certain EC competition law experts which, upon close examination, appear unjustified. The legal avenue provided for by Article 288 EC will most likely prove to be a procedural dead-end. First, from the applicants' perspective, the conditions under which the Commission's liability can give rise to a right to compensation in the field of merger control are set so high by existing case-law that most Article 288 EC claims are likely to be dismissed as unfounded (I). Second, from a public policy standpoint, Article 288 EC does not constitute an adequate instrument to improve the Commission's accountability for its unlawful decisions in the area of merger control (II).

I. The private applicants' perspective - Article 288 EC as an unpromising remedy in the field of merger control

For non-contractual liability of the Commission to arise, and thereby trigger a right to compensation to the benefit of the applicants, three conditions must be met.[6]

The first condition is that the Commission must have committed a "sufficiently serious breach of a rule of law intended to confer rights on individuals."[7] Whether a breach of EC law is "sufficiently serious" will depend on the margin of discretion enjoyed by the Commission when adopting its decision, the factual complexity of the situations at hand and the difficulties in applying and/or interpreting the relevant legal provisions.[8] The higher the margin of discretion, complexity and legal difficulty, the more egregious the violation of EC law must be in order for the Commission to be held liable under Article 288 EC.

In the field of merger control, this condition is unlikely to be fulfilled as far as the Commission's substantive assessment of the transaction is concerned.[9] This is not to say that the existence of a "sufficiently serious breach" could not stem directly from the wording of the Courts' judgments in an annulment action finding a blatant infringement of EC law. However, in practice, the Courts will usually prefer to assess *de novo* in an action for damages whether the Commission has committed a serious breach of EC law in the meaning of Article 288 EC. In this connection, it should be noted that the Court has recalled in recent judgments (i) the significant decisional discretion enjoyed by the Commission when it applies the provisions contained in the merger Regulation and (ii) the fact that most high-profile merger transactions give rise to complex legal, economic and factual questions, the assessment of which is usually tinged by shades of grey and unfit to a "black or white" approach.[10] With the exception of breaches of certain

[6] These conditions are those applicable when the Commission allegedly causes damage in adopting a non-legislative discretionary act.
[7] See Case, C-282/05, *Holcim AG v. Commission*, not yet reported.
[8] Id. at §50. See also, Case C-352/98, *Bergaderm and Goupil v. Commission*, [2000] E.C.R. II-5291 at §40.
[9] That is the question whether the transaction significantly impedes effective competition, along the lines of Article 2(3) of the EC Merger Regulation, Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings, (2004) O.J. L 24.
[10] See e.g. CFI, *Impala v. Commission*, cited above.

procedural requirements or basic principles of due process, it thus appears safe to assume that the first condition for the application of Article 288 will only be met in a marginal set of circumstances.[11]

The second condition is that the applicant must have suffered a certain, specific, proven and quantifiable harm which – in line with classic tort law principles – may consist either of a *damnum emergens* (e.g. a loss of cost savings or of the costs of an M&A bid) or a *lucrum cessans* (e.g. a loss of future profits).[12] While in principle the Courts admit claims of potential imminent losses, the applicant should establish that the damage actually occurred and at least provide a reliable estimate of the amount of such damage. In practice, parties to a blocked merger will be tempted to claim the loss of any efficiency gains that would have been generated following the completion of their transaction.[13] Again, applicants will most likely face an uphill struggle to quantify the losses incurred. The difficulties in assessing any efficiency gains attributable to a merger are well-known.[14] First, certain kinds of welfare effects, such as managerial efficiency or dynamic efficiency are *ex hypothesi* not quantifiable. Second, the availability of pre-merger quantitative studies (for instance, studies conducted by industry analysts) is not particularly helpful. Many *ex ante* assessments of the prospective efficiency gains of a merger are proven unreliable *ex post*, once the merger is consummated.[15] Their evidentiary value is therefore doubtful.[16]

The third condition is that the applicant must establish the existence of a direct and immediate causal link between the damage and the Commission's unlawful action. In practice, the parties will first have to show the *existence of a causal link* between their alleged loss and the Commission's decision. To take one example, the applicant may argue that absent the decision to block the merger, it could have appropriated the profits currently achieved by the other party to the merger.[17] This line of reasoning appears,

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[11] Traditionally, the case-law referred to a "superior rule of law" designed to protect certain individuals. That requirement, which has been relaxed in recent case-law, seems to confine liability proceedings to exceptional cases where the Commission has violated a superior Treaty provision (such as, e.g. the non-discrimination principle enshrined in Article 12 EC) or a general principle of EC law (such as e.g. the principles of sound administration, care, and diligence, as alleged in the application for damages in *Schneider*).

[12] Or both. See, on this, P. CRAIG and G. DE BURCA, *EU Law: Text, Cases and Materials*, Third Edition, Oxford University Press, 2002 at p.570.

[13] Invoked *inter alia* as a loss incurred by MyTravel in its application for damages to the CFI. See Request, Case T-212/03, *MyTravel v. Commission*.

[14] See, on this, D. GERADIN, *Efficiency Claims in EC Competition Law* in H. ULLRICH (Ed.), THE EVOLUTION OF EUROPEAN COMPETITION LAW – WHOSE REGULATION, WHICH COMPETITION?, Edward Elgar, Cheltentham, 2006.

[15] At best, they may lead to the conclusion that a vetoed merger was efficiency-enhancing, without, however, providing a reliable quantitative estimate.

[16] The obstacles encountered in estimating the harm inflicted by the decision certainly explain why claimants have brought enormous figures in respect of their applications. Schneider, for instance, is reported to have claimed 1.6 billion Euros in support to its application. See T. BUCK, "EU antitrust regulator faces €1.6bn damages claim," FINANCIAL TIMES, April 26, 2007.

[17] In its application, MyTravel alleges a loss of the profits generated by Airtours as reported in its audited accounts. See Request, Case T-212/03, *MyTravel v. Commission*.

however, to be too speculative. It could be argued that any such profits were the result of the other merging party's autonomous commercial strategy, which might not necessarily have been pursued had the merger been authorized.

Second, the applicant will have to show that its loss is *directly imputable* to the Commission's illegal decision. Again, the applicant may argue that the Commission's decision is the source of an effective loss of profit that can empirically be observed on the market.[18] However, any observable loss of profit may be due to other exogenous factors such as, for instance, a sector-wide economic slowdown, an increase in the cost of inputs, etc. The Commission's decision prohibiting the merger would thus not be the only plausible reason for the loss alleged by the applicant. While it is not the purpose of the present article to dwell on the complex issue of multiple causation, we will simply note that it heightens the evidentiary obstacles faced by potential applicants seeking to quantify damages.

In sum, the stringent conditions for Commission liability and right to damages set out in the case-law represent a high hurdle for any applicant to overcome. This intuition finds empirical support in the recent ruling of the CFI in *Holcim*, confirmed by the European Court of Justice ("ECJ") on appeal, which dismissed a series of actions brought under Article 288 EC against Commission decisions applying Article 81 EC.[19]

II. <u>The public policy perspective – Article 288 EC as a blunt instrument to promote "accountability" in the field of merger control</u>

The importance of instituting effective "accountability" mechanisms where non-majoritarian institutions make public policy decisions has long been recognized by political scientists.[20] From a public policy standpoint, the case could be made that Article 288 EC should serve as just such a mechanism to check the Commission's use (and misuse) of its discretion in the field of merger control. In accordance with this line of reasoning – with which we disagree – the stringent substantive requirements set out by the Courts for the application of Article 288 EC could therefore be deemed overly restrictive.

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[18] *Id*.

[19] The facts are as follows: in its *Cement* decision, the Commission had fined several undertakings for allegedly being members of a cartel. Alsen AG and Nordcement (amongst others) appealed this decision to the CFI. In order to avoid paying the fines prior to the CFI's ruling, the two companies provided bank guarantees covering the amount of their respective fines. As far as these companies' involvement in the cartel was concerned, the decision was eventually annulled by the CFI. The Commission was ordered to pay the costs of the proceedings. It refused, however, to pay the applicants' lawyers' fees (estimated around €545.000) and costs incurred by the two companies to provide the bank guarantee. Alsen and Nordcement brought the matter before the CFI. They sought, among other claims, to obtain compensating damages for having incurred charges related to the bank guarantee on the basis of an illegal decision. Both the CFI and the ECJ rejected these claims. See Case T-28/03, *Holcim (Deutschland) AG v. Commission*, [2005] E.C.R 1357; Case C-208/05, *Holcim (Deutschland) AG v. Commission*, not yet reported.

[20] See, on this issue, D. GERADIN, R. MUNOZ and N. PETIT (Eds.), *Regulation Through Agencies: A New Paradigm for EC Governance*, Edward Elgar, Cheltenham, 2006.

We submit that bringing the Commission's liability under Article 288 EC into play may be neither a desirable nor an appropriate means to limit the Commission's *de facto* impunity in the field of merger control.

A. Should the legal requirements for the application of Article 288 EC be relaxed?

Relaxing the conditions for the application of Article 288 EC in the field of merger control does not appear to be a desirable solution. As the Court emphasized in *HNL*, widening the scope of actions for damages could negatively affect the Commission's ability to defend the general interest of the Community.[21] Such a concern is particularly relevant in the field of merger control, not least because mergers are among the most sensitive and politicized issues the Commission has to deal with.

Put simply, it should be recalled that contrary to annulment proceedings under Article 230 EC – which only those private applicants "individually and directly concerned" by a Commission decision may bring – actions under Article 288 EC are available to any individual or natural person adversely affected by a decision illegally adopted by the Commission (proof of the illegality may be brought during the proceedings themselves).[22] As a result, should the Commission unlawfully approve a welfare-reducing merger – usually referred to as a type II error – most consumers could argue that they should have the right to bring an Article 288 EC action.[23] This is likely to have profoundly negative effects. In addition to the fact that relaxing the conditions for the application of Article 288 EC could clog the Courts with actions for damages, they would, in all likelihood, face insuperable difficulties in assessing the level of compensation due to any single consumer. Furthermore, since actions for damages are not manifestly limited to claims for "competitive" damages (e.g., loss of cost savings or of unrealized profit margins), one could even imagine that other third parties – such as public institutions or trade unions – would have an incentive to lodge applications for compensation on the basis, for instance, of employment losses.

Similar concerns would apply to cases where the Commission unlawfully blocked a merger; usually referred to as a type I error. In addition to the merging parties, Article 288 EC proceedings would also be open to other stakeholders. For instance, the merging parties' upstream suppliers could seek to obtain compensation for the damages suffered as a result of the fact that they would have been able to sell larger quantities of supplies to the merged entity than to the individual companies. The merging parties' usual customers could also bring claims based on the fact that the efficiencies which would have resulted

[21] See Joined Cases C-83 and 94/76, 4, 15, and 40/77, *Bayerische HNL Vermehrungsbetriebe GmbH & Co KG and others vs Council and Commission*, [1978] E.C.R. 1209 at §6.
[22] See D. SIMON, *Le système juridique communautaire*, 3rd ed., PUF. See also E. BIERNAT, "The Locus Standi of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community", *Jean Monnet Working Paper* 12/03 available at http://www.jeanmonnetprogram.org/papers/03/031201.html, at p.30.
[23] The vast majority of the Commission's merger decisions are clearance decisions.

from the merger would no longer be "passed on" to them. In light of this plethora of potential applicants, the fact that the EC Courts specified stringent substantive conditions for the application of Article 288 EC appears all the more justified.

B. Are there other, more suitable, means to make the Commission more accountable?

It is doubtful that Article 288 EC is the right instrument to make the Commission more accountable for the decisions it adopts in the field of merger control. Indeed, it could be argued that the annulment proceedings provided for in Article 230 EC already provide a powerful mechanism to discipline the Commission. The internal administrative reforms recently implemented by the Commission – following in the wake of the Courts' judgments annulling the *Airtours/First Choice*, *Schneider/Legrand* and *Tetra Laval/Sidel* merger decisions – bear testimony to the influence of the Court's judicial review on the workings of the Commission, as well as to the judicial accountability of the latter.[24]

In addition, the "fast-track" procedure for actions where time is of the essence has allowed the CFI to review merger decisions within a reasonable time frame, with, in certain cases, the possibility of obtaining a judgment within seven months from the date of initiation of proceedings.[25] Of course, the average length of proceedings is still too long, but subject to further improvements, these procedural reforms may entitle parties to a blocked merger to implement their transaction following a swift annulment ruling.[26]

Should other means to increase the Commission's accountability be explored, there are, arguably, preferable alternatives which have so far not been given proper consideration, mainly for political reasons.[27] In that respect, the question whether further judicial reforms in the field of competition law should be promoted has triggered much debate lately. A proposal put forward by the Confederation of British Industry and subsequently backed by the president of the CFI, Judge Bo Vesterdorf, suggested the creation of a fully-fledged specialized competition jurisdiction, in the mold of the ECJ's Civil Service Tribunal.[28]

In our view, placing the Commission under the scrutiny of judges with considerable competition law expertise would certainly contribute to increased accountability in the field of merger control. Given that the main errors identified by the

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[24] See, for a brief account of these reforms, C. J. COOK and C. S. KERSE, *EC Merger Control*, 4th Ed., Thomson/Sweet & Maxwell, London, 2005 at §1-01. See also C. KERSE and N. KHAN, *EC Antitrust Procedure*, at §§3-000 and following.

[25] In the *EDP* case, the fast track (or "expedited") procedure was applied. The application was lodged on 25 February 2005 and the final judgment was delivered on 21 September 2005. See Case, T-87/05, *EDP v. Commission*, [2005] E.C.R. 3745

[26] See, E. BARBIER DE LA SERRE, "Accelerated and Expedited Procedure before the EC Courts: A Review of the Practice", (2006) 43(3) *Common Market Law Review*, 783.

[27] Id.

[28] See INTERNATIONAL HERALD TRIBUNE, "EU judge calls for a new merger tribunal", S. BODONI, 24 October 2006.

CFI in the Commission's *Airtours/First Choice*, *Schneider/Legrand* and *Tetra Laval/Sidel* decisions concerned substantive issues (although the Commission was also found to have committed blatant procedural violations), it is of the utmost importance that during its examination of a notified merger, the Commission bears in mind that its decision will be reviewed in substance by expert judges – preferably well versed in industrial economics – who will doubtless put its substantive findings to the test. Of course, it may be argued that the CFI's rulings in those cases showed that the Court is already well equipped to deal with the complex issues likely to arise in the assessment of mergers. However, the creation of a specialized competition tribunal can be expected to improve the quality of judicial review, and provide increased incentives for aggrieved parties to bring cases before a specialized jurisdiction.

While there may be a number of justified objections – which cannot be examined here – to the creation of a specialized antitrust court in Luxembourg, such a solution would not, from a purely legal standpoint, pose much difficulty. This possibility has been specifically provided for in the EC Treaty since 2005.[29] The main obstacle to the creation of such a jurisdiction is of a political nature. Following the entry into force of the Nice Treaty, the creation of a specialized EC court requires the unanimous support of all Member States.[30] In the current overall political context, it is doubtful that the Member States would actively support any measure designed to improve the institutional design of European competition law, as it appears to be one of the least popular areas of European public policy.[31] In addition, the creation of a specialized Court within the EC legal order is likely to face opposition from some EC magistrates themselves, as it would in all likelihood entail the appointment of economists to serve as judges in Luxembourg, and in turn require doing away with the old-fashioned rule restricting full court membership to lawyers.[32]

Conclusion

Successful actions for damages in the field of merger control will most likely remain confined to exceptional cases where the Commission is shown to have made egregious errors. We do not view this as a necessarily bad outcome. In our opinion, the stringent conditions under which the Community can currently be held liable for

[29] See Article 220(2) EC: "In addition, judicial panels may be attached to the Court of First Instance under the conditions laid down in Article 225a in order to exercise, in certain specific areas, the judicial competence laid down in this Treaty".

[30] See Article 225a EC: "The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Court of Justice or at the request of the Court of Justice and after consulting the European Parliament and the Commission, may create judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas".

[31] The creation of a specialized court in a different field of EC law, such as for instance trademark law, could also trigger positive side effects in the field of competition law. This would lighten the CFI and ECJ's caseload, and in turn allow them to deal more swiftly – in particular where the expedited procedure is applied – with annulment applications in the field of merger control.

[32] See An EU Competition Court, Comments of W. BISHOP, 20th October 2006 available at http://www.parliament.uk/documents/upload/DrWilliamBishop.doc

Commission decisions blocking or approving mergers are appropriate. Any relaxation of these conditions would most likely result in a flood of dilatory applications which would congest the Courts, and in turn encourage the Commission to be excessively cautious when reviewing merger transactions. If we wish to increase the Commission's accountability in this area, other mechanisms – such as, for instance, a revision of the current procedural and judicial architecture – are probably more appropriate.

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