Ryanair and More—EU Merger Control in 2007

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The most memorable event in EU Merger Control during 2007 will certainly be the prohibition of the merger between Ryanair and Aer Lingus, the Commission's first prohibition decision since 2004 and only the second since 2001. In addition two highly significant notices were published: the Consolidated Jurisdictional Notice and the Guidelines for Non-Horizontal Mergers. This review will focus on the most significant developments in the area of EU Merger Control in 2007.

Commission jurisdiction and procedure

With 402 notifications, the year 2007 brought a new record as regards the number of notifications. This record was achieved on the basis of an extremely strong first six months, confirming that merger notifications move in parallel with mergers and acquisitions (M&A) activity. Of 368 Phase I clearance decisions (without remedies), approximately 60 per cent were taken under the simplified procedure. As regards Phase II decisions, for the first time clearance decisions without remedies (five)[1] outnumbered clearance decisions with remedies (four).[2] In addition, one merger was prohibited.[3]

The Consolidated Commission Jurisdictional Notice

On July 10, 2007, the Commission adopted the Consolidated Jurisdictional Notice.[4] This Notice consolidates what were previously four separate notices on jurisdictional issues into one user-friendly document.[5] In addition, the new Notice reflects the latest refinements of the Commission's thinking on matters relating to its jurisdiction, treating, inter alia, such subjects as outsourcing agreements and acquisitions by investment funds. As with most Commission Notices, it does not so much break new ground as it describes existing Commission practice; where such practice is sparse, the Notice is unable to offer much guidance.

Concept of merger—Acquisition of shares in publicly quoted companies

Fundamental to the establishment of the Commission's jurisdiction under the EC Merger Regulation[6] is the concept of a change in control on a lasting basis. While the application of this concept is today relatively straightforward in its application to privately held companies

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1 Decision of 4 April 2007, COMP/M.4403–*Thales/Finmeccanical/Alcatel Alenia Space & Telespazio*; Decision of 21 August 2007, COMP/M.4523–*Travelport/Worldspan*; Decision of 3 October 2007, COMP/M.3333–*Sony/BMG-II*; Decision of 4 December 2007, COMP/M.4662–*Syniverse/BSG*; Decision of 5 December 2007, COMP/M.4647–*AEE/Lentjes*.

2 Decision of 10 May 2007, COMP/M.4381–*JCF/FIAMM*; Decision of 22 May 2007, COMP/M.4404–*Universal/BMG Music Publishing*; Decision of 18 July 2007, COMP/M.4504–*SFR/Télé 2 France*; Decision of 19 September 2007, COMP/M.4525–*Kronospan/Constantia*.

3 Decision of 27 June 2007, COMP/M.4439-*Ryanair/Aer Lingus*.

4 Consolidated Jurisdictional Notice under Regulation 139/2004 on the control of concentrations between undertakings [2008] OJ C95/1. For an overview of the most important changes introduced by the new Notice, see J. Lübking, "Commission Jurisdictional Notice under the Merger Regulation" (2007) 3 *Competition Policy Newsletter* 1. See also, A. Weitbrecht, "EU Merger Control in 2006—The Year in Review" [2007] E.C.L.R. 125.

5 The Consolidated Jurisdictional Notice replaces the Notice on the concept of a concentration, the Notice on the concept of full function joint ventures, the Notice on the concept of undertakings concerned and the Notice on the calculation of turnover, all dating from 1998.

6 Regulation 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1.

where copious Commission practice exists,[7] it poses more difficult issues when applied to the acquisition of shares in publicly traded companies.

The starting point of the analysis has been established early on: in the case of publicly quoted companies, control is acquired where the acquirer can be expected to command a de facto majority in the annual general meeting (AGM); since not all voting shares tend to be represented in these meetings, a shareholding of 20 or 30 per cent may give such a majority and the acquisition of such shareholding may thus confer control. For the likely representation of shareholders in future AGMs the Commission tends to look at the shareholder representation in previous years.[8] Given that the past is not always a reliable proxy for future developments, especially in light of impending changes in the shareholding structure, the application of this principle in practice is far from straightforward.

The acquisition of shares in publicly traded companies also poses particular issues with respect to the prohibition against implementing a merger prior to clearance (Art.7 para.1 of the EC Merger Regulation) and what constitutes the merger that is being notified.

The following two cases from 2007 may illustrate some of the issues.

Yara/Kemira GrowHow

In *Yara/Kemira GrowHow*,[9] Yara initially acquired a 30.05 per cent shareholding in target GrowHow from the state of Finland. Given the low presence at the last three annual shareholders' meetings, this shareholding would confer control over Kemira GrowHow. Yara took the position that this acquisition represents the first step of the overall transaction which would be completed by a public bid for all shares of the target. This overall transaction was notified to the European Commission for clearance. Even though Yara agreed that it would not vote the acquired 30.05 per cent shares pending clearance from the Commission, the Commission took the preliminary view that the acquisition of 30.05 per cent of shares might constitute a partial implementation of the notified merger prior to clearance and thus violate the prohibition against implementation of Art.7 para.1 of the EC Merger Regulation.[10]

Ryanair/Aer Lingus

What exactly constitutes the "merger" that is the subject of the Commission proceeding was also at issue in *Ryanair/Aer Lingus*.[11] In line with established practice, the Commission considered the merger to include not only the public bid (which was not implemented because the required 50 per cent shareholding was not reached) but also the stake building that had occurred prior to the announcement of the public bid, which had given Ryanair approximately 25 per cent of Aer Lingus shares.

However, when the Commission prohibited the merger it did not require a divestiture of those shares that had been acquired prior to the public bid and that had subsequently been increased to 29.4 per cent. Undisputedly this shareholding, while burdensome for Aer Lingus's operations, does not give Ryanair control over Aer Lingus since there are other major shareholders in Aer Lingus, in particular the Irish Government with a 25 per cent shareholding, and pension funds of unions and pilots associations with 15 per cent. When the Commission refused to require Ryanair to divest its entire shareholding, Aer Lingus sued the Commission in order for the Court to force the Commission to require divestiture, arguing that since the acquired shares were considered to be part of the merger, following the prohibition of the merger the Commission is under an obligation to order the divestiture of these shares. It is doubtful whether this argument will prevail since if the Commission were to order divestiture, Ryanair could turn around and re-acquire these shares the next day without need for Commission clearance since it would remain below the threshold that confers control.[12]

Overall, the acquisition of shares in publicly quoted companies still presents frequent issues under the EC Merger Regulation. These issues are compounded by the fact that national merger control regimes such as those

7 This includes the acquisition of joint control on the basis of shareholder agreements where the Commission's practice is particularly well developed. See Consolidated Jurisdictional Notice, para.65 *et seq*.

8 Consolidated Jurisdictional Notice para.59. In practice, the Commission considers the last three annual general meetings to be determinative; the Notice, however, does not contain this limitation.

9 Decision of 21 September 2007 COMP/M.4730-*Yara/Kemira GrowHow*.

10 Decision in COMP/M.4730-*Yara/Kemira GrowHow* at [7]. This view is based on the fact that technically the acquisition of the 30.95% stake could not benefit from Art.7 para.2 of the EC Merger Regulation since it was not acquired from "various sellers".

11 Decision in COMP/M.4439-*Ryanair/Aer Lingus*.

12 This is a variation on the well-established principle of *dolo petit qui petit quod statim redditurus est*. Indeed, the President of the Court of First Instance rejected Aer Lingus's application for interim measures on multiple grounds, including the lack of *fumus boni iuris*, see Order of the President of the Court of First Instance, *Aer Lingus Group Plc v Commission of the European Communities* (T-411/07 R), March 18, 2008, not yet published in the E.C.R.

in Germany, Poland and Austria require notification at thresholds far below the acquisition of control.

Second phase proceedings without a Statement of Objections

As will be remembered, in the summer of 2006 the Court of First Instance annulled the Commission's 2004 clearance decision in *Sony/BMG*.[13] In *Sony/BMG* the Commission had originally issued a strongly worded Statement of Objections according to which the merger would tighten an existing oligopoly in the market for recorded music; subsequently, and upon the submission of economic evidence by the merging parties, the Commission cleared the merger without remedies.

Despite that ultimate result of the Commission proceeding, any unsuspecting reader of the 2004 clearance decision could be forgiven for thinking that they are reading a prohibition decision—in fact the clearance decision repeated vast passages of the Statement of Objections and only at the very end of its clearance decision did the Commission conclude that, after all, the competitive parameters of the recorded music industry were such as to make it unlikely that there would be tacit co-ordination among the major players. As a result, the Commission's clearance decision suffered from intrinsic contradictions and the ultimate result—lack of co-ordinated effects—was supported by far less convincing evidence than the Commission's contrary allegations in the Statement of Objections and the clearance was annulled by the CFI for that reason.[14]

In drawing the conclusions from this unpalatable experience, the Commission during 2007 has followed a practice of refraining from issuing a Statement of Objections unless it is almost certain to either prohibit the merger or to require remedies.[15] The merging parties will, of course, hardly complain against not receiving a Statement of Objections, since the absence of a Statement of Objections only confirms that they are on their way towards an unconditional clearance. What is more problematic is the fact that the Commission is now required to make up its mind earlier in the second phase procedure, and where it ends up issuing a Statement of Objections the objections tend to come very late. In addition, the rights of third parties that oppose the merger may be negatively affected by this practice.

13 *Impala v Commission of the European Communities* (T-464/04) [2006] E.C.R. II-2289; Decision of 19 July 2004 COMP/M. 3333-*Sony/BMG*.
14 The merger was subsequently cleared a second time by the Commission, see below.
15 The issue does not arise where the Commission clears a merger subject to remedies, since in this case the clearance decision need only say that the remedies accepted will cure the serious competition concerns identified and described in the first part of the Commission's analysis.

Horizontal mergers

Horizontal mergers continue to be the principal focus of the Commission's merger control review. As with vertical and conglomerate mergers, the Commission continues to practice its economics-based approach introduced over the past few years which focuses on the removal of competitive constraints and possible co-ordinated effects.

Non-co-ordinated effects

The vast majority of horizontal mergers is scrutinised by the Commission for the presence of non-co-ordinated (unilateral) effects, i.e. whether the removal of a competitive restraint on the merging parties will allow them *post merger* to raise prices, without resorting to a mechanism of tacit collusion with the remaining competitors. The following cases are illustrative of the current state of the Commission's practice.

Ryanair/Aer Lingus

The most important Commission decision in 2007 is the prohibition of the proposed takeover by Ryanair of Aer Lingus.[16] Ryanair is an Irish-based low-cost airline, flying more than 40 million passengers per year on more than 400 point-to-point routes across Europe. Aer Lingus Group Plc, the former Irish flag carrier, likewise offers mainly point-to-point low-cost flights, operating more than 80 routes and carrying more than 8.6 million passengers per year. Both carriers have the base of their operations in Dublin. Their activities directly overlap on 35 routes on which more than 14 million passengers are carried annually, and on short-haul routes between Dublin and various European destinations the two companies carry together around 80 per cent of all passengers.

The Commission's decision covers 353 pages, plus approximately 200 pages of annexes.[17] The decision has been drafted by the Commission with extreme care, in

16 Decision in COMP/M.4439-*Ryanair/Aer Lingus*.
17 The annexes summarise empirical and economic studies undertaken.

anticipation of an appeal.[18] Throughout the decision, the Commission's goal of insulating the decision from possible points of attack is evident. The Commission expressly states that its prohibition is based upon the totality of the evidence before the Commission and that even if individual pieces of that evidence could be successfully attacked, the overall picture and result would not differ.[19] This approach appears to be in line with the position taken by the Court of Justice in *Kali und Salz*,[20] according to which the Commission must base its decision on a "sufficiently cogent and coherent body of evidence".[21]

In addition to its usual market survey of companies active in the sector, the Commission undertook an empirical investigation questioning passengers at Dublin airport about the relevant parameters that enter into their decisions when travelling by aeroplane. The results of the survey, inter alia, allowed the Commission to refute Ryanair's principal contention, according to which Ryanair operates in a market of its own, where the alternative to its customers is not to travel on another airline such as Aer Lingus but rather not to travel at all. Instead, according to the Commission, the market investigation confirmed that Ryanair and Aer Lingus represent the main competitive constraints on each other with reference to the determination of their prices and other elements of competitive behaviour.

Ryanair pointed out that the decision reverses 20 years of EU airline consolidation which has seen the Commission approve all mergers between larger competitors including *Air France/KLM*[22] and *Lufthansa/Swiss*[23] with minimal remedies.[24] All previous cases, however, concerned mergers of carriers that had their centres of operation at different airports and even in different countries. In contrast, the Ryanair/Aer Lingus proposed takeover would have involved the two main airlines operating at the same airport. Given the geographic location of Dublin, slot remedies were unlikely to be effective since other airlines based elsewhere have no incentive to take on such a formidable competitor in Dublin and cannot meaningfully fit flights to and from Dublin into their existing hub-and-spoke system.

On September 10, 2007, Ryanair lodged an appeal against the decision of the Commission.[25]

KarstadtQuelle/MyTravel and TUI/First Choice

During the second quarter of 2007, the Commission reviewed almost contemporaneously two transactions involving the UK and Irish markets for short-haul and long-haul package holidays: the acquisition of the British MyTravel Group (previously called Airtours) by the German Karstadt Quelle AG[26] and the acquisition of the UK travel services company First Choice by TUI.[27]

The two decisions explicitly clarify for the first time the issues that arise when two transactions take place contemporaneously within the same industry affecting the same relevant markets (i.e. the tour operating business in the United Kingdom and Ireland). The Commission will assess the impact of each transaction in light of the competitive situation prevailing at the time of the respective notification, assessing the first transaction independently from the second transaction.[28] According to the Commission, a party that is first to notify a concentration which would not significantly impede effective competition in the Common Market is entitled to have its operation declared compatible within the applicable time limits.[29]

As regards the substantive assessment, the Commission found that markets for tour operators have substantially changed from the time when, in 1999, it had prohibited the merger between MyTravel (formerly

18 For example, each of the overlap routes is discussed extensively with respect to all competitive parameters including alternative airports that serve the same or an adjacent area.
19 Decision in COMP/M.4439-*Ryanair/Aer Lingus* at [38].
20 Cases C-68/94 and C-30/95, *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission of the European Communities* [1998] E.C.R. I-1375.
21 Cases C-68/94 and C-30/95, *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission of the European Communities* [1998] E.C.R. I-1375 at [228].
22 Decision of 11 February 2004 COMP/M.3280-*Air France/KLM*. See also, A. Weitbrecht, "EU Merger Control in 2004—An Overview" [2005] E.C.L.R. 70.
23 Decision of 4 July 2005 COMP/M.3770-*Lufthansa/Swiss*.
24 See A. Weitbrecht, "EU Merger Control in 2005" [2006] E.C.L.R. 43.
25 See application in *Ryanair v Commission of the European Communities* (T-342/07) [2007] OJ C-269/59.
26 Decision of 4 May 2007 COMP/M.4601-*KarstadtQuelle/MyTravel*.
27 Decision of 4 June 2007 COMP/M.4600-*TUI/First Choice*.
28 Decision in COMP/M.4601-*KarstadtQuelle/MyTravel* at [49]. In the particular instance of these two transactions, the *KarstadtQuelle/MyTravel* transaction was the earlier one, both with respect to the announcement of the transaction and with respect to the date of notification. Since the date of the actual notification depends to a certain extent on the discretion of the Commission case team, a "race to notification" can be easily envisaged.
29 Decision in COMP/M.4601-*KarstadtQuelle/MyTravel* at [50].

Airtours) and First Choice on the alleged basis of co-ordinated effects.[30] Today, consumers using the internet are able to put together their own travel package, the principal elements being flight and hotel accommodation, on their own without the need for a package tour operator. This development has been reinforced by the rise of low-cost airlines, opening up many new holiday destinations and encouraging independent travelling.

As a result, the *KarstadtQuelle/MyTravel* transaction was cleared without remedies, whereas the second-in-line transaction, the *TUI/First Choice* merger, was cleared conditionally upon divestiture by TUI of its Irish business operating under the "Budget Travel" brand.

Co-ordinated effects—Sony/BMG II

During the second half of 2006 and the first nine months of 2007 the Commission reviewed again the merger between Sony and BMG, after the Commission's 2004 clearance decision had been annulled by the Court of First Instance in 2006.[31] The Commission was able to take into account the actual development of markets, including not only the effect of the implemented merger but also the increasing importance of the online music market.

The investigation undertaken by the Commission was one of the most thorough and detailed ones it had ever undertaken,[32] and the Commission was again unable to find any evidence of co-ordinated effects and the merger was approved by the Commission for a second time.[33]

Vertical and conglomerate mergers: Non-Horizontal Merger Guidelines

On November 28, 2007, the Commission adopted its Non-Horizontal Merger Guidelines.[34] Dealing with the competitive effects of both vertical and conglomerate mergers, the Guidelines aim to increase the predictability of the Commission's assessment of non-horizontal mergers.

The Commission positions the vertical and conglomerate guidelines in parallel to the horizontal guidelines of 2004.[35] First and foremost, unlike horizontal mergers, vertical and conglomerate mergers do not lead to the loss of direct competition between the merging parties in the same relevant market.[36] Moreover, they tend to produce a substantial scope for efficiencies, as they may reduce transaction costs, allow for improvements in terms of product design, organisation of the production process or in the way in which the products are sold.

As means of practical guidance the Commission defines "safe harbours", i.e. the cases that are clearly unlikely to raise competition concerns. Such cases are non-horizontal mergers where the market share post-merger of the new entity in each of the markets concerned is below 30 per cent and where the post-merger Herfindahl-Hirschman Index (HHI) is below 2,000.[37]

Vertical mergers

As to the possible anti-competitive effects of vertical mergers, the Guidelines distinguish between two different cases in which the access to market is hampered or eliminated for actual or potential rivals as a result of the merger: input foreclosure and customer foreclosure. Input foreclosure may occur where the new entity is able *post merger* to make it harder for rivals to obtain products or services from the upstream entity. Such a strategy can be effective only if the supplier has market power in the (upstream) input market and the input represents a significant cost factor for rival firms active in the downstream market. The opposite situation is presented by the case of customer foreclosure: where the merged entity has market power in the downstream market, it may foreclose access to a sufficient customer base to its actual or potential rivals in the upstream market. In both cases the Commission will analyse the ability and the incentive of the new entity to engage in a foreclosure strategy.

30 Decision 2000/276 IV/M.1524-*Airtours/First Choice* [2000] OJ L93/1; annulled in *Airtours Plc v Commission of the European Communities* (T-342/99) [2002] E.C.R. II-2585.
31 See fn.12 above.
32 Commission Press Release IP/07/1437, October 3, 2007.
33 Decision in COMP/M.3333-*Sony/BMG-II*.
34 Commission Guidelines on the assessment of non-horizontal mergers under Regulation 139/2004, available at *http://ec.europa.eu*. For commentary on the draft guidelines published at the end of 2006, see A. Weitbrecht and R. Flanagan, "The Control of Vertical and Conglomerate Mergers before and after *GE/Honeywell*—the Commission's Draft Guidelines for non-horizontal mergers" (2007) 1 *Bloomberg European Business Journal* 294. For a concise description of the Commission's treatment of conglomerate mergers see J. Koponen, "The Long and Winding Road: The European Commission's Path to a Framework for the Analysis of Conglomerate Mergers" (2007) 1 *Bloomberg European Business Journal* 241.
35 Guidelines on the Assessment of Horizontal Mergers [2004] OJ C-31/5.
36 Draft Non-horizontal Guidelines, para.12.
37 Draft Non-horizontal Guidelines, para.25.

Conglomerate mergers

Conglomerate mergers are even less likely to lead to any competition concerns, except in certain specific cases.[38] Again, the main concern relevant to conglomerate mergers is that of foreclosure. A merged entity with a combination of activities in related markets may have the ability and incentive to leverage a strong market position from one of the markets to another by means of tying or bundling, or other exclusionary practices which may affect actual or potential rivals' ability or incentive to compete.[39]

Three-prong test

In its analysis of both vertical and conglomerate mergers, the Commission will pose three principal questions with respect to potential foreclosure strategies of the merged entity:

- Will the merged entity have the ability to behave in that manner?
- Will there be an economic incentive for the merged entity to behave in that manner?
- Will the effect of such behaviour give rise to a significant impediment to effective competition?

Remedies—Draft Revised Remedies Notice

In April, the Commission published a draft Commission Notice on remedies acceptable under Regulation 139/2004 and a proposal for amendments to the Implementing Regulation 802/2004.[40] The final texts are expected to be adopted in the first half of 2008.

The new draft notice amends the Commission's 2001 Notice on remedies[41] in the light of recent developments. These include the extensive study undertaken by the Commission into the implementation and effectiveness of remedies[42]; recent jurisprudence, such as the judgments by the Court of First Instance in *EDP*,[43] *General Electric/Honeywell*[44] and *Cementbouw*[45]; and the experience gained in the Commission's practice in the past years as regards the design and implementation of remedies. The amendments to the Implementing Regulation 802/2004 consist, in particular, in a new "Form RM" enabling the Commission to require formalised remedy proposals from the parties notifying a merger.

In particular, the draft notice draws the consequences from the judgment of the Court of First Instance in *EDP*[46] which had placed the burden of proof on the Commission, requiring it to show that the merger, as remedied by the proposed commitments of the parties, would significantly impede effective competition.

In addition, the draft notice considers that structural remedies, in particular divestitures, are the preferred remedies, as they are usually the most effective way to restore competition.

Nevertheless, the draft notice recognises that non-divestiture remedies may be appropriate in certain circumstances. In particular, remedies granting access to competitors (access to infrastructure, networks, technology or essential inputs) are often acceptable in order to lower entry barriers or to eliminate concerns of foreclosure. The revised notice maintains, however, the Commission's scepticism towards behavioural remedies and states that it will examine other types of non-divestiture remedies only exceptionally in specific circumstances, such as in relation to competition concerns arising in conglomerate structures.[47]

Furthermore, the draft notice emphasises the importance of the commercial viability of the divested activities, requiring the parties to include in the divestiture package activities that do not in themselves give rise to competition concerns, but are helpful in order to ensure

38 Draft non-horizontal guidelines, para.92.

39 Draft non-horizontal guidelines, para.92.

40 Regulation 802/2004 implementing Regulation 139/2004 on the control of concentrations between undertakings [2004] OJ L133/1 (the Implementing Regulation); the Draft Notice on Remedies is available at *http://ec.europa.eu*.

41 Notice on remedies acceptable under Regulation 4064/89 and under Regulation 447/98 [2001] OJ C68/3.

42 Merger Remedies Study, European Commission–DG COMP, October 2005, the public version is available at *http://ec.europa.eu*.

43 *EDP–Energias de Portugal SA v Commission of the European Communities* (T-87/05) [2005] E.C.R. II-3745.

44 *Honeywell International Inc v Commission of the European Communities* (T-209/01) [2005] E.C.R. II-5527 and *General Electric Co v Commission of the European Communities* (T-210/01) [2005] E.C.R. II-5575.

45 *Cementbouw Handel & Industrie BV v Commission of the European Communities* (T-282/02) [2006] E.C.R. II-319, affirmed in *Cementbouw Handel & Industrie BV v Commission of the European Communities* (C-202/06 P), judgment of December 18, 2007, not yet published in the E.C.R.

46 *EDP–Energias de Portugal SA* (T-87/05) [2005] E.C.R. II-3745.

47 See *Commission of the European Communities v Tetra Laval BV* (C-12/03 P) [2005] E.C.R. I-987 (*Tetra Laval II*), requiring the Commission to take into account remedies that could be characterised as behavioural.

the commercial viability of the divested assets.[48] Where the commercial viability will depend on the purchaser, the Commission proposes to require the purchaser to be known before the parties will be allowed to implement their merger.

Judicial review—Damages for unlawful prohibition decision

In its judgment in *Schneider Electric SA v Commission of the European Communities*,[49] the Court of First Instance in July 2007 held the Commission liable for certain damages incurred as a result of the unlawful prohibition of a notified merger.

In 2001, Schneider, a large French producer of electrical equipment intended to acquire control of Legrand, another large French electrical company, by means of a public offer for exchange of shares on the Paris stock exchange. After the notification of the proposed merger to the Commission, Schneider acquired 98 per cent of the capital of Legrand.[50] Subsequently the Commission declared the merger to be incompatible with the Common Market on the grounds that the merged operation would have significantly impeded competition in certain product and geographic markets for electrical equipment.[51] In a second decision the Commission ordered Schneider to divest Legrand.[52] Both decisions were annulled by the Court of First Instance.[53] The annulment of the prohibition decision was in particular based upon two grounds: the Commission had violated Schneider's right to be heard with respect to a conclusion contained in the final decision, but not in the Statement of Objections, and on the basis of errors of assessment with respect to certain markets.

Following the Court of First Instance judgments, the procedure in 2002 returned to the Commission where the Commission expressed persistent doubts as to whether Schneider's proposed remedies were adequate to render the merger compatible with the Common Market. In light of the Commission's opposition, Schneider decided to honour a contract of divestiture with Wendel/KKR that had previously been concluded and ended up selling Legrand at a substantial loss.

Schneider subsequently sued the Commission in the Court of First Instance for damages. The Court tried to balance the latitude and margin of discretion which the Commission must enjoy, according to the Court, both in its policy decisions and in its appraisal of a merger, against ensuring that the consequences of flagrant and inexcusable failings are born by the Commission rather than private parties. Applying this standard, the Court of First Instance ruled that the Commission's breach of Schneider's right to be heard on a particular allegation was of such egregious nature as to trigger the Commission's non-contractual liability, whereas other errors in the prohibition decision were not.

As regards the *quantum* of damages, the Court of First Instance ruled most importantly that Schneider could not demand to be put in the position as though the merger had been cleared and subsequently implemented. Rather, it could first recover the expenses incurred in the resumed merger control procedure which was undertaken by the Commission following the annulment; secondly, Schneider was to be compensated for two-thirds of the loss which it incurred by reason of a reduction in the divestiture price which Schneider had to concede to Wendel/KKR as compared to the divestiture price it would have obtained had it received in October 2001 a legal (prohibition) decision.[54] It is quite obvious that the judgment, against which the Commission has appealed, represents a somewhat uneasy compromise—both as regards the Commission errors giving rise to liability and as regards the damages for which Schneider is to be compensated.

Conclusion and outlook for 2008

The Commission's merger control practice, despite numerous shortcomings, has reached a certain level of maturity that is particularly evident in such decisions

48 See, e.g. Decision of 20 February 2007 COMP/M.4494-*Evraz/Highveld*, and COMP/M.4404-*Universal/BMG Music Publishing*.

49 *Schneider Electric SA v Commission of the European Communities* (T-351/03), July 11, 2007, not yet reported.

50 In the case of public bids, the prohibition against implementation prior to clearance does not apply as long as the acquirer notifies the merger to the Commission without undue delay and does not exercise its voting rights (see now Art.7 para.2 of the EC Merger Regulation).

51 Decision of 10 October 2001 COMP/M.2283-*Schneider/Legrand*.

52 Décision du 30 janvier 2002 COMP/M.2283-*Schneider/Legrand*.

53 *Schneider Electric SA v Commission of the European Communities* (T-310/01) [2002] E.C.R. II-4071 and, consequently, also the divestiture decision in *Schneider Electric SA v Commission of the European Communities* (T-77/02) [2002] E.C.R. II-4201.

54 The Court of First Instance held that Schneider had itself contributed to its own loss by assuming the risk that the merger would subsequently be declared incompatible.

as *Ryanair/Aer Lingus*. At the same time, with clearance decisions of 300 pages and prohibition decisions of 500 pages (including annexes) it would appear to have reached a point from which the amount of detail in the Commission's analysis, and the sophistication of economic evidence, cannot meaningfully be pushed much higher.

What seems to be more important is to improve the coherence of the overall merger control system in the European Union, which includes not only the Commission but national merger control regimes. The harmonisation of what constitutes a merger and of the substantive standard of assessment should be high on the agenda when the Commission begins to prepare its review of EU Merger Control scheduled for the first half of 2009.