Case T-351/03

Schneider Electric SA

v

Commission of the European Communities

(Non-contractual liability of the Community — Loss sustained by an undertaking owing to a sufficiently serious infringement of Community law vitiating the procedure for examining the compatibility of a concentration with the common market)

Summary of the Judgment

1. *Procedure — Application initiating proceedings — Formal requirements*

(Statute of the Court of Justice, Arts 21, first para., and 53, first para.; Rules of Procedure of the Court of First Instance, Art. 44(1)(c))

2. *Non-contractual liability — Conditions — Sufficiently serious breach of Community law*
(Art. 288, second para., EC)

3. *Non-contractual liability — Conditions — Sufficiently serious breach of Community law*
(Art. 288, second para., EC)

4. *Non-contractual liability — Conditions — Sufficiently serious breach of Community law*
(Art. 288, second para., EC)

5. *Non-contractual liability — Conditions — Decision declaring a concentration incompatible with the common market*
(Art. 288, second para., EC)

6. *Competition — Concentrations — Administrative procedure — Statement of objections — Necessary content — Observance of the rights of the defence*
(Council Regulation No 4064/89, Art. 18(1) and (3))

7. *Competition — Concentrations — The fact that teams of officials responsible for the various stages of the investigation of a concentration between undertakings, despite there being an annulment between those various stages, are composed of the same members*
(Council Regulation No 4064/89, Art. 18(3) and (4))

8. *Competition — Concentrations — Sufficiently serious breach of Community law*
(Council Regulation No 4064/89, Art. 8(4))

9. *Competition — Concentrations — Assessment of compatibility with the common market — Agreements which are lawful under national law and binding on the parties to the concentration taken into account by the Commission*
(Council Regulation No 4064/89, Art. 2)

10. Competition — Concentrations — Examination by the Commission — Decision to open the in-depth investigation phase — Conditions
(Council Regulation No 4064/89, Arts 2(3), 6(1) and 8(3))

11. Competition — Concentrations — Administrative procedure — Decision to open the in-depth investigation phase
(Council Regulation No 4064/89, Art. 6(1)(c))

12. Non-contractual liability — Conditions — Invalid — Damage — Causal link
(Art. 288, second para., EC)

13. Competition — Concentrations — Assessment of compatibility with the common market — No presumption
(Council Regulation No 4064/89, Arts 2 and 10)

14. Non-contractual liability — Conditions — Invalid — Damage — Causal link
(Art. 288, second para., EC)

15. Non-contractual liability — Conditions — Invalid — Damage — Causal link
(Art. 288, second para., EC)

16. Non-contractual liability — Conditions — Invalid — Damage — Causal link
(Art. 288, second para., EC; Council Regulation No 4064/89, Art. 7(3))

17. Non-contractual liability — Damage — Compensation
(Art. 288, second para., EC)

1. Under the first paragraph of Article 21 of the Statute of the Court of Justice, which applies to the procedure before the Court of First Instance by virtue of the first paragraph of Article 53 of that statute, and under Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, all applications must indicate the subject-matter of the dispute and contain a summary of the pleas in law on which the application is based. That statement must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application, if necessary, without any further information. In order to guarantee legal certainty and the sound administration of justice, it is necessary that the basic legal and factual particulars relied on be indicated, at least

in summary form, coherently and intelligibly in the application itself.

In order to satisfy those requirements, an application seeking compensation for damage caused by a Community institution must state the evidence from which the conduct alleged against the institution can be identified, the reasons for which the applicant considers there to be a causal link between that conduct and the damage it claims to have suffered, and the nature and extent of that damage.

(see paras 92-94)

2. In order for the Community to incur non-contractual liability under the second paragraph of Article 288 EC for unlawful conduct of its institutions, a number of conditions must be satisfied: the institution's conduct must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct and the damage pleaded.

Where the unlawfulness of a legal measure is relied on as a basis for an action for damages, that measure, in order to be capable of causing the Community to incur non-contractual liability, must constitute a sufficiently serious breach of a rule of law intended to confer rights on individuals. The decisive criterion in that regard is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion.

The system of rules in relation to the non-contractual liability of the Community takes into account, inter alia, 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.

Where the institution criticised 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 of Community law.

The same applies where the defendant institution breaches a general obligation of diligence or misapplies relevant substantive or procedural rules.

(see paras 113-118)

3. If the concept of a serious breach of Community law, necessary to establish the Community's non-contractual liability, 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, this could compromise its ability to function as a regulator of competition, contrary to the general Community interest.

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.

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.

(see paras 121-125)

4. In principle, the possibility cannot be ruled out that manifest and serious defects affecting the economic analysis underlying competition policy decisions may constitute sufficiently serious breaches of a rule of law to cause the Community to incur non-contractual liability.

However, for such a finding to be made it is first necessary to verify that the rule infringed by the incorrect analysis is intended to confer rights on individuals. Whilst certain principles and certain rules which must be observed in any competitive analysis are indeed rules intended to confer rights on individuals, not all norms, whether of primary or secondary law or deriving from case-law, which the Commission must observe in its economic assessments can be automatically held to be rules of that kind.

Next, the economic analyses necessary for the classification, under competition law, of a given situation or transaction are generally, as regards both the facts and the reasoning based on the account of the facts, complex and difficult intellectual formulas, which may inadvertently contain certain inadequacies, such as approximations, inconsistencies, or indeed certain omissions, in view of the time constraints to which the institution is subject. That is even more so where, as in the case of the control of concentrations, the analysis has a prospective element. The gravity of a documentary or logical inadequacy, in such circumstances, may not always constitute a sufficient circumstance to cause the Community to incur liability.

Last, the Commission enjoys discretion in maintaining control over Community competition policy, which means that rigorously consistent and invariable practice in implementing the relevant rules cannot be expected of it, and, as a corollary, that it 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 consistently.

(see paras 129-132)

5. The defects in a decision declaring a concentration incompatible with the

common market, which have not had any repercussions on the subsequent stages of the procedure and, inter alia, have not deprived the parties to the concentration of an opportunity to secure a decision allowing it to proceed with the transaction are not in themselves capable of causing specific harm to the parties and thus of causing the Community to incur liability.

by considering whether to propose to the Commission measures intended to correct the negative impact of the notified concentration.

Respect for that right, which is one of the fundamental rights guaranteed by the Community legal order in administrative procedures, is of particular importance for the control of concentrations between undertakings.

(see paras 134, 138, 139)

6. As addressees of decisions of a public authority which affect their interests to an appreciable extent, the undertakings involved in a concentration having Community dimension must be placed in a position where they can make their views properly known and, to that end, be clearly informed, in due time, of the Commission's main objections to their notified concentration.

A manifest and serious breach of Article 18(1) and (3) of Regulation No 4064/89 on the control of concentrations between undertakings stems from the fact of the Commission's drafting a statement of objections in such a way that the applicant cannot ascertain that, if it did not submit corrective measures, it would have no chance of securing a declaration that the transaction was compatible with the common market. That breach of the rights of the defence is neither justified nor accounted for by the particular constraints to which Commission staff are objectively subject.

The statement of objections is of particular importance in that connection, given that it is specifically intended to enable the undertakings concerned to react to the concerns expressed by the regulatory institution, first by giving their views on the matter and, second,

(see paras 147-149, 152, 154, 170)

7. The fact that the teams of officials responsible for the various stages of investigation of a concentration between undertakings were composed wholly or partly of the same members does not constitute a sufficiently serious breach by the Commission of a rule of law intended to confer rights on individuals.

Even if observance of all persons' right to a hearing before an independent and impartial tribunal is guaranteed by Article 6(1) of the European Convention on Human Rights, to which reference is made by Article 6(2) of the Treaty on European Union and which was reaffirmed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, and the right to a fair hearing is manifestly a rule intended to confer rights on individuals, provided that the right to an impartial tribunal is guaranteed, Article 6(1) of the Convention does not prohibit the prior intervention of administrative bodies that do not satisfy all the requirements that apply to procedure before the courts.

In the field of merger control, the action for annulment available under Article 230 EC against Commission decisions adopted under Article 8(3) and (4) of Regulation No 4064/89 is a remedy incorporating the safeguards required by Article 6(1) of the Convention.

Moreover, there is no rule of law or principle which prevents the Commission from entrusting to the same officials re-examination of a concentration in compliance with a judgment annulling a decision declaring that concentration to be incompatible with the common market.

Finally, it cannot be stated as a general rule resulting from the obligation to be impartial that an administrative or judicial authority, after annulling a first decision, is bound to send the case back to a different authority or to a differently composed branch of that authority.

(see paras 181-186, 188)

8. Where a concentration has already been implemented when the Commission declares it incompatible with the com-

mon market, Article 8(4) of Regulation No 4064/89 on the control of concentrations between undertakings enables the Commission to require any action to be taken to restore effective competition.

In order to decide whether, by requiring separation of the two parties to the transaction in such a way that the target's size could not be affected and by prohibiting any subsequent retransfer of business, the Commission manifestly and seriously infringed that provision, it is necessary to examine the manner in which the divestiture is carried out, by taking account in particular of the positions of the notifying undertakings in the markets at issue, the difference between their market shares and those of their immediate competitors, the reputation of their brands in those markets, and to ascertain whether the period for implementation of the divestiture decision was manifestly excessively short.

(see paras 199-203, 209)

9. In the exercise of its monitoring powers concerning compatibility with the common market of concentrations having a Community dimension, the Commission cannot disregard binding agreements between the notifying parties, provided that their stipulations are lawful under the applicable national law.

(see para. 221)

10. Serious doubts as to the compatibility of a concentration with the common market are a sufficient basis for taking a decision to initiate an in-depth investigation under Article 6(1)(c) of Regulation No 4064/89 on the control of concentrations between undertakings, whilst evidence of the creation or strengthening of a dominant position is required from the Commission by Article 2(3) of the regulation where it declares a concentration incompatible with the common market on the basis of Article 8(3).

(see paras 235, 249, 250)

11. In the field of merger control, whilst observance of the rights of the defence is

required before the adoption of any decision liable adversely to affect the undertakings concerned, the decision to initiate the in-depth investigatory phase does not constitute an act adversely affecting the undertakings, the legality of which would depend on observance of those rights.

(see para. 240)

12. In the context of the Community's non-contractual liability, in order to determine the harm attributable to a wrongful act of a Community institution, account must be taken of the effects of the failure which caused liability to be incurred and not of the effects of the measure of which it forms part, provided that the institution could or should have adopted a measure having the same effect without breaching any rule of law.

In other words, the analysis of the causal link cannot start from the incorrect premiss that, in the absence of an unlawful measure, the institution would have refrained from acting or would have adopted a contrary measure, which could also amount to unlawful conduct on its part, but must be based on a comparison between the situation arising, for the third party concerned, from the wrongful measure and the situation which would have arisen for that third party if the institution's conduct had been in conformity with the law.

Where the unlawful circumstance on which the claim for compensation is based is associated with a decision whose effect is to withhold from an applicant an authorisation or other favourable measure, it cannot be presumed, for the purpose of analysing the effects of the wrongful measure and the comparison between the real situation and the reconstructed legal situation, that, in the absence of the defect identified, the applicant would necessarily have been granted the authorisation or other favourable measure sought by it.

Similarly, it is necessary, where there has been a breach of the rights of the defence affecting a decision declaring a merger of undertakings incompatible with the common market, not to postulate that, in the absence of that breach, the notified concentration would have been declared compatible, explicitly or implicitly, but rather to assess the effects which the defect identified may have had on the decision that was reached.

Thus, the loss attributable to the Community cannot be assessed on the basis of a comparison between the situation brought about by an incompatibility decision and a situation characterised

by express or tacit authorisation of the concentration, unless the Community judicature is in a position to find that the incompatibility was declared by the Commission as a direct and certain consequence of an established failure to fulfil its legal obligations.

In addition, even if it is accepted that, in the absence of a right to recognition of the concentration's compatibility, the parties might have been deprived of a real opportunity to secure a decision of compatibility, the materialisation of that opportunity may be linked to parameters that are too uncertain to be the subject of any convincing quantification and to give rise to compensation.

Therefore, there is no sufficiently close causal link between the breach of the rights of defence of an undertaking which is party to a concentration and the loss of any opportunity of obtaining a decision that the concentration was compatible for the Community to incur liability as a result of the obligation imposed on the undertaking to dispose of the assets which it owns in the target, or, consequently, for it to be held that damage equal to the total loss of value of those assets between the time of their acquisition and their subsequent disposal can be attributed to the Community.

(see paras 263-267, 278, 280, 282, 283, 286, 292)

13. Regulation No 4064/89 on the control of concentrations between undertakings does not establish a presumption as to the compatibility with the common market of a concentration that has been notified and it is for the Commission in each case to form a clear opinion as to such compatibility and to rule accordingly.

A concentration is tacitly regarded as compatible with the common market where, in particular, the Commission has neither taken a decision to initiate the in-depth phase of investigation within the period of one month set by Article 10(1) of the regulation nor ruled as to the compatibility of a concentration with

the common market within the period of four months set by Article 10(3).

(see paras 275, 276)

On the other hand, the consultancy fees and administrative expenses of various kinds incurred by an undertaking in participating in the resumed investigation of a concentration — the resumption made necessary by the annulment of the Commission decision declaring that decision incompatible with the common market — must be linked by a direct and certain causal link between them and the unlawful conduct of the institution in order for entitlement to compensation to arise.

14. The fees of legal, tax and banking consultants and other administrative costs incurred by an undertaking in carrying out a Commission decision requiring divestiture by two undertakings party to a concentration declared incompatible with the common market cannot be accepted as flowing from the unlawfulness of the Commission's incompatibility decision.

The unlawfulness of the incompatibility decision and, consequently, of the divestiture decision does not imply that the transaction should be recognised as compatible or that the undertakings were entitled to continue as a merged entity. It cannot therefore be presumed that the administrative costs normally incurred by an undertaking with a view to divesting itself of the assets would not have had to be borne if the Commission had adopted a lawful decision.

Finally, the costs incurred in relation to judicial review proceedings before the Community judicature must be regarded as covered by the decisions given, where appropriate, on costs, under the specific procedural rules applicable to that type of expenditure, in the decisions bringing the proceedings to an end and on conclusion of the special proceedings provided for in cases where the amount of the costs is challenged. Those proceedings exclude any claim for the same sums, or sums expended for the same purposes, in connection with proceedings alleging non-contractual liability of the Community, including those incurred by litigants who, having been unsuccessful, have had to pay the costs.

(see paras 293, 294, 297-302)

15. Where a serious infringement of Community law initiating a decision which declares a concentration incompatible with the common market displays a sufficiently direct causal link with the reduction in the transfer price of shares or assets held by the transferor in the undertaking transferred, it is for the Community to compensate the loss suffered. The loss may also be equal to the difference between the transfer price agreed and that which the transferor could have obtained from the transferee if, at the end of the first investigation of the transaction it had been given a lawful decision as to the compatibility of the transaction.

(see paras 316, 317, 322)

16. Where an undertaking acquires control of another undertaking by means of a public bid in reliance on the derogation from the principle of the suspensory effect of concentrations provided for in Article 7(3) of Regulation No 4064/89 — in a manner that is entirely lawful under national and Community competition law — it nevertheless assumes the risk that the investigation of the transaction will, on expiry of the periods laid down by the regulation, result in a decision declaring the transaction to be incompatible with the common market and a corresponding obligation for the assets of undertakings already merged to be separated. In addition, if, having regard to the characteristics of the transaction, it could not have been unaware that the merger at the very least entailed the risk of creating or strengthening a dominant position in a substantial part of the common market and that, accordingly, the transaction would be prohibited by the Commission on the basis of Article 2(3) of the regulation, it may be inferred that the undertaking itself contributed to its own loss by assuming the real risk of a subsequent declaration of incompatibility of a concentration that had been brought about legally and, consequently, the possibility of a forced sale of the assets acquired.

In those circumstances, the undertaking may be held responsible for one third of the compensatable loss suffered by it as a result of the reduction in the transfer price granted to the transferee.

(see paras 328-330, 332, 334)

17. As is apparent from the principles common to the laws of the Member States, referred to in the second paragraph of Article 288 EC, a claim for interest is generally admissible in proceedings for damages.

Reparation for damage suffered as a result of unlawful conduct on the part of the Community authorities is intended, so far as possible, to provide restitution for the victim.

Consequently, provided that the conditions for non-contractual liability of the Community are fulfilled, the Community judicature cannot disregard the unfavourable consequences of the time lapse between the date of materialisation of the loss and that of payment of the compensation, in so far as account must be taken of inflation recorded.

The end of the period for which such monetary revaluation is available must, in principle, coincide with the date of delivery of the judgment establishing the obligation to make good the damage suffered by the applicant.

Nevertheless, since the amount of the claim for compensation is, at the date of delivery of that judgment, neither certain nor determinable on the basis of objective findings, default interest cannot begin to run from that date but only, in the event of delay and until full payment, from the date of delivery of the judgment determining the amount of the damage suffered.

It follows that the amount of compensation due to the applicant will have to be adjusted for the period ending on the date of delivery of the judgment determining the amount of the damage, and then increased by default interest as from the latter date until full payment.

The rate of interest to be applied is to be calculated on the basis of the rates set by the European Central Bank for principal refinancing operations, successively applicable during each of the two periods concerned, plus two points, provided that it does not exceed the figure claimed by the applicant in its pleadings.

(see paras 340-346)