JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)

11 July 2007 *

In Case T-351/03,

Schneider Electric SA, established in Rueil-Malmaison (France), represented by A. Winckler and M. Pittie, lawyers,

applicant,

supported by

French Republic, represented by G. de Bergues, acting as Agent,

intervener,

v

Commission of the European Communities, represented initially by P. Oliver, É. Gippini Fournier and C. Ingen-Housz, subsequently by P. Oliver, O. Beyne and R. Lyal, and lastly by P. Oliver, R. Lyal and F. Arbault, acting as Agents,

defendant,

* Language of the case: French.

supported by

Federal Republic of Germany, represented by W.-D. Plessing and M. Lumma, acting as Agents,

intervener,

APPLICATION for compensation for the damage allegedly suffered by the applicant by reason of the unlawfulness of the procedure for examination of the compatibility with the common market of the concentration between Schneider Electric SA and Legrand SA,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(Fourth Chamber, Extended Composition),

composed of H. Legal (President), I. Wiszniewska-Białecka, V. Vadapalas, E. Moavero Milanesi and N. Wahl, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 25 April 2007,

gives the following

Judgment

Legal background

1 In the version applicable to these proceedings, Article 2(3) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1 and corrigendum OJ 1990 L 257, p. 13), as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1) ('the regulation'), provides that a notified concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it is to be declared incompatible with the common market.

2 Article 3(1)(b) of the regulation provides that a concentration is to be deemed to arise where a company acquires direct or indirect control of another undertaking, in particular by the purchase of securities or assets.

3 Article 6(1)(b) of the regulation states that the Commission is to declare compatible with the common market concentrations notified to it under the regulation which, although falling within its scope, do not raise serious doubts as to their compatibility.

4 If that is not the case, the Commission is to decide to initiate the in-depth control procedure ('a decision to initiate phase II'), in accordance with Article 6(1)(c).

5 Article 10(1) states that those decisions must be taken within one month of the day following the receipt of a notification of a concentration or the day following the receipt of the complete information.

6 Article 8(2) and (3) respectively enable the Commission to adopt, as part of the phase II control, either a decision of compatibility, where appropriate after modifications made by the undertakings concerned to their notified concentration plan, or a decision of incompatibility.

7 Article 10(3) states that decisions declaring a concentration incompatible with the common market must be taken within four months of the date on which phase II is initiated.

8 Under Article 8(4), where a concentration that is declared incompatible has already been implemented, the Commission may, in a decision pursuant to Article 8(3) or by a separate decision, require the undertakings to be separated or any other action that may be appropriate to restore conditions of effective competition.

9 Under Article 10(6), the notified transaction is to be deemed compatible with the common market where the Commission has not taken either a decision to initiate phase II by the end of one month following notification or receipt of complete information, or a decision on the compatibility of the transaction within four months following the initiation of phase II.

10 Under Article 10(5), where the Community judicature gives a judgment that annuls a Commission decision, the periods laid down by the regulation start again from the date of the judgment.

11 Article 7(1) states that a concentration is not to be put into effect either before its notification or within the first three weeks following its notification.

12 Article 7(3) states that Article 7(1) is not to impede the implementation of a public bid which has been notified to the Commission, provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of those investments and on the basis of a derogation granted by the Commission pursuant to Article 7(4).

13 Under Article 7(4), the Commission may, on request, grant a derogation from the obligations imposed in Article 7(1) or (3) in order to prevent serious damage to one or more undertakings concerned by a concentration. That derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, even before notification or after the transaction.

14 Finally, Article 18(1) of the regulation provides that, before taking any decision provided for inter alia in Article 8(3), the Commission is required, at every stage of the procedure up to the consultation of the Advisory Committee, to give the persons, undertakings and associations of undertakings concerned the opportunity of making known their views on the objections against them.

15 Article 18(3) provides that the Commission is to base its decision only on objections on which the parties have been able to submit their observations and that the rights of the defence are to be fully respected in the proceedings.

Background to the dispute

16 Schneider Electric SA ('Schneider') and Legrand SA ('Legrand') are French companies engaged in the production and sale of products and systems in the electrical distribution, industrial control and automation sectors (Schneider) and electrical equipment for low-voltage installations (Legrand).

17 The electrical products distribution sector is divided into segments according to the following product markets:

Segment	Name	Products
Segment 1	Main low-voltage switchboards	Cabinet components, circuit breakers, fuses, etc.
Segment 2	Distribution panel boards	Cabinet components, circuit breakers, fuses, etc.
Segment 3	Cableways and busbar trunking	Cableways and busbar trunking
Segment 4	Final panel boards	Cabinet components, circuit breakers, fuses, switches and differential circuit breakers, etc.
Segment 5A	Electrical equipment downstream from the final panel board	Ultraterminal equipment; Control systems; Security and protection systems; Components for communication system networks

Segment 5B	Distribution installation accessories	Shunt boxes, fixing and wiring equipment for use downstream of the final panel board and downstream of the installation
Segment 5C	Trunking	Floor boxes, wall trunking, conduits, etc.
Industrial components	Transformation and supply products	Control and signalling accessories. Equipment to provide alternating current or direct current electrical supply to industrial equipment. Connection equipment used to control industrial equipment

18 The wholesalers, who are local distributors, buy from industrial manufacturing groups the range of materials which installation engineers and switchboard assemblers need. The latter assemble the various components of electric switchboards.

19 Schneider and Legrand informed the Commission of a plan, within the meaning of Article 3(1)(b) of the regulation, whereby Schneider would acquire control of Legrand in its entirety by means of a public exchange offer ('the offer').

20 A letter of 12 January 2001 exchanged by the chairmen of the two companies provided that the chairman of the board of directors of Legrand would be personally involved in the preparation of any solution proposed to the Commission and that no commitment concerning Legrand could be submitted or agreed to by either of the companies without the prior agreement of the chairmen of the boards of directors of Schneider and Legrand.

21 On 15 January 2001, the two companies announced their agreement concerning the proposed concentration ('the transaction') and Schneider lodged a draft offer in respect of Legrand's shares with the French Financial Markets Council (Conseil français des marchés financiers), Paris.

22 The offer was open from 1 February to 7 March 2001 and was formally notified to the Commission on 16 February 2001.

23 In their Form CO relating to the notification of a concentration, the notifying parties stated among other things that, as regards the effects of the transaction on supplies between segments 4 and 5 of the sectoral markets in question, there was little reason to believe that there would be any conglomerate effects in consequence of the transaction.

24 Considering that the transaction raised serious doubts as to its compatibility with the common market, on 30 March 2001 the Commission initiated phase II of the investigation under Article 6(1)(c) of the regulation.

25 By letter of 6 April 2001, the Commission sent a request for information to Schneider and Legrand under Article 11(1) of the regulation.

26 That request was followed by a formal decision under Article 11(5) of the regulation, dated 27 April 2001, the effect of which, under Article 10(4), was to suspend the four-month period available to the Commission, reckoned from the initiation of phase II, to take a decision on the compatibility of the transaction.

27 Following an annulment decision by the Cour d'appel de Paris (Court of Appeal, Paris, France), in proceedings by minority shareholders of Legrand contesting the admissibility of the offer, on 7 June 2001 Schneider lodged an amended offer, which was declared admissible and was launched on 21 June 2001 and closed on 25 July 2001.

28 On 3 August 2001, the Commission sent Schneider a statement of objections in which it concluded that the transaction would create or strengthen a dominant position on a number of national sectoral markets.

29 On 6 August 2001, the Commission des opérations de bourse (French Stock Exchange Commission) announced the final outcome of Schneider's offer, by virtue of which Schneider acquired 98.7% of the shares in Legrand.

30 In their response of 16 August 2001 to the statement of objections, the parties to the transaction contested the market definition adopted by the Commission and its analysis of the impact of the transaction on those markets.

31 On 29 August 2001, a meeting was held between the notifying undertakings and Commission staff for the purpose of defining any modifications to the transaction which might resolve the competition problems raised by the Commission.

32 To that end, Schneider proposed corrective measures to the Commission on several occasions.

33 In a note of 25 September 2001 to the Member of the Commission responsible for competition matters, Schneider and Legrand expressed their utter surprise at the Commission's negative reaction to their latest proposals, since those proposals envisaged that Legrand would withdraw from the markets for panel-board components throughout the entire European Economic Area ('the EEA').

34 On 10 October 2001, the Commission adopted, under Article 8(3) of the regulation, Decision 2004/275/EC declaring the transaction incompatible with the common market (Case COMP/M.2283 — Schneider-Legrand) (OJ 2004 L 101, p. 1; 'the incompatibility decision').

35 The Commission concluded, in recital 782 to the incompatibility decision, that the notified transaction would create a dominant position with the effect of significantly restricting effective competition on the following national sectoral markets:

— the markets in moulded case circuit breakers, miniature circuit breakers and cabinets for distribution boards in Italy;

— the markets in miniature circuit breakers, earth leakage protection and enclosures for final panel boards in Denmark, Spain, Italy and Portugal;

— the markets in mains connection circuit breakers in France and Portugal;

— the market in cable trays in the United Kingdom;

— the market in sockets and switches in Greece;

— the market in weatherproof wiring accessories in Spain;

— the market in fixing and connecting equipment in France;

— the market in transformation equipment in France;

— the market in control and signalling units in France.

36 The Commission also considered, in recital 783 to the incompatibility decision, that the transaction would strengthen a dominant position, thereby significantly restricting effective competition on the following French markets:

— the markets in moulded case circuit breakers, miniature circuit breakers and cabinets for distribution boards;

— the markets in miniature circuit breakers, earth leakage protection and enclosures for final panel boards;

— the market in sockets and switches;

— the market in weatherproof wiring accessories;

— the market in emergency lighting systems or self-contained emergency lighting units.

37 The Commission also considered that the corrective measures proposed by Schneider were not such as to resolve the competition problems identified in the incompatibility decision.

38 Since, as a result of holding 98.1% of Legrand's capital, Schneider had brought about a concentration subsequently declared incompatible with the common market, on 24 October 2001 the Commission adopted a second statement of objections for the purpose of separating Schneider and Legrand.

39 In that document, the Commission proposed making an order requiring Schneider, under Article 8(4) of the regulation, to dispose of assets in Legrand to the extent that it would no longer hold a significant position, in order to restore effective competition with sufficient certainty and within a sufficiently short period. The Commission also considered it necessary to take immediate steps to entrust the management of Schneider's holding in Legrand to an experienced and independent trustee.

40 In response to a request made by Schneider, the Commission adopted a decision on 4 December 2001, which authorised Schneider, on the basis of Article 7(4) of the regulation, to exercise the voting rights attaching to its shareholding in Legrand through a trustee appointed by Schneider and on the terms laid down in an agreement approved by the Commission.

41 On 10 December 2001, Schneider and Salustro Reydel Management, the trustee, signed the agreement appointing the latter as trustee.

42 On 13 December 2001, Schneider brought an action before the Court of First Instance for the annulment of the incompatibility decision (Case T-310/01) and, by a separate document, asked the Court of First Instance to adjudicate under the expedited procedure in accordance with Article 76a of its Rules of Procedure.

43 On 23 January 2002, the Court dismissed that application, having taken account of the nature of the case and, in particular, the volume of the application and the documents annexed to it.

44 On 30 January 2002, the Commission adopted a decision ('the divestiture decision') under Article 8(4) of the regulation ordering Schneider to separate from Legrand within a period of nine months, expiring on 5 November 2002.

45 The divestiture decision prohibited Schneider from entering into discrete transactions to divest itself of certain of Legrand's businesses, made any purchaser or purchasers of Legrand subject to the Commission's prior approval and prohibited any subsequent transfer of certain of Legrand's businesses back to Schneider.

46 By documents lodged on 18 March 2002, Schneider brought an action for the annulment of the divestiture decision (Case T-77/02), requested the Court to adjudicate on that case under the expedited procedure, and made an application for suspension of the operation of the divestiture decision (Case T-77/02 R).

47 The application for recourse to the expedited procedure was granted in Case T-77/02 by decision of the Court, which was notified to the parties on 25 March 2002.

48 On 5 April 2002, an informal meeting was organised between the President of the First Chamber and the Judge-Rapporteur and the parties' representatives in Case T-310/01.

49 After the hearing for interim relief of 23 April 2002 in Case T-77/02, the Commission, by letter of 8 May 2002, extended until 5 February 2003 the period within which Schneider was to separate from Legrand, without prejudice to the stages in the divestiture procedure being completed during the extended period.

50 On 3 May 2002, the Court of First Instance (First Chamber) decided, after hearing the Commission's views, to grant Schneider's application for Case T-310/01 to be adjudicated under the expedited procedure, since Schneider had confirmed that it would adhere to the abridged version of its application, submitted on 12 April 2002.

51 In view of the extension of the divestiture period granted by the Commission in its letter of 8 May 2002, Schneider withdrew its application for suspension of operation in Case T-77/02 R by letter received on 14 May 2002.

52 By order of the President of the Court of First Instance of 28 May 2002, Case T-77/02 R was removed from the register and the costs of the proceedings for interim relief were reserved until judgment was given in the main proceedings in Case T-77/02.

53 By orders of the President of the First Chamber of the Court of First Instance of 6 June 2002, Legrand, the Comité central d'entreprise de la SA Legrand and the Comité européen du groupe Legrand were granted leave to intervene in Cases T-310/01 and T-77/02 in support of the form of order sought by the Commission, by reason of Legrand's interest in the outcome of the disputes, its situation being directly affected by the upholding or annulment of the contested decisions.

54 Schneider made preparations for the transfer of Legrand, to be carried out in the event of its two actions for annulment being rejected, and, for that purpose, on 26 July 2002 entered into a sale and purchase agreement with the Wendel-KKR consortium, to be implemented no later than 10 December 2002, containing a clause enabling Schneider, in the event of the annulment of the incompatibility decision, to cancel the contract no later than 5 December 2002, in consideration of payment of compensation for cancellation.

55 By judgment of 22 October 2002 in Case T-310/01 *Schneider Electric* v *Commission* [2002] ECR II-4071 ('the *Schneider I* judgment'), 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.

56 Regarding the first point, the *Schneider I* judgment states as follows:

'256 ... the Commission has ... overestimated the economic power of the new entity on the national sectoral markets referred to at recitals 782 and 783 by including in its analysis of the impact of the transaction on those markets the total effect of a product range which does not reflect the true competitive situation which will obtain in those markets following the concentration.

257 The same reasoning must apply as regards the merged entity's wide variety of brands, which is also deemed to be unrivalled because the brands owned by the notifying parties in the EEA as a whole have been taken together in the abstract.

...

296 ... in refusing to include in ABB's and Siemens' market shares their integrated sales of panel-board components, the Commission underestimated the economic power of the merged entity's two main competitors and correspondingly overestimated that entity's strength on the French and Italian markets for distribution panel-board components and on the Danish, Spanish, French, Italian and Portuguese markets for final panel-board components.

...

404 The Court considers the errors, omissions and inconsistencies which it has found in the Commission's analysis of the impact of the merger to be of undoubted gravity.

405 In taking as its basis the fact that the merged entity's activities extend throughout the EEA, the Commission has included indicators of economic power outside the scope of the national sectoral markets affected by the merger and having the effect of unduly magnifying the impact of the transaction on those markets.

406 In that regard, it is appropriate to bear in mind that none of the findings of fact in the Decision suggest that the proposed transaction could give rise to competition problems on markets other than the sectoral markets in France and in six other countries, which the Decision identifies, at recitals 782 and 783, as affected by the transaction.

407 In particular, the Decision does not contain any analysis of the structure of competition in the national sectoral markets not affected by the concentration at issue ...

408 Owing to the incompleteness of, and inconsistencies in, the analysis of distribution structures, the Commission could not qualify as substantial competitive advantages for the merged entity either its alleged privileged access to distributors consequent upon its positions on all the markets for low-voltage electrical equipment at distributor level or the inability of wholesalers to exert competitive constraints on the new entity.

409 The abstract nature of the indicators of economic power based on the Schneider-Legrand group's unrivalled range of products and incomparable variety of brands and the fact that those indicators bore no relation to the relevant national sectoral markets, led the Commission to overestimate even further the merger's impact on the national sectoral markets affected.

410 The same is true, first, of the Commission's refusal to take account of the integrated sales made by ABB and Siemens on the national markets for panel-board components affected by the merger and, second, of the incomplete nature, in particular, of the analysis of the impact of the transaction on the Danish markets for final panel-board components and on the Italian markets for components for distribution panel boards and final panel boards.

411 The errors of analysis and assessment found above are thus such as to deprive of probative value the economic assessment of the impact of the concentration which forms the basis for the contested declaration of incompatibility.

412 None the less, however incomplete a Commission decision finding a concentration incompatible with the common market may be, that cannot entail annulment of the decision if, and to the extent to which, all the other elements of the decision permit the Court to conclude that in any event implementation of the transaction will create or strengthen a dominant position as a result of which effective competition will be significantly impeded for the purposes of Article 2(3) of [the regulation] ...

413 In that regard, the errors found do not in themselves suffice to call in question the objections which the Commission raised in respect of each of the French sectoral markets listed at recitals 782 and 783.

414 The Court notes in that regard that Schneider did not fundamentally dispute the analysis of the impact of the transaction on those markets. On the contrary, it applied itself to criticising the Commission for having used the competitive situation obtaining on the French markets in the aftermath of the transaction to draw conclusions about the other national sectoral markets affected ...

415 In the light of the factual findings in the Decision, it is impossible not to subscribe to the Commission's conclusion that the proposed transaction will create or strengthen on the French markets, where each of the notifying parties was already very strong, a dominant position as a result of which, for the purposes of Article 2(3) of [the regulation], effective competition will be significantly impeded in the common market or in a substantial part of it ...

416 It is clear from the Decision that the Schneider-Legrand group has, on each of the French markets affected, market shares which are indicative of dominance or of a strengthened dominant position, given the weak market presence and thinly spread market shares of its main competitors ...

417 In addition, as the Commission found ..., without challenge from Schneider, and as is also clear from [the Decision], the prices paid by wholesalers for

low-voltage electrical equipment prior to the merger were on average appreciably higher in France than on the other national markets affected.

418 ... there is no doubt that the rivalry between the notifying parties was extremely significant on the French sectoral markets to which the objections relate and that one effect of the merger will be to eliminate a key factor in competition there.

419 The economic analysis underpinning the Decision can therefore be held inadequate only as regards all the national sectoral markets affected apart from the French markets; and the latter markets indisputably constitute a substantial part of the common market within the meaning of Article 2(3) of [the regulation].'

57 As regards breach of Schneider's rights of defence vitiating the analysis of the impact of the transaction on the French sectoral markets and the remedies proposed by the applicant, the *Schneider I* judgment states as follows:

'444 The Commission was ... required to explain all the more clearly the competition problems raised by the proposed merger, in order to allow the notifying parties to put forward, properly and in good time, proposals for divestiture capable, if need be, of rendering the concentration compatible with the common market.

445 It is not apparent on reading the statement of objections [of 3 August 2001] that it dealt with sufficient clarity or precision with the strengthening of Schneider's position vis-à-vis French distributors of low-voltage electrical equipment as a result not only of the addition of Legrand's sales on the markets for switchboard components and panel-board components but also of Legrand's leading position in the segments for ultraterminal electrical equipment. The Court observes in particular that the general conclusion in the statement of objections lists the various national sectoral markets affected by the concentration, without demonstrating that the position of one of the notifying parties on a given product market would in any way buttress the position of the other party on another sectoral market.

...

453 ... the statement of objections did not permit Schneider to assess the full extent of the competition problems to which the Commission claimed the concentration would give rise at distributor level on the French market for low-voltage electrical equipment.

454 It follows that Schneider's rights of defence have been infringed in various respects.

455 Schneider, first, was not afforded the opportunity of properly challenging the substance of the Commission's argument that, at distributor level, Schneider's dominant position would be strengthened in France in the sector for distribution and final panel-board components by Legrand's leading position in ultraterminal equipment.

456 It follows that Schneider was not given a proper opportunity to submit its observations in that regard either in its response to the statement of objections or at the hearing on 21 August 2001.

457 If it had been given such an opportunity, the Commission could have reconsidered its position or, on the contrary, have provided further evidence in support of its proposition, so that the Decision might have been different in any event.

458 Schneider must therefore be regarded as not having been afforded the opportunity to submit, properly and in good time, proposals for divestiture sufficiently extensive to provide a solution to the competition problems identified by the Commission on the relevant French sectoral markets.

459 The Court notes, in that connection, that Schneider stated at the hearing that it had not in fact been able to propose in good time any remedies for the competition problems in respect of which it did not challenge the Decision.

460 Thus Schneider was indirectly deprived of the chance of obtaining the approval which the Commission might have given to the remedies proposed, had the notifying parties been put in a position to submit in good time proposals for divestiture sufficiently extensive to resolve all the competition problems identified by the Commission at distribution level in France.

461 The effect of those irregularities is all the more serious, because, as the Commission stated several times at the hearing, remedies are the only

means of preventing a concentration falling under Article 2(3) of [the regulation] from being declared incompatible.

462 Consequently, the Decision is vitiated by an infringement of the rights of defence and the plea must be accepted.

463 In those circumstances the Decision must be annulled, without there being any need to adjudicate on the other pleas and arguments put forward by Schneider in support of its action and directed, in particular, against the Commission's assessment of the proposals for divestiture which Schneider submitted with a view to rendering the transaction compatible with the common market.

464 Under Article 233 EC, it is incumbent upon the Commission to take the necessary measures to comply with this judgment.

465 Such measures to comply with the judgment must have regard to the grounds constituting the essential basis for the operative part of the judgment (see Joined Cases 97/86, 99/86, 193/86 and 215/86 *Asteris and Others* v *Commission* [1988] ECR 2181, paragraph 27). The relevant grounds of this judgment require, in particular, that, if the Commission should resume its examination of the compatibility of the transaction, Schneider should be placed in a position, as regards the relevant national sectoral markets in respect of which the economic analysis in the Decision has not been rejected, i.e. the French sectoral markets, to put forward a proper defence and, where appropriate, to propose corrective measures addressing the objections made and previously indicated by the Commission.'

58 By judgment of 22 October 2002 in Case T-77/02 *Schneider Electric* v *Commission* [2002] ECR II-4201 ('the *Schneider II* judgment'), the Court of First Instance consequently annulled the divestiture decision on the ground that it was a measure giving effect to the annulled incompatibility decision, without there being any need to examine the other pleas alleging unlawfulness raised independently against the divestiture decision.

59 The Commission did not appeal against the *Schneider I* and *Schneider II* judgments, which thus became final.

60 By note of 29 October 2002, Schneider drew attention to the extent and serious financial consequences of the periods prescribed for the various procedural steps and confirmed that its corrective measures for France of 24 September 2001 could serve as a provisional basis for re-examination of the compatibility of the transaction, pending the notification of any objections.

61 The Commission published in the *Official Journal of the European Communities* of 15 November 2002 (OJ 2002 C 279, p. 22) a notice concerning recommencement of the investigation procedure, stating that, under Article 10(5) of the regulation, the investigation period would run from 23 October 2002, the day following delivery of the *Schneider I* judgment. The Commission added that, on a preliminary analysis of phase I and without prejudice to a final decision, the transaction might fall within the scope of the regulation, and invited interested third parties to submit any observations to it.

62 By statement of objections of 13 November 2002, the Commission informed Schneider 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.

63 The Commission observed in particular:

'Thus the transaction results, in each of the affected markets on which one or other of the parties held a dominant position before the transaction, in the elimination of the only immediate competitor in a position to exercise any competitive restraint on the dominant undertaking owing to the support provided to it by the very strong positions held by the same group in other segments of the same sector, in particular as regards the reputation of its brands and its commercial relations with wholesalers.'

64 On 14 November 2002, Schneider proposed to the Commission a number of corrective measures intended to remove the overlap between the businesses of Schneider and Legrand in the affected French sectoral markets.

65 By letter of 25 November 2002, Schneider informed the Commission that the arguments put forward in the statement of objections of 13 November 2002 remained, in the absence of a market-by-market examination of the effects of the transaction, imprecise in nature and scope and failed to demonstrate the existence of any anti-competitive effect on the affected markets and that the general considerations put forward by the Commission were belied by the actual situation.

66 By note of 29 November 2002, the Commission informed Schneider that the corrective measures successively submitted by it were not sufficient to eliminate all the restrictions of competition deriving from the transaction, because of persistent doubts as to the viability and independence of the businesses transferred and the inability of the proposed measures to create a counterweight to the strength of the Schneider-Legrand entity.

67 By judgment of 29 November 2002, the Cour d'appel de Versailles (Court of Appeal, Versailles, France), issued an interlocutory decision in which it held that Schneider's proposals for corrective measures had not been submitted for prior approval to the chairman of Legrand, in breach of the letter of 12 January 2001, and consequently ordered Schneider to withdraw 'divestiture proposals concerning the assets of Legrand which had not been approved by that company'.

68 By letter of 2 December 2002, Schneider criticised the Commission for contesting the viability and the capability of the corrective measures to ensure the maintenance of a competitive situation on the affected French markets and declared that, at that very advanced stage of the procedure, the Commission's position made further pursuit of the discussions unrealistic. To bring to an end uncertainty that had lasted more than a year, Schneider therefore informed the Commission that it had decided to sell Legrand to Wendel-KKR.

69 By fax of 3 December 2002, Schneider confirmed its decision to the Commission, stating that, under the sale and purchase agreement of 26 July 2002, the sale of Legrand to Wendel-KKR required no further action on its part and was to take place on 10 December 2002.

70 By decision of 4 December 2002, the Commission initiated phase II of the investigation of the transaction, concluding that the corrective measures proposed by Schneider did not make it possible, at the investigation stage, to eliminate the remaining serious doubts as to the compatibility of the transaction, having regard to its effects on the French sectoral markets identified in recitals 782 and 783 to the incompatibility decision.

71 The Commission concluded in particular that the businesses proposed for transfer related to the assets of Legrand and appeared to conflict with the judgment of the Cour d'appel de Versailles, and, in the alternative, rejected the measures proposed on grounds concerning the viability and independence of the entities concerned.

72 On 10 December 2002, Schneider transferred its shareholding in Legrand to Wendel-KKR and on the following day it informed the Commission services that it had done so.

73 By letter of 13 December 2002, the Commission informed Schneider that the investigation procedure had been closed as being devoid of purpose, since Schneider no longer controlled Legrand.

74 On 10 February 2003, Schneider brought an action for annulment of the decision of 4 December 2002 to initiate phase II and of the closure decision of 13 December 2002 (Case T-48/03).

75 By orders of 29 October 2004 in Cases T-310/01 DEP and T-77/02 DEP *Schneider Electric* v *Commission* (not published in the ECR), the Court of First Instance set the amount of costs that Schneider could recover from the Commission at EUR 419 595.32 in Case T-310/01 and EUR 426 275.06 in Cases T-77/02 and T-77/02 R.

76 By order of 31 January 2006 in Case T-48/03 *Schneider Electric* v *Commission* [2006] ECR II-111, the Court of First Instance dismissed as inadmissible the application for annulment lodged in that case on the ground that the decisions complained of, namely the decision to initiate phase II and the decision to close the procedure, were not acts adversely affecting Schneider.

77 By application lodged at the Registry of the Court of Justice on 12 April 2006, Schneider appealed against that order.

78 That appeal was dismissed by order of the Court of Justice of 9 March 2007 (Case C-188/06 P *Schneider Electric* v *Commission,* not published in the ECR). In paragraph 48 of that order, the Court of Justice held 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 defence.

Procedure and forms of order sought

79 By application lodged on 10 October 2003, Schneider brought the present action for damages.

80 By decision of 2 December 2003, the President of the Court of First Instance assigned the case to the Fourth Chamber.

81 On 11 December 2003, the Court of First Instance (Fourth Chamber) adopted a measure of organisation of procedure limiting the scope of the pleadings to the principle of the Community's non-contractual liability and the method for evaluation of the loss.

82 By orders of 20 April 2004 and 6 December 2004, the Federal Republic of Germany and the French Republic were granted leave to intervene, the first in support of the form of order sought by the Commission and the second in support of that sought by Schneider.

83 At the Commission's request, on 13 October 2004 the Court referred the case to the Fourth Chamber, Extended Composition.

84 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber, Extended Composition) decided to open the oral procedure and to put written questions to the main parties, which answered them within the prescribed periods.

85 The parties presented oral argument and replied to the Court's questions at the hearing on 25 April 2007.

86 Schneider, supported by the French Republic, claims that the Court should:

— primarily:

— order the Community to pay it the sum of EUR 1 663 734 716.76, subject to a reduction of the recoverable costs determined by the taxation orders made in cases T-310/01 DEP and T-77/02 DEP, and to an increase by reason, first, of interest accruing from 4 December 2002 until full payment, at an annual rate of 4%, and, second, the amount of taxation for which Schneider will be liable when receiving the compensation awarded to it;

— in the alternative:

— declare the action admissible;

— find that the Community has incurred non-contractual liability;

— determine the procedure to be followed in order to establish the recoverable loss actually suffered by Schneider;

— in any event, order the Commission to pay all the costs.

87 The Commission, supported by the Federal Republic of Germany, contends that the Court should:

— dismiss the action as partially inadmissible and entirely unfounded;

— order Schneider to pay the costs.

Admissibility

Arguments of the parties

88 Without raising an objection of inadmissibility under Article 114 of the Rules of Procedure, the Commission contends in its defence that the details of certain of Schneider's claims involve general references to pleas put forward in support of its three applications for annulment in Cases T-310/01, T-77/02 and T-48/03, which

diverge, as regards either their subject-matter or their description, from the arguments put forward in the present action for damages. General references of that kind do not meet the requirements of the first paragraph of Article 21 of the Statute of the Court of Justice or of Article 44(1)(c) of the Rules of Procedure of the Court of First Instance.

89 The Commission thus confines itself to contesting the merits only of the arguments put forward in the application and does not therefore consider that it is required to respond to the arguments put forward in support of the pleas for annulment contained in the three applications for annulment, since they are not repeated in the present application but are merely referred to.

90 The Commission also states that no effort has been made in the application to identify, justify and classify the nature of the alleged link between the conduct imputed to it and each of the heads of damage relied on.

91 Schneider replies, in essence, that the presentation of all the arguments put forward by it in the application fulfils the conditions of admissibility laid down by the applicable procedural provisions and expounded by the case-law.

Findings of the Court

92 It should be borne in mind that, 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.

93 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 (order of the Court of First Instance of 11 July 2005 in Case T-294/04 *Internationaler Hilfsfonds* v *Commission* [2005] ECR II-2719, paragraph 23).

94 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 (Case T-210/00 *Biret et Cie* v *Council* [2002] ECR II-47, paragraph 34, upheld on appeal by judgment of the Court of Justice in Case C-94/02 P *Biret et Cie* v *Council* [2003] ECR I-10565).

95 In the present case, although lengthy and numerous, the references in the application to the arguments put forward in support of the pleas for annulment in Cases T-310/01, T-77/02 and T-48/03 are to be regarded merely as expanding upon the account set out in the application of the unlawful acts which are alleged to vitiate the Commission's conduct, an account which the Commission does not contend is formally inadmissible.

96 In view of the identity of the parties and of the legal basis, namely the unlawful acts alleged to vitiate the Commission's action, between the three actions for annulment and the present action for damages, it is appropriate to declare admissible the references made in the arguments in the application, which are in themselves admissible, to the account of the pleas put forward in support of the three actions for annulment.

97 The Commission's argument as to the inadmissibility of the application, in that it does not properly describe the causal link between the loss suffered and the conduct imputed to the Commission, must also be rejected.

98 It appears to the Court that the account of the causal link contained in the application meets the minimum conditions for formal admissibility required or laid down for applications by the relevant rules and case-law. Schneider is sufficiently clear and precise to enable the Commission to present its defence and the Court to give an appropriate ruling on the claims for damages when it maintains that the two unlawful acts vitiating the incompatibility decision directly caused it damage and that the Commission's general conduct throughout the investigation of the transaction prevented the applicant from reducing that damage to below the level of compensation claimed.

99 The Commission's observations in that regard must therefore be rejected and both the present action for compensation and all the arguments put forward in support of it should be declared admissible.

Substance

General arguments of the parties

100 Schneider relies on two sufficiently serious breaches of rules of law intended to confer rights on individuals, in the form of the two unlawful elements established in the incompatibility decision by the *Schneider I* judgment, namely, first, the deficiencies in the Commission's analysis of the impact of the transaction on the national sectoral markets outside France and, second, the breach of the applicant's

rights of defence represented by the inadequate particularisation in the statement of objections of 3 August 2001 of the objection based on the support, in the wholesale French low-voltage electrical equipment markets, which Schneider's dominant position in the sector of components for distribution panel boards and final panel boards represented to Legrand's leading position in the ultraterminal equipment segments.

101 The transaction could not be implemented solely because of the unlawful conduct of the Commission. It follows that the two serious irregularities vitiating the incompatibility decision first of all directly resulted in the depreciation of the value of the applicant's assets, that depreciation consisting, first, of the book loss recorded in respect of the assets in Legrand, second, of a loss of profit attributable to the impossibility of achieving the synergies expected from the transaction and the subsequent destruction of the group's industrial strategy and, third and last, a very negative impact on the applicant's reputation.

102 Next, the incompatibility decision directly caused Schneider to incur, first, the costs associated with the special trustee's fees in connection with the administrative procedure for the separation of Schneider and Legrand and the re-examination of the transaction undertaken the day after delivery of the *Schneider I* and *Schneider II* judgments and, second, the costs relating to the applications in Cases T-310/01, T-77/02 and T-77/02 R to the Court of First Instance, after deduction of the recoverable costs already awarded to Schneider by the two orders for taxation of costs of 29 October 2004 in Cases T-310/01 DEP and T-77/02 DEP *Schneider Electric* v *Commission*.

103 The Commission's hostile conduct towards Schneider throughout the investigation of the transaction continued and worsened after the adoption of the incompatibility decision, and that conduct, without being the cause of the initial damage, nevertheless contributed to its final extent.

104 By its attitude, the Commission, first, aggravated the damage initially suffered by reason of the incompatibility decision and, second, caused the applicant additional damage in the form of certain costs which it had to incur as from 10 October 2001.

105 First, from the start of the investigation procedure, the Commission treated Schneider unfairly, then, after the incompatibility decision, infringed the applicant's right to be heard by an impartial authority, and seriously misconstrued the exclusive investigatory authority which the regulation reserves to the institution. When re-examining the transaction, the Commission did not comply in good faith with the *Schneider I* judgment, it again infringed the applicant's rights of defence and, finally, it carried out an incorrect, unfair and discriminatory analysis of the applicant's corrective measures.

106 Second, the intransigence displayed by the Commission in determining the conditions and time-limit for the separation of Schneider and Legrand prompted Schneider to incur various fees of legal, banking and tax advisers in order to explore the various possible methods of separation. Finally, by playing on the tensions which had arisen between Schneider and Legrand following the incompatibility decision, the Commission prompted Legrand to start legal proceedings in France against Schneider in November 2002, then used the decision of the national court as a basis for hindering the applicant's attempts to secure a finding that the concentration was compatible with the common market. This resulted in further costs to which Schneider should never have been exposed.

107 The Commission replies, in essence, that neither of the two unlawful acts in the incompatibility decision found by the *Schneider I* judgment is of sufficient gravity to constitute a fault liable to cause the Community to incur non-contractual liability as against Schneider.

108 The other forms of alleged unlawful conduct have not in its view been established and, in any event, do not constitute sufficiently serious infringements of Community law to cause the Community to incur liability.

109 As regards the amount of its loss, Schneider claims that the loss of value of its assets amounted, as at the date of the unlawful incompatibility decision, namely 10 October 2001, to a sum between EUR 2 483 million and EUR 3 326 million. The amount of that damage subsequently changed, being ultimately limited to EUR 1 663 734 716.76, including the costs incurred by the applicant as a result of all the Commission's unlawful conduct.

110 The incompatibility decision caused Schneider a loss of asset value between the date of the announcement of the offer for the shares in Legrand, in January 2001, and the effective date of the sale and purchase agreement, in December 2002. That loss included the book loss recorded in respect of the assets in Legrand, a loss of profit caused by the impossibility of achieving the synergies expected from the transaction, the subsequent undermining of Schneider's industrial strategy and damage to its image.

111 The Commission replies that no loss has been established. It rejects both the reality and the certainty of the alleged depreciation of assets and the method proposed by Schneider to evaluate that head of damage. It was also incumbent upon the applicant not to incur excessive fees following the incompatibility decision. The Commission reserves the right to analyse in detail the invoices submitted in support of those claims and the possibility of supplementing and adapting the methodology for assessment of the damage.

112 In any event, the Commission denies any causal link between the conduct imputed to it and the various heads of damage alleged. The Commission draws attention to the very hypothetical nature of Schneider's argument that, in the absence of the illegal acts attributed to the Commission, the transaction would have been authorised and carried out.

Preliminary views of the Court

113 It must first be borne in mind that it is settled case-law that, in order for the Community to incur non-contractual liability under the second paragraph of Article 288 EC for unlawful conduct of its institutions, a number of conditions must be satisfied: the 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 (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16, and Case T-383/00 *Beamglow* v *Parliament and Others* [2005] ECR II-5459, paragraph 95).

114 Where, as in this case, 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.

115 The decisive criterion in that regard is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion (Case C-282/05 P *Holcim (Deutschland)* v *Commission* [2007] ECR I-2941, paragraph 47).

116 The system of rules which the Court of Justice has worked out 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 (*Holcim (Deutschland)* v *Commission*, paragraph 50).

117 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 (*Holcim (Deutschland)* v *Commission*, paragraph 47).

118 The same applies where the defendant institution breaches a general obligation of diligence (see, to that effect, Case C-308/87 *Grifoni* v *EAEC* [1990] ECR I-1203, paragraphs 13 and 14) or misapplies relevant substantive or procedural rules (Joined Cases 5/66, 7/66 and 13/66 to 24/66 *Kampffmeyer and Others* v *Commission* [1967] ECR 245, at pp. 262 an
d 263).

119 Moreover, it is for the party seeking to establish the Community's liability to adduce conclusive proof as to the existence or extent of the damage he alleges and to establish a sufficiently direct causal link between that damage and the conduct complained of on the part of the Community institution (Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79 *Dumortier Frères and Others* v *Council* [1979] ECR 3091, paragraph 21, and Case T-178/98 *Fresh Marine* v *Commission* [2000] ECR II-3331, paragraph 118, upheld on appeal by the judgment in Case C-472/00 P *Commission* v *Fresh Marine* [2003] ECR I-7541).

120 Where one of the three conditions governing establishment of non-contractual liability on the part of the Community is not satisfied, the claims for damages must be rejected without there being any need to examine the other two conditions (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 81, and Case T-170/00 *Förde-Reederei* v *Council and Commission* [2002] ECR II-515, paragraph 37), the Community judicature not being required, moreover, to examine the conditions in a particular order (Case C-257/98 P *Lucaccioni* v *Commission* [1999] ECR I-5251, paragraph 13).

121 In that context, the Commission contends that, if it were to incur financial liability in circumstances such as those of this case, its capacity fully to function as a regulator of competition, a task entrusted to it by the EC Treaty, would be compromised as a result of the possible inhibiting effect that the risk of having to bear damages alleged by the undertakings concerned might have on the control of concentrations.

122 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.

123 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.

124 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.

125 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.

126 It is in the light of those principles that it is appropriate to consider whether the Commission committed sufficiently serious breaches of rules of law intended to confer rights on individuals by adopting the incompatibility decision that was annulled by the *Schneider I* judgment, before considering the aspects of the institution's overall conduct in the course of the investigation of the transaction that might have exacerbated the loss.

The irregularities rendering the incompatibility decision unlawful

The defects found in the analysis of the impact of the transaction

— Arguments of the parties

127 Schneider maintains that 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 constitute sufficiently serious irregularities which cannot be justified either by the complexity of the investigation of the transaction or by any time constraints, in view of the fact that the period of four months allowed to the Commission to adopt a decision on the compatibility of the transaction was extended.

128 The Commission replies that, in the absence of proof of manifest and serious failure to observe the limits imposed on its broad discretion, those irregularities are not sufficiently serious, in view of the complexity of the situations examined, the prospective nature of the market analyses and the requirement for speed in the investigation procedure. In any event, the Court made clear in paragraph 412 of the *Schneider I* judgment that the errors committed were not such as to entail annulment of the incompatibility decision.

— Findings of the Court

129 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.

130 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.

131 Next, it must be noted that 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.

132 Last, it must be borne in mind that 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 (see, for example, regarding the definition of the relevant market, Case T-219/99 *British Airways* v *Commission* [2003] ECR II-5917, paragraph 89 et seq., upheld on appeal by the judgment in Case C-95/04 P *British Airways* v *Commission* [2007] ECR I-2331), provided that those choices are not manifestly contrary to the accepted rules of economic discipline and are applied ìconsistently.

133 However, it is unnecessary in this case to decide whether the three foregoing considerations support the view that the defects in the economic analysis of the expected effects of the transaction on the relevant sectoral markets outside France go beyond the threshold at which the Community must be held to have incurred non-contractual liability.

134 The defects in the analysis of the impact of the transaction on national sectoral markets outside France found by the *Schneider I* judgment cannot have had any effect on the finding finally arrived at by the Commission in the incompatibility decision that the transaction was incompatible with the common market.

135 Even in the absence of that breach of Community law, the Commission would not have been in a position to authorise the transaction as proposed at that time, since, according to paragraph 413 of the *Schneider I* judgment, the errors found did not in themselves suffice to call in question the objections which the Commission had raised in respect of each of the French sectoral markets listed in recitals 782 and 783 to the incompatibility decision. In the light of the findings of fact contained in the incompatibility decision, it was impossible, according to paragraph 415 of the same judgment, not to subscribe to the Commission's conclusion that the transaction would create or strengthen on the French sectoral markets for low-voltage electrical equipment, in which each of the two parties was already very strong, a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it within the meaning of Article 2(3) of the regulation.

136 Whilst it has no effect on the characterisation of the transaction in relation to the French sectoral markets, the criticism of the economic analysis of the incompatibility decision is nevertheless not superfluous in the *Schneider I* judgment, since it has the effect of rendering invalid the assessment of compatibility made in relation to the other markets and, consequently, of restricting the examination of observance of the rights of the defence solely to the aspect of the incompatibility decision that remains valid, namely that which relates to the French sectoral markets.

137 For that result to be reached, it was sufficient that the economic analysis of the impact of the transaction should be declared devoid of probative value, as it was in paragraph 411 of the *Schneider I* judgment, the question whether that defect also constituted a sufficiently serious breach of Community law being of no importance in that regard.

138 Consequently, the complaint regarding the defective economic analysis in the incompatibility decision is not, as a matter of construction, capable, by itself, of having had any repercussions whatsoever on the subsequent stages of the procedure nor, consequently, can it have caused Schneider any damage distinct from that which might have derived from a breach of its rights of defence.

139 The only defect in the incompatibility decision which, according to the *Schneider I* judgment, is liable to have deprived the applicant of an opportunity to secure a decision allowing it to proceed with the transaction is therefore to be found in the discrepancy identified between the statement of objections of 3 August 2001 and the incompatibility decision itself, regarding the objection concerning the buttressing of the positions of the parties to the transaction. It is therefore the nature and gravity of that sole defect in the incompatibility decision that must be assessed in determining whether the threshold for Community liability was overstepped by that decision.

The breach of Schneider's rights of defence

— Arguments of the parties

140 Schneider states that the Commission did not articulate sufficiently clearly and precisely in its statement of objections of 3 August 2001 the objection to the compatibility of the transaction based on the support, on the French sectoral low-voltage electrical equipment wholesale markets, which Schneider's dominant position in the sector of components for distribution boards and terminal boards provided for Legrand's leading position in the segment for ultraterminal equipment, thus depriving the applicant of any opportunity to contest the merits of that objection during the administrative investigation procedure and properly to propose corrective measures.

141 Schneider claims, however, that, when notifying the transaction, it provided the Commission with information on the links that were supposed to exist between market segments 4 and 5 and the respective positions of the parties to the transaction in those segments in France, emphasising at the outset that there were no portfolio effects. However, the Commission did not raise that objection until 24 September 2001, after expiry of the normal period for putting forward corrective measures and only a few days before the end of the procedure for the investigation of the transaction.

142 The Commission replies that the discrepancy between the statement of objections of 3 August 2001 and the incompatibility decision derives not from the total absence of, but merely a lack of clarity and precision in, the objection based on that support, since the statement of objections did indeed raise that problem in a number of its recitals.

143 The breach of Schneider's rights of defence is not in its opinion sufficiently serious, in view of the drafting of the statement of objections within a short period, the complex assessment both of all the substantive arguments, in respect of which the objection based on the support provided was merely one of numerous relevant factors, and of the corrective measures proposed by Schneider.

144 The fact that the applicant provided the Commission with information showing that the transaction involved no support problem further reduces the seriousness of the procedural error committed.

— Findings of the Court

145 It must be borne in mind that, before adopting a decision finding that a concentration is incompatible with the common market, the Commission is

required, under Article 18(1) of the regulation, to give the notifying undertakings an opportunity, at every stage of the procedure up to consultation of the Advisory Committee, of making known their views on the objections against them.

146 It is also apparent from Article 18(3) of the regulation that the Commission may base its incompatibility decisions only on objections on which the undertakings concerned have been able to submit their observations.

147 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 (see, to that effect, Case 17/74 *Transocean Marine Paint* v *Commission* [1974] ECR 1063, paragraph 15, and Case T-87/96 *Assicurazioni Generali and Unicredito* v *Commission* [1999] ECR II-203, paragraph 88).

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

149 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, to that effect, Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14).

150 Account must be taken, in that regard, both of the importance of the financial interests involved and the industrial implications of a concentration having a Community dimension and of the considerable scope of the investigatory powers available to the Commission to regulate competition in the common market.

151 It follows that Schneider is alleging breach of a rule intended to confer rights on individuals.

152 In this case, a manifest and serious breach of Article 18(1) and (3) of the regulation stems from the fact of the Commission's drafting a statement of objections in such a way that, as is apparent from the *Schneider I* judgment, the applicant could not ascertain that, if it did not submit corrective measures conducive to reducing or eliminating the support between its positions and those of Legrand in the French sectoral markets, it had no chance of securing a declaration that the transaction was compatible with the common market.

153 Thus, the corrective measures submitted by Schneider in September 2001, which included Legrand's withdrawal from the market in components for panel boards throughout the EEA, were not objectively capable of resolving the specific problem of the support provided, on the French sectoral markets in low-voltage electrical equipment perceived at wholesale level, by Schneider's dominant position in the sector of components for distribution and final panel boards to Legrand's leading position in the ultraterminal equipment segments.

154 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 fault at

issue, the existence and extent of which are not contested by the Commission, therefore imposes upon the Community a duty to make good the harmful consequences.

155 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.

156 It follows that the breach of Schneider's rights of defence is to be regarded in this case as a manifest and serious disregard by the Commission of the limits to which it is subject and, as such, constitutes a sufficiently serious breach of a rule of law intended to confer rights on individuals.

157 The breach of Schneider's rights of defence therefore constitutes a fault on the part of the Commission such as to cause the Community to incur non-contractual liability, provided that it is established in addition that there was real and certain damage and a sufficiently direct causal link between that damage and the sufficiently serious breach of Community law constituting a fault.

158 Before examining whether those two conditions are satisfied, the Court must consider whether or not the Commission conducted itself in relation to the applicant during the investigation of the transaction in a manner that was generally unlawful, resulting, as contended by Schneider, either in aggravation of the loss caused by the unlawful incompatibility decision or in a separate loss represented by further costs incurred by the applicant.

159 Since the complaints made by the applicant against the Commission in addition to those established in the *Schneider I* judgment are presented as supplementing the latter complaints and may therefore constitute circumstances giving rise to damage, over and above the main faults committed, they must be analysed in the light of the general criteria for the establishment of non-contractual liability of the Community, which presuppose, as stated in paragraphs 113 to 126 above, a sufficiently serious breach of a rule of law by the Community institution.

The other instances of unlawful conduct on the part of the Commission which are claimed to have exacerbated the damage allegedly suffered as a result of the incompatibility decision or to have caused separate damage

Lack of fairness

— Arguments of the parties

160 Schneider considers that the Commission was unfair towards it by unlawfully giving it the impression that a decision declaring the transaction compatible might be

contemplated, by not warning it early enough that it intended prohibiting the transaction and by not informing it of the existence of decisive obstacles to the authorisation of the transaction.

161 The Commission never informed Schneider of the mutual support objection before 24 September 2001, although it had information capable of settling that matter long before the drafting of its statement of objections of 3 August 2001. The leading positions of the parties to the transaction on the sectoral markets in question and the importance of the distribution vectors were dealt with at length in Form CO and were very quickly identified by the Commission.

162 As early as May 2001, the Commission possessed information which prompted it to say in October 2001 that the mutual support of the notifying parties' positions constituted an obstacle to the concentration.

163 That lack of fairness is confirmed by the statement of the Member of the Commission responsible for competition published in *Le Monde* on 8 November 2001 according to which '... where the strength of undertakings even before their merger is such that no "corrective measure" can be found, the Commission has no alternative but to prohibit the merger ...'.

164 The Commission replies that in May 2001 it did not have all the information necessary to conclude a competition analysis and identify possible competition problems. It would have been, to say the least, premature for the Commission to express, at that stage, opposition to the transaction in principle without thereby failing in its duty to show reserve and to observe the principle of sound administration.

165 The statement by the Member of the Commission is irrelevant since it post-dated the incompatibility decision and merely presented the Commission's conclusions after the event.

166 In any case, Schneider could, as a normally well-informed trader, have assessed the various risks inherent in the transaction under French law and Community competition law, by reason of the considerable strength of the parties in France.

— Findings of the Court

167 It must be held that Schneider's arguments do not provide a sufficient basis for upholding the complaint of unfairness.

168 In particular, Schneider has not been able to put forward information of a reliable, precise and consistent nature such as to establish that, as the applicant had contended in Case T-310/01, the Commission wished, long before discussion of the corrective measures proposed by Schneider, to prohibit the transaction from the outset for reasons of principle which excluded a priori any solution to the problem of the incompatibility of the transaction with the common market.

169 In view of the background to the dispute, the possibility cannot be ruled out that the Commission was not in a position to assess objectively and in full knowledge of the facts the impact of the transaction on the various national sectoral markets affected until the stage of the drafting of the statement of objections of 3 August 2001, after

examining and using a considerable volume of information provided by Schneider and Legrand at the end of a response time of several weeks, the extent and complexity of which were commented on by the applicant itself in its application in Case T-310/01.

170 It must be borne in mind in that connection that the specific purpose of a statement of objections is to provide all the information needed for the undertakings properly to express their views on the objections raised by the Commission, having regard to information previously supplied by the interested parties, concerning the compatibility of the notified concentration, so that the Commission can thereafter give a final decision in full knowledge of the facts.

171 Whilst the failure to mention the mutual support objection in the statement of objections of 3 August 2001 constitutes a serious breach of Schneider's rights of defence, it is not glaringly obvious from the file that that unlawful conduct must necessarily be seen as stemming from unfairness on the part of the Commission.

172 The statement of the Member of the Commission responsible for competition to which exception was taken, set out in paragraph 163 above, does not necessarily lend itself to the view taken by Schneider. It is not impossible that the Member of the Commission intended, by using the present indicative, to state a general rule which did not apply solely to the transaction in this case, which, moreover, was not the only case referred to in the statement in question.

173 The statement in question cannot therefore in this case be interpreted with certainty as a manifestation ex post facto of the Commission's deliberate intention to oppose the transaction from the outset as a matter of principle.

174 In those circumstances, the criticism of unfair conduct on the Commission's part cannot be upheld.

175 Schneider's claims must therefore be rejected.

Breach of Schneider's right to be heard by an impartial authority

— Arguments of the parties

176 Schneider maintains that decisions of an administrative authority which, as in the case of Commission decisions relating to the control of concentrations, are not subject to a full review on the merits meeting the safeguards required by Article 6(1) of the European Convention on Human Rights ('the Convention'), which guarantees individuals the right to a fair trial, must conform to that provision as from the start of the administrative investigation procedure.

177 Use of the same team of officials to prepare incompatibility decisions and decisions requiring divestiture is, in Schneider's view, contrary to the principle of impartiality enshrined in that provision.

178 Moreover, there is reason to doubt the objectivity and neutrality of the re-examination of the transaction undertaken the day following delivery of the *Schneider I* and *Schneider II* judgments in view of the fact that the teams which successively examined the transaction throughout the investigation procedure were made up, at least in part, of the same people.

179 The Commission objects that no failure in its duty of impartiality has been established and that it is not a 'tribunal' within the meaning of Article 6(1) of the Convention. In any event, compliance with that provision is fully ensured by the right of undertakings to apply to the Community judicature for the annulment of decisions adopted under the regulation.

180 Moreover, no rule of law or of professional conduct opposes re-examination of the transaction being entrusted to the team of officials who carried out the initial investigation.

— Findings of the Court

181 Observance of all persons' right to a hearing before an independent and impartial tribunal is guaranteed by Article 6(1) of the Convention, 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.

182 As an integral part of the fundamental rights protected in the Community legal order, compliance with which by the Commission in the conduct of its control procedures relating to concentrations is ensured by the Community judicature, the right to a fair hearing is manifestly a rule intended to confer rights on individuals (Case T-309/03 *Camós Grau* v *Commission* [2006] ECR II-1173, paragraphs 102 and 103).

183 However, 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 (see European Court of Human Rights, *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 23 June 1981, Series A No 43, § 51).

184 In this case, the action for annulment available under Article 230 EC against Commission decisions adopted under Article 8(3) and (4) of the regulation is a remedy incorporating the safeguards required by Article 6(1) of the Convention.

185 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.

186 It cannot be stated as a general rule resulting from the obligation to be impartial that an administrative or judicial authority is bound to send the case back to a different authority or to a differently composed branch of that authority (see European Court of Human Rights, *Ringeisen v. Austria*, judgment of 16 July 1971, Series A No 13, § 97).

187 As regards the disciplinary section of the governing board of a professional body, the European Court of Human Rights has accepted that no ground for legitimate suspicion can be discerned in the fact that three of the seven members of the disciplinary section had taken part in a decision in a case referred to it after the setting-aside of an earlier decision in the drawing-up of which they had been involved (see European Court of Human Rights, *Diennet v. France*, judgment of 26 September 1995, Series A No 325-A, § 38).

188 It follows that the fact that the teams of officials responsible for the various stages of investigation of the transaction 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.

189 In those circumstances, Schneider's arguments cannot be upheld.

The intransigence demonstrated by the Commission in determining the procedures for the separation of Schneider and Legrand

— Arguments of the parties

190 Schneider objects that the Commission was unnecessarily intransigent as regards the procedures for the separation of Legrand. The Commission's refusal to authorise Schneider to consider a transfer of its assets in Legrand rather than an outright separation discouraged all the industrial operators for whom the enhanced value of the assets in Legrand resulting from industrial and commercial synergies would undeniably have been higher than the value for financial investors who were the only parties able to participate in the sale procedure under the divestiture conditions imposed by the Commission.

191 The general prohibition imposed on Schneider from retaining or repurchasing certain assets in Legrand prevented the applicant from keeping holdings which would have enabled it to achieve some of the envisaged synergies, thereby undermining its negotiating position as regards potential purchasers.

192 The choice between demerger, transfer or quotation on the stock exchange and the possibility of retaining part of Legrand's capital and temporarily retaining a claim against Legrand or the purchaser thereof should have been examined in the light of all the other requirements imposed by the Commission.

193 Despite extension of the period for divestiture, the constant pressure and systematically negative attitude of the Commission forced Schneider not to interrupt or slow down the divestiture process. That extension was in fact merely apparent since it did not prejudge 'completion of the stages necessary for the separation process within the period as extended'.

194 The Commission considers, on the contrary, that it displayed great flexibility. Whilst the statement of objections of 24 October 2001 provided for divestiture through allocation of shares in Legrand to the holders of Schneider shares pro rata to their holdings, the divestiture decision enabled the addressee, at its request, to choose between demerger, transfer or quotation on the stock exchange, retaining a holding in Legrand's capital, or indeed seeking from the Commission prior approval to retain a temporary claim against Legrand or the purchaser thereof.

195 Since the divestiture decision was merely one way of implementing the incompatibility decision, separation of Schneider and Legrand without affecting the latter's size cannot be regarded as an indication of intransigence.

196 The method of proceeding by way of purchase by financial institutions was preferred by Schneider itself. Moreover, the industrial purchasers would not have agreed to the price surcharge required of them by Schneider, as compared with financial institutions.

197 On a proposal from Schneider's investment bankers, the Commission agreed to extend the period for divestiture from six to nine months. The Commission granted an additional extension of three months, until 5 February 2003, and allowed for the possibility of a further extension. Moreover, the divestiture decision enabled that period to be extended, at Schneider's request, in the event of exceptional circumstances arising.

— Findings of the Court

198 In objecting to the procedures for divestiture, Schneider challenges the intrinsic lawfulness, under Article 8(4) of the regulation, of the divestiture decision that was annulled by the Court of First Instance as a result of the unlawfulness of the incompatibility decision of which it was an implementing measure (see paragraphs 44 and 58 above), and therefore without its actual merits having had to be examined.

199 Where a concentration has, as in this case, already been implemented when the Commission declares it incompatible with the common market, Article 8(4) of the regulation enables the Commission to require any action to be taken to restore effective competition.

200 Without it being necessary to decide whether that provision constitutes a rule of law intended to confer rights on individuals, it cannot be taken for granted that the Commission manifestly and seriously infringed it by requiring separation of the two parties to the transaction in such a way that Legrand's size could not be affected and no subsequent retransfer of Legrand's business to Schneider was permitted.

201 Account must be taken in particular of the leading positions of the notifying undertakings in the French sectoral markets in low-voltage electrical equipment affected by the transaction, the difference between their market shares and those of their immediate competitors, the reputation of their brands in France, and the elimination of long-standing rivalry between the two parties concerned.

202 Moreover, the choice of the legal conditions for the divestiture was, as is apparent from recital 105 to the divestiture decision, left to Schneider, provided that they excluded any significant holding by the applicant in Legrand's capital and guaranteed sale of the Legrand group without there being discrete transactions disposing of certain of Legrand's businesses.

203 Moreover, Schneider has not demonstrated that the period for implementation of the divestiture decision was manifestly excessively short. In the contested decision, the Commission extended by three months the initial period of six months set in the statement of objections of 21 October 2001.

204 In recital 122 to the decision, the Commission also declared that it was prepared, first, to grant an additional period of three months during which the trustee would be given irrevocable and exclusive selling authority in order to allow Schneider the requisite room for manoeuvre in its negotiations with potential purchasers or investors and, second, to extend those periods if it was requested to do so, provided that Schneider or the trustee was in a position to prove that it had used its best endeavours to comply with the time-limit.

205 Following the hearing on 23 April 2002 of an application for interim relief in Case T-77/02 R, on 26 April 2002 the Commission granted Schneider an extension of three months, thus deferring the end of the divestiture period until 5 February 2003,

representing a period of one year following notification of the divestiture decision, without prejudice to Schneider's right to request, in the event of exceptional circumstances, an additional extension.

206 Even if it is conceded that the transfer of an undertaking of Legrand's size may generally require a period of more than one year, as the comments attributed to Schneider in paragraph 110 of the incompatibility decision suggest, it would then have been the responsibility of the applicant to seek a further extension. However, the file does not show that this was done.

207 Moreover, as is to be inferred from Schneider's response of 7 November 2001 to the Commission's statement of objections of 24 October 2001, Schneider had already contacted potential purchasers even before the divestiture decision.

208 Finally, as is apparent from point 5 of Annex II to the divestiture decision, the latter required only the adoption, in accordance with the arrangements chosen, of an irreversible legal measure which was to be fully implemented within three months following its adoption.

209 It cannot therefore be accepted that the Commission imposed on Schneider, for the purpose of divesting itself of Legrand, arrangements and a period for divestiture which amounted to a manifest and serious failure to observe the limits to which the Commission's discretion is subject.

210 Schneider's argument cannot therefore be upheld.

Exploitation of the tensions arising between the parties to the transaction

— Arguments of the parties

211 Schneider claims that the Commission fostered the tensions which arose between the parties to the transaction following the incompatibility decision, in particular by not allowing it access in due time to information provided by Legrand during the discussions that led to the adoption of the divestiture decision.

212 The Commission allegedly displayed the same attitude following the divestiture decision. The Commission encouraged Legrand to institute legal proceedings against Schneider in France in November 2002, and then made sure that its reasoning concerning the adequacy of Schneider's new corrective measures conformed with the judgment of the Cour d'appel de Versailles, referred to above.

213 The Commission replies that Legrand's change of attitude was in fact attributable to a possible conflict of interest between the parties to the transaction.

214 In particular, Schneider has produced nothing concrete to show that it was not granted access to information in the file provided by Legrand. After receiving the non-confidential versions of the documents concerned in January 2002, Schneider did not even make a specific request for access to the confidential versions of them.

— Findings of the Court

215 Schneider's allegations do not provide sufficient grounds for upholding the complaint that the Commission exploited tensions that arose between the parties to the transaction.

216 It must be observed in particular that the Commission stated in paragraph 88 of its defence, without being challenged by Schneider, that it disclosed to the applicant in January 2002 non-confidential versions of documents concerning Legrand and a list containing a non-confidential summary of information declared inaccessible. There is nothing in the file to show that Schneider made any specific request for access to the confidential version of any of those documents.

217 Moreover, neither the Commission's concern in the divestiture decision to preserve Legrand's size, nor the taking into account of decisions of national courts in assessing the remedies proposed by Schneider, nor any other action taken by the Commission during the investigation of the transaction can be objectively characterised, beyond doubt, as being inspired by an intention to undermine relations between the parties to the transaction.

218 Schneider's claims must therefore be rejected.

The Commission's failure to observe the limits of its exclusive competence

— Arguments of the parties

219 Schneider considers that the Commission seriously and manifestly failed to respect the fact that it had exclusive competence under the regulation in that, when re-examining the transaction, it made its assessment of the validity of the corrective measures proposed by the applicant dependent upon the operative part of the judgment of the Cour d'appel de Versailles of 29 November 2002, which gave a provisional decision on a question confined to national contract law.

220 The Commission does not consider that it gave up its exclusive competence at any time or, a fortiori, committed any sufficiently serious unlawful act.

— Findings of the Court

221 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.

222 Schneider is wrong to maintain that the Commission made the exercise of its powers to assess the validity of Schneider's corrective measures dependent upon the operative part of the judgment of the Cour d'appel de Versailles. There is no issue

here of the primacy of Community competition rules over those of national law: the issue is the determination of the effects attached to a private contract by the national law applicable to the contract in conformity with Community law.

223 It does not therefore seem that the Commission committed a sufficiently serious breach of Community law by reaching the conclusion that the proposals for the disposal of Legrand businesses put forward by Schneider were fraught with uncertainty and therefore unacceptable because they ran counter to a private agreement properly governed by national law which, according to the findings of the national court having jurisdiction in the matter, was binding on the parties to the transaction in accordance with the provisions of that law.

224 In those circumstances, Schneider's argument cannot be upheld.

The failure to give effect to the *Schneider I* judgment in good faith.

— Arguments of the parties

225 The applicant states that the *Schneider I* judgment set aside the Commission's analysis of all the markets other than the French sectoral markets. The Commission therefore had no reason to resume its re-examination of the transaction in phase I, particularly when it also knew that after 5 December 2002, the date marking the end of the period granted to Schneider by the sale and purchase agreement to invoke the provision allowing it to cancel the Legrand sale, the applicant would lose the benefit of the efforts which it had expended in order to reduce its loss.

226 Thus, Schneider logically insisted that the investigation procedure should be resumed immediately following the *Schneider I* judgment on the basis of the six-week period laid down under phase I. That period should have allowed the Commission to give effect to the *Schneider I* judgment in good faith by giving the applicant an opportunity to put forward, if appropriate, suitable corrective measures.

227 The decision of 4 December 2002 to initiate phase II was also vitiated by numerous manifest errors of assessment and departed from the analytical scheme outlined by the *Schneider I* judgment. The analysis of competition in the relevant markets finally adopted by the Commission was subject to the same kind of serious omissions, errors and contradictions as those which led to annulment of the incompatibility decision.

228 The Commission rejects the view that resumption of the investigation procedure at the phase I stage can be regarded as an indication of bad faith. The course followed, at Schneider's request, was the only one enabling a positive final decision to be adopted in respect of the transaction before 5 December 2002.

229 The economic analysis carried out by the Commission on the basis of updated information provided by Schneider is consistent in every respect with the analysis whose merits were upheld by the *Schneider I* judgment, after the Commission took steps to give clearer details of the mutual support objection.

— Findings of the Court

230 It is apparent from paragraph 48 of the order in Case C-188/06 P *Schneider Electric* v *Commission*, that, contrary to Schneider's contention, the Commission was legally

entitled to choose to resume the investigation of the transaction in phase I, in order to draw the proper inferences from the *Schneider I* judgment, by taking all necessary precautions to ensure that no breach of Schneider's rights of defence could arise.

231 Moreover, the applicant's assertions do not suffice to establish that the analysis of competition in the relevant French sectoral markets contained in the decision to initiate phase II displays the same defects as those present in the assessment of the impact of the transaction on national sectoral markets outside France contained in the incompatibility decision and condemned by the *Schneider I* judgment.

232 The errors of analysis condemned by the *Schneider I* judgment could not have had any influence on the assessment of the impact of the transaction on the French sectoral markets, by reason of the specificity of those markets.

233 A combined reading of paragraphs 413 and 415 of the *Schneider I* judgment discloses nothing to undermine the conclusion that the proposed transaction would create or strengthen on the French sectoral markets in low-voltage electrical equipment, in which each of the notifying parties was already very powerful, a dominant position which would have the effect, within the meaning of Article 2(3) of the regulation, of significantly impeding effective competition in the common market or, at the very least, in a substantial part of it.

234 Market shares indicative of dominance or a strengthened dominant position of the merged entity, the higher prices of low-voltage electrical equipment at wholesale level, the disappearance of traditional rivalry between the two long-standing main protagonists, and the reputation of the two partners' brands were considered relevant factors in that regard.

235 It is also important to note that serious doubts as to the compatibility of a concentration with the common market are a sufficient basis for taking a decision to initiate phase II under Article 6(1)(c) of the regulation, 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).

236 It does not therefore appear that, in examining, for the purposes of implementing the *Schneider I* judgment, the residual problems of competition deriving from the transaction only in the French sectoral markets still regarded as relevant, the Commission manifestly and seriously overstepped the limits imposed on its discretion.

237 In those circumstances, the Court cannot uphold the applicant's arguments.

Breach of the rights of the defence

— Arguments of the parties

238 Schneider maintains that the Commission breached its rights of defence when re-examining the transaction in that it had no access to the results of the market tests carried out by the Commission and could not properly respond to the issues that they might have disclosed.

239 The Commission replies that access by the parties to a concentration to the results of market surveys such as those undertaken in November 2002 is not provided for in the phase of the investigation brought to an end by a decision to initiate phase II and that such access cannot be justified by the principle of respect for the rights of defence of the parties concerned.

— Findings of the Court

240 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 phase II, adopted after the market tests in question, does not constitute an act adversely affecting Schneider (order in Case T-48/03 *Schneider Electric* v *Commission*, paragraph 76, confirmed by the order in Case C-188/06 P *Schneider Electric* v *Commission*, paragraph 72), the legality of which would depend on observance of those rights.

241 The Commission cannot therefore have committed a sufficiently serious breach of a rule of law intended to confer rights on individuals by not disclosing the results of the market tests to Schneider in phase I of the investigation of the transaction which was resumed immediately following delivery of the *Schneider I* and *Schneider II* judgments.

242 Schneider's claims must therefore be rejected.

The incorrect, unfair and discriminatory analysis of the corrective measures proposed by Schneider in November 2002

— Arguments of the parties

243 Schneider criticises the Commission for deciding that serious doubts existed as to the compatibility of the transaction with the common market within the meaning of Article 6(1)(c) of the regulation instead of applying the criterion based on Article 2(3) of the creation or strengthening of a dominant position on which an incompatibility decision should be based by virtue of Article 8(3).

244 Schneider also criticises the Commission for deciding that the corrective measures of November 2002 were insufficient, even though they would have eliminated all overlapping of Schneider's and Legrand's business activities on the affected markets, through transfer to a single purchaser of autonomous and viable undertakings, offered a wide range of products and brands and easier access to distribution, as a result of Schneider's commitments concerning its conduct, eradicated any risk of buttressing on the part of Schneider and limited the list of potential purchasers to industrialists who were capable of developing the transferred entity.

245 Schneider's structural commitments were supplemented by commitments as to conduct, accepted by the Commission in other cases of concentrations, facilitating access to distribution and eliminating any risk of mutual support.

246 The Commission states, in essence, that it concluded that Schneider's corrective measures would not lead to the elimination of all the competition problems

identified in the French low-voltage electrical equipment market and that they raised, in addition to the legal uncertainty deriving from the judgment of the Cour d'appel de Versailles, numerous problems of viability, autonomy and capability of the transferable entities to re-establish effective competition. The Commission evaluated the impact of those corrective measures on the markets concerned in terms of market share, removal of overlapping, the strength of the brands to be assigned and the power of Schneider-Legrand to negotiate with wholesalers.

247 In addition to the fact that every case of concentration raises specific problems of competition, the proposed commitments as to conduct would have had only a very limited effect and monitoring of their application would have raised considerable difficulties, in view of the very large number of products and distributors to which those commitments could have applied.

— Findings of the Court

248 The Court points out that, as is apparent from paragraph 48 of the order of the Court of Justice in Case C-188/06 P *Schneider Electric* v *Commission*, the Commission was legally entitled to resume the examination of the transaction in phase I on the day following delivery of the *Schneider I* judgment.

249 Since it had decided to resume investigation of the transaction at that stage, the Commission had no alternative but to apply, with a view to initiating phase II of the investigation of the transaction by the decision of 4 December 2002, the criterion laid down in Article 6(1)(c) of the regulation of the existence of serious doubts as to the compatibility of the transaction with the common market.

250 Schneider is therefore wrong to object that the Commission did not apply the criterion of the creation or strengthening of a dominant position within the meaning of Article 2(3) of the regulation, on which the Commission must rely when adopting a decision declaring a concentration incompatible with the common market under Article 8(3).

251 As regards the capability of Schneider's corrective measures to resolve the residual problems of competition identified by the Commission in the French low-voltage electrical equipment sectoral markets, it is common ground that the transfers of Legrand businesses proposed by Schneider were a core feature of the suggested corrective measures.

252 It follows that the withdrawal, required of Schneider by the Cour d'appel de Versailles, of its proposals for divestiture of Legrand businesses which had been put forward without Legrand's approval provided support for the doubts which the Commission states it continued to entertain as to the compatibility of the transaction with the common market.

253 Moreover, in view in particular of the strength in France of the Schneider-Legrand group, on account of its strong presence in all the various sectors of products relating to low-voltage electricity distribution, the disappearance of the long-standing rivalry between the two parties to the transaction and the parties' ownership of well-known brands, it does not appear that the Commission seriously and manifestly overstepped its discretion in taking the view that Schneider's corrective measures were not sufficient to remove every material doubt as to the compatibility of the transaction with the common market.

254 It has not therefore been established that the Commission's refusal to accept that those measures were capable of dispelling the serious doubts it continued to entertain as to the compatibility of the transaction with the common market derives, as claimed by Schneider, from an incorrect, unfair and discriminatory analysis of those measures.

255 Schneider's arguments in that regard must therefore be rejected.

256 It is clear from the foregoing that none of the complaints concerning the Commission's conduct as a whole in the investigation of the transaction discloses any sufficiently serious breach of a rule of law intended to confer rights on individuals.

257 In those circumstances, the Commission cannot be held, as a result of that general conduct, either to be guilty of exacerbating the damage Schneider claims to have suffered as a result of sufficiently serious breaches of Community law vitiating the incompatibility decision or to be liable for such costs as Schneider may have incurred in the divestiture procedure or before the French courts.

258 Consequently, only the fact that Schneider was deprived, because of the discrepancy between the statement of objections of 3 August 2001 and the incompatibility decision, of an opportunity to put forward corrective measures conducive to resolution of the problem of the mutual support between its positions and those of Legrand in the relevant French sectoral markets gives the applicant any right to secure reparation for the damage suffered by it as a result of that misconduct.

259 The Court must therefore consider whether the defect in the incompatibility decision, which constitutes a fault of such a kind as to cause the Community to incur non-contractual liability, may be regarded as displaying a sufficiently direct causal link to the heads of damage pleaded in that regard.

The alleged causal link between the sufficiently serious breach of Community law vitiating the incompatibility decision and the heads of damage relating thereto

The loss of value of the assets in Legrand held by Schneider

260 The main damage claimed by Schneider derives from the financial loss suffered by it through having to sell the assets in Legrand at a lower price than it paid to acquire them.

261 The divestiture decision, which was unlawful because it was a measure implementing an incompatibility decision that was itself unlawful, set a time-limit for Schneider to dispose of the assets in Legrand and prohibited it from disposing of certain of those assets separately.

262 Consequently, if, within the period set by the Commission in a decision lacking a legal basis, Schneider was unable to dispose of the assets of which it was required to divest itself without suffering loss, as a result of the drop in the value of those assets between the date of their purchase and the date of their forced disposal, it must be

held that those losses derive directly from the obligation to implement an unlawful decision, regardless, moreover, of any other reasons for which the assets in question lost value during the period concerned.

263 However, 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.

264 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.

265 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.

266 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.

267 Thus, in this case, the loss attributable to the Community cannot be assessed on the basis of a comparison between the situation brought about by the incompatibility decision and a situation characterised by express or tacit authorisation of the transaction, 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.

268 It is therefore necessary, in order to adjudicate on the existence of a sufficient causal link between the failure found and the loss claimed, to assess the impact of the defect identified in the *Schneider I* judgment on the subsequent procedural stages of the investigation of the transaction.

269 In that regard, whilst it is clear from the *Schneider I* judgment that the sufficiently serious breach of Schneider's rights of defence had the effect of rendering the incompatibility decision unlawful, it does not thereby follow that in the absence of such a breach the transaction would necessarily have been declared compatible with the common market.

270 The *Schneider I* judgment found, in paragraph 465, that, so far as concerned the implementing measures made necessary, under Article 233 EC, by the annulment of the incompatibility decision by reason of that unlawfulness (see *Schneider I*, paragraphs 462 and 463), the Commission was required to place Schneider in such a position that it could put forward a proper defence to the objections made by the Commission in relation to each of the French low-voltage electrical equipment sectoral markets affected by the transaction and, where appropriate, to propose corrective measures capable of answering those objections, in such a way as to secure, possibly on completion of re-examination of the transaction, a decision upholding its compatibility.

271 As Schneider itself has conceded in its reply, the economic analysis of the impact of the transaction on the French sectoral markets incorporated in the incompatibility decision was not rendered invalid by the *Schneider I* judgment.

272 By way of measures to implement the *Schneider I* judgment, the Commission was therefore required to resume investigation of the transaction without excluding the possibility of its being declared compatible with the common market and, to that end, to hear the applicant regarding the mutual support objection and to take account of any corrective measures that might be put forward by Schneider and Legrand to resolve the problems of compatibility raised by the mutual buttressing of their positions on the French sectoral markets concerned.

273 The Commission was not therefore, in implementing the *Schneider I* judgment, bound by any procedural obligation to declare the transaction compatible with the common market.

274 The argument put forward by the applicant at the hearing that there was a presumption that a notified concentration was compatible with the common market must also be rejected.

275 According to Community case-law, the regulation 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 (Case T-210/01 *General Electric* v *Commission* [2005] ECR II-5575, paragraph 61).

276 It is true that a concentration is tacitly regarded as compatible with the common market where, in particular, the Commission has neither taken a decision to initiate phase II 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).

277 However, it is common ground that neither of those two situations exists in this case, the Commission having duly completed within the prescribed periods the two phases of the investigation of the transaction by adopting measures of the kind provided for by the relevant provisions of the regulation.

278 Accordingly, the defect identified in the incompatibility decision did not deprive Schneider of any right to a decision that the transaction is compatible, whether explicit or implicit, such as to justify treating all the financial consequences of the loss of that right and, in particular, those deriving from the obligation to dispose of the assets in Legrand as damage attributable to the Community.

279 It follows that Schneider cannot validly claim that, as a result of the defect vitiating the incompatibility decision, it suffered harm equal to the entire loss of value of the assets in Legrand held by it as at 10 October 2001, namely a sum of between EUR 2 483 million and EUR 3 326 million, in the absence of a sufficiently direct causal link between that harm and the infringement giving rise to liability on the part of the Community.

280 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 loss.

281 The possibility cannot be ruled out that, as a result of its comments on the mutual support objection and of its divestiture proposals conducive to the reduction or offsetting, in relation to that charge, of the anti-competitive impact of the planned transaction, the applicant might have been in a position to require the Commission to find, on penalty of committing an error of assessment by not doing so, that the transaction was compatible with the common market.

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.

283 It follows that an assessment of the changes to the economic parameters which would necessarily have accompanied any decision of compatibility is too uncertain to be a basis for a useful comparison with the situation resulting from the incompatibility decision. Even if it is accepted that Schneider may have lost a real opportunity to secure a decision of compatibility, the materialisation of that opportunity is linked to parameters that are too uncertain to be the subject of any convincing quantification.

284 It must be noted in that connection, first, that disposal of the assets in Legrand might have proved unachievable for reasons of domestic law and, second, that it is impossible to decide whether or not disposal of assets by Schneider to an extent sufficient to offset the effect of the mutual support between its positions and those of Legrand might have rendered the transaction entirely devoid of interest for the applicant.

285 Consequently, compensation for the loss suffered by Schneider through forfeiture of a real opportunity to be able to retain the assets in Legrand cannot be envisaged.

286 It must therefore be concluded that there is no sufficiently close causal link between the unlawful act committed and the loss of any opportunity of obtaining a decision that the transaction was compatible for the Community to incur liability as a result of the obligation imposed on Schneider to dispose of its assets in Legrand, 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 by Schneider and their subsequent disposal can be attributed to the Community.

287 For the same reasons, Schneider also has no basis for claiming that the unlawful incompatibility decision denied it any opportunity of achieving the synergies expected from the transaction and consequently destroyed its industrial strategy, or that the decision adversely affected the applicant's image and, therefore, its reputation.

288 On the other hand, there is a sufficiently close causal link to create entitlement to compensation between the wrongful act committed and two types of damage suffered by the applicant. The first type represents the costs incurred by the undertaking in participating in the resumed investigation of the transaction after the annulments pronounced by the Court of First Instance on 22 October 2002. The second corresponds to the reduction in the transfer price which Schneider had to grant to the purchaser of the assets in Legrand in order to secure an agreement that the date on which the disposal was to take effect would be deferred for such time as might be necessary to ensure that the proceedings then pending before the Community judicature would not become devoid of purpose before reaching their conclusion.

The fees and administrative and judicial costs incurred by Schneider

289 As regards the costs incurred by Schneider for the special trustee's fees, it must be observed that the legal basis for the appointment of a trustee is to be found in Article 7 of the regulation, whereby an undertaking which, as in this case, has, before the Commission has given a decision on the compatibility of the notified concentration, acquired ownership of the assets of another company by means of a public bid is under an obligation, by virtue of the proviso contained in Article 7(3), not to exercise the voting rights attached to the securities deriving from that public bid unless it receives an authorisation from the Commission on the basis of Article 7(4).

290 It was therefore on the basis of that provision that, on 4 December 2001, the Commission gave Schneider, at the latter's request, authorisation to exercise the voting rights attached to its holding in Legrand, through a trustee appointed by Schneider under the conditions laid down in a contract of appointment approved by the Commission.

291 Schneider therefore has no basis for claiming, as it does in paragraph 149 of its application, that the trustee's intervention was made necessary by the adoption of the incompatibility decision or, as claimed in paragraph 252 of the reply, that, if the transaction had not been wrongly prohibited on 10 October 2001, Schneider would never have needed to use a trustee to exercise its rights at the general meeting of Legrand in December 2001, since by that time it directly exercised sole control over Legrand.

292 As has already been held, the annulment of the incompatibility decision did not automatically entail a finding that the transaction was compatible with the common

market, in view of the fact that residual problems of competition deriving from the transaction persisted in the French low-voltage electrical equipment sectoral markets.

293 As regards the fees of legal, tax and banking consultants and other administrative costs incurred in carrying out the divestiture in accordance with the conditions laid down by the Commission, they likewise cannot be accepted as flowing from the unlawfulness of the Commission's incompatibility decision.

294 First, the unlawfulness of the incompatibility decision and, consequently, of the divestiture decision does not, as already noted, 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 Schneider with a view to divesting itself of the assets would not have had to be borne by the applicant if the Commission had adopted a lawful decision.

295 Second, although Schneider alleges that it had to incur exceptional costs on account of the improper divestiture arrangements imposed on it by the divestiture decision and by reason of the Commission's intransigence in that regard, that element of the alleged damage is linked not to the breach of the rights of the defence found in the *Schneider I* judgment but to entirely separate complaints which have not been held in the present judgment to constitute sufficiently serious breaches to give rise to entitlement to compensation.

296 As regards the costs incurred for the purpose of the domestic proceedings initiated by Legrand, it need merely be pointed out that the applicant itself considers that they were caused not by the unlawful incompatibility decision but by the attitude

imputed to the Commission whereby it exploited the tensions between the parties to the transaction, which has not been held in this judgment to constitute a claim on the basis of which Community liability might be incurred.

297 The costs incurred in relation to judicial review proceedings before the Community judicature must be regarded as covered by the decisions given 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 (see, in this case, the orders of 29 October 2004 in Cases T-310/01 DEP and T-77/02 DEP *Schneider Electric* v *Commission*). 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, as Schneider did in Cases T-48/03 and C-188/06 P.

298 As regards, finally, the consultancy fees and administrative expenses of various kinds incurred by Schneider in participating in the resumed investigation of the transaction made necessary by the *Schneider I* and *Schneider II* judgments, it must by contrast be accepted that there is a direct and certain causal link between them and the unlawful conduct of the institution.

299 It was because the Commission failed to give details, in the statement of objections of 3 August 2001, of a problem of competition underlying the incompatibility decision that the applicant was deprived of an opportunity to give its views on the subject and to put forward appropriate countermeasures, a circumstance which gave rise to annulment of the decision in question. That annulment made it necessary to resume the procedure specifically in order to enable the applicant to be heard

regarding the objection at issue and, if appropriate, to submit proposals for measures to remedy the effects of the transaction in that regard, whereas it should have been put in a position to do so before the Commission gave a decision on the compatibility of the transaction with the common market.

300 The costs incurred by the applicant in participating in the administrative investigation procedure resumed following the *Schneider I* and *Schneider II* judgments would not have had to be incurred if the Commission had from the outset adopted a decision observing the rights of the defence, which would not have had to be annulled as being defective in that regard and could have definitively brought the investigation to an end by a declaration that the transaction was either compatible or incompatible.

301 Admittedly, if the mutual support objection had been set out in the statement of objections of 3 August 2001, Schneider would have had to give its views on that subject and, if appropriate, prepare adequate corrective measures before the Commission adopted its decision on the compatibility of the transaction, as it had to do after the annulment of that decision and subsequent resumption of the investigation of the transaction. But it can hardly be denied that the fact of resuming, on new legal bases, an administrative procedure suspended 12 months earlier necessarily represented, for the party dealing with the regulatory institution, an incomparably greater burden than that which the undertaking and its advisers, who were already fully involved in meetings and contacts with the relevant Commission staff, would have had to bear in responding to the same objection during the initial investigation procedure.

302 It follows that there is a sufficient causal link between the costs incurred by Schneider in participating in the investigation of the transaction when it was resumed after the *Schneider I* and *Schneider II* judgments and the improper conduct of the institution for entitlement to compensation to arise.

The reduction in the Legrand transfer price granted to Wendel-KKR to enable the date of the transfer to be deferred

303 The Court must consider whether the unlawfulness of the incompatibility decision resulted in a reduction in the figure at which Schneider's shareholding in Legrand was valued in the sale and purchase agreement entered into with Wendel-KKR.

304 It is common ground that the commencement of negotiations for the transfer of Legrand and conclusion of the sale and purchase agreement between Schneider and Wendel-KKR on 26 July 2002 both derived directly from the incompatibility decision of 10 October 2001, which, although unlawful, nevertheless produced full legal effects until its annulment by the *Schneider I* judgment on 22 October 2002.

305 As a result of that decision, Schneider was obliged to commence and conclude negotiations with Wendel-KKR for the transfer of its holding in Legrand, even before delivery of the judgment on its application for the annulment of that decision, in order to avoid exposing itself to the further obligation, in the event of an adverse judgment, to open and conclude transfer negotiations which at the outset were inimical to the defence of its interests, since they would then have had to have been brought to a conclusion in a very short time, in view of the fact that the divestiture period ended on 5 February 2003 and there was no certainty that the Commission would grant a further extension of that time-limit.

306 It follows that Schneider was compelled, because of the existence of the incompatibility decision, to fix a price for the transfer of Legrand in the sale and purchase agreement concluded on 26 July 2002 and, at the same time, to make certain that it would be able to suspend actual implementation of the transfer until 10 December 2002.

307 That date fell sufficiently beyond the foreseeable date of delivery of the *Schneider I* judgment, which was due to be given following an expedited procedure, to enable Schneider both to obtain confirmation, in the event of dismissal of its application for annulment, of the lawfulness of the contested decision or, in the contrary case of annulment, which subsequently came about, to ensure that it would still be possible to secure re-examination of the transaction by the Commission on the basis of a new proposal for corrective measures, with a view to the adoption of a final decision giving a lawful ruling as to the compatibility of the transaction with the common market.

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.

309 Furthermore, it does not appear from the file that the sale and purchase agreement could have been signed earlier than 26 July 2002, even if the contested decision had not appeared to Schneider to be vitiated by manifest irregularities which the applicant wished to have condemned by the Court of First Instance.

310 Account must be taken, as from 10 October 2001, of the irreducible period needed to devise and put into place complex financial mechanisms for a sale of assets on the scale of Legrand, as demonstrated by the efforts made by Schneider to persuade the Commission to extend the initial divestiture period by six months.

311 That obligation to defer effective completion of the sale of Legrand, stemming from Schneider's legitimate attempts to obtain a decision giving a lawful ruling on the

compatibility of the transaction with the common market, necessarily prompted the applicant to offer to sell Legrand to Wendel-KKR at a lower price than the applicant would have obtained in the event of a firm sale accomplished in the absence of an incompatibility decision which, from the outset, appeared to be tainted by two manifest irregularities.

312 It must be accepted that deferral of the completion of the sale of the assets in Legrand until 10 December 2002 meant that Wendel-KKR had to be paid for accepting the risk of depreciation of the assets in Legrand to which it exposed itself by accepting that deferral, if only because of the possibility of an adverse variation in the prices of industrial stocks over the period between signature of the sale and purchase agreement and the final date agreed between the parties for the sale to take effect.

313 It must be observed in that regard that the expert's report produced as Annex 29 to the application specifically refers to an opportunity cost suffered by Schneider, in that it was unable to choose the date for the resale of Legrand.

314 That compensatory reduction in the transfer price appears to have no connection with the compensation provided for in the agreement in the event of the transfer not being proceeded with, which corresponded to what Schneider would have had to pay in the event of its declining to complete the transfer.

315 In those circumstances, the breach of the rights of the defence vitiating the incompatibility decision must be regarded as being sufficiently directly linked to the deferral to 10 December 2002, in the sale and purchase agreement, of the final date for completion of the Legrand sale, because that deferral was essential to enable Schneider properly to exercise the right available to all companies in its position to

obtain a lawful decision as to the compatibility with the common market of a duly notified concentration and, possibly, to be heard in a procedure offering it the requisite safeguards.

316 Consequently, the serious infringement of Community law found by the Court of First Instance is to be regarded as displaying a sufficiently direct causal link with the damage suffered by Schneider as a result of the reduction in the Legrand transfer price associated with the deferral of completion of the transfer to Wendel-KKR.

317 It follows from all the foregoing considerations that the sufficiently serious breach of Community law vitiating the incompatibility decision must be regarded as displaying a sufficiently direct causal link with, first, the costs incurred by Schneider in participating in the administrative procedure for investigation of the transaction resumed on the day following the *Schneider I* and *Schneider II* judgments and, second, with the reduction in the Legrand transfer price granted to Wendel-KKR to secure a deferral of the final date for the transfer.

The two heads of damage and their quantification

318 It must be borne in mind that, by order of 11 December 2003, the Court adopted a measure of organisation of procedure limiting the pleadings to the principle of the establishment of non-contractual liability of the Community and the methods for evaluating the damage.

319 With regard to the costs incurred by Schneider through its participation in the resumed investigation of the transaction, it must be observed that, in connection with the administrative divestiture procedure, with the applications in Cases T-310/01, T-77/02 and T-77/02 R, and, finally, with resumption of the investigation of the transaction, the applicant incurred costs of which it gives a total estimated amount in paragraph 150 of its application.

320 In order to determine the amount of compensation the Commission must pay to Schneider in respect of the costs relating to resumption of the investigation procedure, it will therefore be necessary to deduct from the sum of the costs referred to in the foregoing paragraph the total costs incurred by Schneider in Cases T-310/01, T-77/02 and T-77/02 R, the costs referred to in paragraph 293 above, and, finally, the costs that Schneider would necessarily have incurred in respect of the corrective measures relating to mutual support which it would in any event have had to propose before the adoption of the incompatibility decision, if that decision had been adopted without any breach of its rights of defence.

321 It will be necessary for the parties either to communicate to the Court within a period of three months following the date of delivery of this judgment a figure for this head of damage agreed on in accordance with the calculation procedures indicated in the foregoing paragraph or, within the same period, to lodge their own calculations.

322 The loss corresponding to the reduction in the Legrand transfer price, granted to Wendel-KKR because of deferment of completion of the sale of Legrand to the transferee until 10 December 2002, is equal to the difference between the Legrand transfer price agreed in this case between the parties to the agreement and the price that Schneider could have obtained from the transferee if, at the end of the first investigation of the transaction, on 10 October 2001, it had been given a lawful decision as to the compatibility of the transaction.

323 The Community must therefore be ordered to make good the certain and assessable damage suffered in that regard by the applicant.

324 In order to assess the amount of damage suffered by the applicant on account of the reduction in the Legrand transfer price that the applicant had to grant to Wendel-KKR in consideration of the deferment to 10 December 2002 of the date for completion of the sale of Legrand to the transferee, it is appropriate to order that an expert's report be drawn up, in accordance with Articles 65(d), 66(1) and 70 of the Rules of Procedure, after the parties have submitted their observations and been invited to give their views on the choice of an expert.

325 To that end, the expert is to be given a certified copy of the sale and purchase agreement of 26 July 2002 and of the expert's report of 1 October 2003 on the determination of the loss alleged by Schneider, which are contained in Annexes 8 and 29 to the application respectively.

Schneider's own contribution to the damage suffered by it

Arguments of the parties

326 The Commission considers that Schneider resorted to a high-risk legal remedy in relation to the investigation of concentrations by the Community, whereas, under French law, approaches to Legrand were possible which, although notifiable to the Commission, would not trigger any obligation to launch a public bid.

327 Schneider replies that the legal remedy chosen was the only one available that would not undermine the economic effects and the security of the transaction and that nothing could have forewarned it of the fact that the Commission would oppose the transaction in principle or that its rights of defence would be infringed.

Findings of the Court

328 It is common ground that Schneider acquired Legrand's shares by means of a public bid in reliance on the derogation provided for in Article 7(3) of the regulation from the principle of the suspensive effect of concentrations deriving from the provisions of the regulation.

329 Although thus acquiring control of Legrand, within the meaning of Article 3(1)(b) of the regulation, in a manner that was entirely lawful under French and Community competition law, Schneider nevertheless assumed the risk that the investigation of the transaction would, on expiry of the periods laid down by the regulation, result in a decision declaring to be incompatible with the common market a transaction which had been legally perfected, and the imposition of a corresponding obligation for the assets of undertakings already merged to be separated.

330 In view of the extent of the merger carried out and the appreciable increase of economic strength accruing to the only two protagonists present on the French low-voltage electrical equipment sectoral markets, Schneider 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.

331 The strength of the parties to the transaction on the French sectoral markets and the strengthening of the positions of the two partners following the merger were apparent from Annexes 7 to 17 to draft Form CO of 12 December 2000, which no longer enjoy confidential status (order of the President of the Fourth Chamber of the Court of First Instance of 21 February 2006 in this case (not published in the ECR), paragraph 25), and in which the notifying parties reproduced as follows the percentage shares of the French sectoral markets held by the main operators in the sector during 1999:

Segment	Schneider	Cible	Hager	Siemens	ABB
Segment1 Main switchboards	32	-	-	2	2
Segment 2 Distribution panel boards	30	7	2	0	1
Segment 3 Trunking	-	-	4	-	-
Segment 4 Final panel boards	32	15	15	0.1	1
Segment 5 Ultraterminal	9	67	3	-	-
Segment 5.A.1 Sockets and switches	6	87	-	-	-
Segment 5.A.2 Control systems	-	-	-	-	-
Segment 5.A.3 Safety systems	-	-	-	-	-
Segment 5.A.4 Communication networks	-	-	-	-	-
Segment 5.B Installation systems	31	66	-	-	-
Segment 5.C Trunking	-	38	10	-	-

332 It may thus be inferred that Schneider 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 (see, to that effect, Case 145/83 *Adams* v *Commission* [1985] ECR 3539, paragraph 54).

333 That consideration does not however apply to the loss caused to Schneider by its participation in the resumed administrative investigation of the transaction, such participation having no connection with the date on which the concentration came into being.

334 In those circumstances, on a fair assessment of the facts of the case, it is appropriate to hold the applicant responsible for one third of the compensatable loss suffered by it as a result of the reduction in the transfer price granted to Wendel-KKR.

335 It follows from all the foregoing considerations that the Commission must be ordered to make good, in the terms set out above, first, the costs incurred by Schneider in participating in the resumed investigation of the transaction following the *Schneider I* and *Schneider II* judgments and, second, two thirds of the loss suffered by Schneider as a result of the reduction in the Legrand transfer price granted to Wendel-KKR.

Interest

Arguments of the parties

336 Schneider claims that it should be awarded interest at the annual rate of 4% to compensate for the interest which the amount of compensation granted will have

generated since 4 December 2002, the date of the decision initiating phase II, until delivery of the judgment bringing the present proceedings to an end.

337 The rate of 4% should in its view also be applied to the calculation of default interest on the amount of compensation awarded as from delivery of the forthcoming judgment.

338 The Commission contends that Schneider has not shown that it has been the victim of an exceptional situation giving rise to entitlement to compensatory interest. The compensation could at most bear default interest as from the date of delivery of the judgment.

339 The Commission also reserves the right to contest the excessive rate of 4% claimed by the applicant.

Findings of the Court

340 The Court finds that, 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 (*Dumortier Frères and Others* v *Council*, paragraph 25).

341 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.

342 Consequently, provided that the conditions for non-contractual liability of the Community are fulfilled, as they are in this case, the Community judicature cannot disregard the unfavourable consequences of the time lapse between the date of materialisation of the loss, namely 10 December 2002, the effective date of the transfer of Legrand to Wendel-KKR, and that of payment of the compensation, in so far as account must be taken of inflation recorded (Case C-308/87 *Grifoni* v *EAEC* [1994] ECR I-341, paragraph 40, and Case T-260/97 *Camar* v *Council and Commission* [2005] ECR II-2741, paragraph 138).

343 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 (Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 35, and *Camar* v *Council and Commission*, paragraphs 142 and 143).

344 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.

345 It follows that the amount of compensation due to the applicant as from 10 December 2002 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.

346 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 4% claimed by the applicant in its pleadings (*Mulder and Others* v *Council and Commission*, paragraph 35).

The claim for increase of the compensation on account of national tax

Arguments of the parties

347 Schneider seeks an increase of the compensation awarded so as to cover the tax it will be liable to pay on that amount.

348 The Commission replies that, in the absence of a taxable amount, compensation for costs of a fiscal nature is inconceivable: such costs do not fall within the scope of the criteria for calculating damage but should be examined as a matter of substance.

Findings of the Court

349 The Court considers that the compensation awarded cannot be increased in respect of national tax liable to be charged on it in the future.

350 It must be observed that, according to the expert's report produced by Schneider as Annex 29 to its application, it is not certain that the compensation awarded by the Court would give rise to taxation.

351 In any event, the claim for such an increase must be regarded as premature in the absence of any indication as to the amount awarded or to any tax rate that will be applied if tax is collected by the national tax authorities.

352 Therefore, the claim for increase of the compensation on account of national tax to which it might be subject must be rejected.

On those grounds,

THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)

by way of interlocutory judgment,

hereby:

1. **Orders the European Community to make good, first, the expenses incurred by Schneider Electric SA in respect of its participation in the resumed merger control procedure which followed delivery of the judgments of the Court of First Instance on 22 October 2002 in Cases T-310/01 and T-77/02 *Schneider Electric* v *Commission* and, second, two thirds of the loss sustained by Schneider Electric as a result of the reduction in the transfer price of Legrand SA which Schneider Electric had to concede to the transferee in exchange for the postponement of the effective date of sale of Legrand until 10 December 2002;**

2. **Dismisses the action as to the remainder;**

3. **Orders the parties to communicate to the Court, within the period of three months from 11 July 2007, the amount representing the first head of loss, jointly agreed in accordance with the procedure set out in paragraph 320 of this judgment;**

4. Failing such agreement, orders the parties to submit to the Court, within the same period, their proposed figures;

5. Orders that the amount of the second head of loss of Schneider Electric referred to in paragraph 1 above shall be assessed by an expert;

6. Invites Schneider Electric and the Commission to nominate the expert or to propose to the Court a list of experts so that one may be appointed by the Court from that list;

7. Instructs the Registrar of the Court to transmit to the expert for the purposes of his examination a certified copy of Annexes 8 and 29 to the application;

8. Declares that the expert shall be invited to submit his report within a period of time to be determined;

9. Instructs the Registrar of the Court to serve the report on the parties;

10. Declares that the compensation shall be reassessed and increased to take account of interest in accordance with the criteria defined in paragraphs 345 and 346 of this judgment;

11. Reserves the decision on costs.

Legal Wiszniewska-Białecka Vadapalas

Moavero Milanesi Wahl

Delivered in open court in Luxembourg on 11 July 2007.

E. Coulon H. Legal

Registrar President

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