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The Role of Judicial Review in Merger Control

*Mark Clough**

I. INTRODUCTION

This article explains the role of judicial review in European Community ("EC") Merger Control ("ECMR") by reference to the *Airtours* case¹ and three other important recent judgments of the European Court of First Instance ("CFI") (*Schneider*², *Tetra Laval*³ and *Lagardère*⁴), all decided in 2002. Article 230 of the EC Treaty, which governs actions for annulment of acts adopted by the EC Institutions "on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of this [EC] Treaty or of any rule of law relating to its application, or misuse of powers,"⁵ is considered only in the context of these cases. General questions of admissibility, evidence and procedure are outside the scope of this article.

Judicial review of EC competition decisions and decisions under the EC Merger Regulation⁶ had been developed by the CFI, without criticism from the European Court of Justice ("ECJ"), to reflect the greater attention to review of facts that was considered one of the reasons for creating the CFI with competition law jurisdiction when it was first established in 1989. Sir Christopher Bellamy QC, when United Kingdom Judge in the CFI,

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¹ Case T-342/99, *Airtours plc v. Commission*, 2002 E.C.R. II- 2585.

² Joined Cases T-310/01 and T-77/02, *Schneider Elec. v. Commission*, 2002 E.C.R. 4201.

³ Joined Cases T-5/02 and T-80/02, *Tetra-Laval v. Commission*, 2002 E.C.R. 4381.

⁴ Case T-251/00, *Lagardère SCA and Canal+ SA v. Commission*, 2002 E.C.R. II-4825.

⁵ TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11, *as amended by* TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340) 1 (1997).

⁶ Council Regulation 4064/89/EEC of 21 December 1989 on the Control of Concentrations Between Undertakings, 1989 O.J. (L395) 1. Corrected version in 1990 O.J. (L257) 13, *amended by* Council Regulation (EC) No. 1310/97 of 30 June 1997, 1997 O.J. (L180) 1 [hereinafter Council Regulation].

explained the Court's powers of review as follows:

Unlike the federal courts in the United States, the Kammergericht in Berlin, the Cour d'Appel in Paris, and the soon-to-be-established Competition Appeal Tribunal in the United Kingdom, an appeal to the CFI is not an appeal by way of rehearing, at least formally speaking; it is an appeal by way of judicial review under the four grounds set out in the Treaty: lack of jurisdiction, procedural error, error of law and misuse of power.

However, to that somewhat unpromising and limited jurisdiction, over time by case law have been added three further grounds of review: error of fact, error of appreciation - and that comes in most in economic issues, which I will come to in a moment - and absence of reasoning.

The Treaty imposes the very clear obligation on the Community authorities to give reasons for every decision. The theory elaborated by the Court is that: if I cannot understand the reasons in the decision, or if there are no reasons in the decision, then I cannot exercise my role as judicial reviewer of its legality; and, therefore, I can quash the decision for lack of reasons. This is quite a useful power, as we will see in a moment.

On facts, what is the approach? On the primary facts - has a particular agreement been made; did such-and-such a telephone call take place; what do the documents prove - I think that one can say that there is now quite a place for judicial control of whether or not the facts are proved "to the requisite legal standard." We are somewhat coy about exactly what the "relevant standard" is; it is not really defined yet in the case law. But, in practice, it is something quite close to "proof beyond reasonable doubt," which is in itself quite close to "*la conviction intime*" of a Continental judge, or at least "to a very high degree of probability." So we tend to look very closely at what elements of proof the Community has before it.⁷

The CFI savaged the European Commission ("Commission") merger prohibition decision in the *Airtours* case in a detailed exposure of the defects in the Commission's legal definitions, treatment of evidence, and the factual and economic analysis of that evidence.⁸ In its decision, the Commission had prohibited the notified merger of Airtours and First Choice on the ground that the merger would create a collective dominant

⁷ Sir Christopher Bellamy QC, *Anti-Trust and the Courts Roundtable*, in FORDHAM ANNUAL ANTITRUST CONFERENCE 369, 389 (1999).

⁸ *Airtours*, 2002 E.C.R. II-2585.

position in the United Kingdom short-haul foreign packaged tours market. The Court's judgment contains a detailed examination of the Commission's factual analysis, the economic tests for establishing collective dominance and the application of that concept to the evidence. It held that the decision was "vitiating by a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created."⁹ Hence, the Court annulled the prohibition decision finding that the Commission had not "proved to the requisite legal standard that the concentration would give rise to a collective dominant position."¹⁰

The *Airtours* judgment by the CFI was of little commercial value since it was two years after the Commission's decision prohibiting the merger. The CFI now has to adjudicate a claim for damages recently lodged by the aggrieved merger party, MyTravel Group, formerly *Airtours*¹¹. However, in the first two major cases decided under the new expedited procedure introduced on February 1, 2003, the *Schneider* case and the *Tetra-Laval* case,¹² the CFI annulled the Commission merger prohibition decisions, applying an equally high standard of review.¹³ Some, including the Commission, believe that the CFI went beyond the scope of its powers of review under Article 230 of the EC Treaty in the *Tetra-Laval* case and claim that the Court substituted its own view for that of the Commission. For this reason, the Commission has appealed the CFI judgment in the *Tetra-Laval* case.¹⁴ Until the ECJ rules on this appeal, uncertainty will hinder the CFI's review of further EC merger decisions. However, in this article the CFI's approach to judicial review is analyzed primarily by reference to *Airtours* which has not been appealed.

In addition to the substantive and economic issues raised by these leading cases, questions inevitably arise regarding the adequacy of the procedural safeguards that allow such substantive errors of assessment in the Commission's merger control decision-making process. The Commission itself has made numerous proposals to improve its own procedures and practice. Ultimately, however, judicial review by the European Courts remains the essential safeguard for parties involved in EC Merger Control.

There are a number of mechanisms that have been introduced to

⁹ *Airtours*, 2002 E.C.R. II-2585, at para. 294.

¹⁰ *Id.*

¹¹ Case T-212/03, *MyTravel Group v. Commission*, 2003 O.J. (C200) 28, 29.

¹² Amends. to the Rules of Procedure of the Court of First Instance of the EC Communities, 2000 O.J. (L 322) 4, at art. 76(a), available at http://europa.eu.int/eur-lex/pr/en/oj/dat/2000/l_322/l_32220001219en00040006.pdf [hereinafter CFI Rules of Procedure].

¹³ *Schneider Elec.*, 2002 E.C.R. 4201; *Tetra-Laval*, 2002 E.C.R. 4381.

¹⁴ Case C-12/03P, *Commission v. Tetra-Laval*, 2003 O.J. (C70) 3; Case C-13/03P, *Commission v. Tetra-Laval*, 2003 O.J. (C70) 5.

improve the way the Commission proves its case including clarification or change of the substantive legal test applied to concentrations which would significantly impede effective competition, improving the procedural safeguards and rights of defense to ensure that the Commission obtains sufficient and unambiguous evidence (access to complaints, status report meetings and Peer group challenges), and improvement in economic analysis of the evidence (use of chief economist and related unit). However, the main proposition of this article is that the role of judicial review will remain paramount as the only effective available method of holding the Commission accountable. Accordingly, the standards of the mechanisms selected will be maintained only if judicial review by the CFI is fast and of high quality.

This article discusses the standard of proof or “requisite legal standard” imposed on the Commission by the CFI in the *Airtours* case (followed in the *Tetra Laval* and *Schneider* cases) as well as suggestions for improving the speed of the Court’s decision-making under the expedited procedure, including the use of additional judges and a specialist competition court.

In the first part, the requisite legal standard established by the CFI in the *Airtours* case is examined with a view to confirming that the CFI has not trespassed on the Commission’s “margin of appreciation” recognized when the Court reviews the Commission’s economic decision making. The *Airtours* and other recent merger cases are cited to illustrate the Court’s application of its previous “convincing evidence” or “cogent evidence” standard of proof accepted by the Commission in earlier cases such as those dealing with the accountants mergers following the *Kali und Salz* case.

The second part highlights the need for Article 225a of the amended EC Treaty (inserted by the Nice Treaty) to be activated so that a specialist competition court or judicial panel may be established below (or as part of) the CFI with a view to accelerating or at least maintaining the speed of the current expedited procedure, such as that achieved in the *Tetra-Laval* case.

The third part reviews the Commission’s procedure under Article 10(5) of the ECMR following annulment of a merger prohibition decision by reference to the *Kali und Salz* and *Tetra-Laval* cases, and the new text for Article 10(5) codifying that past practice.

The main conclusions of this article are that in order to meet the requirements, and avoid the criticisms, of the latest CFI annulment judgments, the Commission must establish its findings in the following way:

- by defining clearly the legal test that it applies and explaining how that test is satisfied;
- by reference to sufficient convincing or cogent evidence to justify

- the conclusions drawn, and
- by applying a rigorous economic and factual analysis free from manifest errors.

II. THE CFI HAS MADE IT MORE DIFFICULT FOR THE COMMISSION TO BLOCK MERGERS

A. *Airtours v. Commission*

On June 6, 2002, the CFI overturned the September 1999 Commission decision blocking the acquisition of First Choice by Airtours.¹⁵ The Commission had prohibited the Airtours/First Choice merger on the ground that the merger would have created a collective dominant position between the three largest short-haul package holiday companies in the United Kingdom (previously the Commission's collective dominance cases had only involved two firms—this was the first time the Commission applied the collective dominance theory to three firms).¹⁶

This was the first case in which the CFI overturned a negative Commission Decision under the ECMR. For that reason alone the case has prompted much interest and has been widely recognized as having great importance for the quality of future Commission ECMR decisions.¹⁷

1. *The CFI's approach to judicial review under Article 230 of the EC Treaty*

As demonstrated in *Airtours* and by an apparently similar exercise carried out by the Court in *Tetra Laval* and *Schneider*, there are two main approaches pursued during its review on appeal under Article 230 of the EC Treaty. First, the CFI reviews the evidence to verify carefully if the factual findings are based on cogent evidence. Second, it checks whether the reasons for conclusions are consistent with those factual findings and, without substituting its own judgment for the assessment resulting from the Commission's exercise of its discretion, confirms whether or not the Commission has made any manifest errors.

The section of the CFI's judgment addressing the first plea alleging errors in the definition of the relevant product market (and infringement of

¹⁵ See *Airtours*, 2002 E.C.R. II-2585.

¹⁶ *Id.*

¹⁷ See Case C-30/95, French Republic and Societe Commerciale des Potasses et de l'azote (SCPA) and Enterprise Miniere et Chimique (EMC) v. Commission, 1998 E.C.R. I-1374. Although the ECJ had annulled the Commission's *Kali and Salz* merger decision in 1998, the CFI's duty to review Commission ECMR decisions has required it always to pay careful attention to the findings of fact made by the Commission, which is just what it has done in the *Airtours* case.

the Article 253 of the EC Treaty—duty to state reasons) provides a useful illustration of the Court's approach to judicial review in the context of alleged "manifest errors of assessment."¹⁸ Three main characteristics of the judicial review approach followed by the CFI can be identified. First, the test that the court applies is whether or not the Commission's proposition in question may be regarded as "manifestly incorrect."¹⁹ Second, when the Commission is assessing the facts and factors that it considers decisive, with a view toward concluding an issue such as the relevant market definition, the court recognizes that the Commission has a certain discretion, the bounds of which will not be exceeded simply by the fact that the Commission did not consider decisive certain factors which could have supported a different finding.²⁰ Third, in summarizing (without criticism), the applicant's ground for challenge in relation to the allegation that the Commission's assessment of demand—side and supply—substitutability was incorrect. The Court described the applicant's manifest error of assessment claim as a plea of error of law: "as a result of that flaw in the Commission's reasoning the Decision is vitiated by manifest errors of assessment and thus an error of law."²¹

These three principles can be illustrated by their application in this section of the judgment where the CFI rejects the applicant's challenge to the definition of the relevant product market given in the decision. First, the Court identifies the factors taken into account by the Commission in reaching its conclusion by reference to the documents before the Court, i.e. the Court identifies the reasons for the Commission's decision:

The Court notes that it is apparent from the documents before it that the Commission took account of consumer preferences, average flight time, the level of average prices and the limited interchangeability of the aircraft used for each type of destination in reaching its conclusion that short-haul package holidays belong to a separate market from that to which long-haul package holidays belong.²²

Second, the Court then reviews those reasons to establish whether or not the Commission made a manifest error of assessment: "the Court must therefore consider whether the Commission made a manifest error of assessment when it concluded that those factors were reasons for defining the relevant product market narrowly and excluding long-haul package holidays which it did not regard as sufficiently interchangeable with short-

¹⁸ *Airtours*, 2002 E.C.R. II-2585, at paras. 19-47.

¹⁹ *Id.* at para. 41.

²⁰ *Id.* at para. 44.

²¹ *Id.* at para. 21.

²² *Id.* at para. 25.

haul package holidays.”²³

The applicant disputed the relevance of average prices as a means of comparing the effect of prices on the consumers’ decisions where the products are clearly differentiated. The applicant submitted that the behavior of customers at the margin and the question of whether they would be prepared to substitute long-haul package holidays for short-haul packages if the price of the latter were to rise is significant for defining the relevant product market. The Commission’s position was that while average prices do not necessarily reflect prices at the margin, where the differences are so significant, as in the present case, it is unlikely that a sufficient range of generally comparable long-haul package holidays is available at prices which are sufficiently similar to constrain prices of short-haul packages, since the long-haul packages concerned are regarded as genuine substitutes by only a very small proportion of the customers. Accordingly, in this particular context the Court said it was appropriate

to consider whether the Commission made a manifest error of assessment in relation to the significance of the margin, that is, the number of customers prepared to react on a price increase in short-haul package holidays by purchasing a long-haul package holiday, as compared with the total number of customers who habitually purchase a short-haul package holiday from tour operators.²⁴

A review of the relevant documents before the Court established that the Commission’s assessment that none of the long-haul destinations cited by the applicant in its reply to the statement of objections, in support of its view on price convergence was in the same price-range as that which it previously supplied, were well founded.²⁵ The Court concluded: “in those circumstances, the Commission’s proposition that only a small proportion of the customers of the main United Kingdom tour operators regard long-haul package holidays as substitutes in terms of value for money for short-haul package holidays cannot be regarded as manifestly incorrect.”²⁶

Although the applicant advanced other arguments, the Court rejected them by reference to the Commission’s discretion:

however, in the circumstances of the present case and with reference to market definition, the fact that the Commission did not consider decisive: (i) changing consumer tastes; (ii) the growing importance of substitutability between long-haul package holidays for destinations such as Florida and the Dominican Republic and short-haul packages; or

²³ *Id.* at para. 36.

²⁴ *Id.* at paras. 31-32.

²⁵ *Id.* at para. 36.

²⁶ *Id.* at para. 41.

(iii) the growth of the market for long-haul packages over recent years is not sufficient to support a finding that the Commission exceeded the bounds of its discretion in concluding that short-haul package holidays are not within the same product market as long-haul packages.²⁷

2. *Substantive tests for collective dominance in Airtours*

In addition to outlining the CFI general approach to judicial review applied when it reviewed the Commission's decision in *Airtours*, it is also relevant to set out the substantive legal approach applied by the Court which contains the tests against which the findings and reasoning of the Commission's decision on collective dominance were reviewed by the Court:

[w]here, for the purposes of applying Regulation No 4064/89, the Commission examines a possible collective dominant position, it must ascertain whether the concentration would have the direct and immediate effect of creating or strengthening a position of that kind, which is such as significantly and lastingly to impede competition in the relevant market. If there is no substantial alteration to competition as it stands, the merger must be approved (see, to that effect, Case T-2/93 *Air France v. Commission* [1994] ECR II-323, paragraphs 78 and 79, and *Gencor v. Commission*, paragraph 170, 180 and 193).

It is apparent from the case law that 'in the case of an alleged collective dominant position, the Commission is . . . obliged to assess, using a prospective analysis of the reference market, whether the concentration which has been referred to it leads to a situation in which effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, in particular because of factors giving rise to a connection between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and also of consumers.'

The Court of First Instance has held that:

'There is no reason whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly within which, in a market with the appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those

²⁷ *Id.* at para. 44.

parties are in a position to anticipate one another's behavior and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximize their joint profits by restricting production with a view to increasing prices. In such a context, each trader is aware that highly competitive action on its part designed to increase its market share (for example a price cut) would provoke identical action by the others, so that it would derive no benefit from its initiative. All the traders would thus be affected by the reduction in price levels.'

A collective dominant position significantly impeding effective competition in the common market or a substantial part of it may thus arise as the result of a concentration where, in view of the actual characteristics of the relevant market and of the alteration in its structure that the transaction would entail, the latter would make each member of the dominant oligopoly, as it becomes aware of common interests, consider it possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the market with the aim of selling at above competitive prices, without having to enter into an agreement or resort to a concerted practice within the meaning of Article 81 EC and without any actual or potential competitors, let alone customers or consumers, being able to react effectively.

As the applicant has argued and as the Commission has accepted in its pleadings, three conditions are necessary for a finding of collective dominance as defined:

- first, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy. As the Commission specifically acknowledges, it is not enough for each member of the dominant oligopoly to be aware that interdependent market conduct is profitable for all of them but each member must also have a means of knowing whether the other operators are adopting the same strategy and whether they are maintaining it. There must, therefore, be sufficient market transparency for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the way in which the other members' market conduct is evolving;

- second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market. As the Commission observes, it is only if all the members of the dominant oligopoly maintain the parallel conduct that all can benefit. The notion of retaliation in respect of conduct deviating from the common policy is thus inherent in this condition. In

this instance, the parties concur that, for a situation of collective dominance to be viable, there must be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy, which means that each member of the dominant oligopoly must be aware that highly competitive action on its part designed to increase its market share would provoke identical action by the others, so that it would derive no benefit from its initiative;

- third, to prove the existence of a collective dominant position to the requisite legal standard, the Commission must also establish that the foreseeable reaction of current and future competitors, as well as of consumers, would not jeopardize the results expected from the common policy.²⁸

3. *Requisite legal standard to establish collective dominance*

After identifying the substantive tests applied by the CFI, which provide a blue print for collective dominance in oligopolistic markets under the ECMR, it is also essential to set out the legal standard that the CFI expects the Commission to meet. That is, what evidence and legal reasoning will be required where the Commission seeks to prohibit a merger on the ground that it creates or strengthens a collective dominant position. The Court notes that its review of the Commission's decisions will be made in light of the following:

[t]he prospective analysis which the Commission has to carry out in its review of concentrations involving collective dominance calls for close examination in particular of the circumstances which, in each individual case, are relevant for assessing the effects of the concentration on competition in the reference market. As the Commission itself has emphasized, at paragraph 104 of its decision of 20 May 1998 *Price Waterhouse/Coopers & Lybrand* (Case IV/M.1016) (OJ 1999 L 50, p. 27), it is also apparent from the judgment in *Kali and Salz* that, where the Commission takes the view that a merger should be prohibited because it will create a situation of collective dominance, it is incumbent upon it to produce convincing evidence thereof. The evidence must concern, in particular, factors playing a significant role in the assessment of whether a situation of collective dominance exists, such as, for example, the lack of effective competition between the operators alleged to be members of the dominant oligopoly and the weakness of any competitive pressure that might be exerted by other operators.

Furthermore, the basic provisions of Regulation No 4064/89, in

²⁸ *Id.* at paras. 58-62.

particular Article 2 thereof, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature, and, consequently, when the exercise of that discretion, which is essential for defining the rules on concentrations, is under review, the Community judicature must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations (*Kali & Salz*, paragraphs 223 and 224, and *Gencor v. Commission*, paragraphs 164 and 165).

Therefore, it is in the light of the foregoing considerations that it is necessary to examine the merits of the grounds relied on by the applicant to show that the Commission made an error of assessment in finding that the conditions for, or characteristics of, collective dominance would exist were the transaction to be approved.²⁹

The CFI's approach to judicial review in the context of collective dominance can be illustrated by the following extracts from the Court's judgment in the section upholding the third and main plea which alleged infringement of Article 2 of Regulation 4064/89 in that the Commission made an error of assessment since the Decision did not prove to the requisite legal standard that the concentration would create a collective dominant position.³⁰

...it follows from the foregoing that the Commission made errors of assessment in its analysis of competition obtaining in the relevant market prior to the notification. First, it did not provide adequate evidence in support of its finding that there was already a tendency in the industry to collective dominance and, hence, to restriction of competition, particularly as regards capacity selling. . .³¹

...the Court holds that the Commission's findings are based on an incomplete and incorrect assessment of the data submitted to it during the administrative procedure. . .³²

...however, it is apparent from a cursory examination of that document that the Commission's reading of it. . .". "It follows that the Commission construed that document without having regard to its actual wording and overall purpose, even though it decided to include it as a document crucial to its finding that the rate of market growth was moderate in the

²⁹ *Id.* at paras. 63-64.

³⁰ *See generally, id.* at paras. 120-295.

³¹ *Id.* at para. 120.

³² *Id.* at para. 127.

1990s and would continue to be so. . .³³

As regards volatility linked to the business cycle, the Commission cannot just conclude as it does. . .that “it is likely that all tour operators will have similar views as to the market development” without producing any evidence in support of that statement, given that capacity is set initially some 18 months before the start of the season. . .³⁴

. . .it follows from all of the foregoing that the Commission wrongly formed a view that market transparency is high for the four major integrated operators during the planning period. Accordingly, it appears that it wrongly concluded that the degree of market transparency was a characteristic which made the market conducive to collective dominance. . .³⁵

. . .the Court finds that the Commission has failed to prove that the result of the transaction would be to alter the structure of the relevant market in such a way that the leading operators would no longer act as they have in the past and that a collective dominant position would be created.³⁶

As a result of its searching analysis of the findings in the Commission’s decision, the evidence taken into account by the Commission and the available evidence which it either did not take into account or had misunderstood, the Court concluded

that the Decision, far from basing its prospective analysis on *cogent evidence*, is vitiated by a series of *errors of assessment* as to factors fundamental to any assessment of whether a collective dominant position might be created. It follows that the Commission prohibited the transaction without having proved to *the requisite legal standard* that the concentration would give rise to a collective dominant position of the three major tour operators, of such a kind as to significantly impede effective competition in the relevant market (emphasis added).³⁷

The reason, therefore, that the Court overturned the Commission’s decision is not that it rejected the theory of collective dominance in the form of collusion on capacity through tacit collusion to which the CFI effectively equates collective dominance involving three parties. In laying

³³ *Id.* at para. 130.

³⁴ *Id.* at para. 144.

³⁵ *Id.* at para. 180.

³⁶ *Id.* at para. 293.

³⁷ *Id.* at para. 294.

down three conditions to establish collective dominance or tacit collusion, the Court found the Commission lacking in its treatment of the facts rather than the theory. The three conditions identified by the Court were transparency, the possibility of retaliation and the absence of actual and potential external constraints on competition. While these three conditions are a helpful guide to future collective dominance cases and go beyond the checklist approach followed by the Commission to date, the Court's judgment is taken up with testing the Commission's decision in the context of each of the three conditions and concluding that the Commission's analysis was at fault on each. In particular, the Commission wrongly found that the package travel market characteristics were conducive to passive collusion since there was insufficient market transparency for all firms in the oligopoly to be aware, sufficiently precisely and quickly, of the way in which the other firms' market conduct would develop. Second, any tacit co-ordination would not be sustainable over time since the retaliatory measures identified by the Commission are not capable of acting as adequate deterrents in that way. Third, the Commission underestimated the counter-balance of competitors as well as customers to destabilize any expected collusion.

B. Schneider v. Commission

On October 22, 2002, acting for the first time under the accelerated procedure, the CFI annulled the Commission's decision to force the divestiture by Schneider Electric SA of Legrand SA.³⁸ On the same day, it also annulled the Commission's decision ordering the unbundling of Schneider and Legrand.

1. Flawed economic analysis

The Commission found that the concentration would lead to the creation or strengthening of a dominant position in 18 distinct product markets. All product markets were national, nine in France and the rest in six other Member States. With respect to the product markets outside France the CFI found "errors, omissions and inconsistencies" in the Commission's economic analysis.³⁹ The CFI criticized the Commission for basing its assessment of the impact of the concentration in order to demonstrate the creation or strengthening of a dominant position in that market on international considerations on an extrapolation from a single market, without demonstrating an impact at a national level. The Court also said that the findings relating to wholesalers were supported only by general data when an analysis at the national level would have been more relevant.

³⁸ *Schneider Elec.*, 2002 E.C.R. II-4201.

³⁹ *Id.* at para. 404.

The Commission had not demonstrated that the large wholesalers lacked purchasing power, nor that the merged entity would be an “indispensable trading partner.”⁴⁰ Moreover, the CFI found that the Commission did not establish properly the potential portfolio, and unequalled range, of products in the national markets. It failed to consider the competitive effects of potential competitors on those markets that also have broad portfolios and underestimated the main competitor of the merged entity by failing to take into account their intra-group component sales.

2. *Rights of Defense*

Although the CFI agreed with the Commission’s analysis of the French market, namely that the concentration would eliminate competition in France because of the merged entity’s considerable market share on several French product markets, it found that the Commission had committed a serious procedural irregularity. The CFI found that there had been a substantial change between the Statement of Objections (“SO”) and the final decision. In particular, the Commission in the SO had stressed the overlapping activities of the parties, when the decision found that the parties held dominant positions in two distinct but complementary product markets. This substantial change constituted a breach of the parties’ rights of defense, a general principle of Community law expressly guaranteed by Article 18(3) of the ECMR.⁴¹

C. *Tetra Laval v Commission*

Shortly after the *Schneider* judgment, the CFI annulled the Commission’s decision to prohibit the merger between Tetra-Laval, the world leader in carton packaging, and the French company Sidel, which was active in the manufacture and sale of equipment and of PET plastic bottles.⁴² The Commission’s main reasons for prohibiting the merger were that the parties were active in closely neighboring markets and that the merger would have enabled Tetra to leverage its dominant position in the carton processing market into the PET packaging market. The CFI criticized the Commission’s analysis of the horizontal (control of PET equipment) and vertical effects of the merger as being over-estimated. However the significant issue was the assessment of conglomerate effects in merger cases.

⁴⁰ *Id.* at para. 198.

⁴¹ Council Regulation, *supra* note 6.

⁴² *Tetra-Laval BV*, 2002 E.C.R. II-4381. See also *Tetra-Laval*, 2003 O.J. (C70) 3; *Tetra-Laval*, 2003 O.J. (C70) 5.

1. Conglomerate Effects

The judgment in *Tetra-Laval* is of major significance as it is the first time the CFI has addressed the issue of conglomerate effects. Conglomerate issues arise when the parties to a concentration are active in different product markets and do not consequently compete with each other. The Commission considered that it could not be ruled out that the merger would give rise to anti-competitive repercussions in the future. The rationale behind this view is leveraging, where the parties use their dominant position in one market to become dominant in another, thereby eliminating potential competition and strengthening the merged entity's overall economic position.

Although the CFI agreed that the Commission should consider future conglomerate effects of the merger, it stated that the Commission had failed to prove properly that the merged entity would have the incentive to utilize this possibility given the likelihood of detection by national and EC competition authorities. The Commission should have accepted the behavioral commitments offered by the parties. The CFI said that the Commission had not adequately considered the position of competitors and the price sensitivity of customers. Further, the Commission had failed to prove that the merged entity would refrain from reducing prices and carrying out innovative activities as a result of the elimination of Sidel as a competitor. The CFI, therefore, concluded that conglomerate effects may only justify the prohibition of a merger where there is sufficient evidence that it would result in the creation or strengthening of a dominant position significantly impeding competition. Since the CFI considered the econometric evidence and analysis to be lacking in this respect, it found that the Commission had committed a *manifest error* in its assessment that a dominant position would be created.

If correct, the *Tetra-Laval* judgment limits the ability of the Commission to assess conglomerate effects. The Commission has appealed to the ECJ claiming that the CFI has exceeded its powers of review under Article 230 of the EC Treaty, as it should have confined itself to reviewing clear errors of fact rather than substituting its view of the case for that of the Commission. The Commission considers the burden of proof imposed on it by the CFI to be disproportionate, as it has to prove not only whether a company could leverage its dominance in one market to another market but also how likely it is that this will take place when such behavior would be unlawful in itself. The Commission also seeks clarification from the Court as to the approach the Commission should take to behavioral commitments in merger proceedings.⁴³

Uncertainty, therefore, will continue with regard to the CFI's role in

⁴³ *Id.*

judicial review, and in particular in the context of conglomerate mergers and behavioral safeguards. The Commission, in clearing the subsequent re-notification of the merger, stated in its press release that the clearance given "could be affected by the outcome of the Commission's appeal and an eventual re-examination of the Commission's earlier decision of the Court of Justice or the CFI, in the event that the matter would be referred back to it by the Court of Justice."⁴⁴

D. Lagardère and Canal+ v. Commission

In June 2002, the Commission had cleared a proposed concentration between the Lagardère Group, Canal+, and Liberty Media whereby they acquired joint control of CanalSatellite, a French satellite broadcasting company, and Multithématiques, a French TV channel, (including the notified ancillary restraints) under Article 6(1)(b) of the ECMR.⁴⁵ In its decision the Commission declared that the notified ancillary restraints were directly related to and necessary for the implementation of the concentration.⁴⁶

Subsequently, in July 2002, the Commission modified its decision stating that the non-compete clauses in the initial decision were not directly related or necessary to the implementation of the concentration. The Commission explained that it had to modify its decision to ensure coherence with a previous decision made under Article 81 of the EC Treaty.⁴⁷ This second decision was appealed before the CFI by Canal+ and Lagardère on the grounds that the second decision was a retroactive withdrawal and the Commission had exceeded its powers. The Commission claimed that the appeal should be dismissed as inadmissible since the findings on ancillary restraints were contained in the reasoning but not in the operative part of the decision and, therefore, constituted advice which did not produce legal effects.

1. Ancillary Restraints

The CFI disagreed with the Commission and held that the assessment of ancillary restraints in the clearance decision did not merely give advice

⁴⁴ Press Release, E.U. Commission, Commission clears acquisition of Sidel by Tetra Laval Group (Jan. 13, 2003), *available at* [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/36\[0\]RAPID&lg=EN](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/36[0]RAPID&lg=EN).

⁴⁵ Council Regulation, *supra* note 6.

⁴⁶ Mary Loughran et al., *Merger Control: Main Developments between 1st September 2002 and 31st December 2002*, 2003/1 COMMISSION NEWSLETTER 84, 88.

⁴⁷ Press Release, European Commission, Commission clears the creation of the digital satellite television platform TPS (France), IP/99/161 (Mar. 8, 1999), *available at* [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/99/161\[0\]RAPID&lg=EN](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/99/161[0]RAPID&lg=EN).

but was a substantial part of the Commission's decision.⁴⁸ The Court held that Article 6(1)(b) of the ECMR not only excluded the application of Regulation 17/62 to the assessment of ancillary restraints but also conferred exclusive competence to take a binding act in this respect upon the Commission. It also resulted clearly from Article 21(1) of the ECMR that the Commission's exclusive competence regarding the control of mergers is not limited to compatibility decisions alone as defined in Article 3 of the ECMR, but extends to all acts with binding effect which the Commission is called upon to take in application of its role under the ECMR.⁴⁹ In the CFI's opinion, the Community legislature has created a specific legal basis for the examination of ancillary restrictions which are notified as such in the context of a concentration.

The CFI found that the Commission, in its second decision, had changed substantially a part of its initial decision which amounted to a revocation of the initial decision. In its judgment, the CFI acknowledged that the Commission may revoke an illegal decision provided:

- the decision is revoked within a reasonable period of time;
- the Commission establishes the illegality of the decision revoked; and
- the Commission respects the general principle of legitimate expectations.

The CFI considered that the Commission failed to outline the grounds for the illegality of the initial decision. Consequently, the CFI annulled the Commission's decision. The decision of the CFI appears to contradict the Commission's own Notice on ancillary restrictions,⁵⁰ which stated that the Commission decisions were merely declaratory and not legally binding. The Notice also stated that the Commission was not obliged to assess and address formally such restrictions. In rejecting this argument the CFI is supported by the analogous Commission decision of *Reuter/BASF*⁵¹ that was endorsed by the ECJ in *Remia and Nutrica v. Commission*⁵²—which predate the ECMR—where restrictions were held to fall outside Article 81(1) of the EC Treaty because they were objectively necessary for the performance of a particular contract. The CFI has established that the Commission must assess ancillary restrictions by virtue of the exclusive competence it enjoys, provided that the parties request such an assessment.

⁴⁸ *Lagardère SCA and Canal+ SA v Commission*, 2002 E.C.R. II-4825.

⁴⁹ Council Regulation, *supra* note 6.

⁵⁰ Commission Notice on restrictions directly related and necessary to concentrations, 2001 O.J. (C 188) 5.

⁵¹ Commission Decision 76/743, 1976 O.J. (L 254) 40.

⁵² Case 42/84, 1985 E.C.R. 2545.

It is now also clear that ancillary restrictions can only be revoked in accordance with the limited circumstances outlined by the CFI. The *Legardère* case has been reflected in the new ECMR which provides in Recital 21:

[t]his Regulation should also apply where the undertakings concerned accept restrictions directly related to, and necessary for, the implementation of the concentration. Commission decisions declaring concentrations compatible with the common market in application of this Regulation should automatically cover such restrictions, without the Commission having to assess such restrictions in individual cases. At the request of the undertakings concerned, however, the Commission should, in cases presenting novel or unresolved questions giving rise to genuine uncertainty, expressly assess whether or not any restriction is directly related to, and necessary for, the implementation of the concentration. A case presents a novel or unresolved question giving rise to genuine uncertainty if the question is not covered by the relevant Commission notice in force or a published Commission decision.⁵³

E. Conclusions

The *Airtours* case (as the *Schneider* and *Tetra-Laval* cases) does no more and no less than require the Commission to prove its case. And it goes no further than the Court has gone in general competition cases. It is recognized by the Court that the Commission enjoys a considerable discretion or margin of appreciation where its decision involves complicated economic assessments.⁵⁴ Where a matter falls within the Commission's margin of appreciation, the CFI will not overrule the Commission except where there has been a manifest error of appraisal. In the *Dan Air* case,⁵⁵ Air France argued that the Commission should have used the power given it by Article 8(2) of the ECMR to impose an obligation permanently to discontinue the charter operations. The CIF held:

[i]t is in any event not for the Court, in the context of annulment proceedings, to substitute its own appraisal for that of the Commission and to rule on the question of whether the Commission should have imposed an obligation, by means of Article 8(2) of the Regulation, requiring discontinuance of the activity.⁵⁶

⁵³ Council Regulation, *supra* note 6.

⁵⁴ See Case T-88/94R, *Société Commerciale des Potasses et de L'Azote and Entreprise Minière et Chimique v. Commission*, 1994 E.C.R. II-263.

⁵⁵ Case T-3/93, *Air France v. Commission*, 1994 E.C.R. II-121.

⁵⁶ *Id.* at para. 113.

In the *Lagardère* case, the CFI has demonstrated its power to ensure that the Commission does not avoid its legal obligations where the Community legislation grants it exclusive competence. The principle established by the CFI may well have implications for the decentralized allocation of powers under the new Regulation 1/2003 which comes into force on May 1, 2004, at the same time as the new ECMR.

III. EXPEDITION REQUIRED TO IMPROVE JUDICIAL CONTROL OF MERGERS

The current delays before the CFI in competition and merger cases have been of as much concern to critics as the alleged inadequate standard of review. The Commission's Summary of Responses to the EC Merger Review Green Paper reflected these concerns: "[t]he availability of an effective judicial review is illusory, on account of the lengthy delays before appeals can be heard and judgments rendered, as well as because of the existence of what is perceived by some to be inadequate standard of review."⁵⁷

While the CFI has convincingly demonstrated that it applies as strict a standard of review in merger cases as in competition cases (though no stricter), merger control needs to be swift as well as of high quality. Consequently, the commercial value of judicial review which is untimely will be no greater than a fast review process of a low standard. There is no doubt that the workload of the CFI and its own internal working mechanisms have created an unacceptable level of delay in its decision making process.

The CFI itself has amended its rules of procedure to provide for an expedited procedure in Article 76(a).⁵⁸ The President of the CFI, Bo Vesterdorf, has made it clear that the expedited procedure is intended to benefit merger cases.⁵⁹ The procedure operates by limiting the written pleadings to one exchange. The CFI's Practice Directions limit the length of the application and defense so that in a complex case the applicant may have to sacrifice weaker grounds for annulment in favor of expedition.⁶⁰ It follows that the oral hearing plays a much greater role both for the court and the parties. This is borne out by the references in judgments such as *Schneider* to the questions and submissions at the hearing. The expedited procedure evidences the major effort that the CFI is making to reduce delays but even so there is room to reduce the ten month duration of the

⁵⁷ *Id.* at paras. 192, 216-19.

⁵⁸ CFI Rules of Procedure, *supra* note 12.

⁵⁹ Bo Vesterdorf, Recent CFI rulings on merger cases, interim measures and accelerated procedures and some reflections on reform measures regarding judicial control, Remarks at the IBA EC Merger Control Conference (Nov. 7-8, 2002).

⁶⁰ Court of First Instance, Practice Directions, 2002 O.J. (L 87) 48 (issued on March 14, 2002) [hereinafter CFI Practice Directions].

shortest expedited cases to a period of less than six months. Otherwise, the commercial value of the judicial review process will be of little significance.

A. The Expedited Procedure

The possibility of expedited proceedings before the CFI is relatively new, having been introduced by amendments to the CFI's Rules of Procedure which came into force on February 1, 2003. A new Chapter 3a (comprised of Article 76a) was added to the CFI's Rules of Procedure entitled "Expedited Procedures." In summary, Article 76a provides that:

- an application for treatment of the case under the expedited procedure may be made by the applicant or the defendant;
- it is entirely at the discretion of the CFI, having heard the parties, whether to handle the case under the expedited procedure;
- an application for expedited procedure should be made separately to, but lodged at the same time as, the application or defense;
- replies, rejoinders, statements of intervention and replies to the intervention will not be submitted where the expedited procedure applies unless the CFI so requires;
- parties wishing to supplement their arguments and offer additional evidence during the oral procedure must give reasons for the delay in making the new arguments or giving the further evidence.

B. Expedited Procedure in *Tetra-Laval/Sidel* and *Schneider/Legrand*

Key features of the *Tetra-Laval/Sidel* and *Schneider/Legrand* cases help to explain why these cases were accepted under the expedited procedure by the CFI and why it is unlikely that the CFI will apply the procedure save in similarly exceptional cases of urgency.

Article 7(1) of the ECMR prohibits consummation of a merger which is subject to clearance by the Commission until such clearance has been received.⁶¹ This prohibition is typically complied with in practice by agreeing the merger on a legally binding basis but making completion subject to the condition precedent that ECMR clearance is received. However, both *Tetra-Laval/Sidel* and *Schneider/Legrand* concerned public bids for companies listed on the Paris stock exchange. French law requires that such bids must be unconditional.⁶² It is, therefore, not permitted to adopt the usual approach of making ECMR clearance a condition precedent to completion. These two cases are therefore relatively rare examples of consummated mergers which were subsequently prohibited by the

⁶¹ Council Regulation, *supra* note 6.

⁶² Case COMP/M.2416, *Tetra-Laval/Sidel* (Jan. 13, 2003) (not yet published), available at http://europa.eu.int/comm/competition/mergers/cases/decisions/m2416_62_en.pdf.

Commission and required to be unwound.

The appeals to the CFI accordingly had a particular urgency because of the unsettling and potentially disruptive uncertainty for the target businesses (Sidel and Legrand respectively) whose ownership was in dispute. There would already have been a reasonably long period of uncertainty for these businesses while the ECMR investigation took place and the appeal only served to exacerbate that situation.⁶³ This is likely to have been a key factor in the CFI's decision to grant expedited status to these two appeals.

However, the commercial urgency does not, in itself, appear to have been sufficient to merit the fast track procedure. It was also necessary for the cases to be presented in such a way that expedited handling was manageable and in accordance with the practice direction issued by the CFI.⁶⁴ In *Tetra-Laval/Sidel*, the appeal did not, as it might have done, attack the prohibition decision in its entirety, but attacked it only "in so far as it prohibited the merger as modified by the commitments."⁶⁵ This reinforces the indications in the CFI's practice direction that lengthy written documents are not appropriate in fast track cases. In *Schneider/Legrand*, adoption of the expedited procedure was initially refused, in the light of the length of the appeal and its annexes. The case was only fast tracked following the lodging by Schneider of a reduced version of its appeal.⁶⁶

The various steps taken by the CFI in these two landmark cases enabled it to give judgment within 10 months in both cases. This compares highly favorably with the timetable for other appeals under the ECMR:

- *GE/Honeywell*: the appeal was lodged on September 12, 2001, and is still pending.⁶⁷
- *MCI Worldcom/Sprint*: the appeal was lodged on September 27, 2000, and is still pending.⁶⁸

C. Institutional Changes to Reduce Delay

A more fundamental change in approach is required to overcome the delays in the judicial process before the CFI. Unless the radical suggestions

⁶³ In *Tetra-Laval/Sidel*, the original notification to the EC Commission was made on May 18, 2001. The decision prohibiting the merger was made on October 30, 2001, and the decision imposing the break-up of the concentration was issued on January 30, 2002.

⁶⁴ CFI Practice Directions, *supra* note 60, at 48.

⁶⁵ *Tetra-Laval*, 2002 E.C.R. 4381, at para. 81.

⁶⁶ *Schneider Elec.*, 2002 E.C.R. 4201, at paras. 63-65.

⁶⁷ Case COMP/M.2220, General Electric/Honeywell, 2001 O.J. (C 74) 6 (merger blocked by the EC Commission on July 3, 2001), *appeal filed*, Case T-209/01, Honeywell Int'l Inc. v. Commission, 2001 O.J. (C 331) 23 and Case T-210/01, General Electric Co. v. Commission, 2001 O.J. (C 331) 24 (decision pending on both cases).

⁶⁸ Case COMP/M.1741, MCI Worldcom/Sprint, 2000 O.J. (C 143) 5 (merger blocked by the EC Commission on January 11, 2000), *appeal filed*, Case T-310/00, Worldcom Inc. v. Commission, 2000 O.J. (C 355) 35 (decision pending).

of those who would like to see the introduction of a U.S. style court injunction procedure, removing the adjudicative role of the Commission and replacing it with the court, bear fruit, an enhancement of the resources available to deal with competition and merger cases must be pursued as a matter of urgency. In this connection, the provision for creation of judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas has been provided by Article 225(a) of the EC Treaty (inserted by the Treaty of Nice).⁶⁹ The objective must be to have a specialist competition court whose procedures will allow it to reach a substantive decision on an appeal from the Commission's merger decision within a maximum of six months, if not less. This means that a full review by Commission and Court of a complex merger could take up to 12 months. While that is probably still too long a period for commercial reality, such a development might lead to further reduction in both the Commission's and the Court's timetable.

According to the text of Article 225 (amended by the Treaty of Nice)⁷⁰

⁶⁹ TREATY OF NICE AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Mar. 10, 2001, O.J. (C 80) 1 (2001) [hereinafter TREATY OF NICE].

⁷⁰ Article 225 reads:

The Court of First Instance shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Article 230, 232, 235, 236 and 238, with the exception of those assigned to a judicial panel and those reserved in the Statute for the Court of Justice. The Statute may provide for the Court of First Instance to have jurisdiction for other classes of action or proceeding.

Decisions given by the Court of First Instance under this paragraph may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute.

The Court of First Instance shall have jurisdiction to hear and determine actions or proceedings brought against decisions of the judicial panels set up under Article 225(a).

Decisions given by the Court of First Instance under this paragraph may exceptionally be subject to review by the Court of First Instance, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Community law being affected.

The Court of First Instance shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234, in specific areas laid down by the Statute.

Where the Court of First Instance considers that the case requires a decision of principle likely to affect the unity or consistency of Community law, it may refer the case to the Court of Justice for a ruling.

Decisions given by the Court of First Instance on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Community law being affected.

and the new Article 225(a),⁷¹ once a competition judicial panel is established, it will be a tribunal below the CFI with a right of appeal on a point of law to the CFI. There will be no right of appeal to the ECJ from the CFI in such a case, but decisions given by the CFI under Article 225(2) on appeal from a judicial panel may exceptionally be subject to review by the ECJ under the conditions and within the limits laid down by the statute, where there is a serious risk of the unity or consistency of Community law not being effective. Effectively, the first Advocate General of the CFI will consider whether the decision of the CFI should be re-examined by the ECJ within one month of the CFI decision. If the first Advocate General recommends re-examination, the ECJ has an additional month in which to accept or decline the request. The U.K. government has supported the use of a judicial panel in the competition sphere and other member states must be encouraged to support the CFI in its hour of need.

IV. COMMISSION PROCEDURE AFTER ANNULMENT

Article 10(5) of the ECMR provides that: “[w]here the Court of Justice gives a judgment which annuls the whole or part of a Commission decision taken under this Regulation, the periods laid down in this Regulation shall start again from the date of the judgment.”⁷²

There are a number of ways that Article 10(5) could be interpreted. It may mean that the whole procedural timetable begins again with an obligation to notify a merger if clearance is still required. On the other hand, it may be intended to mean that the procedure terminated by adoption of the Commission’s decision should be re-opened at the stage when the decision was adopted, i.e. there may be very little time left for the Commission to adopt a new decision. The effect of the judgment, in any event, is to require the Commission to re-open the case to take account of the Court’s ruling. As the original notification may well be out of date and

⁷¹ Article 225(a) reads:

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

The decision establishing a judicial panel shall lay down the rules on the organisation of the panel and the extent of the jurisdiction conferred upon it.

Decisions given by judicial panels may be subject to a right of appeal on points of law only or, when provided for in the decision establishing the panel, a right of appeal also on matters of fact, before the Court of First Instance.

TREATY OF NICE, *supra* note 69, art. 225(a).

⁷² Council Regulation, *supra* note 6.

need to be made complete before any time limit triggered by the notification begins, the Commission may need to go through the whole procedure from notification to decision. This was the approach followed by the Commission in the only case re-examined after annulment by the ECJ before the *Tetra-Laval* case.⁷³

A. Re-examination of *Tetra-Laval/Sidel*

In the *Tetra-Laval* case, the Commission re-opened the procedure requiring a fresh notification. However, the Commission cleared the merger within the one month first phase time limit regardless of its decision to appeal certain aspects of the CFI's judgment in that case.⁷⁴ It will be interesting to see whether the ruling of the ECJ on that appeal will have any impact on the clearance decision adopted by the Commission to give effect to the CFI's judgment.

B. Re-examination under the New ECMR

In accordance with the Commission's proposal to codify its current practice in the new ECMR, Article 10(5) of the Regulation has been clarified to reflect current practice as to the procedure to be followed where the Court gives a judgment which annuls the whole or part of a Commission decision. Such an annulment will, if it relates to a decision that was subject to a time limit under Article 10, lead to the re-examination by the Commission with a view to adopting a new decision pursuant to Article 6(1). The new examination will be made in the light of current market conditions. In such cases, the parties will have to submit a new notification or supplement the original notification, where the original notification has become incomplete by reason of intervening changes in market conditions or in the information provided. Where there are no such changes, a certification of this fact will suffice.

Beginning May 1, 2004, Article 10(5) will read as follows:

Where the Court of Justice gives a Judgment which annuls the whole or part of a Commission decision taken under this Regulation which is subject to a time limit set by this Article, the concentration shall be re-examined by the Commission with a view to adopting a decision pursuant to Article 6(1).

⁷³ *French Republic and Societe Commerciale des Potasses et de l'azote*, 1998 E.C.R. I-1374. See European Commission, XXVIIIth Report on Competition Policy 1998, paras. 175-79, available at http://europa.eu.int/comm/competition/annual_reports/1998/en/001_130.pdf, for the description of the procedure that Commission followed after the ECJ's annulment of the Commission's decision in *Kali und Salz*.

⁷⁴ Case COMP/M.2416, *Tetra-Laval/Sidel* (Jan. 13, 2003), available at http://europa.eu.int/comm/competition/mergers/cases/decisions/m2416_62_en.pdf.

The concentration shall be re-examined the light of current market conditions.

The notifying parties shall submit a new notification or supplement the original notification, without delay, where the original notification has become incomplete by reason of intervening changes in market conditions or in the information provided. Where there are no such changes, the parties shall certify this fact without delay.

The periods laid down in paragraph 1 shall start on the working day following that of the receipt of complete information in a new notification, a supplemented notification, or a certification within the meaning of the second subparagraph. . .⁷⁵

V. CONCLUSIONS

There are three main conclusions to be drawn from the CFI's approach to judicial review under Article 230 of the EC Treaty demonstrated by *Airtours* and the Court's decisions under the expedited procedure.

First, the CFI has shown that it is willing to apply the same rigorous review that it applies in ordinary EC competition cases to Commission decisions under the ECMR while recognizing the margin of discretion that the Commission retains in reaching economic decisions whether or not to approve a merger. The *Airtours* case is the first where the CFI has scrutinized in the greatest detail the factual as well as the legal assessment by the Commission of a merger decision, following a Phase II investigation under the ECMR. In particular, the Court identifies from the documents and evidence before it which factors the Commission took into account and then determined whether the Commission made a manifest error of assessment in the conclusions that it made on the basis of those factors.

A. Implications for Future Merger Proceedings

Second, the main lesson to be learned from the approach taken by the CFI is that the Commission will have to be more professional in its gathering and analysis of evidence. Put simply, the Commission will have to use the correct legal tests and apply those tests to the evidence. If the evidence does not reveal that the legal tests are satisfied, the Commission must accept as much or its decision will be overturned by the Court. This is encouraging for future parties in acquisitions and joint ventures which may involve complex economic issues in markets affected by their merger

⁷⁵ Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings, 2004 O.J. (L 24) 1.

transaction since it will justify provision of the full evidence relating to the competition issues raised by particular transactions in the expectation that the Commission must reach the correct economic assessment (subject to its margin of discretion) or the Court will overturn the Commission's Decision.

B. Delays Deprive Judicial Control of Commercial Benefit

Third, while dealing with the substance, the *Airtours* case does not deal with the timetable problems facing appeals against misguided Commission merger decisions. Taking nearly three years, the *Airtours* case has been described as a pyrrhic victory for the parties. However, there is now an expedited procedure intended specifically to benefit merger cases and the *Airtours* case itself has focused attention on the unsatisfactory delays at the CFI. It will be interesting to see the CFI's judgment in the pending damages case brought by MyTravel Group (formerly Airtours) against the Commission in connection with the prohibited Airtours/First Choice merger.⁷⁶

⁷⁶ *MyTravel Group*, 2003 O.J. (C200) 28.