OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 3 February 2009 [1]

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1 — Original language: Spanish.

I — Introduction

1. The European Commission is appealing against the judgment of the Court of First Instance of 11 July 2007 [2] which partially upheld an action seeking a declaration of the Community's non-contractual liability in respect of its prohibition of a concentration, that prohibition being subsequently annulled by the Court of First Instance.

2. Over and above the enormous sum claimed, almost EUR 1 700 million, the importance of this case lies in the potential impact of the Court of Justice's decision on the economic policy of the Community institution whose task it is to protect competition in Europe.

3. As this case involves a breach of an undertaking's rights of defence in administrative proceedings and the damage resulting from this infringement of a fundamental right, the Court must exercise the greatest caution and circumspection in view of the serious consequences of the judgment for undertakings, for the Community institutions and perhaps even for institutions of Member States.

2 — Case T-351/03 *Schneider Electric* v *Commission* [2007] ECR II-2237 ('the judgment under appeal').

II — The facts in the proceedings at first instance

4. The complex events which have given rise to the dispute which is the subject of this appeal are set out in the judgment under appeal [3] and are summarised below.

A — *The administrative proceedings*

5. The two French companies Schneider Electric SA ('Schneider') and Legrand SA ('Legrand') informed the Commission of a transaction whereby Schneider was to acquire control of Legrand by means of a public exchange offer ('the offer'), within the meaning of Article 3(1)(b) of Regulation (EEC) No 4064/89 ('the regulation'). [4] Schneider is engaged in the production and sale of equipment and systems in the electrical distribution, industrial control and automation sectors, while Legrand is active in the area of low-voltage electrical installations.

6. Given that the transaction raised serious doubts as to its compatibility with the common market, on 30 March 2001 the

3 — Paragraphs 16 to 78.

4 — Council regulation 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 most recent version, Council Regulation (EC) No 139/2004 of 20 January 2004 (OJ 2004 L 24, p. 1), is not relevant to this case.

Commission initiated phase II of the investigation, pursuant to Article 6(1)(c) of the regulation, and requested information from Schneider and Legrand.

7. On 3 August 2001 the Commission sent Schneider a statement of objections indicating that the transaction would create a dominant position on a number of national sectoral markets.

8. In their response of 16 August 2001 to those objections, the companies concerned contested the Commission's market definition and its analysis of the impact of the transaction on those markets. On 29 August 2001, at a meeting which was attended by the notifying companies and Commission staff, Schneider agreed to adopt various corrective measures.

9. On 10 October 2001 the Commission adopted, under Article 8(3) of the regulation, Decision 2004/275/EC ('the incompatibility decision'), [5] declaring the proposed transaction incompatible with the common market. In recitals 782 and 783 in the preamble to that decision, the Commission stated that the merger would create a dominant position with the effect of significantly restricting effective competition in certain national markets and, furthermore, would strengthen a leading position in several French sectors. [6] The Commission also claimed that the corrective measures proposed by Schneider would not prevent the disruption to competition referred to in the incompatibility decision.

10. Since, by acquiring 98.1% of Legrand's capital, Schneider had brought about a concentration subsequently declared to be incompatible with the common market, on 24 October 2001 the Commission issued a second statement of objections with the aim of separating the two companies and Schneider was thereby required, under Article 8(4) of the regulation, to dispose of its assets in Legrand to the extent that it would no longer have a significant holding, in order to restore effective competition with sufficient certainty and within a sufficiently short period.

11. Since the Commission wished to take immediate steps to entrust the management of Schneider's interest in Legrand to an experienced and independent trustee, on 4 December 2001, in accordance with Article 7(4) of the regulation, it authorised Schneider to exercise the voting rights attaching to its capital in Legrand through a

5 — Case COMP/M.2283 — Schneider/Legrand, declaring the transaction to be incompatible with the common market (OJ 2004 L 101, p. 1).

6 — These are described in greater detail in paragraphs 35 and 36 of the judgment under appeal.

trustee appointed on the terms set out in an agreement approved by the Commission.

12. On 30 January 2002, under Article 8(4) of the regulation, the Commission adopted a decision ('the divestiture decision') [7] requiring Schneider to separate from Legrand within a period of nine months, expiring on 5 November 2002.

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

B — *Proceedings before the Court of First Instance*

14. Prior to the divestiture decision, on 13 December 2001 Schneider brought an action before the Court of First Instance of the European Communities for the annulment of the incompatibility decision (Case T-310/01).

15. By an application dated 18 March 2002, Schneider also sought the annulment of the divestiture decision (Case T-77/02) and the suspension of its operation (Case T-77/02 R).

16. After the hearing for interim relief of 23 April 2002 in Case T-77/02 R, the Commission extended the period within which Schneider was to divest itself of Legrand until 5 February 2003, without prejudice to stages of the divestiture being completed during the period granted, and consequently Schneider withdrew its application for suspension.

17. In preparation for carrying out the transfer of Legrand if its two actions for annulment were rejected, on 26 July 2002 Schneider signed a sale contract with the Wendel-KKR consortium which was to be executed no later than 10 December 2002. The agreement contained a clause enabling Schneider to cancel the contract as late as 5 December 2002, in consideration of payment of compensation (EUR 180 million), should the incompatibility decision be annulled.

18. As mentioned previously, by the *Schneider I* judgment [8] the Court of First Instance annulled the incompatibility decision on the grounds of errors of analysis and

7 — Commission Decision C(2002) 360 final of 30 January 2002 requiring undertakings to be separated (Case COMP/M.2283-Schneider/Legrand).

8 — Case T-310/01 *Schneider Electric* v *Commission* [2002] ECR II-4071.

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. Similarly, in the *Schneider II* judgment [9] of the same date, the Court of First Instance annulled the divestiture decision on the ground that it gave effect to the incompatibility decision. As the Commission did not appeal against either of those two decisions, they acquired the authority of *res judicata*. To avoid further complicating the factual account, I will set out in greater detail the content of those two judgments in Part III of this Opinion, which deals with the legal background to the case. [10]

19. The Commission published a notice setting 23 October 2002 as the date for recommencement of the investigation period, [11] under Article 10(5) of the regulation. The Commission added that, on a preliminary analysis of phase I and without prejudice to a final decision, Schneider's transaction might fall within the scope of the regulation and it invited interested third parties to submit observations.

20. In a fresh statement of objections dated 13 November 2002, the Commission informed Schneider that its actions potentially undermined competition in the French sectoral markets, by reason of the 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 influence over wholesalers and the inability of any competitor to replace the competitive pressure exerted by Legrand prior to the merger.

21. On 14 November 2002 Schneider proposed to the Commission measures intended to correct the overlapping of some of the businesses of the merging companies in the relevant French sectoral markets. Those proposals led to an exchange of correspondence in which the Commission rejected as inadequate Schneider's proposals to mitigate the negative effects on competition in France, while Schneider criticised the Commission's reservations as to the viability of its solutions and their ability to ensure that competition was maintained in that country.

22. In a letter of 2 December 2002, Schneider stated that, at such an advanced stage in the proceedings, the Commission's attitude made further discussion pointless and therefore, to bring to an end uncertainty that had lasted for more than a year, informed the Commission that it intended to sell Legrand to Wendel-KKR. It confirmed that intention the following day by fax, stating that, pursuant to the sale agreement, the sale of Legrand to Wendel-KKR would take place on 10 December 2002, and on 11 December Schneider informed the Commission that this had occurred.

9 — Case T-77/02 *Schneider Electric* v *Commission* [2002] ECR II-4201.

10 — Point 39 et seq. of this Opinion.

11 — *Official Journal of the European Communities* of 15 November 2002 (OJ 2002 C 279, p. 22).

23. Although, initially, the Commission opened phase II of the investigation of the transaction on 4 December 2002, stating that the corrective measures proposed by Schneider did not eliminate the doubts about the compatibility of the transaction, on 13 December it informed Schneider that the investigation had been closed as being devoid of purpose, since the company no longer controlled Legrand.

24. Consequently the action brought by Schneider for annulment of the decision to initiate phase II and of the closure decision of 13 December 2002 in Case T-48/03 was dismissed, [12] and the appeal against that order was dismissed by order of the Court of Justice. [13]

25. In paragraph 48 of the latter order, the Court of Justice held that, by opting to resume phase I of the investigation of the transaction, the Commission had drawn the appropriate inferences from the *Schneider I* judgment and had thus taken all the necessary precautions to ensure that there was no further breach of Schneider's rights of defence.

12 — Order of 31 January 2006 in Case T-48/03 *Schneider Electric* v *Commission* [2006] ECR II-111, ruling that the application for annulment was inadmissible 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.

13 — Order of 9 March 2007 in Case C-188/06 P *Schneider Electric* v *Commission*.

III — The legal background

A — *Community merger control legislation*

26. In the version applicable to these proceedings, Article 2(3) of 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 must be declared incompatible with the common market.

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

28. Article 6(1)(b) of the same legislation provides 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.

29. If that is not the case, the Commission is to initiate the investigation procedure referred to above ('a decision to initiate phase II'), in accordance with Article 6(1)(c).

30. Article 10(1) requires those decisions to 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.

31. Article 8(2) and (3) respectively authorise the Commission to decide on compatibility, within the framework of phase II of the investigation, following modifications made by the undertakings concerned to their notified merger proposal.

32. Article 10(3) lays down a time-limit for taking decisions declaring a concentration incompatible with the common market of not more than four months from the date on which phase II is initiated.

33. Under Article 8(4), where a transaction which has been found to be incompatible with the common market 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 require any other action appropriate to restoring effective competition.

34. Article 10(6) provides that failure to reply denotes tacit approval with the result that a notified concentration is deemed to have been declared compatible with the common market if the Commission has not initiated phase II within one month of either notification or receipt of the complete information, or has not made a declaration concerning the compatibility of the transaction within no more than four months of the initiation of phase II.

35. By virtue of Article 10(5), where the Community judicature annuls a Commission decision, the time-limits laid down in the regulation apply again from the date of the judgment.

36. Article 7(1) provides that a concentration is not to be put into effect before it is notified or within three weeks after notification to the Commission. An exception is however allowed by Article 7(3), which states that Article 7(1) does not impede a public offer to purchase or exchange shares which has been notified to the Commission, provided that the

buyer does not exercise the voting rights attached to the shares or does so only to maintain the full value of those investments and with the benefit of a derogation from the Commission.

37. Article 18 of the regulation is of great importance in the present case since, under Article 18(1), before taking any decision provided for, inter alia, in Article 8(3), the Commission is required to give to the relevant persons, undertakings and associations of undertakings the opportunity, at every stage of the procedure up to referral to the Advisory Committee, of making known their views on the objections against them.

38. Finally, Article 18(3) provides that the Commission is to base its decisions only on objections on which the parties have submitted their observations and that their rights of defence are to be fully respected in the proceedings.

B — *Previous judgments having a bearing on the proceedings*

39. Schneider commenced legal proceedings against the Commission by challenging the incompatibility decision and the divestiture decision before the Court of First Instance, and it is therefore appropriate to summarise the judgments annulling these decisions, since they have the authority of *res judicata*.

40. The *Schneider I* judgment annulled the incompatibility decision on the grounds that, on the one hand, it contained errors in the assessment of the impact of the transaction on the national sectoral markets outside France, and that, on the other, it infringed the rights of the defence, thereby invalidating the analysis of the impact on such markets and of the corrective measures proposed by the company.

41. Since defects of economic assessment are not matters for consideration on appeal, it is therefore only the breach of the rights of the defence which falls to be reviewed. In that regard, the *Schneider I* judgment held that it is for the Commission to identify the threat to competition represented by the transaction, so that the notifying parties can propose, effectively and in good time, divestitures capable of rendering the transaction compatible with the common market.

42. The Court of First Instance added that the statement of objections of 3 August 2001 did not deal with sufficient precision with the strengthening of Schneider's position vis-à-vis French distributors of low-voltage electrical

equipment, stemming from the addition of Legrand's sales on the electrical switchboard component markets and from Legrand's leading position in the ultraterminal electrical equipment segment. [14]

43. The Court of First Instance further indicated that the statement of objections listed the various national sectoral markets affected by the transaction but did not demonstrate that there was any buttressing of the positions of the notifying parties. [15] Thus the Commission deprived Schneider of the opportunity to submit observations and to challenge the argument that the company would be strengthening its dominant position in the sector for distribution and final panelboard components because of Legrand's leading position in the ultraterminal equipment sector.

44. By not allowing Schneider to assess the full extent of the competition problems which the Commission claimed the concentration would create at distributor level on the French market for low-voltage electrical equipment, the incompatibility decision infringed Schneider's rights of defence. In particular, the company was not afforded the opportunity to propose a substantial divestiture or some other corrective measure to provide a solution to those competition problems. Thus Schneider was indirectly deprived of the chance of obtaining the Commission's approval, and this constitutes a sufficiently serious irregularity given that such corrective measures are the only means of saving a merger which falls under Article 2(3) of the regulation. [16]

45. Furthermore, owing to its intrinsic connection with the incompatibility decision, the Court of First Instance also annulled, by the *Schneider II* judgment, the divestiture decision.

IV — The procedure before the Court of First Instance and the judgment under appeal

A — *The procedure in Case T-351/03*

46. On 10 October 2003 Schneider brought an action for damages under Article 235 EC and the second paragraph of Article 288 EC.

47. Primarily, Schneider, supported by the French Republic, claimed that the Court of

14 — The 'buttressing' objection.
15 — Paragraphs 444 and 445 of the *Schneider I* judgment.
16 — Paragraphs 453 to 461 of the *Schneider I* judgment.

First Instance should order the Community to pay it the sum of EUR 1663734716.76,under deduction of the recoverable costs determined by taxation orders, [17] and with the addition of interest accruing from 4 December 2002 until full payment at an annual rate of 4%, and the amount of taxation payable by Schneider on the compensation.

48. Schneider structured its arguments [18] around the two unlawful elements of the incompatibility decision which were identified in the *Schneider I* judgment: 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 due to the failure to specify adequately the objection based on buttressing in the statement of objections of 3 August 2001.

49. Schneider argues that, as a direct result, it suffered damage by way of depreciation in the value of its assets due, firstly, to the book loss recorded in respect of the assets in Legrand, secondly, to a loss of profit attributable to the impossibility of achieving the synergies expected and the subsequent collapse of the group's industrial strategy, and, thirdly, to the detrimental effect on the applicant's reputation. It also claimed that the damage was aggravated by the Commission's negative attitude.

50. In addition to these losses, Schneider also claimed the costs associated with the trustee acting in the administrative separation procedure, the costs relating to re-examination of the transaction undertaken after the *Schneider I* and *Schneider II* judgments, as well as the costs arising out of the actions in Cases T-310/01, T-77/02 and T-77/02 R, under deduction of the recoverable costs already awarded to Schneider by the two taxation orders referred to above.

51. In the alternative, Schneider claimed that the Court of First Instance should declare the action admissible, find that the Community had incurred non-contractual liability, the extent of which to be determined by an ad hoc procedure for calculating the recoverable loss suffered, and order the Commission to pay all the costs of the proceedings.

52. For its part, the Commission, supported by the Federal Republic of Germany, argued that the Court of First Instance should dismiss the action as partially inadmissible and entirely unfounded and accordingly order Schneider to pay the costs.

17 — Orders of 29 October 2004 in Case T-310/01 DEP and Case T-77/02 DEP.

18 — Paragraphs 100 to 106 of the judgment under appeal.

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

B — *The basic elements of the judgment under appeal (Case T-351/03)*

1. A sufficiently serious breach

54. The *Schneider I* judgment annulled the incompatibility decision on the grounds that it constituted a breach of Schneider's rights of defence, focusing its reasoning on resolving the question whether there had been a sufficiently serious breach of a rule of law which confers rights on individuals, using the criterion established in the case-law of manifest and grave disregard by a Community institution of the limits on its discretion. [19]

55. Before considering whether the conduct of the Commission during the investigation aggravated the damage, that judgment examined whether the irregularities in the incompatibility decision could be described as a sufficiently serious breach.

56. Having rejected the defects in analysis of the economic impact of the transaction as a source of Community liability, [20] on the grounds that it had no effect on the finding of incompatibility with the common market, [21] the Court of First Instance analysed the only defect in the incompatibility decision which, according to the *Schneider I* judgment, had deprived the applicant of an opportunity to secure a decision in favour of the concentration: 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.

57. The Court of First Instance held that the drafting of the statement of objections constituted a manifest and serious breach of Article 18(1) and(3) of the regulation, since, according to the *Schneider I* judgment, the applicant could not ascertain that, if it did not submit corrective measures conducive to reducing or eliminating the buttressing

19 — Case C-282/05 P *Holcim (Deutschland)* v *Commission* [2007] ECR I-2941 ('*Holcim*'), paragraph 47, and the case-law cited.

20 — Dawes, A. and Peci, K. criticise this outcome in '"Sorry but there's nothing we can do to help": *Schneider II* and extra-contractual liability of the European Commission in merger cases', *European Competition Law Review*, 2008, 29(3), pp. 151 to 161.

21 — Paragraphs 129 to 138 of the judgment under appeal.

between its positions and those of Legrand in the French sectoral markets, it would have no possibility of securing a declaration that the transaction was compatible with the common market.

58. The Court did not accept the justification or the explanations, based on the particular constraints to which Commission staff are subject, which emphasised the difficulty inherent in undertaking a complex market analysis under a very rigid time constraint. The Court took the view that that argument was irrelevant, given that the damage did not arise out of the analysis of the relevant markets contained in the statement of objections or the incompatibility decision but out of the omission from the statement of objections of a reference which was of the essence as regards its consequences in the operative part of the incompatibility decision.

59. That information did not involve any particular technical difficulty or call for any additional specific examination that could not be carried out for reasons of time; furthermore, the absence could not be attributed to a fortuitous or accidental drafting defect that could be compensated for by a reading of the statement of objections as a whole.

60. The Court of First Instance concluded from those considerations that the breach of Schneider's rights of defence implied a manifest and serious disregard by the Commission of the limits to which it is subject and constituted a sufficiently serious breach of a rule of law intended to confer rights on individuals.

2. The causal link

61. First of all, it should be borne in mind that the Court of First Instance had 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. [22]

62. Schneider claimed that it had suffered a loss in the value of its assets between the date of the announcement of the offer for Legrand shares, in January 2001, and the date the sale contract was implemented, in December 2002, on the terms set out above.

63. The Court of First Instance's interpretation of the causal link revolved around 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 Commission's

22 — Paragraph 81 of the judgment under appeal.

conduct had been in conformity with the law. [23] Thus, it rejected the notion that the defect in the incompatibility decision deprived Schneider of any right to a decision that the transaction was compatible, whether explicit or implicit, such as to justify attributing to the Community the financial consequences of the loss of such right and, in particular, those resulting from the obligation to dispose of the assets in Legrand.

64. The Court took the view that it was difficult to determine the nature and amount of the divestiture necessary to render the transaction compatible with the common market and obtain the Commission's agreement that it should proceed, but that it was even more difficult to calculate the effects on the total value of the assets held by Schneider of the transfers and transactions which those corrective measures would have involved.

65. The Court considered that the uncertainty involved in assessing the changes to the economic parameters which would have accompanied any decision of compatibility was too great, making it impossible to draw a useful comparison with the consequences of the incompatibility decision.

66. Neither did it accept Schneider's claim that the unlawful incompatibility decision frustrated the synergies expected from the transaction and consequently destroyed its industrial strategy and damaged its image because of the adverse effect on its reputation. [24]

67. On the other hand, the Court stated that there was a causal link which was sufficiently close to create entitlement to compensation between the wrongful act committed and two types of damage suffered by the applicant: the costs of participating in the resumed investigation of the transaction after the annulment of the two decisions; and the reduction in the transfer price which Schneider had to concede to the purchaser of the assets in Legrand in order to obtain 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.

23 — Paragraphs 263 and 264 of the judgment under appeal.

24 — Paragraphs 260 to 287 of the judgment under appeal.

3. Determination of the damage suffered

In support of its conclusion the Court of First Instance relied on the following arguments. [26]

(a) Fees and administrative and judicial costs incurred by Schneider

68. As regards the costs of resuming the investigation, the Court of First Instance identified three areas: the special trustee's fees; the fees of legal, tax and banking consultants for separating the companies and those arising out of the domestic and Community legal proceedings; and the consultancy fees and administrative fees and expenses of various kinds incurred by Schneider following the *Schneider I* and *Schneider II* judgments.

69. Although the Court rejected the first two categories of costs referred to, [25] it accepted that the last category ('miscellaneous costs') resulted from the Commission's unlawful act.

70. The Commission's failure to mention in the statement of objections of 3 August 2001 the competition problem underlying the incompatibility decision deprived Schneider of the right to give its views on the subject and to suggest appropriate countermeasures, and was the reason for the annulment of that decision. The reopening of the procedure cured that error by enabling the company to be heard regarding the objection and giving it the opportunity to put forward proposals to counteract the transaction's disruptive effects.

71. Thus, the additional costs incurred by the applicant in participating in the administrative investigation procedure resumed after the *Schneider I* and *Schneider II* judgments would not have arisen if the Commission had from the outset observed the rights of the defence. Even though, had the applicant been given the opportunity to give its views on buttressing, which was not mentioned in the statement of objections, it would have had to bear the costs of preparing responses and any corrective measures, the Court of First Instance held that resuming, on a new legal basis, an administrative procedure suspended 12 months earlier represented, for the party dealing with the Commission, a much greater burden than that of responding during the

25 — Paragraphs 289 to 292 of the judgment under appeal. In the case of the first category, on the grounds that these payments flowed directly from the provisions of Article 7(4) of the regulation and, in the case of the second, because it was possible that Schneider might have had to bear them if the decision adopted had been lawful (in the case of the costs arising out of the divestiture), either because they were covered by costs (Community legal costs) or because they were caused by a claim which had not been accepted as a basis for Community liability (expenses incurred in proceedings before domestic courts).

26 — Paragraphs 298 to 302 of the judgment under appeal.

initial investigation procedure, when the undertaking and its advisers would have been fully involved in meetings and contacts with the relevant Commission staff.

(b) The reduction in the Legrand sale price conceded to Wendel-KKR to enable the sale date to be deferred [27]

72. The Court of First Instance held that Schneider had negotiated and signed the contract with Wendel-KKR for the sale of Legrand and had deferred execution of the agreement until 10 December 2002, pending delivery of judgment in the pending Cases T-310/01 and T-77/02.

73. Had it not taken this course and if its actions had been dismissed, Schneider would have run the risk of having to conclude negotiations in haste under conditions which were not favourable to its interests, given that the divestiture period ended on 5 February 2003 and it was not certain that a further extension would be granted.

74. According to the judgment under appeal, since Schneider found itself caught between two possibilities, the effect of deferring the sale of Legrand, stemming from Schneider's desire to obtain a decision on the compatibility of the transaction with the common market, was that Schneider offered to sell Legrand to Wendel-KKR at a lower price than it would have obtained under normal circumstances. Deferring the sale of the assets in Legrand until 10 December 2002 involved paying compensation for the risk of depreciation of those assets to which Wendel-KKR was exposed by agreeing to that deferral, if only because of the possibility of a drop in the prices of industrial stocks over that period.

75. The Court of First Instance concluded from the above that the breach of the rights of the defence in the incompatibility decision was directly linked to the deferral, since the delay was essential if Schneider was to be able to exercise its right to obtain a lawful decision on the compatibility of the notified transaction and to be heard with all the necessary safeguards.

(c) Quantification, allocation and interest

76. With regard to the costs incurred by Schneider as a result of its participation in the resumed investigation of the transaction, the Court of First Instance calculated the

27 — Paragraphs 303 to 317 of the judgment under appeal.

compensation payable by deducting from the sum of the costs borne by Schneider in Cases T-310/01, T-77/02 and T-77/02 R the administrative costs normally borne by the company itself in relation to divestiture of assets and, finally, those that Schneider would have had to incur in respect of the corrective measures relating to buttressing.

77. The Court quantified the damage resulting from the reduction in the Legrand transfer price, granted to Wendel-KKR because of the deferral of the sale of Legrand until 10 December 2002, as the difference between the transfer price agreed between the parties to the agreement and the price that Schneider would have obtained if, at the end of the first investigation, on 10 October 2001, it had been given a lawful decision as to the compatibility of the transaction.

78. The Court of First Instance referred the precise quantification of the amounts payable by the Commission to an ad hoc procedure to be followed at a later stage, thereby allowing the parties to determine the total amount of the compensation. [28]

79. As it had acquired Legrand's shares by means of a public bid under the terms of the derogation contained in Article 7(3) of the regulation, the Court found that Schneider had assumed the risk of an incompatibility decision and of the consequent obligation to separate the assets of the merged undertakings. As Schneider was not unaware that the merger of the companies would create or strengthen its dominant position within a substantial part of the common market, the Court also inferred [29] that it had contributed to its own damage, [30] and quantified this as one third of the damage suffered as a result of the reduction in the transfer price agreed with Wendel-KKR.

80. Finally, the Court also awarded default interest [31] until payment in full, from the date of delivery of the judgment determining the amount of damages.

V — The procedure before the Court of Justice and the forms of order sought in the appeal proceedings

81. The appeal was lodged at the Registry of the Court of Justice on 24 September 2007. [32] The Commission puts forward seven grounds of appeal and asks the Court of Justice to set aside the judgment of the Court of First

28 — Paragraphs 318 to 325 of the judgment under appeal.

29 — On the basis of Case 145/83 *Adams* v *Commission* [1985] ECR 3539, paragraph 54.

30 — Paragraphs 326 to 335 of the judgment under appeal.

31 — On the basis of the rates set by the European Central Bank for main refinancing operations, plus two points, provided that it did not exceed 4% (paragraphs 336 to 346 of the judgment under appeal).

32 — Fax of 21 September.

Instance in Case T-351/03 and order Schneider to pay all the costs. [33]

82. In its response, which reached the Registry on 31 December 2007, [34] Schneider asked the Court to dismiss the appeal and to make an order for costs against the Commission.

83. The President of the Court of Justice gave leave to lodge a reply and a rejoinder, which were lodged at the Registry on 12 March [35] and 8 May [36] 2008 respectively, in which both parties reiterated their claims.

84. At the Commission's request, the case was assigned to the Grand Chamber pursuant to the second subparagraph of Article 44(3) of the Rules of Procedure of the Court of Justice.

85. At the hearing held on 3 December 2008, the representatives of Schneider and of the Commission appeared to make oral submissions and to reply to the questions of the members of the Chamber.

33 — Although it is unclear from the wording relating to the form of order sought in the appeal proceedings, in fact it is the costs at both instances which are being referred to.

34 — Fax of 21 December.

35 — Fax of 10 March.

36 — Fax of 6 May.

VI — Analysis of the appeal

A — *Approach*

86. The Commission's appeal is structured around seven grounds of appeal, some of which are divided into several parts. Although the faults which the Commission attributes to the judgment under appeal are given labels which are familiar in this type of proceedings, such as error of law, distortion of the facts or failure to state reasons, amongst others, it is immediately apparent that the criticisms can be grouped into three categories, which relate to the 'sufficiently serious' nature of the breach, the damage caused and the causal link between those two elements.

87. It therefore seems appropriate to group them according to the category to which they

belong and to deal with them in the most logical order, [37] starting with an analysis of the severity of the breach, whose existence is not at issue since it was determined by the *Schneider I* judgment, moving on to the damage, an issue only briefly touched on in this appeal, and finishing with the connection between the two. My analysis would thus cover all the grounds put forward by the Commission, thereby fulfilling my remit as an Advocate General.

B — *Grounds relating to sufficiently serious breach*

1. Positions of the parties

88. The Commission claims that, by finding, first, that the Commission had 'omitted' the objection relating to the buttressing of the positions of Schneider and Legrand from the statement of objections of 3 August 2001, and, second, that to formulate that objection 'did not involve any particular technical difficulty', [38] the Court of First Instance infringed the principle of *res judicata*, failed in its duty to state reasons, erred in its assessment and distorted the facts.

89. By the second ground of appeal in the same category, the Commission claims that the judgment under appeal contained errors of law in its characterisation of the facts because it failed to take into account the complexity of the situations to be regulated [39] and, furthermore, that it failed to state reasons in its summary rejection of the arguments deployed in the Commission's defence to demonstrate the time pressure and the technical difficulties involved in preparing the statement of objections.

90. Schneider's principal contention is that the Commission's reasoning on both grounds is inadmissible and, furthermore, that it is irrelevant and unfounded since in reality it seeks to re-examine facts which have the authority of *res judicata*, relies on assertions not made at first instance and does not adequately explain the technical difficulties alluded to.

2. The first ground of appeal: a misunderstanding of the judgment under appeal

91. Without prejudice to any grounds of inadmissibility, the first ground of appeal, the two parts of which can be examined together, must be rejected because it is based on a misunderstanding of the judgment under appeal.

37 — It has been suggested that it is not essential to follow this method and that the order of analysis of the three components of non-contractual liability may vary; see Ruffert, M., 'EG-Vertrag — Art. 288', in Calliess, C. and Ruffert, M. (eds), *Kommentar des Vertrages über die Europäischen Union und des Vertrages zur Gründung der Europäischen Gemeinschaft*, 2nd edition, Luchterhand, Neuwied, 2002, p. 2414. However, although this approach makes the work of the Court of Justice easier, I do not think that it is necessarily compatible with the role of the Advocate General, who is required to give a view on all the points at issue.

38 — Paragraph 155 of the judgment under appeal.

39 — See *Holcim*, paragraph 50, and the case-law cited.

92. In the first part of the first ground of appeal, the Commission criticises the Court of First Instance for holding, in paragraph 155 of the judgment under appeal, that the cause of Schneider's damage was the 'omission' from the statement of objections of any reference to the buttressing objection, whereas paragraph 445 of the *Schneider I* judgment stated that the statement of objections had not dealt 'with sufficient clarity or precision' with the buttressing point.

93. Comparing the two judgments, the appellant identifies three discrepancies which, it is argued, support its claim that the judgment under appeal should be set aside.

94. First, the appellant notes that paragraph 445 of the *Schneider I* judgment assumes that there was at least an *implicit* mention of buttressing. Second, it follows that the criticism made in that judgment is that the Commission did not refer *explicitly* to this detrimental economic effect, even though it was clear from the statement of objections as a whole that this objection was being made against Schneider. Third, the appellant complains of the consequences of these obvious differences in meaning between the two judgments, since, whereas in *Schneider I* the implication was merely that the Commission's error prevented the company from assessing the full extent of the hindrances to competition identified on the French market, [40] in the judgment under appeal it was concluded that, as a result of that omission, Schneider was unaware that if it did not propose corrective measures to mitigate these shortcomings it would not be able to secure a declaration of compatibility. [41]

95. The Commission claims that these disparities amount to a reassessment of the facts in breach of the Commission's rights of defence, since the Court of First Instance did not seek its views on the new assessment which the Court undertook, and the Court thereby contravened the principle of *res judicata* in respect of the facts established in the *Schneider I* judgment, wrongly classified the facts and distorted the evidence.

96. In the second part of the first ground of appeal, in addition to that criticism of the judgment under appeal, the Commission pleads failure to state reasons. It complains that the judgment disregarded its point of view that the lack of reference to buttressing in the statement of objections was excusable given the imperative to act swiftly, as is normal in merger proceedings, and given the difficulties involved in preparing such documents. The judgment under appeal, by contrast, states that the task of mentioning the objection in question 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 that its absence could not be attributed to a fortuitous or accidental drafting error. [42]

40 — Paragraph 453 of the *Schneider I* judgment.

41 — Paragraph 152 of the judgment under appeal.

42 — Paragraph 155 of the judgment under appeal.

97. Leaving aside the fact that, as Schneider correctly points out in its defence and rejoinder, some of the grounds invoked, such as distortion of the clear sense of the evidence, have not been adequately substantiated, suffice it to say that the first ground of appeal is based in its entirety on a mistaken interpretation of the judgment. The Commission relies on an exercise in semantics to try to show that the different degrees of meaning of the words employed in the two judgments reflect an intention by the Court of First Instance to exaggerate the consequences of the facts established in the *Schneider I* judgment.

98. Furthermore, the Commission's submissions are irrelevant, since the linguistic differences between the *Schneider I* judgment and the judgment under appeal do not invalidate the conclusion that the wording of the statement of objections prevented Schneider from clearly ascertaining that the buttressing brought about by the merger with Legrand was being invoked against it; that failure exists irrespective of whether the objection had been omitted or expressed in a less than succinct manner because, since it had virtually no discretion — as the Commission itself admits — in the application of Article 18 of the regulation, its mere infringement gave rise to a sufficiently serious breach. [43]

99. Similarly, the second part of the first ground of appeal, which justifies the error in presenting the buttressing objection on the basis of the lack of time available for dealing with such a complex matter, must also be rejected, because the judgment under appeal expresses with greater clarity the criticism of the Commission made by the Court of First Instance in the *Schneider I* judgment by emphasising the unfortunate manner in which the buttressing objection was structured and 'dealt with [without] sufficient clarity or precision' by the Commission, in that it did not demonstrate it in the document. [44]

100. Far from distorting the facts, the interpretation by the judgment under appeal of the *Schneider I* judgment contributes to a better understanding of it by emphasising the fact that the defect in the statement of objections did not lie in the substantive analysis of the disruption of competition, but was limited to the omission or defective formulation of a specific objection, which deprived the company concerned of the opportunity of constructing its defence on that point. That explains logically why the Commission's excuses were dismissed without much explanation, given that they would only have been of value had the outcome of the investigation been criticised from a competition point of view, which was not the case, as can be inferred also from the *Schneider I* judgment.

101. It is difficult to see how it could be otherwise, since the fact that the Commission

43 — Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029, paragraph 55; Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291 ('*Bergaderm*'), paragraph 43; Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, paragraph 54; Case C-472/00 P *Commission* v *Fresh Marine* [2003] ECR I-7541, paragraph 26; Case C-198/03 P *Commission* v *CEVA and Pfizer* [2005] ECR I-6357, paragraph 64; and *Holcim*, paragraph 47. Commentators have emphasised the vital role played by discretion in assessing the seriousness of a breach; see Wilson, C., 'The role of discretion in EC law on non-contractual liability', *Common Market Law Review*, No 42, 2005, p. 686.

44 — Paragraph 445 of the *Schneider I* judgment.

is under time pressure in its handling of an investigation leading up to the statement of objections does not exempt it from taking proper care over the nature of its arguments, and in particular the critical ones, in order to comply with the requirements of Article 18 of the regulation. It was therefore reasonable for the Court of First Instance to take the view that a reference to the objection did not involve any particular technical difficulty or call for an additional specific examination.

102. In the light of the above, it is clear that the Court of First Instance did not err in law or in fact and neither did it distort the clear sense of the evidence or fail to state reasons for the judgment under appeal, and I therefore propose that the first ground of appeal be rejected.

3. The second ground of appeal

103. The Commission takes issue with the judgment under appeal, claiming that it contains errors in its characterisation of the facts because it fails to take into account the complexity of the situations regulated and that it fails to state reasons in its summary rejection of the arguments which the Commission had relied on in its defence to demonstrate the difficulties involved in preparing the statement of objections.

104. While admitting that it had almost no discretion in the application of Article 18(1) and (3) of the regulation, the Commission takes the view that the Court of First Instance should have considered the complexity of the situations regulated, in accordance with the case-law of the Court of Justice. [45]

105. In relation to the second part of the first ground of appeal, the Commission alleges that the failure to appreciate that the buttressing objection involved a particular added complication, because of the market-by-market analysis in respect of low-voltage electrical equipment in all the Member States, including the sectoral markets, constitutes an error in characterisation of the facts. In that context, the Commission regards it as unrealistic to adopt an approach such as the one taken in the judgment under appeal which, within an operation as complex as phase II of the investigation of an economic concentration, isolates the task of presenting the objections clearly in the statement of objections, on the basis that it is straightforward. In that regard, the Commission emphasises the time pressure which the staff preparing the statement of objections of 3 August 2001 were under.

106. The Commission also claims that the judgment under appeal had inadequate grounds for its rejection of submissions seeking to show that buttressing had been referred to in the statement of objections.

45 — See *Bergaderm*, paragraph 40, and *Holcim*, paragraph 50.

107. Once again, the solution is to be found in a correct understanding of the judgment under appeal, since the material factor for assessing 'the complexity of the situations regulated' is not the Commission's acts, analyses or economic observations but the expressed views of the undertakings concerned.

108. The legislation in question, which must be interpreted in accordance with the principles in *Bergaderm* and *Holcim*, gives such undertakings the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections affecting them; [46] furthermore, the legislation requires the Commission to base its incompatibility decisions only on objections on which the parties have been able to give their views. [47]

109. It is clear from the judgment under appeal that the facts relevant to assessing the infringement were not complex, nor the applicable legislation difficult to interpret, [48] and consequently, in line with the Court of Justice's settled case-law, as there is no ostensible discretion, the mere breach of Article 18 of the regulation gives rise to liability on the part of the Commission. [49]

110. Furthermore, paragraphs 152 and 155 of the judgment under appeal rejected, albeit in the Commission's view very summarily, the submissions relating to the particular technical difficulties inherent in drafting statements of objections; the judgment also indicates that the omission of the buttressing objection did not arise out of a fortuitous or accidental drafting defect that could be offset by reading the statement of objections as a whole, and this is a clear reference to the possible implicit inclusion of such objections claimed by the appellant.

111. In brief, as the Commission has based its second ground of appeal on the complexity of facts which were irrelevant when the issue is whether or not the Community has incurred non-contractual liability and whether the

46 — See the end of Article 18(1) of the regulation.
47 — Article 18(3) of the regulation.
48 — Paragraphs 145 and 146 of the judgment under appeal.

49 — Academic opinion also supports this view; see, for example, Lenaerts, K., Arts, D. and Maselis, I., *Procedural Law of the European Union*, 2nd edition, Sweet & Maxwell, London, 2006, p. 395, and Schermers, H.G. and Waelbroeck, D.F., *Judicial Protection in the European Union*, 6th edition, Kluwer Law International, The Hague, London and New York, 2001, p. 552. The case-law only goes so far as to accept that in cases where there is only a reduced, or even no, discretion, this simple infringement 'may' be sufficient to show the existence of a sufficiently serious breach; for citation of all the case-law, see *Commission* v *CEVA and Pfizer*, paragraph 65.

breach established by the *Schneider I* judgment was sufficiently serious, the Court of First Instance did not err in law by rejecting the submissions without going into lengthy explanations on the subject.

112. Consequently, the argument of failure to state reasons also fails, since the judgment under appeal does not criticise the statement of objections for explaining the buttressing point too briefly but for doing so obscurely, thereby preventing Schneider from understanding the importance of the objection and making it impossible for Schneider to defend itself. [50] No justification for the absence of a clear statement emphasising the importance which the Commission attributed to that objection could be found in the complexity of the proceedings; the Court of First Instance simply required, as a basic rule for safeguarding the right provided for in Article 18 of the regulation, more precision from the Commission in the written presentation of objections. There is therefore no failure to state reasons.

113. In summary, the Commission has not convincingly refuted the findings in the judgment under appeal that the breach is sufficiently serious, which must therefore stand, and we must proceed to examine the next factor needed to establish liability, namely the occurrence of damage.

50 — Despite being characterised as a preparatory document, case-law recognises that the statement of objections has the function of delimiting the scope of the administrative procedure initiated by the Commission, thereby prohibiting that institution from relying on other objections in its decision terminating the procedure (see Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraph 63; the order of 18 June 1986 in Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1986] ECR 1899, paragraphs 13 and 14).

C — *The ground of appeal relating to the damage suffered by Schneider*

114. My wish to deal logically with the components of non-contractual liability leads me to bring forward the analysis of the sixth ground of appeal.

115. In this ground of appeal, the Commission criticises the Court of First Instance for making an *ultra petita* ruling by accepting a financial loss on the part of Schneider which had not been claimed. Thus, although the application was, primarily, for compensation in respect of the financial loss which arose from having to sell the assets in Legrand at a price lower than the acquisition price, [51] the Court accepted the damage suffered by reason of the reduction in the transfer price which Schneider had to grant to the purchaser of those assets in order to defer the execution of that disposal until such time as the then pending Community proceedings would not become otiose before reaching a conclusion. [52]

51 — Paragraph 86 read in conjunction with paragraph 260 of the judgment under appeal.

52 — Paragraph 286 of the judgment under appeal.

116. The Commission concludes from the judgment under appeal that there has been a breach of the rules concerning the burden of proof, because it should be for Schneider to show damage, and that the Commission's rights of defence have also been infringed as it was prevented from giving its view on the damage.

117. For the following reasons this ground of appeal should also be rejected.

118. First, with regard to the question of an *ultra petita* ruling, I share Schneider's view that the Court of First Instance did not rule out a causal link with any negative effects suffered by Schneider and, in those circumstances, the financial loss in question was part of the totality of losses claimed. In this context, it is clear that determining court proceedings by making an *infra petita* ruling is not contrary to any procedural rule.

119. Second, the foregoing consideration is further supported by the fact that the judgment under appeal was only required to determine whether there was damage, without quantifying it. In those circumstances, it was for the Commission to construct an argument capable of refuting any finding that it had a duty to pay compensation, even where this was of a lower amount than originally claimed.

120. Consequently, the Commission's arguments concerning the burden of proof and breach of its rights of defence cannot be sustained, since there is no *ultra petita* ruling, and the Commission's sixth ground of appeal must therefore be rejected.

D — *The grounds of appeal relating to causal link*

121. It is helpful to rearrange the three grounds of appeal put forward by the Commission relating to the causal link between the breach and the damage caused to Schneider according to whether they relate to a complete denial of the existence of such a link, [53] a break in the chain of causation, [54] or the contradictions in reasoning used in assessing that link which would mean that the judgment under appeal should be set aside. [55]

122. The last of those arguments has implications for both types of damage in respect of which the judgment under appeal ordered Schneider to be compensated, while the others affect only the quantification of the financial loss described above.

53 — Third ground of appeal: first and second parts and first submission in the third part.

54 — The remaining submissions in the third ground of appeal and the whole of the fifth ground of appeal.

55 — Fourth ground of appeal.

1. Absence of a causal link

(a) Distortion of the facts and the evidence (first part of the third ground of appeal)

123. First, the Commission claims that paragraphs 305 to 309 of the judgment under appeal distorted the facts and the evidence by holding that Schneider had felt 'obliged' by the incompatibility decision to enter into the agreement with Wendel-KKR for the sale of Legrand.

124. In the appellant's opinion, the circumstances of the case and Schneider's actions indicate that the divestiture period, which had been extended until 5 February 2003, was sufficiently long to accommodate both any prolongation of negotiations for the sale of Legrand and an application for a further extension, had this been required, thereby accepting the offer made by the Commission in paragraph 122 of the divestiture decision.

125. Schneider contends that this part of the third ground of appeal should be held to be inadmissible because it calls into question the facts set out in the judgment under appeal. That argument must, however, be rejected since the Commission has clearly stated that the judgment of the Court of First Instance is being challenged precisely because of its distortion of the facts of the case.

126. In that regard, the Commission's case is also unconvincing, as there does not appear to be any distortion. In the paragraphs criticised, the Court of First Instance did no more than conclude, quite logically, that Schneider had to divest itself of Legrand, a conclusion supported by the fact that suspending operation of the divestiture decision was impossible.

127. Furthermore, while Schneider did not wish to walk away from the merger before the legal dispute before the Court of First Instance reached a conclusion and while negotiations with the future purchaser proceeded apace, Schneider felt caught between complying with its legal obligations and the prospect of a judicial solution. It would be unfair to blame Schneider for acting swiftly to comply with the divestiture decision when the Commission itself was demanding an immediate end to the economic concentration. [56]

128. It is difficult to see how the Commission can accuse the judgment under appeal of distorting the evidence, when, although the

56 — End of paragraph 114 of the divestiture decision.

parties may not share the Court of First Instance's assessment of the facts and of the Commission's resulting financial liability in particular, those facts have not been distorted.

129. It follows that the first part of the third ground of appeal should be rejected.

(b) Absence of a causal link between the invalidity of the incompatibility decision and the reduction in the price for the sale of Legrand to Wendel-KKR (second part of the third ground of appeal)

(i) Positions of the parties

130. The Commission claims that, by holding [57] that there was a direct link between the reason why the incompatibility decision was unlawful and the sale of Legrand at a price lower than that for an unconditional executed sale, the judgment under appeal made factually incorrect findings, distorted the facts and erred in the legal characterisation of the facts.

131. The basis of its argument is threefold: first, the Commission submits that the deadline of 10 December 2002 agreed for Schneider's sale of Legrand to Wendel-KKR was set the previous 26 July, when the company had no need to subject itself to any time-limits, as the Commission was willing to extend the period for the divestiture beyond 5 February 2003, which was the maximum period initially agreed. Furthermore, according to the Commission, when Schneider decided not to avail itself of the cancellation clause on 5 December 2002, it knew that it was no longer legally obliged to divest itself of Legrand, as the Court of First Instance had on 22 October 2002 annulled the two decisions in question.

132. Second, the Commission maintains that the sale of Legrand was Schneider's decision alone and that in acting as it did it relinquished both its right to cancel the sale contract and the possibility of a decision declaring the transaction compatible with the common market, since it could have proposed measures to mitigate the buttressing during the Commission's resumed investigation procedure.

133. Third, the Commission takes the view that the procedural nature of its infringement precludes any causal relationship arising between that fault and the type of damage that the Court of First Instance found Schneider to have suffered.

57 — Paragraphs 311 to 316 of the judgment under appeal.

134. Schneider, for its part, argues that all these allegations are irrelevant, because they are not directed at the causal link but at the resulting costs; thus, as regards the date agreed for the transfer, it repudiates the Commission's argument on the ground that, on the one hand, no account is taken of the fact that postponement of the transfer date until 10 December 2002 was all that Wendel-KKR would accept, and Schneider cannot be criticised for it; and, on the other hand, Schneider insists that the Commission's hostility did not augur well for a further decision which this time would authorise the merger of the two companies.

135. Regarding the date when Legrand was actually transferred to the purchaser, Schneider states that the Commission is mistaken in equating the date of the actual sale with the date the damage was caused, as, in its view, the damage started to arise when the incompatibility decision was adopted. Schneider also denies that the procedural nature of the irregularity which gave rise to the annulment of the incompatibility decision rules out any causal link.

(ii) Assessment

136. This ground of appeal requires a detailed analysis of the reasoning of the Court of First Instance in order to determine whether there is a causal link.

137. According to the judgment under appeal, the consequence of deferring completion of the sale of Legrand to await the outcome of the pending litigation in order to obtain a declaration that the transaction was compatible with the common market was that Schneider had to offer to sell Legrand to Wendel-KKR at a lower price than it would have obtained if there had been an executed sale unaccompanied by an incompatibility decision which contained two manifest irregularities. [58]

138. The judgment under appeal therefore makes a connection between this deferral of the sale until 10 December 2002 and the payment made to Wendel-KKR for accepting the risk of depreciation of the assets in Legrand to which Wendel-KKR exposed itself, if only because of the possibility of an adverse variation in the prices of industrial stocks over the period between signature of the agreement and the date it came into effect. [59]

139. Having attributed to Schneider some responsibility for the extent of the damage, the Court of First Instance ordered the Commission to pay two thirds of the damage sustained by Schneider due to the reduction in the transfer price of Legrand which it had to concede in exchange for the postponement of the sale until 10 December 2002. [60]

58 — Paragraph 311 of the judgment under appeal.
59 — Paragraph 312 of the judgment under appeal.
60 — Paragraph 1 of the operative part of the judgment under appeal.

140. I am in agreement with the Commission that this approach is misconceived. In particular, the link which would trigger non-contractual liability is inadequate in this case because it lacks the particular characteristics which are necessary, that is, the damage does not directly, immediately and exclusively arise from the unlawful act, [61] in a relationship of cause and effect. [62]

141. Undoubtedly, the incompatibility and divestiture decisions drove Schneider to seek out an undertaking capable of assuming the cost of acquiring a company the size of Legrand, and this involved complex negotiations, as Schneider maintains in the rejoinder. [63]

142. To that extent, the annulment of those decisions meant that the costs of those negotiations had been unnecessary, since, if the divestiture had not been ordered, Schneider would not have incurred those costs. However, Schneider is not claiming compensation for this type of damage and it is unnecessary to linger on its analysis. Nevertheless, I mention it as an example of costs linked to the annulment of the Commission's administrative acts or at least costs which, having become superfluous, could be taken to have stemmed from the infringement.

143. On the other hand, the reduction in the sale price of Legrand offered to Wendel-KKR, although a result of those same negotiations, is not a consequence of the invalidity of the contested decision but is a matter of Schneider's own free choice in its dealings with its contractual partner. In this context, Schneider was in a rather uncomfortable position, because of the pressure it felt from the Commission to comply with the divestiture decision, but that pressure was only one of the factors affecting the final form of the agreement with Wendel-KKR.

144. In its rejoinder, Schneider provides some information which sheds light on the conditions under which the Legrand sale agreement took shape, listing other sources of strong pressure on the Schneider management to divest itself rapidly of the company with which it had tried to merge, such as the attitudes of the chairman of Legrand, [64] the Schneider shareholders, financial analysts and the markets. [65] That information helps to fill in the details of the circumstances in which the agreements between Schneider and Wendel-KKR were conceived and shows that the requirement (which turned out to be unlawful) imposed on Schneider to separate the merged undertakings was only the background and did not have a direct influence on

61 — Toth, A.G., 'The concepts of damage and causality as elements of non-contractual liability', in Heukels, T. and McDonnell, A. (eds), *The Action for Damages in Community Law*, Kluwer Law International, The Hague, London and Boston, 1997, p. 192.

62 — Case 253/84 *GAEC de la Ségaude* v *Council and Commission* [1987] ECR 123, paragraph 10.

63 — Point 99 of the rejoinder.

64 — On the legal proceedings between Schneider and Legrand in the national courts, see paragraphs 27, 67 and 219 et seq. of the judgment under appeal.

65 — Point 100 of the rejoinder.

the terms discussed and agreed by Schneider in the Legrand sale and purchase contract. All those factors probably offer a better explanation of why Schneider was anxious to conclude the deal on 26 July 2002.

145. It appears unexceptional that Schneider retained the right to cancel the contract with Wendel-KKR depending on the outcome of the cases before the Court of First Instance. However, apart from the factors mentioned in the previous point, it was under no compulsion to have the sale agreement in place and effective at so early a date, as the Commission rightly suggests when it argues that the period granted until 5 February 2003, which could moreover have been extended, appeared adequate for finding a suitable purchaser.

146. Schneider's conduct fuels a suspicion that it intended to give priority to the transaction with Wendel-KKR and regarded continuation of the merger as merely hypothetical. That conjecture, supported by the existence of the pressures referred to above, is strengthened by the fact that rather than save the economic concentration by returning to phase II of the Commission's investigation after the annulment of the decisions, Schneider chose to implement the agreement reached with the purchaser.

147. Moreover, the EUR 180 million that it would have cost Schneider to withdraw from the sale was simply the result of its conduct of the negotiations, and any reduction in the value of the assets in Legrand due to a drop in the prices of industrial stocks over the period under consideration strikes me as too vague and uncertain to create a causal link. [66]

148. Finally, looking at the challenges faced by the two undertakings, [67] Wendel-KKR was familiar with Schneider's thinking and was well aware of the possibility that the incompatibility and divestiture decisions might be annulled, with the logical outcome that it would have been prevented from acquiring Legrand. Consequently, Wendel-KKR built into the contract the appropriate provisions for avoiding any risk: the reduced sale price and the EUR 180 million compensation for cancellation of the contract, thereby contractually transferring the risk to the vendor, who freely agreed to it.

149. Schneider therefore took a considerable risk in choosing to follow the route set out in Article 7(3) of the regulation. That provision constitutes an exception to the general rule

66 — Case 26/74 *Roquette frères* v *Commission* [1976] ECR 677, paragraph 23, and Opinion of Advocate General Trabucchi (p. 694).

67 — On the extent of a party's own liability in the area of State aid, see Joined Cases 83/76, 94/76 and 4/77, 15/77 and 40/77 *HNL and Others* v *Council and Commission* [1978] ECR 1209, paragraph 6, and Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 13. See also Koenig, C., 'Haftung der Europäischen Gemeinschaft gem. Art. 288 II EG wegen rechtswidriger Kommissionsentscheidungen in Beihilfensachen', *Europäische Zeitschrift für Wirtschaftsrecht*, No 7/2005, p. 205.

regarding implementation of a concentration before the Commission makes its view known, whether expressly or tacitly. [68] Consequently, any prudent businessman must be aware of the inevitable consequences of the Commission making a negative assessment of a transaction, entailing adoption of a divestiture decision, since, despite the terms of Article 8(4) of the regulation ('[w]here a concentration has already been implemented, the Commission *may* …require the undertakings …to be separated …'), in the circumstances described in Article 7(3), the Commission has no discretion in the reinstatement of the market status quo, which is the acknowledged aim of the provision in question. [69]

150. In short, the normal vicissitudes associated with mergers fall within the risks which are assumed by companies relying on the exception in Article 7(3), as they are easily foreseeable in the light of the legislation on concentrations. [70]

151. Although the annulment of the incompatibility and divestiture decisions is not a 'normal' event, there are grounds for recognising some losses, such as the costs resulting from the negotiations for the sale of the undertaking, as I have already indicated; however, when the invalidity stems from a procedural error on the part of the Commission, the correction of which allows the investigation of the concentration to be resumed, it is not appropriate to allow other types of damage, since the identified cause of invalidity does not taint the economic analysis, as is clear in the judgment under appeal in this case.

152. Against this background, the Commission correctly observes that the annulment on formal grounds did not affect the substance of the transaction being investigated, so that, once the defect relating to the breach of Article 18 of the regulation had been corrected, any decision adopted following the reopening of phase II was not a foregone conclusion and could have gone either way, depending, in the main, on whether Schneider proposed adequate measures.

153. In short, since Schneider had assumed both risks of its own and, contractually, those of Wendel-KKR, the Court of First Instance's award of compensation for the reduced price that the former company had to concede to the latter while waiting for conclusion of the pending proceedings, would provide companies choosing to follow the route provided by Article 7(3) of the regulation with a guarantee or insurance against additional

68 — Ablasser-Neuhuber, A.,'Artikel 7. Aufschub des Vollzugs von Zusammenschlüssen', in Loewenheim, U., Meessen, K.M. and Riesenkampff, A., *Kartellrecht — Band 1 Europäisches Recht — Kommentar*, C. H. Beck Verlag, Munich, 2005, p. 1192.

69 — Immenga, U. and Körber, T.,'Fusionskontrollverordnung — Artikel 8. Entscheidungsbefugnisse der Kommission', in Immenga, U. and Mestmäcker, E.-J., *Wettbewerbsrecht — EG/Teil 2 — Kommentar zum Europäischen Kartellrecht*, 4th edition, C. H. Beck, Munich, 2007, p. 673.

70 — On the inherent risks of economic activities, see the recent judgment in Case C-47/07 P *Masdar (UK)* v *Commission* [2008] ECR I-9761, paragraphs 59 and 93.

costs of all kinds which might arise in the event of an infringement, even if the infringement is of procedural rules which have no direct effect on the economic substance of the merger.

154. For all the above reasons, I consider that the ground of appeal should be upheld and the judgment under appeal should be set aside in so far as it awarded Schneider compensation for damage resulting from the reduction in the sale price for Legrand which it had to offer Wendel-KKR as payment for the deferral of the sale until 10 December 2002.

2. The break in the chain of causation (third and fifth grounds of appeal)

(a) Summary of the submissions of the parties

155. In essence, the Commission claims, albeit in a somewhat diffuse manner in its written pleadings, that the Court of First Instance has erred in law in its failure to hold that, for various reasons, the chain of causation had been broken by the actions of the defendant.

156. Firstly, in the third ground of appeal, the Commission claims that, despite the formal nature of its error, the adoption of a fresh decision, following the resumption of phase II, was essential, and that entailed breaking the chain of causation. Secondly, it argues that the damage claimed was caused by setting a time-limit of 10 December 2002 for the sale and by Schneider's failure to make use of the cancellation clause in the contract. [71]

157. Additionally, in the fifth ground of appeal, the Commission states that Schneider failed to fulfil its duty to act with due diligence in three respects: firstly, by not requesting more detailed information from the Commission regarding buttressing; secondly, by failing to seek the interim measures which it could have applied for before and after the annulment; and thirdly, by implementing the Legrand sale contract at a time when it was no longer legally obliged to dispose of the company.

158. Schneider, however, before going on to reject the allegations relating to the substance of the judgment under appeal, argues that all those submissions made by the Commission are inadmissible because they constitute new pleas in law on which the Court of First Instance did not rule.

71 — Citing Case 33/82 *Murri frères* v *Commission* [1985] ECR 2759, paragraphs 37 and 38, and quoting, in their entirety, several paragraphs of the judgment of the Court of First Instance in Case T-360/04 *FG Marine* v *Commission* [2007] ECR II-92, paragraphs 51 to 56 and 75 to 77.

159. As I have proposed that the ground of appeal relating to the absence of a causal link be upheld, I will therefore give my opinion on these matters on an alternative basis, in case the Court of Justice does not share my opinion and requires an examination of the substance of the remaining grounds of appeal.

(b) Admissibility of certain submissions

160. Schneider's criticism of the appeal in this respect applies to the claim of negligence in the third ground of appeal and to the whole of the fifth ground of appeal, which is set out in point 167 of this Opinion; in both cases its criticism is based on the fact that they are new pleas which did not feature in the proceedings before the Court of First Instance.

161. Taking, first of all, the Commission's alleged new plea in law that it was Schneider's negligence that gave rise to the damage, suffice it to say that the case-law of the Court of Justice allows arguments not used at first instance to be introduced in this type of proceedings, provided that they are in support of a plea which was raised at first instance. [72]

162. Secondly, in respect of the fifth ground of appeal, the Commission's submission is that, in paragraphs 326 to 335, the judgment under appeal considered the issue of whether responsibility should be attributed to Schneider for its loss, or some part of it at least. However, since all the submissions which Schneider claims to be inadmissible address that matter, Schneider's plea of inadmissibility must be rejected.

163. The plea of inadmissibility presented by Schneider cannot therefore be upheld and must be rejected in its entirety.

(c) The substance

164. The parameters for this analysis are provided by the case-law of the Court of Justice, which states that, where the non-contractual liability of Community institutions is concerned, a lack of foresight or prudence on the part of the applicant for compensation can affect the causal link between the unlawful act and the damage, and may reduce [73] the liability or even extinguish it. [74] Nevertheless, apart from these general observations, proceedings in this

72 — Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 178, and Case C-229/05 P *PKK and KNK* v *Council* [2007] ECR I-439, paragraph 66.

73 — *Adams* v *Commission*, paragraphs 53 to 55, and Case C-308/87 *Grifoni* v *EAEC* [1990] ECR I-1203, paragraphs 16 and 17.

74 — For example, in Case 169/73 *Compagnie Continentale France* v *Council* [1975] ECR 117, paragraphs 22 to 32; Case 58/75 *Sergy* v *Commission* [1976] ECR 1139, paragraphs 46 and 47; Case 97/76 *Merkur* v *Commission* [1977] ECR 1063, paragraph 9; and *Mulder and Others* v *Council and Commission*, paragraph 33.

area inevitably reveal a case-by-case approach.

165. In relation to the judgment under appeal, it is difficult to understand the Commission's first argument that the need to adopt a decision on compatibility following recommencement of phase II would break the chain of causation between the annulled decisions and the damage suffered by Schneider, if such a chain exists. The Commission takes the view that the new formal decision would break the chain of causation because, if it had declared compatibility, Schneider would not have had to sell Legrand and, if it had not, the new decision would prevent the damage from arising.

166. The Commission's approach has an air of sophistry about it, as Schneider points out in its defence to the appeal, and cannot be accepted. In any event, its reasoning is ineffective, as it is based on a hypothesis which never materialised following the sale of Legrand to Wendel-KKR. It should therefore be rejected, since the Court must rule on the facts as they were, rather than as they might have been.

167. I foresee a similar fate for the first part of the fifth ground of appeal, concerning Schneider's lack of diligence in not having requested the Commission to provide further clarification regarding buttressing; this is an attempt by the Commission to transfer to Schneider its own failure to draft with precision the statement of objections. However, so obvious a ruse cannot pass unnoticed and it must consequently be rejected.

168. In the second part of the fifth ground of appeal, the Commission relies on certain rulings of the Court of First Instance [75] as a basis for its view that the chain of causation has been broken by Schneider's failure to seek interim measures, which it could have applied for before or after the annulment of the decisions.

169. However, it is clear from the established facts [76] that, at the same time as the application for annulment, Schneider lodged an interlocutory application seeking suspension of the effects of the divestiture decision; furthermore, the subsequent withdrawal of the application was due to the occurrence of two events: first, Case T-310/01 was admitted for adjudication under the expedited procedure; and, second, the period set by the Commission for the divestiture of Legrand was extended until 5 February 2003.

75 — Case T-230/95 *BAI* v *Commission* [1999] ECR II-123, paragraph 36, and *FG Marine* v *Commission*, paragraph 74.

76 — Paragraphs 50 to 52 of the judgment under appeal.

170. That being the case, Schneider did, contrary to the Commission's view, act with due diligence, because the result of its strategy was virtually the same as would have been obtained by interim measures, since the uncertainty over the validity of the two contested decisions was resolved very quickly and, irrespective of the outcome of those proceedings, the time window for disposing of Legrand had been extended.

171. Consequently, in the circumstances, Schneider's conduct cannot be considered negligent or capable of breaking the relationship of causality in question and the Commission's approach must therefore be dismissed as unfounded.

172. Finally, it is appropriate, because of the evident connection between them, to carry out a combined analysis of the third part of the fifth ground of appeal, which criticises Schneider for selling Legrand at a time when it was no longer legally obliged to dispose of the company, and the Commission's complaint that the period for the sale was extended until 10 December 2002 and that Schneider failed to make use of the cancellation clause in the contract; according to the Commission, all those factors contributed to the damage claimed, thus submerging the causal link in question.

173. Schneider claims that there were two reasons for the sale, one subsequent to the other: the first was compliance with the obligation to divest itself of Legrand; and the second, after annulment of the decisions, was avoiding the danger of assuming that authorisation would be forthcoming, as it was aware of the Commission s inflexibility in the second investigation of the merger.

174. For the reasons explained below, those arguments should be upheld, albeit, I repeat, in the alternative, given that I have already stated that I am satisfied that there is no causal link.

175. At the time the Legrand transfer contract was implemented, on 10 December 2002, Schneider was bound only by this contract since the incompatibility and divestiture decisions had been annulled by the Court of First Instance on 22 October of the same year. Even taking into account the fact that this contract came into existence as the result of a legal obligation which was subsequently found to be invalid, the completion of the sale, which precipitated the end of the

merger investigation, was an act of free choice by Schneider, on terms which were the result of negotiations with the purchaser which the Commission could not influence.

176. Furthermore, Schneider does not appear to have acted with due diligence in choosing to disregard the cancellation clause, quite apart from the fact that Schneider could then have tried to obtain a positive decision after a further investigation, given that it was being offered the opportunity to propose measures to counteract the buttressing, a possibility that it implicitly rejected by disposing of Legrand.

177. In the circumstances described, assuming that Schneider still wished to complete the merger with Legrand, [77] it would have been more logical to withdraw from the sale, relying on that clause, in order to minimise the damage claimed, because the sum of EUR 180 million cannot be compared to the compensation of almost EUR 1 700 million which is being claimed. An action to establish the non-contractual liability of the Community to the extent of the sum referred to in the cancellation clause would have been more reasonable and more in line with the course of events.

178. It is therefore my view that, by selling without being legally obliged to do so and by failing to act with due diligence, Schneider broke the chain of causation and I therefore propose that, in the alternative, the fifth ground of appeal be upheld.

3. The ground of appeal based on contradictory reasoning

179. In its fourth ground of appeal, the Commission criticises the contradictory reasoning of the judgment of the Court of First Instance due to the inconsistency implied by, on the one hand, the rejection of a causal link between the breach which led to the annulment of the two decisions and the damage allegedly suffered (paragraphs 260 to

77 — See point 146 et seq. of this Opinion.

286), and, on the other, acceptance of the link in the case of the two types of damage for which it accepted that Schneider could obtain compensation (paragraph 288).

180. In rebuttal of that criticism, suffice it to say that the first analysis mentioned by the Commission refers to the causal link in relation to the *total* amount of the loss in value of the assets in Legrand between their acquisition and their sale in December 2002, while the second refers to the losses which the Court of First Instance found Schneider to have suffered. There is therefore no contradiction in the narrative of the judgment under appeal and, consequently, the fourth ground of appeal also fails.

E — *The seventh ground of appeal*

181. In the alternative, the Commission seeks to set aside the judgment under appeal on the grounds that it awarded Schneider default interest from the date when the material damage occurred, on 10 December 2002, until the date of payment of the compensation.

182. Since I believe that the judgment under appeal will be set aside on the grounds of absence of a causal link and, in the alternative, on grounds of a break in the chain of causation, it is not necessary to examine the merits of the seventh ground of appeal, which concerns only damage which my analysis has ruled out.

VII — Ruling of the Court of Justice on the substance

183. The second sentence of Article 61 of the Statute of the Court of Justice enables the Court, in the event that it sets aside the judgment of the Court of First Instance, to give itself final judgment in the matter, where the state of the proceedings so permits, or to refer the case back to the Court of First Instance for judgment. One of the circumstances in which the first possibility offered by this provision can apply is where there is error *in iudicando*, provided that the account of the facts is complete and sufficient to give judgment and no further evidence needs to be taken into account. The practice of the Court of Justice is to avail itself of that possibility, although it does not usually give reasons for considering that the state of proceedings enables it to give judgment itself. [78]

78 — It normally confines itself to stating very laconically that this is the case in the particular dispute. See Joined Cases C-432/98 P and C-433/98 P *Council* v *Chvatal and Others* [2000] ECR I-8535, paragraph 37; Case C-76/00 P *Petrotub and Republica* v *Council* [2003] ECR I-79, paragraph 93; and Case C-326/05 P *Industrias Químicas del Vallés* v *Commission* [2007] ECR I-6557, paragraph 71.

184. It will be appropriate for the Court of Justice to give judgment on the substance where it appears from the documents before it that the case is ready for judgment, [79] in view of the fact that the Community legislature has created it as a modern appeal court, enjoying full freedom to give final judgment where it considers that it is necessary to do so. [80]

185. In this case, there can be no doubt that the question referred to the Court of Justice on appeal is strictly a matter of law. Although the Court of First Instance restricted the scope of the pleadings to the principle of the occurrence of damage, without quantifying the damage, it referred that task, which, in the circumstances of the case, was complex, to a subsequent procedure, to take place at the stage of enforcement of the judgment. It would be contrary to procedural economy to refer the matter back to the Court of First Instance for it to perform virtually the sole task of quantifying the amount due by the Commission in respect of the only head of claim for which it is liable to pay compensation. There is nothing to preclude the Court of Justice performing that task, as it has done in the past, [81] based on the method used in the judgment under appeal.

79 — Héron, J. *Droit judiciaire privé*, Montchrétien, Paris, 1991, p. 517, and Vincent, J. and Guinchard, S., *Procédure civile*, Dalloz, Paris, 1994, p. 922.

80 — Nieva Fenoll, J., *El recurso de casación ante el Tribunal de Justicia de las Comunidades Europeas*, Bosch, Barcelona, 1998, p. 430.

81 — Case 238/78 *Ireks-Arkady* v *Council and Commission* [1979] ECR 2955; *Adams* v *Commission*; Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477; and *Mulder and Others* v *Council and Commission*.

VIII — Costs in the two sets of proceedings

186. The outcome which I am proposing would not require that Schneider be ordered to pay all the costs, as the Commission has been unsuccessful in relation to some of the forms of orders which it sought, although they are not the most important ones.

187. As the Court of First Instance reserved the decision on costs of the proceedings, and since my proposal is that the quantification of the damage incurred by Schneider in respect of the costs involved in participating in the resumed investigation of the concentration should be resolved before the Court of Justice, it is necessary that the Court rule on the costs at first instance and on appeal.

188. In that regard, a fair assessment of the case as a whole would suggest that Schneider should be ordered to bear two thirds of the costs incurred by the Commission at first instance and on appeal.

IX — Conclusion

189. In the light of the foregoing considerations, I propose that the Court of Justice should:

(1) set aside the judgment of the Court of First Instance of 11 July 2007 in Case T-351/03 *Schneider Electric* v *Commission* in so far as it ordered the European Community to make good to Schneider Electric SA 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) set aside paragraphs 5 to 10 of the operative part of that judgment ordering the quantification of such damage by an expert and granting default interest;

(3) dismiss the appeal as to the remainder;

(4) order the parties to communicate to the Court of Justice, within the period of three months from the date of the judgment, their jointly agreed estimate of the expenses incurred by Schneider Electric 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*;

(5) failing agreement, order the parties to submit to the Court of Justice, within the same period, their proposed figures;

(6) order Schneider Electric to pay two thirds of the costs incurred by the Commission at first instance and on appeal, and to bear its own costs in both sets of proceedings.