JUDGMENT OF THE COURT (Grand Chamber)

16 July 2009 *

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* Language of the case: French.

In Case C-440/07 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 21 September 2007,

Commission of the European Communities, represented by M. Petite, F. Arbault, T. Christoforou, R. Lyal and C.-F. Durand, acting as Agents, with an address for service in Luxembourg,

appellant,

the other parties to the proceedings being:

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

applicant at first instance,

Federal Republic of Germany,

French Republic,

interveners at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, A. Ó Caoimh and J.-C. Bonichot, Presidents of Chambers, J. Makarczyk, P. Kūris, E. Juhász, G. Arestis, A. Borg Barthet and L. Bay Larsen (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 3 December 2008,

after hearing the Opinion of the Advocate General at the sitting on 3 February 2009,

gives the following

Judgment

1 By its appeal, the Commission of the European Communities requests the Court to set aside the judgment of the Court of First Instance of the European Communities in Case T-351/03 *Schneider Electric* v *Commission* [2007] ECR II-2237 ('the judgment under appeal'), in which the Court of First Instance:

— ordered the European Community to make good, first, the expenses incurred by Schneider Electric SA ('Schneider') in respect of its participation in the resumed merger control procedure which followed delivery on 22 October 2002 of the judgments of the Court of First Instance in Case T-310/01 *Schneider Electric* v *Commission* [2002] ECR II-4071 and Case T-77/02 *Schneider Electric* v *Commission* [2002] ECR II-4201('*Schneider I*' and '*Schneider II*') and, second, two thirds of the loss sustained by Schneider as a result of the reduction in the transfer price of Legrand SA ('Legrand') which Schneider had to concede to the transferee in exchange for the postponement of the effective date of sale of Legrand until 10 December 2002;

— dismissed the action as to the remainder;

— ordered the parties to communicate to it, within a three-month period, the assessment of the amount representing the first head of loss, jointly agreed, or failing such agreement, their proposed figures;

— ordered that the amount of the second head of loss be assessed by an expert;

— decided that the amount of compensation due to the applicant as from 10 December 2002, the date of materialisation of the loss related to the actual completion of the transfer of Legrand, was to be reassessed to take account of interest for the period ending on the date of delivery of the judgment determining the amount of the damage, and then increased by default interest as from the latter date until full payment;

— reserved the decision on costs.

I — Legal context

2 Pursuant to Article 2 of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1 and corrigendum OJ 1990 L 257, p. 13), as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1, 'the Regulation'), the compatibility with the common market of concentrations within the scope of the Regulation is to be appraised by the Commission.

3 In accordance with Article 4(1) of the Regulation, such concentrations must be notified to the Commission not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest.

4 Under Articles 6 and 8 of the Regulation:

— the Commission must examine the notification as soon as it is received;

— if it finds that the concentration notified falls within the scope of the Regulation but does not raise serious doubts as to its compatibility with the common market, it is not to oppose it and is to declare it compatible with the common market;

— if, on the other hand, it finds that the concentration notified falls within the scope of the Regulation and raises serious doubts as to its compatibility with the common market, it must initiate proceedings ('the in-depth investigation');

— when it finds that, following modifications by the undertakings concerned where necessary, the concentration no longer raises serious doubts, it may decide to declare the concentration compatible with the common market;

— when it finds that the concentration is not compatible with the common market, it must take a decision making a declaration to that effect;

— in such a case, where a concentration has already been implemented, the Commission may, either in the decision declaring the concentration incompatible or by a separate decision, require the undertakings or assets brought together to be separated or the cessation of joint control or any other action that may be appropriate in order to restore conditions of effective competition.

5 Article 7(1) of the Regulation states that a concentration may not be put into effect either before its notification or until it has been declared compatible with the common market.

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

7 Under Article 10(1), once a concentration has been notified, the Commission's decision either declaring the transaction compatible or initiating the in-depth investigation must be taken within one month at most, starting with the day following the receipt of a notification or, if the information to be supplied with the notification is incomplete, on the day following receipt of the complete information.

8 Paragraphs (2) and (3) of Article 10 provide that, in the context of the in-depth investigation, the Commission must take a decision concerning the compatibility of the transaction within not more than four months of the date on which the investigation is initiated.

9 In accordance with Article 10(5), where the Community judicature gives a judgment which annuls the whole or part of a Commission decision taken under the Regulation, the periods laid down therein are to start again from the date of the judgment.

10 Under Article 10(6), a notified transaction is to be deemed compatible with the common market where the Commission has not taken either a decision to initiate

proceedings by the end of one month following notification or receipt of complete information, or where such proceedings have been initiated, a decision on the compatibility of the transaction within four months following the initiation of those proceedings.

11 Article 18(1) of the Regulation provides that, before taking any decision declaring a concentration to be incompatible, the Commission is required, at every stage of the procedure up to the consultation of the Advisory Committee provided for in Article 19, to give the undertakings concerned the opportunity of making known their views on the objections against them.

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

II — Background to the dispute

13 On 16 February 2001, Schneider and Legrand, the French parent companies of two groups engaged in the production and sale of products and systems in the electrical distribution, industrial control and automation sectors (Schneider) and electrical equipment for low-voltage installations (Legrand), notified the Commission, in accordance with Article 4(1) of the Regulation, of a proposal whereby Schneider would acquire control of Legrand in its entirety by means of a public exchange offer.

14 Considering that the transaction raised serious doubts as to its compatibility with the common market, the Commission initiated the in-depth investigation.

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

16 On 6 August 2001, the Commission des opérations de bourse (French Stock Exchange Commission) announced the final outcome of Schneider's offer. On conclusion of that transaction, Schneider had acquired 98.7% of the shares in Legrand.

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

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

19 Schneider proposed corrective measures to the Commission on a number of occasions.

20 On conclusion of the in-depth investigation, the Commission found that the concentration was incompatible with the common market. In its view, the transaction, first, would create a dominant position as a result of which effective competition would be significantly impeded in various national sectoral markets, namely those of Denmark, Greece, Spain, France, Italy, Portugal and the United Kingdom and, second, that it would strengthen a dominant position on various French sectoral markets.

21 On 10 October 2001, the Commission thus adopted Decision 2004/275/EC declaring a concentration to be incompatible with the common market (OJ 2004 L 101, p. 1, 'the negative decision'), in which it held that the corrective measures proposed by Schneider were not sufficient to resolve the competition problems identified.

22 On 24 October 2001, the Commission notified Schneider of a second statement of objections for the purpose of separating Schneider and Legrand.

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

24 On 23 January 2002, the Court of First Instance dismissed the latter application.

25 On 30 January 2002, the Commission adopted Decision 2004/276/EC requiring undertakings to be separated adopted pursuant to Article 8(4) of Council Regulation (EEC) No 4064/89 (OJ 2004 L 101, p. 134, 'the divestiture decision').

26 That decision required Schneider to divest itself of Legrand within a period of nine months, expiring on 5 November 2002.

27 By documents lodged on 18 March 2002, Schneider brought an action for annulment of the divestiture decision (Case T-77/02), requested the Court of First Instance to

adjudicate on that case under the expedited procedure, and made an application for suspension of the operation of the divestiture decision (Case T-77/02 R).

28 The application for recourse to the expedited procedure was granted in Case T-77/02 by decision notified on 25 March 2002.

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

30 On 3 May 2002, the Court of First Instance granted Schneider's application for Case T-310/01 to be adjudicated under the expedited procedure, since Schneider had confirmed that it would adhere to the abridged version of its application, submitted on 12 April 2002.

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

32 Schneider made preparations for the transfer of Legrand, which was to be carried out in the event of its two actions for annulment being dismissed. For that purpose, it entered, on 26 July 2002, into a sale and purchase agreement with the Wendel-KKR consortium ('Wendel-KKR'). The agreement for transfer was to be implemented no later than 10 December 2002. It contained a clause enabling Schneider, in the event of annulment of the incompatibility decision, to cancel the agreement no later than 5 December 2002, in consideration of payment of compensation for cancellation of EUR 180 million.

33 On 22 October 2002 the Court of First Instance annulled the negative decision by its judgment in *Schneider I* on the grounds of errors of analysis and errors in the assessment of the impact of the transaction on the national sectoral markets outside France and breach of the rights of the defence vitiating the analysis of the impact of the transaction on French sectoral markets and of the corrective measures proposed by Schneider.

34 With regard to national sectoral markets outside France, the Court of First Instance held, in particular, that the Commission had overestimated the economic power of the new entity resulting from the concentration and, on certain markets, had underestimated the economic power of two of the entity's main competitors, thereby correspondingly overestimating the new entity's strength.

35 With regard to the French sectoral markets affected by the transaction, the Court of First Instance ruled on Schneider's plea that the Commission had infringed the rights of the defence in the course of the in-depth investigation.

36 In that regard, the Court of First Instance held that it was not apparent on reading the statement of objections of 3 August 2001 that it dealt with sufficient clarity or precision with the strengthening of Schneider's position vis-à-vis French distributors of low-voltage electrical equipment as a result not only of the addition of Legrand's sales on the markets for switchboard components and panel-board components but also of Legrand's leading position in the segments for ultraterminal electrical equipment.

37 It also observed that the general conclusion in the statement of objections listed the various national sectoral markets affected by the concentration, without demonstrating that the position of one of the two undertakings on a given product market would in any way buttress the position of the other party on another sectoral market.

38 The Court of First Instance went on to conclude that the statement of objections had not permitted Schneider to assess the full extent of the competition problems to which the Commission claimed the concentration would give rise at distributor level on the French market for low-voltage electrical equipment.

39 It held that Schneider was thus not afforded the opportunity properly to challenge the substance of the Commission's argument or to submit, properly and in good time, proposals for appropriate corrective measures.

40 By the *Schneider II* judgment, the Court of First Instance annulled the divestiture decision on the ground that it was a measure implementing the annulled negative decision.

41 The Commission did not appeal against the *Schneider I* and *Schneider II* judgments, which therefore became res judicata.

42 By letter of 13 November 2002, the Commission informed Schneider that the concentration was liable to undermine competition in the French sectoral markets, by reason of the significant overlapping of the market shares of Schneider and Legrand, the end of their long-standing rivalry, the importance of the brands owned by the Schneider-Legrand entity, its power over wholesalers and the inability of any competitor to replace the competitive pressure exerted by Legrand before the transaction was effected.

43 According to the Commission, the transaction would result, in each of the affected markets on which one or other of the parties held a dominant position before the transaction, in the elimination of the only immediate competitor in a position to

exercise any competitive restraint on the dominant undertaking owing to the support provided to it by the very strong positions held by the same group in other segments of the same sector.

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

45 On 15 November 2002, the Commission published in the *Official Journal of the European Communities* of 15 November 2002 (OJ 2002 C 279, p. 22) a notice concerning recommencement of the merger control procedure, stating that, under Article 10(5) of the Regulation, the investigation period would run from 23 October 2002, the day following delivery of the *Schneider I* judgment, inviting interested third parties to submit any observations to it.

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

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

48 In a letter of 2 December 2002, Schneider responded that, at such an advanced stage in the proceedings, the Commission's attitude made further discussion pointless and that,

to bring to an end uncertainty that had lasted for more than a year, it had decided to sell Legrand to Wendel-KKR.

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

50 By decision of 4 December 2002, the Commission initiated the in-depth investigation on the ground that the corrective measures proposed by Schneider did not make it possible, at the investigation stage, to eliminate the remaining serious doubts as to the compatibility of the transaction, having regard to its effects on the French sectoral markets identified in the negative decision.

51 On 11 December 2002, Schneider confirmed to the Commission that the transfer to Wendel-KKR of its holding in Legrand had taken place on 10 December 2002.

52 By letter of 13 December 2002, the Commission informed Schneider that the investigation procedure had been closed as being devoid of purpose.

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

54 By orders of 29 October 2004 in Cases T-310/01 DEP and T-77/02 DEP *Schneider Electric* v *Commission*, the Court of First Instance set the amount of costs that Schneider could recover from the Commission at EUR 419595.32in Case T-310/01 and EUR 426275.06in Cases T-77/02 and T-77/02 R.

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

56 On 12 April 2006, Schneider appealed against that order.

57 The appeal was dismissed by order of the Court of Justice of 9 March 2007 in Case C-188/06 P *Schneider Electric* v *Commission*.

III — Procedure before the Court of First Instance and the judgment under appeal

58 On 10 October 2003, Schneider brought an action before the Court of First Instance seeking compensation for the damage it claimed it had sustained as a result of the unlawfulness of the procedure examining the compatibility of the concentration with the common market.

59 It claimed that the Court should:

— primarily:

— order the Community to pay it the sum of EUR 1663734716.76, subject to a reduction of the recoverable costs determined by the taxation orders made in Cases T-310/01 DEP and T-77/02 DEP, and to an increase by reason, first, of interest accruing from 4 December 2002 until full payment, at an annual rate of 4%, and, second, the amount of taxation for which Schneider will be liable when receiving the compensation awarded to it;

— in the alternative:

— declare the action admissible;

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

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

— order the Commission to pay all the costs.

60 On 11 December 2003, the Court of First Instance decided to limit the scope of the pleadings to the principle of the Community's non-contractual liability and the method for evaluation of the loss.

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

62 In the judgment under appeal, the Court of First Instance came to the decision described in paragraph 1 of this judgment.

63 In paragraphs 152 and 156 of the judgment under appeal, it was held that the infringement of the rights of the defence found in the *Schneider I* judgment concerning the French sectoral markets constituted a manifest and serious breach of the rule of law found in Article 18(1) and (3) of the Regulation, which is intended to confer rights on individuals.

64 In paragraph 155 of the judgment under appeal, the Court dismissed the Commission's argument concerning the particular constraints to which Commission staff are objectively subject during the in-depth investigation:

'The defendant's argument as to the difficulty inherent in undertaking a complex market analysis under a very rigid time constraint is irrelevant, since the fact giving rise to the damage under consideration here is not the analysis of the relevant markets contained in the statement of objections or the incompatibility decision but the omission from the statement of objections of a reference which was of the essence as regards its consequences and from the operative part of the [negative] decision, which did not involve any particular technical difficulty or call for any additional specific examination that could not be carried out for reasons of time and the absence of which

cannot be attributed to a fortuitous or accidental drafting problem that could be compensated for by a reading of the statement of objections as a whole.'

65 In paragraph 157 of that judgment, it was found that the breach of the rights of defence in question constituted a fault on the part of the Commission such as to cause the Community to incur non-contractual liability.

66 In its consideration of the question of the existence of a loss and a causal link between the Commission's fault and the loss, the Court stated, in paragraph 269 of the judgment under appeal, that whilst the sufficiently serious breach of Schneider's rights of defence had the effect of rendering the negative decision unlawful, it did not thereby follow that, in the absence of such a breach, the transaction would necessarily have been declared compatible with the common market.

67 The Court concluded, in paragraph 278 of the judgment under appeal, that the defect identified in the negative decision did not deprive Schneider of any right to a decision that the transaction was compatible such as to justify treating all the financial consequences of the loss of that right and, in particular, those deriving from the obligation to dispose of the assets in Legrand as damage attributable to the Community.

68 In paragraph 279 of the judgment under appeal, the Court held that Schneider could not claim that it had suffered harm equal to the entire loss of value of the assets in Legrand held by it as at 10 October 2001, in the absence of a sufficiently direct causal link between that harm and the infringement giving rise to liability on the part of the Community.

69 In paragraphs 288 and 316, on the other hand, the Court of First Instance accepted that there was a sufficiently close causal link between the unlawful act committed and two types of damage suffered by Schneider, namely:

— the costs incurred by the undertaking in participating in the resumed merger control procedure after the annulments pronounced by the Court on 22 October 2002;

— the reduction in the transfer price which Schneider had had to concede to the purchaser of the assets in Legrand in order to secure an agreement that the date on which the disposal was to take effect would be deferred for such time as might be necessary to ensure that the proceedings then pending before the Community judicature would not become devoid of purpose before reaching their conclusion.

70 With regard to the costs incurred in respect of the resumption of the merger control procedure, namely consultancy fees and administrative expenses of various kinds, it was stated, in paragraph 301, that if the objection relating to the buttressing of market positions had been set out in the statement of objections of 3 August 2001, Schneider would admittedly have had to give its views on that subject and, if appropriate, prepare adequate corrective measures before the Commission adopted its decision on the compatibility of the transaction, as it had to do after the annulment of that decision and subsequent resumption of the investigation of the transaction.

71 However, it was held, also in paragraph 301 of the judgment under appeal, that the fact of resuming, on new legal bases, an administrative procedure suspended 12 months earlier necessarily represented, for Schneider, an incomparably greater burden than that which the undertaking and its advisers, who were already fully involved in meetings and contacts with the relevant Commission staff, would have had to bear in responding to the same objection during the initial procedure.

72 With regard to the reduction in the purchase price which Schneider had to concede, the Court of First Instance noted, in paragraph 308, that Schneider had found itself constrained both to negotiate and to conclude, on 26 July 2002, the agreement for the transfer of Legrand and to put back the effective date of that transfer to 10 December 2002.

73 In paragraph 311, the Court of First Instance held that the obligation to defer effective completion of the sale of Legrand had necessarily prompted Schneider to grant Wendel-KKR a reduction in the transfer price in relation to the price it would have obtained in the event of a firm sale accomplished in the absence of a negative decision tainted by illegality.

74 In paragraph 312, the Court of First Instance accepted that deferral of the completion of the sale until 10 December 2002 meant that Wendel-KKR had to be paid for accepting the risk of depreciation of the assets in Legrand, arising from the possibility of an adverse variation in the prices of industrial stocks over the period of deferral.

75 In paragraph 322 of the judgment under appeal, the Court of First Instance took the view that the loss corresponding to the reduction in the transfer price was equal to the difference between the transfer price actually agreed and the price that Schneider could have obtained if, at the end of the first investigation of the transaction, on 10 October 2001, it had been given a lawful decision as to the compatibility of the transaction.

76 In paragraph 329, however, the Court of First Instance pointed out that Schneider, although acquiring control of Legrand in a manner that was entirely lawful had nevertheless assumed the risk that the investigation of the transaction would result in a decision declaring the transaction to be incompatible with the common market and in the imposition of a corresponding obligation for the assets of undertakings already merged to be separated.

77 In paragraph 330, the Court of First Instance held that, in view of the extent of the merger carried out and the appreciable increase of economic strength accruing to the only two protagonists present on the French low-voltage electrical equipment sectoral markets, Schneider could not have been unaware that the merger at the very least entailed the risk of creating or strengthening a dominant position in a substantial part of the common market and that, accordingly, the transaction would be prohibited by the Commission.

78 It concluded from that, in paragraph 334, that Schneider was responsible for one third of the loss connected with the reduction in the transfer price granted.

79 In those circumstances, the Court of First Instance held, in paragraph 335, that the Community would be required to make good only two thirds of that loss.

80 Finally, in paragraphs 342 and 344 to 346, the Court of First Instance decided that the compensation due to Schneider with effect from 10 December 2002, the date of materialisation of the loss related to the actual transfer of Legrand, would be adjusted by means of interest adjusted for the period ending on the date of delivery of the judgment determining the amount of the damage, and then increased by default interest as from the latter date until full payment.

IV — Forms of order sought

81 The Commission claims that the Court should set aside the judgment under appeal and order Schneider to pay the costs.

82 Schneider contends that the Court should dismiss the appeal and order the Commission to pay the costs.

V — The grounds of appeal

83 The Commission formally raises seven grounds of appeal in support of its action. These may, in essence, be regrouped into five grounds of appeal.

84 With its grounds of appeal, the Commission complains that the Court of First Instance, wrongly:

— in paragraph 155 of the judgment under appeal, held there to be an 'omission' in the statement of objections of 3 August 2001 of the objection relating to the buttressing of market positions and held that the formulation of the objection concerned did not involve 'any particular technical difficulty';

— in paragraph 156 of the judgment under appeal, accepted that there was a sufficiently serious breach, on the part of the Commission, of a rule of law intended to confer rights on individuals;

— in paragraph 316 of the judgment under appeal, accepted that there was a direct causal link between the Commission's wrongful act and the damage suffered by Schneider as a result of the reduction in the transfer price of Legrand conceded in consideration of the deferral until 10 December 2002 of the actual completion of the sale agreed on 26 July 2002;

— in paragraph 288 of the judgment under appeal, identified a head of damage not put forward by Schneider, namely a price reduction granted in order to obtain a deferral of the transfer of Legrand until 10 December 2002;

— made an error of law in awarding, in paragraphs 345 and 346 of the judgment under appeal, with regard to the loss related to the reduction in the transfer price, compensatory interest from 10 December 2002 until the date of delivery of the judgment determining the amount of the damage suffered, when such interest can be awarded only in exceptional situations.

VI — The appeal

A — *First ground of appeal, alleging that the Court of First Instance incorrectly found there to be an 'omission' in the statement of objections of 3 August 2001 of the buttressing objection and incorrectly held that the formulation of that objection did not involve 'any particular technical difficulty'*

1. Arguments of the parties

85 The Commission recalls that at no stage in the proceedings before the Court of First Instance did it deny that it had infringed Schneider's right to be heard during the investigation of the transaction. It states, however, that it formally disputes that the irregularity found causes the Community to incur non-contractual liability.

86 It sub-divides its first ground of appeal into four parts.

87 It submits that, in finding, in paragraph 155 of the judgment under appeal, there to be an 'omission' in the statement of objections of 3 August 2001 of the objection relating to the buttressing of market positions ('the buttressing objection') and, in holding, also in paragraph 155 of that judgment, that the formulation of the objection concerned did not involve any particular technical difficulty, the Court of First Instance:

— disregarded the force of res judicata attaching to the *Schneider I* judgment;

— made materially inaccurate findings of fact;

— distorted the clear sense of the evidence;

— infringed its obligation to state reasons.

88 In actual fact, according to the Commission, the Court of First Instance merely stated, in paragraph 445 of the *Schneider I* judgment, that the buttressing objection had not been set out with 'sufficient clarity or precision'. By then criticising the Commission for concluding the statement of objections 'without demonstrating that the position of one of the notifying parties on a given product market would in any way buttress the position of the other party', the Court merely stated that the Commission had not, on conclusion of its analysis, sufficiently explained that specific objection.

89 The Commission submits that it must nonetheless be concluded that the Court of First Instance considered that objection to have at the very least been implicitly formulated in the body of the statement of objections.

90 It claims that a similar conclusion may be drawn from a second inconsistency between the *Schneider I* judgment and the judgment under appeal, which, in paragraph 155, explicitly held there to be no reference to the objection, an absence which could not be compensated for by 'a reading of the statement of objections as a whole'.

91 A third instance of inconsistency between the two judgments consists, according to the Commission, in their differing appraisals of the consequences for Schneider of the defects in the statement of objections.

92 In that regard, the Commission argues that, in paragraph 453 of the *Schneider I* judgment, the Court of First Instance held that the way the statement of objections was drafted did not permit Schneider to assess 'the full extent' of the competition problems identified on the French market for low-voltage electrical equipment, whilst, in paragraph 152 of the judgment under appeal, it was held that Schneider 'could not ascertain' that, if it did not submit appropriate corrective measures to deal with the support between positions created by the concentration, it had 'no chance' of securing a declaration that the transaction was compatible with the common market.

93 According to the Commission, it follows from a comparison of the two judgments that, in the *Schneider I* judgment, the Court found that it had been possible for Schneider to ascertain that buttressing of market positions represented a difficulty from the point of view of competition but that it had not been able to gauge the full extent of the obstacle it represented because it had not been explicitly formulated in the conclusion to the statement of objections. By contrast, in the judgment under appeal, the Court found that it had never been possible for Schneider to become aware of the problem and thus it had never known that it should propose suitable remedies.

94 The Commission also asserts that, before the Court of First Instance, it had referred to the difficulty inherent in undertaking a complex market analysis in an already complex case under the very rigid time constraints imposed by the Regulation. It had pointed out, in particular, that the drafting of a statement of objections is an extremely delicate

exercise which must be completed sufficiently quickly after the initiation of the procedure and the end of the investigation in order to allow the parties to submit their observations.

95 The Commission complains that the Court of First Instance brushed aside these arguments, deciding that they were merely an explanation of the difficulties associated with complex market analysis and that accordingly they were irrelevant, as the fact giving rise to the damage was in reality the omission, in the statement of objections, of a reference which did not involve any particular technical difficulty or call for any additional specific examination that could not be carried out for reasons of time and the absence of which cannot be attributed to a fortuitous or accidental problem.

96 The Commission submits that those remarks of the Court of First Instance, inasmuch as they are findings of fact, are manifestly wrong in the light of the material submitted for the Court's appraisal during the proceedings and that they show that the clear sense of the evidence was distorted.

97 In any event, the Court of First Instance failed to state reasons in support of its finding that a reference to the buttressing objection was omitted and its finding that reference to that objection did not involve any particular technical difficulty.

98 The judgment under appeal should, in fact, be set aside in its entirety on the basis of the first ground of appeal alone.

99 Schneider contends that this ground of appeal should be rejected.

100 It submits that it is inadmissible, since the Commission:

— challenges assessments of facts;

— puts forward new arguments, according to which, first, as the Court of First Instance implicitly found in the *Schneider I* judgment, the buttressing objection had been at the very least implicitly formulated in the statement of objections of 3 August 2001 and, second, the Court of First Instance held, also in *Schneider I*, that it had been possible for Schneider to ascertain that the buttressing of market positions represented a difficulty from the point of view of competition;

— does not explain in which respect its ground of appeal is based on a distortion of the clear sense of the evidence and an infringement of the obligation to state reasons.

101 In any event, Schneider submits that the ground of appeal is unfounded.

2. Findings of the Court

(a) The first three parts of the first ground of appeal, alleging disregard of the principle of res judicata attaching to the *Schneider I* judgment, materially incorrect findings of fact and distortion of the clear sense of the evidence

102 The principle of res judicata extends to the matters of fact and law actually or necessarily settled by a judicial decision (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 44 and the case-law cited).

103 Moreover, it is clear from Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice that the Court of First Instance has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. The Court of Justice thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced to it. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice (see, inter alia, Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraph 29).

104 In other words, the finding of facts and the appraisal of evidence by the Court of First Instance constitute points of law subject to review by the Court of Justice on appeal where the substantive inaccuracy of the findings of the Court of First Instance is apparent from the documents submitted to it or the clear sense of the evidence has been distorted (see, to that effect, Case C-119/97 P *Ufex and Others* v *Commission* [1999] ECR I-1341, paragraph 66).

105 By the first part of the ground of appeal under consideration, based on disregard for the principle of res judicata attaching to the *Schneider I* judgment, the Commission seeks to show that, in the judgment under appeal, the Court of First Instance accepted matters of fact at variance with those actually or necessarily settled by the *Schneider I* judgment, which had become res judicata.

106 By the second and third parts of that same ground of appeal, the Commission in essence seeks to show, in the light of the case-law referred to above:

— the substantive inaccuracy of the findings made by the Court of First Instance, in the judgment under appeal, in relation to the facts actually accepted in the *Schneider I* judgment, an inaccuracy which is immediately apparent from the wording of the *Schneider I* judgment;

— the distortion by the Court of First Instance, in the judgment under appeal, of the clear sense of the *Schneider I* judgment considered as evidence which must, if necessary, be interpreted to determine the facts to be examined for the purpose of deciding whether the Community has incurred non-contractual liability.

107 The first three parts of the first ground of appeal thus require the following issues to be considered:

— what were the matters of fact on which the Court of First Instance, in paragraphs 152 and 156 of the judgment under appeal, based its finding of a 'manifest and serious breach' by the Commission of the limits to which it was subject in respect of Schneider's rights of defence;

— whether those matters of fact were settled in the *Schneider I* judgment;

— whether, as they were relied on in the judgment under appeal, they are in contradiction with those settled in the *Schneider I* judgment.

108 It is therefore appropriate to examine together the arguments put forward in respect of those three parts of the first ground of appeal and to do so in relation to the question whether in the statement of objections there was a reference to the buttressing objection and then in relation to the question whether there were difficulties such as to prevent the objection concerned from being formulated sufficiently clearly and precisely in the statement of objections.

109 It must nevertheless be observed that the second and third parts overlap with the first part in so far as they concern matters of fact which, in the following analysis, will be shown to have been actually or necessarily settled by the *Schneider I* judgment. Those parts retain an independent existence only in so far as they concern matters of fact which prove not to have been settled by the *Schneider I* judgment.

(i) Whether there was a reference in the statement of objections of 3 August 2001 to the buttressing objection

110 In paragraph 140 of the judgment under appeal, the Court of First Instance states that Schneider maintained before it that the Commission had not articulated sufficiently clearly and precisely in its statement of objections of 3 August 2001 the objection to the compatibility of the transaction based on the buttressing of positions on the French sectoral low-voltage electrical equipment wholesale markets.

111 In its assessment, the Court of First Instance first sets out, in paragraphs 145 to 150 of the judgment under appeal, the substance and scope of the Commission's obligations under Article 18 of the Regulation. It concludes, in paragraph 151 of the judgment, that Schneider is invoking breach of a rule intended to confer rights on individuals under the system of non-contractual liability of the Community.

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

113 By employing the formulation in paragraph 152 of the judgment under appeal, which finds one of the conditions for the Community to incur non-contractual liability to be met by referring to what 'is apparent from the *Schneider I* judgment', the Court of First Instance, at that stage of its reasoning, necessarily bases its characterisation of a 'manifest and serious breach' on the analysis set out in paragraphs 440 to 461 of the *Schneider I* judgment, in the terms used therein, as regards the circumstances in which the statement of objections was produced.

114 With regard to the drafting of the statement of objections of 3 August 2001, the Court of First Instance thus takes into account the following matters of fact, as they were actually established and appraised in paragraphs 445 and 453 of the *Schneider I* judgment:

— the statement of objections '[did not deal] with sufficient clarity or precision with the strengthening of Schneider's position vis-à-vis French distributors of low-voltage electrical equipment as a result not only of the addition of Legrand's sales on

the markets for switchboard components and panel-board components but also of Legrand's leading position in the segments for ultraterminal electrical equipment';

— 'the general conclusion in the statement of objections lists the various national sectoral markets affected by the concentration, without demonstrating that the position of one of the notifying parties on a given product market would in any way buttress the position of the other party on another sectoral market';

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

115 Thus, by its reference to the *Schneider I* judgment, the Court of First Instance, in the judgment under appeal, far from founding its reasoning simply on an omission of any reference in the statement of objections of 3 August 2001 to the buttressing objection, specifically takes into account, as it had done in the *Schneider I* judgment, the fact that the issue of the buttressing of market positions was not addressed with sufficient clarity or precision in the body of the statement of objections and the absence of an express reference to that issue in the general conclusion thereto.

116 In those circumstances, the Court of First Instance cannot be found to have disregarded the principle of res judicata attaching to those matters of fact settled by the *Schneider I* judgment.

117 That conclusion is not invalidated by the fact that, in paragraph 155 of the judgment under appeal, the Court of First Instance, for the purpose of rejecting an argument put forward by the Commission seeking to exempt it from liability, subsequently states that the fact giving rise to the damage is 'the omission from the statement of objections of a reference which was of the essence as regards its consequences and from the operative part of the [negative] decision'. Indeed, taken in the context described above, the phrase

'omission … of a reference which was of the essence' must be understood as referring to the omission of a sufficiently clear and precise reference to the buttressing objection.

118 In any event, the use by the Court of First Instance of the word 'omission' cannot be regarded as having resulted in an allegedly incorrect appraisal, in paragraph 152 of the judgment under appeal, on the part of that Court, according to which Schneider 'could not ascertain that, if it did not submit corrective measures conducive to reducing or eliminating the support between its positions and those of Legrand in the French sectoral markets, it had no chance of securing a declaration that the transaction was compatible with the common market'.

119 In the *Schneider I* judgment, the Court of First Instance sought to verify whether the statement of objections had permitted Schneider to be fully aware that buttressing of market positions could be a ground for a declaration of incompatibility in respect of the concentration, that is to say, a definitive obstacle to it.

120 As is the case when all reference to an objection is omitted, an objection which is not drafted with sufficient clarity and precision and which does not permit, in the words of paragraph 453 of the *Schneider I* judgment, 'the full extent' of certain competition problems to be gauged, prevents the undertakings concerned from realising the critical nature of those problems so far as the outcome of the investigation is concerned.

121 That is why the Court of First Instance found, in paragraphs 455, 456, 458 and 460 of the *Schneider I* judgment, that Schneider:

— had not been 'afforded the opportunity of properly challenging the substance of the Commission's argument that, at distributor level, Schneider's dominant position

would be strengthened in France in the sector for distribution and final panel-board components by Legrand's leading position in ultraterminal equipment';

— '[had] not [been] given a proper opportunity to submit its observations in that regard either in its response to the statement of objections or at the hearing on 21 August 2001';

— had to 'be regarded as not having been afforded the opportunity to submit, properly and in good time, proposals for divestiture sufficiently extensive to provide a solution to the competition problems identified by the Commission on the relevant French sectoral markets';

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

122 The expressions 'not afforded the opportunity', 'was not given [an] … opportunity', '[was] not … afforded', 'was indirectly deprived' convey in that connection the Court of First Instance's finding in the *Schneider I* judgment that it had been impossible for Schneider, by reason of the defect in the statement of objections, to be aware of the decisive nature of the buttressing objection.

123 In those circumstances, when, in paragraph 152 of the judgment under appeal, the Court of First Instance states that '[Schneider] could not ascertain that, if it did not submit corrective measures …, it had no chance of securing a declaration that the transaction was compatible with the common market', it does not make a finding which

is different from that made by the Court of First Instance in the *Schneider I* judgment but is merely expressing the same finding in different words.

124 Nor is the Court of First Instance inconsistent in its findings when, in paragraph 155 of the judgment under appeal, it states that the drafting problem '[could not have been] … compensated for by a reading of the statement of objections as a whole'. The fact that the *Schneider I* judgment took into account the impossibility of ascertaining that the issue of buttressing of market positions was an obstacle presupposes precisely that a reading of the statement of objections as a whole did not compensate for its defective drafting.

125 It follows from the foregoing that the Commission's arguments concerning the presence in the statement of objections of 3 August 2001 of a reference to the buttressing objection cannot be accepted.

(ii) Whether there were difficulties such as to prevent the buttressing objection from being formulated sufficiently clearly and precisely in the statement of objections of 3 August 2001

126 On reading paragraph 437 et seq. of the *Schneider I* judgment, it must be noted, first, that in that judgment the Court of First Instance did not settle the question of fact relating to whether or not the reference in the statement of objections of 3 August 2001 to the buttressing objection involved any 'particular technical difficulty' for the Commission.

127 Second, that issue does not relate to a finding of fact but to an assessment of facts.

128 Therefore, so far as that issue is concerned, the first two parts of the first ground of appeal alleging disregard of the principle of res judicata and substantive inaccuracy of a finding of fact are inoperative.

129 As to the third part of the first ground of appeal, it must be ascertained, on the merits, whether the Court of First Instance's statement that the reference to the buttressing objection did not involve any particular technical difficulty derives from a distortion of the clear sense of evidence.

130 In that regard, it must be held that the reference, in a statement of objections, to an objection such as that relating to the buttressing of market positions, does not require a comprehensive demonstration of the merits of the objection following an exhaustive economic analysis.

131 Such a demonstration, which in the sphere of concentrations may indeed entail significant difficulties, must be completed only at the next stage of the procedure, in light, in particular, of the observations of the undertakings concerned, which have been duly informed of the existence of a competition problem by the statement of objections in order to ensure an effective exercise of their rights of defence.

132 At the stage of the statement of objections, the Commission need merely set out, with sufficient clarity and precision, the problem of buttressing of market positions which may be an obstacle to a declaration that the concentration is compatible with the common market.

133 In the light of those considerations, it must be held that the assessment of the Court of First Instance, according to which the formulation of the buttressing problem did not involve any particular technical difficulty, did not result from a distortion of the clear sense of the evidence before it.

134 It follows from the foregoing that the first three parts of the first ground of appeal must be rejected.

(b) Fourth part of the first ground of appeal, alleging infringement of the obligation to state reasons

135 It is clear from established case-law that the obligation to state reasons does not require the Court of First Instance to provide an account which follows exhaustively and one by one all the arguments put forward by the parties to the case and that the reasoning may therefore be implicit on condition that it enables the persons concerned to know why the Court of First Instance has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review (see, in particular, Joined Cases C-120/96 P and C-121/06 P *FIAMM and Others* v *Council and Commission* [2008] ECR I-6513, paragraph 96 and the case-law cited).

136 In paragraph 152 of the judgment under appeal, with regard to the issue of the reference to the buttressing objection, the Court of First Instance refers to what 'is apparent from the *Schneider I* judgment' in relation to the way in which the statement of objections was drafted.

137 As has been stated in paragraph 114 of this judgment, the Court of First Instance thus refers to facts taken into account in paragraphs 445 and 453 of the *Schneider I* judgment and covered by the first three parts of the first ground of appeal. It thereby makes clear that it bases its characterisation of a 'manifest and serious breach' on those facts.

138 In addition, as is clear from paragraph 117 of this judgment, the Court of First Instance's reference establishes a context which allows the implications of the expression 'omission … of a reference which was of the essence' subsequently used in paragraph 155 of the judgment under appeal to be ascertained.

139 With regard to the finding that the reference to the buttressing objection in the statement of objections did not involve any particular technical difficulty, the Court of First Instance, also in paragraph 155 of the judgment under appeal, points out in essence, with an adequate statement of reasons, the distinction that must be drawn between (i) the substantive analysis of the relevant markets for the purpose of demonstrating incompatibility with the common market and (ii) the mere enunciation, in the statement of objections, of a competition problem which may present, subject to the observations of the undertakings concerned, an obstacle to the concentration being declared compatible with the common market.

140 It follows from the foregoing that the fourth part of the first ground of appeal must also be rejected.

141 Accordingly, the whole of the first ground of appeal must be rejected on its merits and there is no need to adjudicate on its admissibility.

B — *Second ground of appeal, alleging that the Court of First Instance incorrectly held the Commission to have committed a sufficiently serious breach of a rule of law intended to confer rights on individuals*

1. Arguments of the parties

142 The Commission subdivides its second ground of appeal into two parts, alleging, respectively, error in the legal characterisation of the facts and infringement of the obligation to state reasons.

143 In the first part of the second ground of appeal, the Commission accepts that, under the rules governing the non-contractual liability of the Community, where the institution concerned has only considerably reduced, or even no, discretion, the mere infringement of Community law may be enough to establish a sufficiently serious breach of a rule of law intended to confer rights on individuals.

144 It acknowledges that, with regard to application of the right to be heard in accordance with Article 18(1) and (3) of the Regulation, its obligation to formulate the buttressing objection with sufficient clarity and precision was not a matter in respect of which it could exercise a discretion but was merely a matter of applying the relevant procedural rules.

145 It submits, however, that the Court of First Instance should necessarily have taken into account, in addition to the fact that the Commission had reduced, or even no, discretion in relation to Schneider's right to be heard, the complexity of the situations to be regulated, with which the Commission had to deal during the administrative procedure.

146 The Commission points out that, before the Court of First Instance, it argued that the drafting of the statement of objections of 3 August 2001 had been particularly complex, given not only the time constraints to which it was subject but also — and above all — the extent of the competition problems posed by a concentration covering a wide number of national sectoral markets. The articulation with sufficient clarity and precision of each of the objections which the Commission was formulating in respect of each national sectoral market was thus extremely complex from both a conceptual and a drafting standpoint.

147 The buttressing objection itself involved a particular added complication deriving from the fact that its preparation and drafting did not require an analysis of each national sectoral market taken individually, as was the case for the other complaints in the statement of objections, but rather a market-by-market analysis of all the markets for

low-voltage electrical equipment in each Member State, including the sectoral markets in respect of which the transaction did not pose any horizontal competition problem.

148 In order to explain the buttressing objection, which is a complex economic concept, it was necessary to compare the positions of the parties and their competitors on a number of sectoral markets within each Member State and then to examine the structure of distribution and the relations between suppliers and wholesalers in each of the States.

149 The Commission stresses that it is not arguing that it is difficult to establish the merits of the buttressing objection but rather that the enunciation of that objection with sufficient clarity and precision is particularly complex.

150 The Commission notes that, before the Court of First Instance, Schneider had maintained that from the time it notified the transaction it had disputed the existence of such buttressing of market positions. This should have made it less difficult for the Commission to articulate an objection on that point with sufficient clarity and precision. The Commission had responded that that circumstance reduced still further the gravity of the procedural error.

151 The Commission asserts that, since Schneider had itself played down the impact of the problems associated with buttressing, the fact of not having articulated the relevant objection with sufficient clarity or precision could not, in any event, have amounted to a sufficiently serious breach.

152 The Court of First Instance should have accepted in this instance that, in producing under rigid time constraints a statement of objections which was 145 pages long, the

Commission had had to deal with a situation whose complexity precluded a finding of a sufficiently serious breach.

153 In the second part of its second ground of appeal, the Commission maintains that the onus was on the Court of First Instance to set out with particular care the reasons which led it to conclude that the breach found in the *Schneider I* judgment was sufficiently serious.

154 In the Commission's view, however, the Court of First Instance provided virtually no reasoning on that point in the judgment under appeal.

155 The reasoning did not explain why the various constraints invoked did not mitigate the gravity of the breach.

156 In any event, the Commission submits that the Court of First Instance did not sufficiently address the relevant arguments it made before it, which claimed in particular that the Commission:

— had in fact referred to the buttressing problem at several points in the statement of objections;

— had invoked the difficulties associated with the drafting of the statement of objections within a short period and with the complex assessment of both the substantive arguments as a whole, in relation to which the buttressing objection was merely one of a number of relevant factors, and the corrective measures proposed;

— had confirmed that the fact that Schneider had provided the Commission with information showing that the transaction involved no buttressing problem further reduced the seriousness of the procedural error committed;

— had maintained that it could in good faith consider itself entitled to include in the incompatibility decision additional arguments of fact and law concerning the buttressing objection, which had already been identified;

— had argued that the requirement for clarity in the statement of objections in the sphere of concentrations was not at the material time so clearly expressed by the case-law.

157 Schneider contends that the second ground of appeal should be rejected.

158 According to Schneider, the first part thereof is inadmissible since it seeks to reopen assessments of fact and contains a new argument, namely the alleged complexity involved in formulating the buttressing objection.

159 In any event, the ground of appeal under consideration is unfounded.

2. Findings of the Court

(a) First part of the second ground of appeal, alleging an error in the legal characterisation of the facts

160 For the non-contractual liability of the Community to arise, a number of conditions must be met, including, where the unlawfulness of a legal measure is at issue, the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals. As regards that condition, the decisive criterion for establishing that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where that institution has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (Case C-282/05 P *Holcim (Deutschland)* v *Commission* [2007] ECR I-2941, paragraph 47 and the case-law cited).

161 The system of rules which the Court of Justice has worked out in relation to the non-contractual liability of the Community takes into account, where appropriate, the complexity of the situations to be regulated (*Holcim (Deutschland)* v *Commission*, paragraph 50 and the case-law cited).

162 In the present case, it is not disputed that the illegality relied on consists, as the Court of First Instance rightly held in paragraphs 145 to 151 of the judgment under appeal, in the breach of a rule of law intended to confer right on individuals, namely Article 18(3) of the Regulation, which requires the principle of respect for the rights of the defence to be applied.

163 In that connection, it is appropriate to point out, first, that the statement of objections is a document which is essential for the application of that principle.

164 In order to ensure that the rights of the defence may be exercised effectively, the statement of objections delimits the scope of the administrative procedure initiated by the Commission, thereby preventing the latter from relying on other objections in its decision terminating the procedure (*Bertelsmann and Sony Corporation of America* v *Impala*, paragraph 63).

165 For that purpose, Article 18(3) of the Regulation implies that, when the Commission finds during the in-depth investigation, following the statement of objections, that a competition problem which may give rise to a declaration of incompatibility has not been mentioned, or has been inadequately formulated, in the statement of objections, it must either abandon the objection concerned at the stage of its final decision or put the undertakings concerned in a position to submit, before the final decision, all observations on the substantive issues and proposals for relevant corrective measures.

166 Second, the Commission's obligation to formulate the buttressing objection with sufficient clarity and precision resulted, as the Commission acknowledges, from the mere application of the relevant procedural rules and, in relation to Schneider's right to be heard, the margin of discretion was therefore considerably reduced, or even non-existent.

167 The part of the ground of appeal under consideration is based, in the first place, on the complaint that the Court of First Instance did not take into account the complexity of the situation to be regulated in order to exclude the existence of a sufficiently serious breach.

168 This part is thus based on a premiss which calls in question the assessment of the facts made in paragraph 155 of the judgment under appeal, according to which the inclusion of the buttressing objection in the statement of objections of 3 August 2001 did not involve 'any particular technical difficulty': that assessment falls within the jurisdiction of the Court of First Instance.

169 The claim that the clear sense of the evidence was distorted has, however, already been held (in paragraph 133 of this judgment) to be unfounded in relation to the assessment in question.

170 In those circumstances, the Commission's argument concerning the complexity of the situation to be regulated, which it advanced to establish an error in the legal characterisation of the facts, cannot be accepted.

171 The first part of the second ground of appeal is based, in the second place, on the complaint that the Court of First Instance characterised the Commission's conduct as a sufficiently serious breach, whilst Schneider, which itself played down, from the time the transaction was notified, the impact of the problems associated with buttressing, was aware of the competition problem posed, which reduced the gravity of the procedural error.

172 Nevertheless, even assuming that, when it notified the transaction, Schneider did in fact, preventively, assure the Commission that the transaction did not give rise to a problem of such buttressing of market positions, the fact that the reference to an objection on that issue in the statement of objections was insufficiently clear and precise, far from making the undertaking aware of the risk of a declaration of incompatibility, was, on the contrary, liable to confirm it in its view and make it less likely, when preparing its observations, to add additional reasoning and/or propose suitable remedies.

173 It follows from the foregoing that the Court of First Instance did not make an error in the legal characterisation of the facts in finding there to be a sufficiently serious breach without accepting either the complexity of the situation to be regulated or Schneider's knowledge that the transaction was at risk as a result of a problem arising from the buttressing of market positions.

174 It follows that the first part of the second ground of appeal must be rejected on the merits without any need to rule on its admissibility.

(b) Second part of the second ground of appeal, alleging infringement of the obligation to state reasons

175 As is clear from paragraph 135 of this judgment, the obligation to state reasons does not require the Court of First Instance to provide an account which follows exhaustively all the arguments put forward by the parties to the case and it is sufficient that the reasoning, even if implicit, enables the persons concerned to know why their arguments have not been upheld and the Court of Justice to exercise its power of review.

176 In the judgment under appeal, the Court of First Instance, in order to state grounds for its finding of a sufficiently serious breach, points out first, in paragraphs 145 to 150, the importance of the statement of objections with regard to the exercise of the rights of the defence, referring to a number of precedents in the case-law.

177 It thus notes that:

— '[under] Article 18(3) of the regulation[,] … the Commission may base its incompatibility decisions only on objections on which the undertakings concerned have been able to submit their observations';

— '[a]s addressees of decisions of a public authority which affect their interests to an appreciable extent, the undertakings involved in a concentration having Community dimension must be placed in a position where they can make their views

properly known and, to that end, be clearly informed, in due time, of the Commission's main objections to their notified concentration (see, to that effect, Case 17/74 *Transocean Marine Paint* v *Commission* [1974] ECR 1063, paragraph 15, and Case T-87/96 *Assicurazioni Generali and Unicredito* v *Commission* [1999] ECR II-203, paragraph 88)';

— '[t]he statement of objections is of particular importance in that connection, given that it is specifically intended to enable the undertakings concerned to react to the concerns expressed by the regulatory institution, first by giving their views on the matter and, second, by considering whether to propose to the Commission measures intended to correct the negative impact of the notified concentration';

— '[r]espect for that right, which is one of the fundamental rights guaranteed by the Community legal order in administrative procedures, is of particular importance for the control of concentrations between undertakings (see, to that effect, Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14)'.

178 In paragraph 152 of the judgment under appeal, the Court of First Instance then refers to the *Schneider I* judgment in order to assess the consequences, for the exercise of the rights of the defence, of the defective formulation of the statement of objections.

179 It thus takes as its basis the elements relied on by the Court of First Instance in paragraphs 445 and 453 et seq. of the *Schneider I* judgment, namely:

— the statement of objections had not dealt with sufficient clarity or precision with the buttressing objection;

— the general conclusion to the statement of objections had not demonstrated that there was any kind of buttressing of market positions;

— the statement of objections had not afforded Schneider the opportunity of properly challenging the substance of the Commission's argument or of submitting, in good time, proposals for corrective measures.

180 On the basis of those points, the Court, in paragraph 152 of the judgment under appeal (set out in paragraph 112 of this judgment), draws in essence the firm conclusion that Schneider was not put in a position which allowed it to ascertain that a problem of buttressing of market positions could result in the notified transaction being declared incompatible.

181 In paragraph 153 of the judgment under appeal, the Court notes the harmful consequence to which that situation gave rise, pointing out that subsequently the corrective measures proposed by Schneider were not objectively capable of resolving the specific problem of buttressing of positions on the relevant French sectoral markets.

182 Finally, in paragraph 155 of the judgment under appeal, the Court distinguishes in essence between a comprehensive substantive analysis of a competition problem and the enunciation of that problem and concludes that the mere enunciation did not involve any particular difficulty. In doing so, it examines more particularly, in relation to the question as to whether there was a complex situation to be regulated, the condition for a finding of a sufficiently serious breach.

183 It must be held that, with all of those considerations, the Court of First Instance:

— enabled the Commission to know why it held there to be a sufficiently serious breach and the Court of Justice to exercise its power of review;

— provided the Commission with explicit and implicit answers to the arguments raised by it.

184 It follows that the second branch of the second ground of appeal must be rejected.

185 The second ground of appeal must therefore be rejected in its entirety.

C — *Third ground of appeal, alleging that the Court of First Instance incorrectly held there to be a direct causal link between the Commission's wrongful act and the loss suffered by Schneider as a result of the reduction in the transfer price of Legrand*

1. Arguments of the parties

186 The third ground of appeal is broken into five parts which allege that, by holding there to be a direct causal link between the Commission's wrongful act and the loss suffered by Schneider as a result of the reduction in the transfer price of Legrand conceded in consideration for the deferral until 10 December 2002 of effective completion of the sale agreed on 26 July 2002, the Court of First Instance:

— made materially inaccurate findings of fact in order to decide, first, that Schneider had been obliged to conclude negotiations on the resale and transfer price of Legrand on 26 July 2002, second, that the date of deferral of 10 December 2002 agreed for completion of the sale fell sufficiently beyond the foreseeable date of delivery of the *Schneider I* judgment to allow Schneider to ensure that it would still be possible to secure re-examination of the transaction by the Commission on the basis of a new proposal for corrective measures and, third, that there was a causal link between the sufficiently serious breach and the reduction in the transfer price alleged by Schneider;

— also distorted the clear sense of the evidence in order to arrive at its decision on those three points;

— made an error in the legal characterisation of the facts;

— vitiated its decision by contradictory reasoning, in view of the analysis in paragraphs 260 to 286 of the judgment under appeal, which had initially led the Court of First Instance to conclude that there was no sufficiently close causal link between the Commission's unlawful act and the total loss of value of the assets concerned between the time of their acquisition by Schneider and their subsequent disposal;

— made materially inaccurate findings of fact and errors of law in order to arrive at its decision that Schneider had not contributed to its total loss, when a different conclusion was called for, since, first, Schneider was in a position to appreciate the competition problems necessarily posed by the buttressing of market positions to which the transaction gave rise, second, it had withdrawn its application for suspension of the divestiture decision and had not subsequently brought an action for interim relief concerning the obligation to sell Legrand and, third, had decided to transfer Legrand on a date on which it was under no obligation to do so.

187 In support of its third ground of appeal, the Commission points out, inter alia, that, following the *Schneider I* and *Schneider II* judgments and, in particular, the annulment of the divestiture decision which resulted from them, Schneider, on 10 December 2002, was not obliged to transfer Legrand, 'the condition sine qua non of the loss in question'.

188 Schneider submits that the first three parts of the third ground of appeal are inadmissible on the ground that they amount to reopening findings of fact made in the judgment under appeal. The fifth part is also inadmissible, since the arguments put forward in it are raised for the first time at this stage in the dispute.

189 As to the remainder, it contends that the arguments advanced in the third ground of appeal are unfounded or inoperative.

2. Findings of the Court

190 It is appropriate to start by examining the third and fifth parts of the third ground of appeal together, since they concern the effect of the actual transfer of Legrand, which took place on 10 December 2002.

(a) Admissibility

191 When the Court of First Instance has found or assessed the facts, the Court of Justice has jurisdiction under Article 225 EC to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them (see, inter alia, *Bertelsmann and Sony Corporation of America* v *Impala*, paragraph 29, and Case C-510/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-1843, paragraph 105).

192 So far as the non-contractual liability of the Community is concerned, the question as to whether there is a causal link between the wrongful act and the damage, a condition for that liability to be incurred, is a question of law which, as a consequence, is subject to review by the Court of Justice.

193 In those conditions, the third part of the third ground of appeal is admissible, inasmuch as (i) the very thing it seeks is a review of the Court of First Instance's legal characterisation of the facts in holding there to be a direct causal link between the Commission's unlawful act and the loss claimed by Schneider and (ii) as will be shown below, that review can be carried out in the present case without calling in question the relevant findings and assessments of facts.

194 Moreover, contrary to Schneider's assertion, the argument in the fifth part that Schneider had decided to decided to transfer Legrand on a date on which it was under no obligation to do so is not raised for the first time on appeal.

195 In its rejoinder lodged in the proceedings before the Court of First Instance, the Commission, when it disputed the existence of a causal link, expressly argued that:

— the Commission's decision to re-open the in-depth investigation following the *Schneider I* and *Schneider II* judgments did not make the sale inevitable;

— the Commission did not require Schneider to dispose of its shares, especially since Schneider had the possibility of exercising the cancellation clause it had negotiated so as not to complete the transfer;

— it was as a result of its own decision not to propose appropriate corrective measures to remedy the problems to which the transaction gave rise in France that Schneider chose to go through with the transfer of Legrand and not as a result of any wrongful act on the part of the Commission.

196 In those circumstances the fifth part of the third ground of appeal is admissible in so far as it argues that Schneider had chosen to dispose of Legrand on a date on which it was under no obligation do so.

(b) Substance

197 In paragraph 303 of the judgment under appeal, the Court of First Instance states that it must consider whether the unlawfulness of the negative decision resulted in a reduction in the figure at which Schneider's shareholding in Legrand was valued in the sale and purchase agreement.

198 In paragraphs 315 and 316 of the judgment under appeal, it concludes that:

— the breach of the rights of the defence vitiating the negative decision must be regarded as being sufficiently directly linked to the deferral to 10 December 2002, in the sale and purchase agreement, of the final date for completion of the Legrand sale, because that deferral was essential to enable Schneider properly to exercise the right available to all companies in its position to obtain a lawful decision as to the compatibility with the common market of a duly notified concentration and, possibly, to be heard in a procedure offering it the requisite safeguards;

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

199 In order to arrive at that conclusion, the Court of First Instance, in paragraphs 304 to 312 of the judgment under appeal relies essentially on the following elements:

— the commencement of negotiations for the transfer of Legrand and conclusion of the sale and purchase agreement on 26 July 2002 both derived directly from the negative decision, which, although unlawful, produced full legal effects until its annulment by the *Schneider I* judgment on 22 October 2002;

— as a result of that decision, Schneider was obliged to commence and conclude negotiations for the transfer, even before delivery of the judgment on its application for the annulment of that decision;

— Schneider was compelled, because of the existence of the negative decision, to fix a price for the transfer in the sale and purchase agreement concluded on 26 July 2002 and to make certain that it would be able to suspend effective completion of the transfer until 10 December 2002;

— that date fell sufficiently beyond the foreseeable date of delivery of the *Schneider I* judgment to enable Schneider both to obtain confirmation, in the event of dismissal of its application for annulment, of the lawfulness of the negative decision or, in the contrary case of annulment, to ensure that it would still be possible to secure re-examination of the transaction by the Commission on the basis of a new proposal for corrective measures, with a view to a final decision giving a lawful ruling as to the compatibility of the transaction with the common market;

— that obligation to defer effective completion of the sale necessarily prompted Schneider to offer to sell to the purchaser at a lower price than it would have obtained in the event of a firm sale accomplished in the absence of a negative decision tainted by illegality;

— deferral of effective completion of the sale until 10 December 2002 meant that the purchaser had to be paid for accepting the risk of depreciation of the assets in Legrand, if only because of the possibility of an adverse variation in the prices of industrial stocks during the period between signature of the sale and purchase agreement and the final date agreed between the parties for the sale to take effect.

200 As at 26 July 2002, the date on which Schneider concluded an agreement with Wendel-KKR to sell Legrand pursuant to which the transfer was to be implemented no later than 10 December 2002, subject to Schneider's option to cancel the agreement in consideration of payment of compensation for cancellation of EUR 180 million, Schneider was required under the divestiture decision to enter into a sale procedure.

201 It must nevertheless be noted, (i) that by 26 July 2002, following Schneider's application for interim relief (which it subsequently withdrew), the Commission had extended until 5 February 2003 the period initially due to end on 5 November 2002 for the divestiture and (ii) that the Court of First Instance, which had agreed to adjudicate under the expedited procedure, annulled the negative decision on 22 October 2002 by its judgment in *Schneider I*, before the end of the period fixed by the agreement for completion of the transfer.

202 Against that background, Schneider decided not to exercise the cancellation option within the period expiring on 5 December 2002 and thus to allow completion of the transfer to take effect on 10 December 2002.

203 It is apparent from the documents before the Court that Schneider's decision was based essentially on its fear that, on resumption of the in-depth investigation, it would not

obtain, even following a proposal for corrective measures, a decision upholding the compatibility of the concentration, although:

— the risk of a decision of incompatibility with the common market is inherent in every merger control procedure, either initially or, following the annulment of an initial incompatibility decision, where the administrative procedure is resumed;

— an incompatibility decision remains in any event subject to review by the Community judicature.

204 The normal legal consequence of annulment of the negative decision and the divestiture decision would, however, have been that Schneider participated in the resumed in-depth investigation until its conclusion, at which point, there would have been two possible outcomes, as the Commission has in substance argued in its appeal:

— either a decision finding the concentration to be compatible would have been adopted, in which case Schneider would not have been required to transfer Legrand and would thus not have been subject to the price reduction claimed;

— or a further incompatibility decision and divestiture decision would have been adopted, in which case the transfer would have been the legal consequence of the incompatibility found and would thus not have been the cause of damage to be compensated, since such a transfer is among the risks normally assumed by an undertaking which exercises the option provided for in Article 7(3) of the Regulation to implement a concentration through a public bid before the Commission has given a decision on the transaction concerned.

205 It is therefore apparent that the Court of First Instance did not draw its findings to their full conclusion and made an error in the legal characterisation of the facts, since the direct cause of the damage claimed was Schneider's decision, which it was not obliged to take under the sale procedure entered into in the circumstances referred to above, to allow the transfer of Legrand to take effect on 10 December 2002.

206 That conclusion is not called in question by the fact that, in making that choice, Schneider was at risk of having to pay a penalty of EUR 180 million. That risk derived from the sale agreement which Schneider had entered into in the circumstances outlined above.

207 In conclusion, the third ground of appeal must be accepted and it is not necessary to consider either the remainder of the third and fifth parts of that ground of appeal or the first, second and fourth parts thereof.

208 It follows from the foregoing that, without it being necessary to consider the fourth and fifth grounds of appeal relating to identification of a head of loss not invoked by Schneider and to the award of compensatory interest from 10 December 2002 on the loss associated with the reduction in the transfer price, the judgment under appeal must be set aside in so far as it:

— ordered the Community to make good two thirds of the loss claimed by Schneider as a result of the reduction in the transfer price of Legrand, which Schneider conceded to the transferee in exchange for the postponement of the effective date of sale until 10 December 2002;

— ordered the amount of that head of loss to be assessed by an expert;

— awarded interest on the compensation corresponding to that head of loss.

209 The remainder of the appeal must be dismissed.

VII — Consequences of the judgment under appeal being set aside in part

210 Under the first paragraph of Article 61 of the Statute of the Court of Justice, if the appeal is well founded, the Court of Justice is to quash the decision of the Court of First Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

211 In the present case, the state of the proceedings permits final judgment to be given on Schneider's application for damages.

A — *Loss represented by the expenses incurred by Schneider in respect of its participation in the resumed merger control procedure*

212 By the judgment under appeal, the Community was ordered to make good the loss represented by the expenses incurred by Schneider as a result of its participation in the resumed merger control procedure which followed delivery of the *Schneider I* and *Schneider II* judgments.

213 The grounds of appeal put forward by the Commission to challenge that order have been rejected.

214 Accordingly, the amount of the loss in question must be determined.

215 In its application for compensation, Schneider claims additional costs of EUR 2107619.18, arising mainly from assistance provided by its legal, economic and banking consultants.

216 As has already been stated in paragraph 320 of the judgment under appeal, in order to determine the amount of compensation the Commission must pay to Schneider, it will be necessary to deduct from the sum of those costs:

— the total costs incurred by Schneider in Cases T-310/01, T-77/02 and T-77/02 R;

— the fees of legal, tax and banking consultants and other administrative costs incurred in carrying out the divestiture in accordance with the conditions laid down by the Commission;

— the costs that Schneider would necessarily have incurred in respect of the corrective measures relating to the buttressing of market positions which it would in any event have had to propose before the adoption of the negative decision, if that decision had been adopted without any breach of its rights of defence.

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

B — *Loss corresponding to the reduction in the transfer price of Legrand conceded by Schneider*

218 The judgment under appeal ordered the Community to make good two thirds of the loss represented by the reduction in the transfer price of Legrand, which Schneider conceded to the transferee in exchange for postponement of the effective date of sale until 10 December 2002. Moreover, the Court of First Instance ordered that the amount of that loss be assessed by an expert and awarded interest on the compensation relating to that head of loss.

219 Those parts of the judgment under appeal have been set aside on appeal by the Commission.

220 It is therefore appropriate to give judgment afresh on Schneider's application so far as the loss in question is concerned.

221 In light of the reasoning which has led to the judgment under appeal being set aside in part, the Court finds that there is no direct causal link between the price reduction at issue and the illegality vitiating the Commission's negative decision.

222 Indeed, the direct cause of the damage alleged is Schneider's decision, which it was under no obligation to take, to allow the transfer of Legrand to take effect on 10 December 2002.

223 As a consequence, Schneider's action must be dismissed in so far as it concerns compensation (principal sum and interest) for that damage.

VIII — Costs

224 Under the first paragraph of Article 122 of the Rules of Procedure of the Court of Justice, where an appeal is well founded and the Court gives final judgment in the case, the Court is to make a decision as to costs.

225 Under Article 69(2) of the Rules of Procedure of the Court of Justice, which is applicable to appeals by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

226 The Commission claims that Schneider should pay the costs relating to the proceedings at first instance and the proceedings on appeal.

227 Since Schneider has, in respect of this judgment, been largely unsuccessful, it must be ordered to pay, in addition to its own costs relating to the proceedings at first instance and the proceedings on appeal, two thirds of the costs incurred by the Commission in both sets of proceedings.

On those grounds, the Court (Grand Chamber) hereby:

1. Sets 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 two thirds of the loss claimed by Schneider Electric SA as a result of the reduction in the transfer price of Legrand SA, which Schneider Electric conceded to the transferee in exchange for the postponement of the effective date of sale until 10 December 2002;

— ordered the amount of that head of loss to be assessed by an expert;

— awarded interest on the compensation corresponding to that head of loss;

2. Dismisses the remainder of the appeal;

3. Orders the parties to communicate to the Court of Justice of the European Communities, within the period of three months from delivery of this judgment, the assessment of the loss represented by the costs incurred by Schneider Electric SA as a result of its participation in the resumed merger control procedure which followed delivery of the judgments of the Court of First Instance of the European Communities of 22 October 2002 in Cases T-310/01 and T-77/02 *Schneider Electric* v *Commission*, the assessment to be jointly agreed in accordance with the procedure set out in paragraph 216 of this judgment;

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

5. Dismisses the remainder of the action brought by Schneider Electric SA;

6. Orders Schneider Electric SA to pay, in addition to its own costs relating to the proceedings at first instance and on appeal, two thirds of the costs incurred by the Commission of the European Communities in both sets of proceedings.

[Signatures]