

A new era of competition policy ? Competition DG and the control of the Court of First Instance of the European Communities¹

Spyros Pappas and David Demortain

The Commission faced unprecedented criticism during 2002 with the successive annulments by the Court of First Instance of the European Communities (CFI) of three of its decisions concerning major mergers. Although the CFI had always formally been the review body for all Commission decisions regarding mergers, this review had seldom been exercised with such severity and rigor. Rather than drawing conclusions on the changes that these judgements are likely to bring to the doctrine and methodology of merger control by the Commission, this paper seeks to analyse whether these judgements will remain seen as “accidents” or will continue to symbolise a major change. If so, in what sense ?

The succession of three judgements seems to imply that there is more behind these cases than particular mistakes regarding specific situations. Of paramount importance in the judgements is the fact that the CFI questioned more than the handling of the procedures and the doctrine on which the decisions were based. The CFI looked into the way the Commission selects data and proceeds to the interpretation. In this respect, it put into question the ability of the Competition Directorate General (DG) to cast itself in the role of judge by recalling that it may lack the analytical capacity and clearheadedness that is required by the decision-making on more and more complex merger cases. Thus, the CFI implicitly installed itself in the position of the ultimate judge.

The political system of the European Union is familiar with fierce oppositions between institutions. The judgements are yet another illustration of those. The impact of the judgements may lie in the weakening of the tendency the Competition DG had to think of itself as having the upper hand, if not the unique authority, over matters of competition. The necessity to treat competition like other policies, through collegiality and networking of a variety of principals, is the expression of a new era as much as a possible way out for the Commission.

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Introduction : The Court judgements in a political context

It is clear that competition policy, foreseen in the original treaties, further developed in the secondary community law, and implemented by the European Commission, has been of paramount importance to European integration. Nevertheless, with the exception of democracy, no institution in the organisation's history has proved to be eternal. It is certain that ways of thinking and acting, in other words behaving, change with the passage of time. After more than 40 years of (constructive) competition policy's predominance among community policies, an objective assessment and reforms will be vital to ensuring the policy's continued effectiveness. By now, The European Union is more than the Internal Market and the unilateral implementation of the competition rules. The Competition Directorate General of the Commission is no longer the *primus inter pares*, among the other departments of the Commission. In fact, it is one of the Commission's services, responsible for acting in a quasi-judicial manner by duly taking into account the views of all parties in a reasoned and non discriminatory manner, while remaining subject to the effective juridical control of the Court of First Instance (CFI). Those are some of the signals issued recently by the CFI.

On the 22 October 2002, the CFI annulled the Commission's decision to prohibit the merger of the two companies Schneider and Legrand². The Court of First Instance based its decision on the grounds that the Commission's factual analysis of the transaction's impact on the relevant national product markets outside of France was in fact erroneous and contradictory. Secondly, the Commission was blamed for not respecting Schneider's right of defence. This judgement came five months after the *Airtours* judgement in which the Commission was bluntly corrected³. The Commission's decision concerned the merger of two tour operators, *Airtours* and *First Choice*. There CFI judgement was based on three factual grounds: the Commission was wrong in concluding that the major tour operators would be prompted to collude after the merger ; secondly, the Commission did not manage to demonstrate the existence of adequate retaliatory mechanisms, thought of as a condition for the existence of collusion (punishment mechanisms would be used by dominant companies against other companies tempted to depart from the collusive common policy). Thirdly, the Commission failed in its analysis of competitors' power to respond to collusion by the dominant companies. This judgement mirrors a previous case concerning the merger of the packaging companies *Tetra Laval* and *Sidel*⁴. The CFI there held that the Commission made a number of obvious mistakes in the following areas: inflated growth projections; the presumption that the merged entities would engage in the abuse of dominant position; the implications of *Tetra*'s behavioural obligations stemming from prior Commission

²Case T-310/01, *Schneider Electric v Commission*.

³ Case T-342/99, *Airtours v Commission*.

⁴ Case T-5/02, *Tetra Laval v Commission*.

decisions; eventually, the strength of Sidel's competitors on the market for packaging equipment.

By coincidence, these judgements were released while Commissioner Mario Monti was reforming merger control tools and policy. As he put it, "the judgements came at the right moment". Indeed, the judgements were released in the midst of important debates concerning DG Competition and the way it handles merger cases. The Commission reacted quickly to this exceptional series of judgements which are detrimental to its reputation and which questioned the quality of its decisions. As a matter of fact, the handling of these judgements was imperative for the Commission in order to save face and defend its authority : "we should not allow these setbacks to disturb our view of the Community's merger control policy" said the Commissioner. Mario Monti actually used the judgements as an opportunity to legitimise and deepen the merger reform. The extent to which the reform of the Merger policy will be inspired by the aftermath of the Court's judgements is not clear at present. The reform of the merger policy began much before the Court published its judgements. In principle, its objectives were independent from the content of the three cases.

Although these cases have been largely commented upon, several important conclusions should be emphasized. Particular areas of importance include the Competition Directorate General's "authority" both within the Commission and in its multiple relations with external actors.

1. Analysis of the judgements : what will be the impact ?

The procedural questions are not the most salient ones in any of the three judgements. Only in the Schneider-Legrand case has the Commission's decision been overruled on procedural grounds. In that judgement, the CFI upheld Schneider's plea and came to the conclusion that the statement of objections did not fully allow Schneider to assess the full extent of the competition problems identified by the Commission. While the Commission argued that it had no time to assess the remedies proposed by Schneider in the second place, the CFI found that the Commission did not provide the opportunity to offer appropriate commitments. It is precisely on these grounds that the Commission decision has been annulled. However the CFI also left aside several additional pleas made by Schneider related to other procedural questions. Likewise, the Court stated that the Commission acted reasonably or on its own rights in both Airtours and Tetra cases.

At the same time, the CFI dismissed several pleas by Schneider and by Tetra Laval based on procedural grounds. The CFI may have decided to leave these concerns aside in order to balance with the weight and depth of its substantive

criticism⁵. Indeed, the CFI has been tough on the assessments made by the Commission. The CFI identified errors in the assessments of the market, of the potential for retaliation and of the reaction of competitors and consumers, three of the pillars of the Commission decision. In the Schneider case, the error made by the Commission concerned the assessment of the impact of the merger on the national product markets other than France.

The contention of this paper is that the novelty of these judgements lies in the fact that the Commission has not been contradicted on the grounds of the procedural handling of the cases but merely because of the way it has demonstrated its points and used data. As Mario Monti stated, “it is clear that the Court is now holding us to a very high standard of proof”. It is worthy of noting that there is no precedent in the fact that the Commission was contradicted in its assessment and analysis of factual evidence three times in a row, while the Court accepted that it scrutinised a conglomerate merger under the Merger Regulation. In that regard, the common aspect of the three cases is the criticism of the Commission’s modes of assessment and analytical capacity rather than procedural matters.

The respective authority of the Commission and of the Court is, of course, legally and formally defined. However, the “brutal language” and summations that the CFI used in its judgements, added to the fact that the review of the Commission decisions has been “merciless”, leaving no point aside, is a signal of how the supervision and review of Commission decisions might be carried out in the future. The CFI reviewed the Commission’s decisions in detail and recalled some of its past judgements such as in the *Genvor vs Commission* case. The *Airtours* case, for instance, shows the CFI willingness to finally check the substance and act as an independent review body. This turn implies a considerably important change. Hence, the following question arises: what will be the impact of the Court annulments of Commission decisions on its authority? More precisely, how will it affect the reform of the merger policy and the pursuit of the Commission’s goals in the enforcement of competition policy in general?

Turning to substantive matters, one may ask how whether the Court’s decisions brought clarity to the process? For instance, the problem of collective dominance was scrutinised in the *Airtours* judgement. According to Massimo Motta⁶, the Commission extended “collective dominance” in its decision to the point of including unilateral effects and not only coordinated ones. The Commission believes that there is no need for the undertaking in question to explicitly agree or enter into concerted practice to find evidence of potential collective dominance. What matters is the fact that the market structure and the behaviour of the undertaking, including individual behaviour, are conducive to anti-competitive oligopolistic

⁵ Wilmer, Cutler and Pickering 2003, “Court of First Instance annuls Tetra Laval/Sidel merger prohibition”, *EC Competition Bulletin*, October 2002.

⁶ Motta, M. 2000, “EC Merger Policy and the *Airtours* Case”, *European Competition Law Review*, pp. 199-207.

outcomes. Airtours also submitted a similar idea : the absence of retaliation mechanisms was not considered by the Commission, while such absence backs up the interpretation that there is no collective dominance.

From the moment that the Commission finds that it can look into individual behaviour beyond agreed or coordinated practices, the need to have an effective or strict punishment mechanism should also be lifted. The Commission argued that it was “incorrect to speak of ‘punishment’ in the case of ‘deviation from the tacit agreement’ since in the present case, no agreement exists”. In any event, the Commission does not dispute that a situation of oligopolistic dominance requires there be a real risk of retaliation or long-term adverse consequences for an operator that departs from the parallel conduct adopted by members of the oligopoly. However, the notion of punishment used by the applicant is incorrect, since it implies that sanctions are taken by the other operators or ‘parties’ to the ‘agreement’.” More precisely, the Commission refused to consider that the types of punishment or retaliation mechanisms matter in the assessment. The Commission does not take into account the specificity of the punishment mechanism as a valid argument in the demonstration of a collective dominance.

The CFI described this as an “ambiguous approach”. In effect, the assessment of economic data becomes all the more important and subtle as the Commission leaves aside clear-cut criteria such as the existence of agreements, or concerted practices or “strict” retaliation mechanisms. This is in contradiction with the consensus in economic theory that a credible retaliation mechanism is necessary in the framework of a coordination policy between undertakings in order to control the temptations of individual companies to cheat. The CFI therefore rehabilitated these criteria and went further to lay the burden of proof on the Commission.

The CFI also contradicted the Commission’s analysis of the merger’s consequences for fringe players and potential competitors. The Commission determined that fringe players and competitors must be able to increase their capacity in a sustained manner in order to offer a real competitive challenge. The Commission estimated that this would not be possible as competitors will not be able to counter the dominance effects of the merger. The CFI did not use the same criteria as the Commission but said that competitors’ situation must be viewed globally : if competitors, taken as a whole, can withstand the merger, it means that the dominance is relative. It is not a matter of individual undertakings being able to increase their capacity and challenge the larger players.

The CFI’s approach is economically sensible. At the same time, unless the Commission manages to sustain that the judgement must remain specific to the Airtours case, it is likely to deprive the Commission of one of its levers for prohibiting mergers. In any case, the judgement reinforces the requirement of precision and rigour in the collection and analysis of facts when it comes to the position of fringe players, potential entrants and consumers.

These various points are of great importance because they are likely to modify the doctrine applied to merger cases in the long run. However, this does not seem to be guaranteed. Commentators of the decision challenge the idea that the CFI judgement represents a major turn and will have an impact⁷. Furthermore, as already pointed out, some uncertainty remains after the judgements. The CFI for instance did not solve the issue of unilateral effects cases. To what extent can the doctrine be applied to these cases? Likewise, it is unclear as to which evidence the Commission is required to use. The judgment “as such leaves a number of issues unanswered and provides the Commission with sufficient freedom to develop its interpretation of the scope of application of the doctrine”⁸.

Other points were addressed in the two other cases but both cases confirm that the CFI now pays a lot of attention to the factual record built along the process and the analysis carried out by the Commission. The *Airtours* judgement was based on discrepancies between the Commission and the Court on matters of principles : collective dominance and retaliation mechanisms in particular. The *Schneider* and *Tetra* cases are less cases of disagreements on the doctrine than on the factual evidence. The CFI went back to the statement of objections from *Tetra Laval* and third party studies in the Commission’s file that the Court requested before the oral hearing⁹.

It is not certain what the impact will be on the Commission’s practice and modes of assessment. At first glance, this will depend on how much of the CFI judgements are taken up in the reform of the merger policy and, hence, how the judgements are interpreted by DG Competition. Commissioner Mario Monti seems to believe that there are lessons to be drawn. Changes will likely be made because the CFI doeshold the Commission to a very high standard of proof. That is indeed the most common view, although not the only one. In any event, the project to recruit a “Chief economist”, attached to the Director General and the hiring of more industrial economists shows that indeed the need to improve the analytical capacity of the DG has been recognised. The idea to have some form of quality assurance carried out by a control commission goes in the same direction.

This is the truly innovative picture that comes into sight when looking at these three cases. The CFI managed to get the Commission to adopt in its analysis that the assessments, not necessarily or not only the principles and doctrines, were not of the quality that the economic importance and complexity that these merger cases required. In a nutshell, the explicit message sent by the CFI was the need to ensure that decisions are more robust. However, next to this message there is an

⁷ Nikpay, A. and Houwen, F. 2003, “Tour de Force or Little Local Turbulence ? A Heretical View on the *Airtours* Judgement”, *European Competition Law review*, issue 5.

⁸ *Ibid.*

⁹ Wilmer, Cutler and Pickering 2003, “Court of First Instance annuls *Tetra Laval/Sidel* merger prohibition”, *EC Competition Bulletin*, october 2002.

implicit signal: irrespective of the lessons drawn by the Commission and its new policy proposals, the CFI strongly reminded them that “there are judges in Luxembourg” having the final word: the monopoly of the Competition DG is no longer the dominant view it used to be. There are other ways to ensure a strong and intelligent implementation of competition policy.

2. Factual assessment and authority of the Competition DG

The succession of three similar cases leaves the impression that there is a structural problem with DG Competition, namely how cases are handled and how it proceeds to the analysis of data. In the *Airtours* case in particular, the CFI analysed the Commission reasoning in detail and exposed its flaws. It pointed out the discrepancies between the facts and data and their interpretation by DG Competition. In particular the analysis of the demand on the market was said to be “incomplete and incorrect”, and not supported by any study. However the CFI seems to have gone more deeply into the issue of how the Commission assesses factual data and uses evidence. As Nikpay and Houwen say, “the degree of scrutiny exercised by the Court in *Airtours* was tantamount to an appeal on the facts¹⁰”. The CFI’s list of the empirical errors made by the Commission is quite impressively long: The Commission did not prove that the market was sufficiently transparent, it erred in saying that market shares resulting from acquisitions should not be taken into account, that demand growth on the market was slow and finally that it did not give sufficient consideration to the responses of fringe players and consumers to the postulated reduction in output and price increase.

Schneider and *Tetra* were the first Commission merger prohibition decisions to be reviewed under the expedited procedure. Politically these cases are important because they demonstrate that the CFI effectively reviews the Commission prohibition decisions if appealed in the framework of the expedited procedure. Arguably, this newly effective supervision will be welcomed by business circles in which the perception that justice was not served effectively remains strong. Furthermore, insisting on the Commission’s obligation to provide convincing evidence and to carry out rigorous assessments of facts, is a signal to the industry that DG Competition’s decisions will be more predictable. Whereas economic thinking in the Merger Task Force went through many variations in the last few years¹¹, here the CFI recognises the need to ground the decisions in sound factual analysis, rather than new theories.

¹⁰ Nikpay, A. and Houwen, F. 2003, “Tour de Force or Little Local Turbulence ? A Heretical View on the *Airtours* Judgement”, *European Competition Law review*, issue 5, p.196.

¹¹ Ysewyn, J. 2002, “The New World of the Merger Task Force”, *European Competition Law Review*, issue 5.

However, it is likely that if it was only a matter of lacking analytical capacity, the CFI could have been more lenient. The forensic demolition of the Airtous case shows that there is more behind it. Actually, does the problem of analytical capacity summarise all the issues the CFI wanted to point out? Does the analysis issue suffice to explain the behaviour of the Commission? It is more defensible to argue here that the more fundamental issue is the authority of the Commission and its various roles and goals as competition policy enforcing body in the inter-institutional equilibrium. How is it possible to properly safeguard that analysis? How can adequate autonomy and independence for the Commission be preserved enough, while ensuring that the analysis which informs the final decision is accurate and convincing?

In our view, what makes these three judgements crucial is not necessarily or exclusively their impact on legal principles and doctrine. From this point of view, much remains to be answered, on a case-by-case basis. Rather, the cases question the internal capacity and, subsequently the credibility, of the Commission to handle merger cases. Therefore, the robustness of its decisions vis-à-vis the subordinates of the decisions and the review body is called into question.

The independence of the Commission is a crucial issue in this regard. We are used to characterise the DG Competition as a unitary organization, and as a service within a service, with relatively clear objectives and priorities. The study of merger cases is most relevant because it helps to focus on the activity of one branch of DG Competition, that is the former Directorate A and current Merger Task Force. Another question concerns how the DG Competition manages decision-making processes in which it must play different roles. The DG accommodates these different roles or tasks by dealing with them sequentially and therefore assuming them at different stages¹². Again, however, the three cases tend to demonstrate the fact that these roles are either not enough congruent – which is highly probable – or are not adequately separated.

Although not formally independent, the DG has a certain degree of autonomy. For that reason it resembles an agency that carries out an inquiry and an assessment of data while also making the decision. In this respect, the DG does not abide by the functional partition between assessment and decision-making that is often at the source of the creation of agencies in various sectors. The autonomy is also preserved thanks to a strong and specific administrative culture. It is of crucial importance to note that in the framework of its extended formal powers, such culture tends to make it a powerful and semi-autonomous institution, rather similar to a federal agency¹³. Federal agencies, however independent or autonomous, are

¹² From, J. 2002, “Decision-making in a complex environment: a sociological institutionalist analysis of competition policy decision-making in the European Commission”, *Journal of European Public Policy*, April, 9, 2, pp. 219-237.

¹³ Cini, M. and McGowan, L. 1998, *Competition policy in the European Union*, London, MacMillan.

nonetheless also subject to external influence for the very reason that they need to stay close to external actors in order to collect data. Likewise, in this respect the DG functions similarly to an agency : it is an independent regulator but subject to pressure and potential capture by external interests. It is also quite often seen as an institution that draws its power from membership of a larger network of influential public actors and organisations which rely on these external actors for information and negotiated decisions¹⁴. In both cases, its powers derive from relations with external actors. What conclusions do the merger cases lead to on that point ?

In our view, what the CFI states throughout the various judgements is that the autonomy of the Competition DG is a necessary but not sufficient condition to reach high analytical capacity and sensible decisions. The various errors which the CFI highlighted show that the assessment and interpretation of data suffer from the contradictions faced by the Commission as a semi-autonomous organisation which also derives its powers from relations with external actors. This is all the more a problem as the increasing complexity and global scale of merger cases implies that the DG will be put under more pressure, as we have seen in the Schneider/Legrand case, by Member States or other stakeholders. This point highlights the need for the Commission to have greater expertise and independent analytical capacity in-house. The proposal to create a new position of Chief economist attached to the Director-General comes in the framework of the strengthening of the economic capabilities of the DG. The recruitment of industrial economists by the DG goes in the same direction. Similarly, the Commissioner intends to increasingly commission the independent econometric studies in Phase two of the mergers investigations. The analysis phase tends to receive greater emphasis in comparison with the investigation and the decision-making phases. That is indeed the phase in which the roles of the Commission are the least congruent : the DG is both analyst and prosecutor. The CFI judgements tend to show that the gordian knot is most tightened at this step of the process. Similarly, the cases point at this problem through raising the point that a supplementary specialised chamber could be needed. In what form ? How can such an institution help the Commission to improve analytical work while this analytical work has importance precisely because it is conducted by a body which retains decision-making power ?

This series of problems, highlighted indirectly by the three cases, is of crucial importance if one considers the role and objectives of DG Competition in the institution to which it belongs. In view of the primary role of competition policy during the consolidation of the European experiment, DG Competition is usually seen as a separate institution – as qualified as an agency. In an oversimplified way, it is also often described as the most “powerful” DG of the whole Commission. On the conviction that the CFI judgements have an impact which goes beyond the solution of the case each time at hand, the question arises as to what will be the impact on the integration of DG Competition with the other Community objec-

¹⁴ From, J. 2002, see above.

tives ? Will competition policy objectives continue to prevail over other community objectives or will the grounding of the Commission's decisions be based on a wider policy context?

Needless to say, DG Competition plays a particularly important role throughout the decision-making processes. Its goals, however, quite often contradict the goals of other directorates general defending parallel – and not conflicting – community objectives. The challenge is to go from contradiction to synthesis. After all, this is the meaning of the community interest which must be sought in each instance. Absolute implementation of competition rules, despite their weight vis-à-vis other community objectives, does not serve the abstract notion of the community interest that is the result of the confrontation, or of the systemic analysis, of all other involved community policies distilled via the national ways. From this point of view, the overall goal of the Competition DG to enforce EU competition law in a uniform and effective manner does not comprise the interest of the Community as a whole. Consequently, implementation of competition policy is not just a matter of pure implementation of competition rules, but a matter of policy as such, aiming to attain the overall Community objective. What is the value of a rigorous implementation of these rules if it results in the disadvantage of the European economy and its competitiveness or if this is detrimental to another policy objective of the Community? Therefore, the problem is twofold: on the one hand substantiated implementation of the competition rules by expert officials in an independent and transparent manner ensuring equal treatment of all involved parties and on the other implementation with political responsibility and sensibility to other affected sectors. Technocracy must be balanced by political vision. The task is immense and complex. The fact that the CFI decided to deepen its control is not accidental. The invocation of the rights of defence in the Schneider case possibly indicates that the Competition DG, after that many years of uncontested life, reached the illusion of owning the policy. Nobody is perfect. Besides, the resources that the DG possesses are limited and disproportionate to the task, whereas its constraints are high. For instance, time is determinant in this field. Particularly, in the initial phase when the DG ensures that the case is handled according to the rules is crucial. A lot of attention and eventually a lot of time were dedicated to the Airtours First Choice merger, even more so to the Schneider-Legrand case. Indeed the companies concerned were large conglomerates. Already before the Court's judgement, these cases were controversial. Mergers are now more often concerning very large companies and have a large economic impact. Therefore, when such a prohibition decision emerges, stakes tend to be high. Cases have various degree of importance. No doubt, a systematic involvement of a specialised chamber of the CFI as a review body would help to ensure that the quality of the assessment is up to the complexity and importance of the case.

In our view, the CFI judgements indirectly show that the allocation of cases to the body whose analytical capacity is the most up to the task will become an issue. This is of great actuality in the framework of the revised division of tasks between the Commission and the Member States' competent authorities. The improvement

of the decision-making process and the enhancement of Competition DG's economic capabilities are therefore linked to the reform of the merger policy. In this regard, while acknowledging some weaknesses in the present system, we can not but express deep appreciation for the way the Commission has thus far managed such a heavy responsibility. The matter is not how to reverse or reform the system, but how to improve it, and how to build on it, now that it is strained due to changing parameters.

3. Commission's authority and the implementation of competition policy

It is for this reason that the comments concerning the CFI's judgements should lead to an assessment of Competition DG's authority in relation to its partner organisations : the ones with which it is meant to collaborate within its own sector, the national competent authorities, and those in the other sectors of the Commission, the other DGs. The quality and credibility of the Commission's decisions can only be assessed in that context of networking and collegiality.

It is a common view that the Commission has been losing some of its authority in recent years. In the trajectory from the EEC to the EC and the EU, there were periods characterised by intense action by the Commission and others characterised by a more low key approach, according to the prevalent political mood of the key European political figures or the vision of the Commission and its respective Presidents. The more mooted period of the 1970s was succeeded by the euphoric Delors and Santer Commissions, which in turn have been followed by the regressive Prodi Commission. Is it a pattern of alternating phases of history repeating in the course towards European completion or is it an evolution to a next phase, always with the same objective, but via a different direction? A deeper review of the facts cannot but lead to the conclusion that the rhythm of the course has not just been a result of certain successive, coincidental or not, attitude changes, but rather, a corrosion of the Commission's right of initiative and of its inter-institutional negotiating power since 1970¹⁵.

It is true that at the initial phase of the history of the European Communities, the Commission not only had the necessary legal basis in order to assume the primary role: Rather the Commission as the *par excellence* Community institution was able to flourish in the climate of Euro-optimism which characterised the pe-

¹⁵ Devost, J.L., 1980, « Les relations entre le Conseil et la Commission dans le processus de la décision communautaire », *Revue du marché Commun*, 289. Against, Labouz, M.-F., 1988, *Le système communautaire européen*, 2^{ème} éd., Berger-Levrault, p.191, on grounds of the J.Delors period.

riod and which prevailed significantly in the key Member States following the tragic experience of the Second World War which had torn the continent apart. The Commission moreover had the appropriate technical infrastructure and know-how. On the other hand in the Member States, the concept of the nation state reigned, the dominant role of national policies continued to prevail over Community policies and notably national administrations had not yet developed the necessary familiarity with the complex procedures which characterised negotiations and decision making in the Community. With the passing of time the necessary Community know-how was obtained, and it became well understood that Community policies were not external to national policies, but rather constituted an integral part of policy at the national level. The result was that the lack of national interest and action was replaced by a vying on the part of the Member States to ensure the prevalence of their respective national interests prior to the formulation of the final Community interest by means of diplomatic, but at the same time, unrelenting negotiating rivalry¹⁶.

In this respect, the implementation of competition policy requires collegiality, much like other matters. Historically, the large number of Commissioners rendered difficult the handling of major issues. The resorting to a vote in the College of Commissioners had become more frequent and was replacing the traditional custom of seeking a consensus. The same situation was occurring in the departments. The increase in the number of Community policies, and therefore of service, renders their coordination very difficult if not impossible¹⁷. The lack of collegiality, which became more marked following the decision to separate the Commissioners – whereas they shared the same premises until the Santer Commission – and the lack of interdepartmental coordination, has weakened the capacity of the Commission to identify and define the Community interest. This condemnation of the collegiality principle has been confirmed by Commissioners themselves in a recent and joyful declaration whereby they accepted their resignation *a priori*, following the recommendation of their President who succumbed to the pressure of the European Parliament. Each Commissioner and each Director-General is confined to their particular dossier. All of that does not favour the systemic approach required in the field of competition policy. Although it has been proposed by Mario Monti that merger teams conclusions would be reviewed systematically by a panel comprising experienced and independent officials from the Merger Task Force, it seems that this solution will not be the most appropriate. Reviewers will have little time and no decision-making power without the other Commissioners examining the conclusions of the panel. Panels are better than nothing, but they are far less far-reaching than a Court judgement¹⁸. For all these reasons it has already become apparent to many that the Commission is increas-

¹⁶ Pappas, S., “Europe will find itself at the crossroads to integration in Nice”, *New Europe*, Dec. 3-9 2000.

¹⁷ Labouz, M.-F., see above, p. 190.

¹⁸ Temple Lang, J. 2003, “Two important Merger Regulation judgments: the implications of Schneider-Legrand and Tetra Laval-Sidel”, *European Law Review*, 28, April.

ingly unable to fulfil its institutional role¹⁹ and that solutions to correct this gap are not so obvious.

Conclusion

Sometimes political signals such as decentralisation, the principle of subsidiarity, or the need for appropriate administrative solutions, are inimical to reasoned conclusions. Although an increased role for the national competition authorities is to be welcomed, multiple questions remain: isn't it premature? Is there really a consolidated culture of competition policy in place in the private sector, as assumed? If yes, why then does the Commission continue to be occupied with various degrees of infringements? Are national authorities ready to take over? Will the Commission be relieved of part of its present work or will it be *bussier ex posteriori* with other negative consequences for the European economy? What about the need for uniform implementation of competition rules? If problems exist with the fifteen, what will happen with the enlarged Community?

In conclusion: The "balance-sheet" of competition policy thus far has been more than positive. Instead of looking for panic solutions, the Community should capitalise on its *acquis*. Part of this *acquis* in the field of the competition policy is the Competition DG of the Commission. This contains a large reservoir of experience and qualified officials. If the Commission as an Institution is losing power in relation to the European Parliament and the Council in purely political terms (right of initiative), the way of gaining back its credibility and authority lies with its natural field: through policy implementation and of guardian of the community law. This means that the Commission should maintain its responsibility for safeguarding the implementation of competition rules. This should be done in close cooperation with national competition authorities, through quasi-judicial cooperation, and without loss for the Commission of its prerogatives. The creation of new bodies, such as a separate agency, does not answer the need of adjustments due to the new developments. On the contrary, such a solution would water down the necessary strengthening of effective interservice consultation intended to take other policy objectives into account. Such a reinforced service should be able to carry out complex expert assessments in a reasonable time and most importantly in an accountable manner, as the CFI would be the judge of both formalities and substance. As such, it is believed that competition policy will be implemented in a

¹⁹ Kapteyn, P.J.G. and Perloren van Theemaat, P., 1990, *Introduction to the Law of the European Communities*, Kluwer Law and Taxation Publishers, NL, p. 254: "There is the inescapable impression that the Commission has gradually allowed itself to be maneuvered into a position in which it can no longer play to the full the role envisaged for in the Treaties". See also Conclusions of the "Three Wise Men" in Bull. EC 11-1979: "The role and authority of the Commission have declined in recent years".

more balanced way, which better corresponds to the new European requirements and expectations.

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