



European Court rejects claim for damages arising from unlawful merger prohibition

The European Court of First Instance (CFI) has rejected MyTravel Group's claim for damages arising from the unlawful prohibition by the European Commission of its proposed merger with First Choice in 1999. In so doing, the CFI has in effect emphasised that there is a strong Community interest in maintaining a robust and sustainable European merger control regime which, absent exceptional circumstances, needs to be protected against the threat of extensive damages claims.

The European Court of First Instance (CFI) has rejected MyTravel Group's claim for damages arising from the unlawful prohibition by the European Commission (the Commission) of the proposed merger between MyTravel (formerly named Airtours) and First Choice in 1999. This outcome contrasts with the (partial) award of damages granted by the CFI to Schneider in similar circumstances last year.

This briefing looks at the background to the *MyTravel* case, and discusses its potential implications for European merger control and for merging parties in future cases.

Background – CFI annuls three merger prohibitions and awards partial damages in one of them

Prohibition decisions in European merger cases are rare. Therefore, it was highly unusual when, in 2002, three of the Commission's prohibition decisions were quashed by the CFI in quick succession: *MyTravel* (then *Airtours*)/*First Choice*; *Schneider/Legrand* and *Tetra Laval/Sidel*.

While this series of annulments led to a general tightening of the Commission's approach to merger assessment, the practical consequences differed for each of the three transactions in question. In *Tetra Laval/Sidel*, the Commission re-examined the case and ultimately approved the transaction, subject to commitments.

However, in the other two cases the annulments ultimately led to the acquisitions being abandoned

(*MyTravel*) or disposed of (*Schneider*). Consequently, MyTravel and Schneider launched separate damages actions against the Commission during 2003, for £256.8m (approx €320m) and €1.66bn respectively. Both claims were made under Article 288 of the EC Treaty which provides that, on the basis of non-contractual liability, 'the Community shall... make good any damage caused by its institutions or by its servants in the performance of their duties'.

In relation to Schneider's action, the CFI awarded partial damages to Schneider in July 2007. In its judgment, the CFI applied the test that, in order to prove an Article 288 damages claim, the alleged breach of Community law must be 'sufficiently serious' that the Commission can be said to have 'manifestly and gravely disregarded the limits on its discretion'. On the facts, the CFI concluded that the Commission's failure to detail in its Statement of Objections the specific theory of harm on which it had relied in its prohibition decision did indeed constitute such a breach.

Significantly, *Schneider* was the first (and, so far, still the only) time a damages award had been made in a merger case, prompting speculation among advisers and businesses as to what impact it would have on the Commission's approach to decision-making in future cases, including its willingness to issue prohibition decisions that could lead to similar damages claims from inevitably aggrieved merging parties.

CFI rejects MyTravel's damages claim

On 9 September 2008, the CFI rejected MyTravel's claim for damages. Although the CFI applied the same substantive test as it had done in *Schneider* (above), the outcome this time was different.

On the facts of *MyTravel*, the CFI found that the Commission's conduct did not constitute a sufficiently serious breach in relation to either of the two areas on which MyTravel had based its action, namely:

- the Commission's *assessment of the transaction's substantive effect* on competition – in particular, whether it gave rise to a position of collective dominance in the relevant market; and
- the Commission's *treatment of the commitments* offered by My Travel to remedy the substantive concerns identified by the Commission.

In reaching this conclusion, the CFI's judgment acknowledged the particular circumstances under which the Commission must operate in the field of merger control, including the need to assess often complex issues within strict time constraints. It highlighted in particular the Commission's margin of discretion in the decision-making process, even going as far as to say that, as a result of such discretion, rigorously consistent and invariable practice cannot be expected of the Commission across different cases.

As a key element of its reasoning, the CFI noted that, if the bar for proving damages claims were set too low, this might have an undesirable, inhibiting effect on the Commission's proper function as a competition regulator, due to the consequent fear it would have of facing extensive damages claims.

Implications for European merger control and merging parties

Following last year's award of damages in *Schneider*, the CFI judgment in *MyTravel* might be said to go some way to redressing the balance of power between the Commission on the one hand and merging parties on the other. While the respective sets of Commission errors relied on by the parties in the two cases were undoubtedly different, it is at least questionable whether they were sufficiently distinguishable in gravity to justify the contrast in outcomes.

The *MyTravel* judgment might therefore be read as sending out a strong policy message that the CFI is determined to protect the robustness of the European merger control system, which, as the CFI underlines, is in the general Community interest.

The CFI recognised that it is to the benefit of businesses that the Commission is forced to review merger cases within very short deadlines. It considered that, on that basis, the right to compensation can only arise if an error committed by the Commission is seriously detrimental to the merging parties and cannot be justified or accounted for by the particular constraints to which the Commission is objectively subject in the field of merger control.

Accordingly, the Commission will see the *MyTravel* judgment as a welcome strengthening of its position in the merger control process, especially insofar as it affirms the Commission's margin of discretion in reaching its decisions.

As far as merging parties are concerned, the case suggests that, while the way remains open for them to seek damages against Commission merger decisions, the bar is a high one. To that extent, the damages awarded to *Schneider* last year may prove to be the exception rather than the rule.

It should be noted that in *Schneider*, the Commission has lodged an appeal – still pending – to the European Court of Justice (ECJ), contesting the damages award. So this long-running saga may yet take another turn. Similarly, it remains to be seen whether MyTravel decides to exercise its right to appeal its case to the ECJ.

For further information please contact
Thomas Wessely
Partner
T +32 2 504 7027
E thomas.wessely@freshfields.com

Martyn Chu
Associate
T +44 20 7716 4161
E martyn.chu@freshfields.com

Freshfields Bruckhaus Deringer LLP is a limited liability partnership registered in England and Wales (number OC334789). It is regulated by the Solicitors Regulation Authority. Please refer to www.freshfields.com/support/legalnotice for further information including a list of members (and non-members who are designated as partners) of the firm.