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EU

A costly decision

The ECJ has ordered the EC to pay damages for its veto of the Schneider/Legrand merger

The judgment of the Court of First Instance (CFI) of the European Communities delivered on 11 July, 2007, merits close examination on the grounds that the court does not usually condemn the European Commission (EC) to pay such high damages, and that merger control in the European Union (EU) has always been characterised by a broad margin of discretion on the side of the EC. It is, therefore, not surprising that most of the arguments presented by Schneider have been rejected.

But let us start at the beginning: on 16 February, 2001, Schneider Electric notified the EC of its intention to acquire Legrand by way of an exchange of stock. In August, 2001, Schneider bought 98% of Legrand's shares. On 10 October, 2001, the EC blocked the concentration and, on 30 January, 2002, gave Schneider nine months to divest its Legrand shares. This deadline was later extended until 5 February, 2003. On 26 July, 2002, Schneider concluded an agreement to sell Legrand to Wendel/KKR, which had to be consummated by 10 December, 2002. On 22 October, 2002, however, Schneider won

the appeal to the CFI, which it had undertaken against the EC's two decisions.

Since the EC raised concerns in the ongoing merger control procedure and refused remedies offered by the parties on 29 November, 2002, Schneider sold Legrand to Wendel/KKR on 10 December, 2002. On 10 February, 2003, Schneider estimated the damage caused by the EC's illegal decision at €1.6bn (£1.13bn).

The European Court of Justice (ECJ) decided that the costs generated through the resumed merger control procedure were to be reimbursed in their entirety, whereas the loss of earnings caused by the delayed transfer of Legrand to Wendel/KKR were to be reimbursed in part (two thirds). The further loss of value was not imputed to the EC's misconduct.

The EC opposed the Court's decision. It argued that breaching Schneider's right of defence — the EC had presented its main arguments in the decision without having mentioned them in the statement of objections thus effectively denying Schneider's right to be heard — would not

constitute a sufficiently serious breach of Community law. Moreover, the Commission argued that there was no link between its breach of Schneider's right of defence and the main area in which Schneider lost money — the reduced price at which Schneider had to divest to the new buyer Wendel/KKR.

Even if it is difficult to believe that the EC's argument will be successful at court — in particular with regard to the quality of the breach — a final evaluation will not be possible before the ECJ has delivered its judgment on the appeal. One essential practical consequence of the decision right now might be that the EC will carefully watch for consistency between complaints and final decisions emanating from the ECJ. This would, naturally, be a desirable consequence. On the other hand, it could lead to an increase in effort and expense for companies involved in anti-trust cases, which have to provide significant amounts of data and documents to the Commission during the merger control procedure.

The risk that the EC will see its room for

manoeuvre decreasing in the case of potential legal actions for financial compensation against its decisions remains limited, however. The facts in the *Schneider/Legrand* case were so particular, notably with the acquisition having been completed before clearance, that it is difficult to generalise any of the court's findings. Perhaps the statement of the CFI that serious flaws in the economic analysis may trigger the non-contractual liability is more of a practical concern for the EC.

The decision as such is not a 'quantum leap' but based on established case law which the court applied to the merger control procedure. Claims for financial compensation based on non-contractual liability of the EC will thus likely not be more successful in the wake of Schneider and in the case of merger control procedures than they have been in the past. This, however, does not change anything. The fact is that the concrete procedure could be very expensive for the European Commission. ■

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