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CASE NOTE:

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By

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Introduction

On July 11, 2007 the European Court of First Instance ("CFI") ruled that Schneider Electric SA should be compensated for some of the losses suffered following the European Commission's unlawful prohibition of its merger with Legrand SA in 2001.[2] The CFI's decision is undoubtedly historic. It is the first case in which damages have been awarded against the Commission for getting a merger wrong. The question is whether this will herald a change in the courts' hitherto restrictive approach to non-contractual liability of the European institutions.

The original case

Schneider/Legrand forms one of the trio of mergers that the Commission controversially prohibited in quick succession in 2002; decisions which were subsequently overturned on appeal by the CFI.[3] The CFI quashed the *Schneider* decision with scathing criticism of the Commission's inadequate reasoning ("several obvious errors, omissions and contradictions") and procedural irregularities. Unlike the other cases, it upheld parts of the Commission's dominance finding.

As Schneider had already acquired the Legrand shares on the basis of the public bid exception, the Commission also ordered the divestiture of almost the entire shareholding. Even though Schneider appealed both the prohibition and the divestment order, it had agreed to sell its shares to a third party. It seemingly negotiated a deferral of the sale when a court victory looked increasingly likely, but finally sold Legrand in the course of the Commission's second merger review.

The test for damages claims

A claim against the Commission for non-contractual liability (i.e. tort) is based on Article 288 of the EC Treaty. This provides that "the Community shall…make good any damage caused by its institutions or by its servants in the performance of their duties."

So far Article 288 has not proved to be a happy hunting ground for companies seeking damages from the Commission. Simply getting the decision wrong – or even

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[2] *Schneider Electric SA v. Commission (Case T-351/03).*
[3] *Schneider Electric SA v Commission (Case T-310/01).* The other two being, *Airtours/First Choice (Case T-342/99)* and *Tetra Laval/Sidel* (Case *T-5/02).*

badly wrong – is not sufficient. Instead, the claimant needs to show (a) that the Commission has manifestly and gravely disregarded the limits on its discretion (i.e. got it very very badly wrong) and (b) a causal link between that and the resulting damage subject to the complaint.

Given the intrinsically complex nature of competition law, the European courts have afforded such a wide margin of appreciation to the Commission that it has hitherto prevented successful claims for damages. Most recently they refused damages for wrongful imposition of a fine for cartel behavior[4] or for incorrectly ordering repayment of state aid.[5]

Has the bar been lowered?

The answer is a most resounding no. In this respect it is useful to examine not only on what basis damages were *awarded* but which part of the claim the CFI *refused*.

First, the CFI's basis for establishing liability was not that the Commission got the decision very badly wrong. In fact, the CFI concluded that the Commission's errors of economic analysis were not such as to constitute a sufficiently serious breach of a law. It was the breach of Schneider's rights of defense that gave rise to the claim, i.e. changing the analysis between the statement of objections and the final decision, without giving Schneider the opportunity to respond and to propose remedies.

Second, the CFI refused to award damages for economic or consequential loss. Schneider based its claim on the following five distinct categories of loss:

i. All fees incurred in the divestment and the re-examination of the case;

ii. The price reduction arising from the deferral of Legrand (because of the appeal);

iii. The loss of a chance to have the merger cleared;

iv. Lost synergies that might have resulted had the merger gone ahead; and

v. The negative impact on Schneider's reputation.

Combined, these claims amounted to some €1.7 billion. In the end, Schneider got significantly less; exactly how much is yet to be determined by an expert.

The CFI concluded that only the first two categories of loss flowed from the Commission's breach of Schneider's rights of defense. Moreover, the CFI awarded

[4] *Holcim (Deutschland) AG v Commission (Case C- 282/05 P)* of April 19, 2007.
[5] *Denis Bouychou v Commission* and *FG Marine SA v. Commission (Cases T-344/4 and T-360/04)* of July 19, 2007.

Schneider only two-thirds of the price reduction, given that Schneider had assumed part of the risk by acquiring the shares.

The Commission has already announced its intention to appeal the ruling on the basis that (i) the breach of the rights of defense was insufficiently serious, and (ii) there was no causality between the prohibition and Schneider's ultimate decision to defer and then sell the shareholding during the Commission's second review.[6]

What does this mean for MyTravel?

Even if the CFI's judgment is ultimately upheld, this does not bode well for MyTravel's comparatively modest £518 million claim against the Commission for the prohibition of its bid for First Choice.

MyTravel is currently seeking compensation for First Choice's profits that, because of the prohibition, did not accrue to MyTravel. In addition, it is claiming for lost synergy costs savings and the costs of the abortive bid.

In other words, the bases of claim, save, possibly, for the bid costs, are consequential losses similar to those claims which were unsuccessful in Schneider. It also places less emphasis on procedural rights, but then it has a much stronger case on the substantive aspects. Whether this will be enough to carry it over the threshold remains to be seen.

[6] See Commission press release MEMO/07/321 of August 6, 2007.