Studying *Schneider*

The unprecedented award of compensation for the European Commission's illegal prohibition of a merger in *Schneider/Legrand* has paved the way for similar EU court actions – but don't expect a deluge say PETER ALEXIADIS and VASSILI MOUSSIS

In its long-awaited judgment in the appeal of Schneider Electric SA against the decision of the European Commission, on 11 July the European Court of First Instance (CFI) ruled for the first time that a merging party can be compensated (at least in part) for losses sustained as a result of the illegal prohibition of its merger (case T-351/03).

The Court pointed out that, for the Community to incur non-contractual liability, there must have been unlawful conduct on the part of its institutions, with the standard of review being whether there was a grave and manifest disregard of the limits of their powers of assessment. The CFI found that there had been such an infringement of Schneider's rights of defence on the facts, as the Commission's Statement of Objections had not allowed Schneider to assess adequately the Commission's competition concerns, thereby depriving it of the possibility of offering appropriate remedies that were capable of reducing or eliminating those competition concerns. There was no objective justification nor explanation by the Commission for this infringement of the rights of defence. The Court therefore concluded that the illegality, whose existence and character were not disputed by the Commission, resulted in an obligation on the Commission to compensate for the harmful consequences of that illegality.

The Court went on to hold that the illegality vitiated the Commission's decision of incompatibility, thereby conferring upon Schneider a right to compensation in respect of: first, expenses incurred by Schneider relating to its participation in the resumed merger control procedure which was undertaken by the Commission following the Court's annulment of the Commission decision; and, second, the reduction in the divestiture price which Schneider had to concede to the purchasers in order to obtain a postponement of the execution of that divestiture (while it was trying to obtain the annulment of the Commission's prohibition decision). As to that second type of loss, the CFI ruled that, in this specific case, only two-thirds of that loss should be compensated, since Schneider had itself contributed to its own loss by assuming the real risk that the merger would subsequently be declared incompatible, and that the resale of the shareholding in Legrand would be the inevitable consequence of assuming such a risk.

Although unprecedented, there had always existed the theoretical possibility that damages could be available in limited circumstances for an aggrieved merging party where the Commission's decision to block a merger was fundamentally flawed. The issue that had remained unresolved since the inception of the EC Merger Regulation, however, was the extent to which this principle of non-contractual liability could be invoked in practice, given the existence of a certain margin of discretion of the Commission in its interpretation of economic evidence.

By clearly identifying the threshold at which point the Community incurs non-contractual liability for unlawful conduct as a situation where there was a 'grave and manifest' disregard of the limits of the authority's powers of assessment, the CFI in *Schneider/Legrand* has paved the way for damages actions to be brought against the Commission by undertakings which consider themselves aggrieved by the Commission's handling of merger control proceedings. Thus, serious procedural errors can serve as the basis for a damages action, but such an action based on an alleged faulty assessment (ie a substantive assessment) might prove as elusive as ever, despite the willingness of the CFI to subject to intense scrutiny the Commission's economic analysis. (See, for example, the CFI's review of Commission decisions in cases such as *Impala*, *Airtours* and *Tetra Laval*).

In addition, the Court has focused on the importance in the Commission's merger review procedure of the scope of a Statement of Objections, which needs to set forth clearly the types of anti-competitive concerns the Commission has in connection with the notified merger. This position is consistent with the importance attached to the Statement of Objections by the CFI in *Impala*, insofar as the Commission was judged to have materially and therefore illegally departed from its Statement of Objections in its final decision. This will probably have the unintended consequence that the Commission will be tempted, at least in those merger cases that might be problematic from an antitrust perspective, to extend the length of merger pre-notification discussions so that it is better placed to articulate its position in the Statement of Objections where it might harbour 'serious doubts' about the notified merger.

Finally, it should be made clear that the judgment does not open the 'floodgates' to appellants wishing to argue that the quantum of damages in any given merger case should approximate the total value of the deal lost to the acquirer. On the contrary, the CFI is keen to explore the causal nexus between the allegedly illegal

behaviour of the Commission and the damage actually suffered. For example: the loss suffered through the failure to realise post-merger synergies, or anticipated profits, was excluded by the CFI (namely, there is no compensation merely because the merger might have received clearance); the loss incurred by Schneider for divesting the Legrand business was rejected because the illegality of the Commission decision did not, in the view of the Court, necessarily mean that the merger was compatible with the common market; it would, however, be reasonable to claim damages for the reduction in the divestiture price occasioned by the fact that the divestiture was postponed pending the rulings by the Court.

The precise quantum of damages remains to be calculated after the Court receives expert testimony. Moreover, there also remains the more complex issue of the application of the legal standard in practice where the Commission has erred in its substantive analysis – in other words, in which circumstances the Court will be prepared to consider that the Commission has exceeded its margin of discretion in interpreting economic data, and has thereby committed a 'grave and manifest' error of judgement. That issue will fall to be decided in the pending *My Travel* appeal before the Court. Given the fundamental restructuring of the travel industry that has occurred recently in a series of mergers blessed by the Commission under the EC Merger Regulation, the CFI's views as regards the quality of the Commission's forward-looking economic analysis could not be coming at a more inconvenient time for the Commission. ■