II. Wettbewerbsrecht

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Damages for Schneider Electric: Setting the Standards for Community's Non-Contractual Liability

(Schneider Electric SA ⁄ Commission, CFI of 11 July 2007, T-351/03)

(1) **Facts**

Schneider Electric SA (*Schneider*) and *Legrand SA* (*Legrand*) are French companies engaged in the production and sale of products and systems in the electrical distribution, industrial control and automated sectors and electrical equipment for low-voltage installations. In January 2001 *Schneider* lodged a draft offer to acquire control over *Legrand*. The offer was opened from February to March 2007 and was formally notified to the Commission on 16 February 2001. After proceeding through the Phases I and II of the ***merger investigation***, the Commission provided *Schneider* a ***statement of objections*** (SO) in which it concluded that the proposed concentration would create or strengthen a dominant position on a number of national sectoral markets. In October 2001, after assessing corrective measures proposed by *Schneider*, the Commission adopted a ***final decision*** declaring the transaction ***incompatible with the common market***.[1] The Commission also considered that the corrective measures proposed by *Schneider* were not sufficient for resolving the competition problems identified in the incompatibility decision. Since by that time *Schneider* had already realized the acquisition of the *Legrand*'s shares, the Commission adopted a second SO for the purpose of separating *Schneider* and *Legrand*. The Commission also appointed a trustee in order to exercise *Schneider*'s rights stemming from its shareholding in *Legrand*. In January 2002, the Commission adopted a decision (divestiture decision) ordering *Schneider* to separate from *Legrand* within nine months.

Schneider launched two actions before the CFI calling for annulment of the incompatibility decision and the divestiture decision. In the meantime, *Schneider* made preparations for the transfer of its *Legrand* shareholding to the *Wendel-KKR* consortium by entering into a sale and purchase agreement to be implemented in December 2002 in case the annulment claims will be sustained by the CFI.

In October 2002, ***the CFI annulled the incompatibility decision*** on the grounds of errors of the Commission's analysis in the assessment of the impact of the transaction on the national sectoral markets outside France and breach of the rights of the defence vitiating the analysis of the impact of the proposed concentrations and of the corrective measures proposed by *Schneider* (the *Schneider I* Judgment).[2] Among others, the Court concluded that the Commission's SO did not permit *Schneider* to assess the full extent of the competition problems and therefore the applicant was not given a proper opportunity to submit its observations in that regard. The CFI ordered the Commission to resume the investigation and place *Schneider* in a position to put forward a proper defence and, where appropriate, to propose corrective measures addressing the objections previously raised by the Commission. Consequently, CFI annulled the divestiture decision on the ground that it was a measure giving effect to the annulled incompatibility decision (the *Schneider II* Judgment).[3]

Following these judgments, the Commission submitted to *Schneider* ***new SO*** which the latter criticized for its lack of precision and preservation of the arguments contained in the preceding SOs. Once again the Commission rejected corrective measures proposed by *Schneider*. In order to put an end to the fruitless negotiations, *Schneider* decided to divest its shareholding in *Legrand* and in December 2002 *Schneider* sold its *Legrand* shares to *Wendel-KKR*. The Commission subsequently closed its investigation and in October 2003, *Schneider* brought the present action for damages before the CFI.

Schneider based its ***claim for damages*** on Article 288(2) which establishes the non-contractual liability of the Community caused by the unlawful conduct of its institutions. It identified the violations in the deficiencies of the Commission's analysis of the impact of the proposed transaction on the national sectoral markets and in the breach of the applicant's rights of defence represented by inadequate particularization in the Commission's SO. *Schneider* claimed depreciation of the value of *Schneider*'s assets as a result of these alleged violations, loss of profit attributable to the impossibility of achieving the synergies expected from the transaction and subsequent destruction of the group's industrial strategy and negative impact on *Schneider*'s reputation. *Schneider* also claimed ad-

ministrative expenses caused by the incompatibility decision and various fees of legal, banking and tax advisers incurred in order to explore possible methods of separation from *Legrand*.

(2) **Judgment**

Before entering into the merits of *Schneider*'s claims, the CFI clarified legal standards that have to be satisfied in order to establish the Community's liability under Article 288 EC: (1) the institution's conduct must be unlawful; (2) actual damage must have been suffered; and (3) there must be a causal link between the conduct and the damage pleaded. The Court emphasized that the decisive criterion related to the unlawful conduct is whether Community institution concerned manifestly and gravely disregarded the limits of its discretion. In the view of the CFI, such a definition of the threshold for the establishment of non-contractual liability of the Community is conducive to the protection of the room for manoeuvre and freedom of assessment which must be enjoyed by the Community regulator of competition – the Commission.

Prior to commencing its analysis of the particular heads of *Schneider*'s claim, the CFI noted that in relation to every rule allegedly infringed by the Community institution it is necessary to verify whether that rule is intended to confer rights on individuals because not all the norms which the Commission must observe in its economic assessments can be automatically be held to be rules of that kind.

Applying the above mentioned legal standards, the CFI arrived to the conclusion that the ***defects in the Commission's analysis*** of the national sectoral markets established in the *Schneider I* Judgment could not have any impact on the final findings of the incompatibility decision. The Court ruled that the complaint regarding the defective economic analysis by itself could not have caused *Schneider* any damage distinct from that which might have derived from a breach of its rights of defence. Thus, the Court confined its assessment of the incompatibility decision to the determination of the nature and gravity of the violation of the *Schneider*'s rights of defence.

Regarding the procedural violations of the applicant's ***rights of defence***, the CFI emphasized that Article 18(1) ECMR, which mandates the Commission to give the notifying undertakings an opportunity to express their views on the objections against them, is one of the fundamental rights guaranteed by the Community legal order in administrative procedures and that it intends to confer rights on individuals. The Court found the Commission in serious breach of that right for drafting its SO in such a way that *Schneider* could not ascertain that its corrective measures proposed to the Commission were not objectively capable of resolving certain anticompetitive concerns. Finally, the CFI held that the breach of *Schneider*'s rights of defence constitutes a fault on the part of the Commission and causes the Community to incur non-contractual liability with an obligation to compensate the applicant. This was the single instance of wrongful conduct of the Commission that gave rise to the non-contractual liability of the Community.

The Court ***dismissed*** *Schneider*'s claim alleging ***lack of fairness*** on the part of the Commission for giving an impression that the transaction might be nevertheless cleared while it had already decided to prohibit it. The CFI noted that in the absence of additional evidence, the improper drafting of the SO cannot be viewed as stemming from unfairness of the Commission.

Likewise, the Court dismissed *Schneider*'s contention that the Commission's merger decisions are not subject to ***full judicial review*** on the merits and would therefore be contrary to Article 6(1) ECHR. It found the EC merger control regime structured in compliance with the ECHR by ensuring that the Commission's decisions are subject to judicial review by the Community judicature. The Court rejected the existence of any rule of law or principle which would prevent the Commission from entrusting to the same officials the re-examination of a concentration in compliance with a judgment annulling an incompatibility decision.

The CFI also rejected *Schneider*'s claim that the Commission was unnecessary intransigent regarding the procedures for separation of *Legrand*. *Schneider* pleaded ***lack of flexibility*** on the part of the Commission, which should have considered alternative possibilities for divestiture rather than outright separation. The Court stated that Article 8(4) ECMR enables the Commission to require any action to be taken to restore effective competition. The CFI also pointed out that the divestiture decision left the choice of the legal conditions for the divestiture to *Schneider*, only requiring an irreversible legal measure which was to be fully implemented within the prescribed period of time.

Schneider's claim that the Commission failed to give effect to the *Schneider I* Judgment in ***good faith*** be resuming the investigation from the Phase I was likewise rejected by the CFI. The Court

found that according to the *Schneider I* Judgment the Commission was legally entitled to choose to resume the investigation from any phase and since the residual problems of competition deriving from the transaction on the French national sectoral markets were still relevant it could not be held that the Commission had manifestly and seriously overstepped the limits of its discretion.

Summarizing its assessment of the above heads of claim, the Court concluded that none of the complaints concerning the Commission's conduct as a whole in the investigation of the transaction discloses any sufficiently serious breach of a rule of law intended to confer rights on individuals. As a result, only the fact that *Schneider* was deprived of an opportunity to put forward corrective measures conducive to resolution of the competition problems gives it a right to secure reparation for the damages suffered as a result of this procedural misconduct.

In assessing the ***value of the damages*** claimed by *Schneider*, the CFI concentrated its analysis on determining the ***causal link*** between the Commission's breach and the damage suffered as a result. This determination was arrived at through the application of the «but for» test – a comparison between the situation arising from the wrongful measure and the situation which would have arisen if the institution's conduct had been in conformity with the law. Applying this test the Court emphasized that it could not be held that in the absence of the Commission's breach the transaction would necessarily have been declared compatible with the common market. Referring to its *General Electric* judgment,[4] CFI highlighted that there could be ***no presumption as to the compatibility*** with the common market of a transaction that has been notified and that it is for the Commission in each case to form a clear opinion as to such compatibility and to rule accordingly. Based on the above consideration CFI ruled that *Schneider* is not entitled to claim that it suffered harm equal to the entire loss of value of the assets of *Legrand*. On similar grounds CFI also refused to order compensation for the forfeiture of a real opportunity to retain the assets of *Legrand*.

The CFI found a sufficiently close link between the wrongful conduct and the damage suffered by the applicant only in two instances: (1) the costs incurred by *Schneider* in ***participating in the resumed investigation*** of the transaction after the annulment judgments pronounced by the CFI; and (2) the ***reduction of the transfer price*** which *Schneider* had to grant to *Wendel-KKR* in order to secure an agreement that the date of which the disposal of *Schneider*'s shareholding in *Legrand* was to take effect would be deferred for such time as might be necessary to ensure that the proceedings pending before the Community judicature would not become devoid of purpose before reaching their conclusion. In calculating the amount of damages, the CFI also noted that *Schneider*, who consummated the transaction prior to the affirmative clearance by the Commission, had therefore assumed the risk that an incompatibility decision might be adopted. Since the merged entity's strength on the national sectoral markets was obvious, the Court concluded that *Schneider* itself had ***contributed to its own loss*** by assuming the real risk of a subsequent declaration of incompatibility. As a result, the CFI held *Schneider* responsible for one-third of the compensable loss suffered by it as a result of the reduction of the transfer price granted to *Wendel-KKR*.

(3) **Commentary**

Without any doubt, the *Schneider* judgment on damages represents an important milestone in the development of the EC competition law as it was the first time that damages have been awarded by the Court in a merger case. However, its impact on future damage claims is far from clear. First, it should be noted that incompatibility decisions of the Commission are extremely rare, as is their annulment by the Community courts. In this respect, the *Schneider* case stands in line with the famous *Airtours*, *General Electric* and *Tetra Laval* mergers. Secondly, *Schneider* had already consummated the transaction at the time when the incompatibility decision was adopted which, as a result, had contributed to its damages sustained.

The CFI has formulated a ***narrow test*** that has to be satisfied by the parties claiming damages under Article 288 EC. They have to prove that (1) the conduct at issue amounts to a «grave and manifest disregard» of the limits of the institution's discretion and (2) that the losses claimed flow directly from the wrongful conduct (causal link). Through its limited application of the causation test the Court has limited the types of losses that can be compensated under Article 288 EC.

The above considerations should be indicative of the limited actual impact that the *Schneider* damages judgment might have on the ***Commission's*** exercise of its ***margin of discretion*** in the matters of economic analysis in merger cases. The CFI has expressly recognized this margin and refused to view the defects in Commission's analy-

sis as an expression of bad faith or discrimination of the merging parties. The only claims for compensation admitted by the Court evolved around procedural irregularities which resulted in the violation of the applicant's rights of defence. The judgment underlines the importance of procedural fairness, but, provided that the Commission exercises its discretion in the substantive analysis with due diligence, it would be difficult for the merging parties to claim damages against the Commission. It is important to note that factual or economic errors made by the Commission in the process of the merger assessment will continue to fall under the Commission's discretion, shielding it from the potential compensation claims.

The issues raised in the *Schneider* damages judgment will await its final resolution by the ECJ as the Commission has subsequently announced its ***decision to appeal*** the CFI's judgment. It also remains to be seen whether the CFI would follow the same line of reasoning in the pending proceedings for damages launched by *Airtours* (*My Travel*).[5]

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[1] Case COMP/M.2283 *Schneider/Legrand*.
[2] CFI [2002] ECR II-4071 *Schneider Electric ⁄ Commission*.
[3] CFI [2002] ECR II-4201 *Schneider Electric ⁄ Commission*.
[4] CFI [2005] ECR I-5575 *General Electric ⁄ Commission*.
[5] Case T-212/03 *MyTravel ⁄ Commission*, not yet decided.

III.

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«Too close for comfort?» – National Courts and the Recovery of Unlawfully Implemented State Aid

(Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication ⁄ Société internationale de diffusion et d'édition (SIDE),
ECJ (Grand Chamber) of 12 February 2008, C-199/06)

The case in point results from a reference for a preliminary ruling addressed by the French Conseil d'État (Council of State) to the ECJ in a matter involving parallel proceedings brought before Community and national instances against state aid granted by the French State to a book exporter (CELF). In this judgement, the ECJ undertakes the task of clarifying the scope of action of national courts under Article 88(3) EC vis-à-vis state aid which, although considered lawful by the Commission, has been challenged before the CFI. The matter has been brought to the attention of the Court in previous occasions, but unlike the cases van Calster and Transalpine, the ECJ has chosen to address the problem from a different perspective, one that arguably safeguards the Commission's role in the assessment of state aid, while allowing greater legal certainty to the aid recipients.

(a) Facts

The *Centre d'exportation du livre français* (*CELF*) is a cooperative society in the form of a ***public limited company*** generally ***aiming at the promotion of French culture abroad***, in particular in the French overseas territories and departments. The *CELF's* activity consists, more specifically, in ***exporting books***, brochures and any communication media to the aforementioned French territories. The *CELF* carries out its business activity ***irrespective of the size of the orders*** – thus including those that are too small to be profitable –, as a result of the obligation included in the agreements celebrated between the *CELF* and the French Ministry of Culture and Communication (henceforth, «the Ministry»). In order to offset the resulting extra costs, the *CELF* has received operating subsidies from the French State in the period between 1980 and 2002.

These subsidies were first challenged in 1992 when a competitor of *CELF*, the *Société internationale de diffusion et d'édition* (*SIDE*), asked the Commission whether it had been informed, as required under Article 88(3) EC, of the aid being granted to *CELF*. This not being the case, the Commission nevertheless concluded, in its decision NN 127/92 of 8 May 1993 that the special nature of competition in the book trade, combined with the cultural purpose of the specific state aid, made the latter ***compatible with the common market*** as a result of the application of the derogation foreseen in Article 87(3)(d) EC.[1]

SIDE brought an ***action for annulment*** before the Court of First Instance (CFI) and, by judgement