

# INFORMATIVE NOTE



## EU AND COMPETITION

# TJCE GIVES FINAL RULING ON SCHNEIDER SAGA

On 16 July 2009, the European Court of Justice ("ECJ") partially set aside<sup>1</sup> the Court of First Instance ("CFI") judgment of 2007 that condemned the European Commission to compensate Schneider Electric SA ("Schneider"), for damages caused by the Commission's decision to block the acquisition of Legrand SA ("Legrand")<sup>2</sup>.

The first episode of this case goes back to 10 October 2001, when the Commission declared the acquisition of Legrand by Schneider incompatible with the common market. Subsequently, on 30 January 2002, it ordered Schneider to divest of Legrand. Schneider, unwilling to accept them, brought actions before the CFI for the annulment of the incompatibility and divestiture decisions. The CFI, on 22 October 2002, annulled the decisions<sup>3</sup>, on the grounds that the Commission had committed errors on the analysis and assessment of the merger impact and had infringed Schneider's rights of defense. Meanwhile, on 26 July 2002, fearing the rejection of the two claims, Schneider had concluded an agreement for the sale of Legrand to Wendel-KKR, foreseeing the implementation of the agreement no later than 10 December 2002, and including a cancellation clause, upon

payment of a penalty of 180 million euro, that could be enforced until 5 December 2002. After the CFI judgment, the Commission reopened proceedings and expressed again its doubts regarding the merger compatibility with the common market. Schneider thus decided to give up the transaction and sold Legrand to Wendel-KKR.

On 10 October 2003, Schneider brought proceedings against the Community, requesting the declaration of the Commission's civil liability and subsequent compensation. The CFI, considering that the violation of Schneider defense rights constituted a sufficiently serious breach of a rule of law intended to confer rights on individuals, condemned the Community to compensate Schneider (i) for the expenses incurred relating to its participation in the resumed merger control procedure, and (ii) in two thirds of the loss due to the reduction of Legrand's sale price that Schneider had to concede Wendel-KKR for the postponement of the date for the sale's implementation to 10 December. The Commission appealed to the ECJ, which has now given final ruling on this case.

The ECJ confirmed the CFI decision as regards the Community's duty to compensate for the loss represented by the expenses incurred by Schneider with its participation in the recommenced merger control proceedings.

However, the ECJ set aside the CFI judgment insofar as it condemned the Commission to reimburse two thirds of the loss alleged by Schneider in relation

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<sup>1</sup> Case C-440/07 P, Commission vs. Schneider, ECJ judgment of 16 July 2009.

<sup>2</sup> Case T-351/03, Schneider vs. Commission, CFI judgment of 11 July 2007.

<sup>3</sup> Case T-310/01, Schneider I, CFI judgment of 22 October 2002, and Case T-77/02, Schneider II, CFI judgment of 22 October 2002.

At the end of the investigation, either a decision finding the concentration to be compatible would have been adopted, or a further incompatibility decision would have been taken, in which case the transfer would have been the legal consequence of the incompatibility found and would thus not have been the cause of damage to be compensated.

to the reduction of Legrand's sale price conceded to Wendel-KKR. The ECJ considered that one of the liability's requirements was missing – the causal link. It concluded that the direct cause of the loss in relation to the price reduction was Schneider's decision to allow Legrand's sale to become effective on 10 December 2002. The ECJ reminded that a decision of incompatibility with the common market is a risk inherent to any merger control procedure, either initially or where it is resumed. Therefore, it considered that the normal legal consequence of annulment of the negative decision and the divestiture decision would have been that Schneider participated in the resumed in-depth investigation. At the end of the investigation, either a decision finding the concentration to be compatible would have been adopted, or a further incompatibility decision would have been taken, in which case the transfer

would have been the legal consequence of the incompatibility found and would thus not have been the cause of damage to be compensated.

Although this judgment makes the Commission's liability for unlawful decisions to block mergers very hard to obtain, some positive aspects can be drawn from it. Firstly, it is a warning as regards the duty to observe the companies' right to be informed and heard on all the issues and problems identified by the Commission in the course of proceedings and that may affect them. Secondly, the principle according to which the Commission can be found liable for unlawful decisions to block mergers was not overruled by the ECJ; it will however be necessary to show adequate evidence of the existence of all liability requirements, including the causal link between the illegal decision and the loss suffered.

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