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**CASE NOTE:**

***Schneider Electric* Damages Judgment: A New Era in EC Merger Control?**

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**Schneider Electric Damages Judgment: A New Era in EC Merger Control?**

by

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The judgment of the Court of First Instance (“CFI”) of July 11, 2007 awarding damages to Schneider Electric is unlikely to lead to a flood of merger-related damages litigation against the European Commission. But, unless it is overturned on appeal, the judgment has broken new ground in the Community Courts’ case law under Article 288(1) of the EC Treaty.<sup>1</sup> Schneider’s claim gave the CFI its first opportunity to apply Article 288(1) to a merger investigation under the EC Merger Regulation. Given this novelty, the Court was faced with the task of applying a body of law derived largely from cases involving agriculture and external trade to a complex merger control situation.

**Article 288(1): Law and Policy**

The CFI and ECJ’s case law under Article 288(1) stretches back to the late 1960s and shows consistently that claimants have to discharge a heavy evidential burden in order to obtain damages. They must prove, first, that the conduct at issue amounts to a “grave and manifest disregard” of the limits of the institution’s discretion, and second, that the losses claimed flow directly from the erroneous conduct. The “grave and manifest” test has been used by the Court to distinguish “excusable” errors, which do not trigger liability under Article 288(1), from errors that are of such gravity as to call for pecuniary compensation. In applying the test for causation, the Court has found the requisite causal link only in cases of clear and direct linkage between the error and alleged damage. Through its strict application of the causation test, the Court has limited the types of loss that can be compensated under Article 288(1).

No doubt, the Court’s narrow formulation of the tests to be met under Article 288(1) is intended to shield the Community institutions from the risk of frequent and frivolous claims for damages which could undermine their ability to carry out their tasks. The evidential standard is particularly exacting for damages claims that relate to decisions under the EC Merger Regulation. As the Community Courts have consistently pointed out in actions for the annulment of Commission merger control decisions, the Commission enjoys a broad margin of discretion when assessing the competitive effects of mergers notified under the Regulation. Given the breadth of its discretion, only the most egregious errors leading directly to loss would seem capable of meeting the evidential standard.

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<sup>1</sup> On August 6, 2007, the Commission announced that it intends to file an appeal against the CFI judgment.

### **The *Schneider* Judgment**

The Court found that by failing to clearly spell out in the statement of objections certain conglomerate concerns that it subsequently relied upon to block Schneider's acquisition of Legrand,<sup>2</sup> the Commission had infringed Schneider's rights of defense and manifestly and gravely disregarded the limits on its powers under the Merger Regulation. Interestingly, the Commission Hearing Officer had previously dismissed Schneider's complaint on this point.

Although the Court's assessment of the gravity of the Commission's error is noteworthy, its analysis of causation may have greater jurisprudential value. As could be expected, the Court applied the causation test very strictly. Schneider claimed damages for the total loss it sustained from selling Legrand for less than it had paid to acquire Legrand. The loss was estimated to be between EUR 2.48 billion and EUR 3.2 billion. The Court found that only loss flowing directly from the defect in the Commission's decision, and not loss flowing from the decision itself, had the requisite causal link. The Court concluded that the infringement of Schneider's rights of defense was not the sole reason for the Commission prohibiting the transaction. In other words, while it could be concluded that the Commission's infringement had denied Schneider the opportunity to rebut or address the alleged conglomerate concern with remedies, it could not be concluded that but for the Commission's infringing conduct, the Commission would have approved the transaction. Unless the Court had been convinced that the prohibition of the transaction was the "direct and certain" consequence of the Commission's erroneous conduct, the total loss from Schneider selling Legrand for less than the acquisition cost was too remote to merit damages under Article 288(1). As the immediate consequence of the annulment of the prohibition decision was reopening of the Commission's investigation into the transaction, Schneider's costs of participating in the reopened investigation were sufficiently linked to the infringement to merit damages. Consequently, Schneider could recover its legal fees and other costs of participating in the reopened investigation.

The Court also found that Schneider could recover damages for the loss it sustained from having to defer completion of its sale of Legrand. The Court agreed that the short timeframe that the Commission gave Schneider to dispose of its interest in Legrand required Schneider to negotiate sale terms several months before Schneider knew the outcome of its appeal against the prohibition decision. That constraint, together with Schneider's legitimate desire to preserve its ability to retain Legrand in the event of the prohibition decision being annulled, required Schneider to enter into a sale agreement which provided for deferral of the sale by approximately four months. Such a deferral entailed risk of reduction in the value of Legrand to the purchaser, which was reflected in the lower sale price. The Court ordered that the amount of this loss be established by a

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<sup>2</sup> The Commission alleged that the transaction would strengthen Schneider's dominant position in the markets for panel-boards because it would combine that position with Legrand's leading (but not dominant) position in ultraterminal equipment, an entirely separate market from panel-boards.

third party expert. The Court also assessed whether Schneider's entitlement to damages should be reduced on the ground that Schneider had contributed to the loss. It concluded that Schneider could recover only two-thirds of the loss because, by proceeding to acquire Legrand prior to completion of the Commission's review of the transaction, Schneider had accepted the risk of subsequently having to make a forced sale of its interest in Legrand.

### **Significance of the *Schneider* Judgment**

The Court steered carefully between a ruling that that would have been tantamount to outright denial of the availability of damages in a merger control context and setting an evidential standard so low as to encourage frequent claims under Article 288(1). The judgment highlights the pivotal role of rights of defense in EC Merger Regulation proceedings and confirms that actions under 288(1) in the context of EC Merger Regulation decisions may not always be futile. It is less likely in the future that the Commission will commit errors of the type and gravity that it committed in the Schneider proceedings. The procedural reforms that the Commission implemented in response to the Court's censure in the *Airtours*, *Schneider* and *Tetra Laval* Article 230 proceedings makes such errors less likely. The painstaking detail in which the Commission now drafts statements of objections makes it highly unlikely that the Commission will repeat the error it made in Schneider/Legrand. Moreover, through its strict application of the causation rules, the Court has signaled that only limited compensation is likely to be awarded.

That said, the judgment provides helpful insight into how the Court is likely to apply the causation rules to any future damages claims in the Merger Regulation context. The Court was perhaps somewhat harsh in finding that Schneider had contributed to its loss. It should be recalled that at the time Schneider launched its bid for Legrand, French stock exchange rules did not allow a bidder for a French listed company to make closing of its bid conditional upon merger control approval. Thus, Schneider's only alternative course of action would have been to seek Commission approval before launching its bid, with the obvious risk of interlopers frustrating the transaction and diminution in the value of Legrand as a result of uncertainty over its fate.