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CVRIA
LUXEMBOURG

Press and Information

PRESS RELEASE No 8/09

3 February 2009

Advocate General's Opinion in Case C-440/07 P

Commission v Schneider Electric

MR RUIZ-JARABO PROPOSES THAT THE COURT SET ASIDE IN PART THE JUDGMENT WHICH GRANTED SCHNEIDER THE RIGHT TO COMPENSATION FOR TWO HEADS OF DAMAGE SUSTAINED AS A RESULT OF THE ILLEGAL PROHIBITION OF ITS MERGER WITH LEGRAND

The European Community ought solely to pay compensation to Schneider to cover costs incurred by the latter in order to take part in the recommenced investigation of the transaction

Schneider is a company engaged in the production and sale of equipment and systems in the electrical distribution, industrial control and automation sectors, while Legrand is active in the area of low-voltage electrical installations. On 16 February 2001 the two French companies notified the Commission of a plan whereby the former company would acquire control of the latter by means of a public exchange offer for shares (the offer).

On 3 August 2001 the Commission sent to Schneider a statement of objections indicating that its actions would create a dominant position on a number of national sectoral markets

After completion of the offer, the Commission adopted on 10 October 2001 a Decision[1] which declared the transaction to be incompatible with the common market, on the grounds that the merger would create a dominant position and significantly impede effective competition in some national markets and furthermore would strengthen a leading position in several French sectors.

Since Schneider had implemented a merger which was subsequently declared to be incompatible with the common market, on 30 January 2002 the Commission adopted a second Decision[2] which ordered Schneider to divest itself of Legrand within nine months, a period which expired on 5 November 2002.

Schneider brought an action against the decisions of incompatibility and divestiture before the Court of First Instance, and sought their annulment.

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[1] Commission Decision 2004/275/EC of 10 October 2001 declaring a merger transaction incompatible with the common market (Case COMP/M.2283 — Schneider-Legrand).

[2] Commission Decision C(2002) 360 final of 30 January 2002 requiring undertakings to be separated (Case COMP/M.2283 – Schneider-Legrand)

In the interim, the Commission extended until 5 February 2003 the period allowed to Schneider to divest itself of Legrand.

For its part, Schneider made preparations for the sale of Legrand, to be carried out in the event of its two actions of annulment being rejected. For that purpose, on 26 July 2002 Schneider concluded with the consortium Wendel KKR a contract of sale which had to be implemented by 10 December 2002 at the latest. The contract contained a clause which, upon payment of compensation (EUR 180 million), allowed Schneider to cancel the contract no later than 5 December 2002, provided that the decision of incompatibility was annulled.

By two judgments of 22 October 2002[3], the Court of First Instance annulled the incompatibility decision and, consequently, the divestiture decision which gave effect to the former. Among other grounds, the Court of First Instance held that the Commission had failed to have regard to Schneider's rights of defence, because of a procedural irregularity.

As a result of those judgments, the Commission recommenced the procedure of investigating the Schneider-Legrand transaction. In a fresh statement of objections, the Commission notified Schneider that its actions potentially affected competition in the French sectoral markets. On 2 December 2002 Schneider advised the Commission that it intended to sell Legrand to Wendel KKR, a sale which finally took place on 10 December 2002.

On 10 October 2003 Schneider brought an action for damages before the Court of First Instance, seeking compensation of approximately EUR 1 700 million as reparation for the losses Schneider claimed it had sustained because of the illegality of the incompatibility decision.

By judgment of 11 July 2007[4] the Court of First Instance recognised Schneider's right to obtain compensation but only in respect of some of the losses alleged by that company. After finding that the failure to have regard to Schneider's rights of defence constituted a sufficiently serious breach of a rule of law intended to confer rights on individuals, the Court of First Instance confirmed that there was a sufficiently close causal connection between the unlawful act committed and two heads of damage sustained by Schneider to give rise to a right to compensation. The first comprised the expenses incurred by Schneider relating to its participation in the resumed merger control procedure which was undertaken by the Commission following the annulments pronounced by the Court on 22 October 2002. The second represented two-thirds of the reduction in the divestiture price which Schneider had to concede to Wendel/KKR in order to obtain a postponement of the execution of that divestiture.

By the appeal now before the Court of Justice, the Commission asks the Court to set aside the judgment of the Court of First Instance of 11 July 2007.

In his Opinion, Advocate General Dámaso Ruiz-Jarabo begins by finding that the unlawful act committed by the Commission constitutes a sufficiently serious breach.

Next, Mr Ruiz-Jarabo analyses whether or not there is a causal link between the unlawful act committed and the harm caused to Schneider. As regards the loss suffered by Schneider by agreeing a reduced price for the sale of Legrand in order to compensate for the risk of depreciation of Legrand's assets to which Wendel KKR was exposed through postponement of the actual sale until a date when judgments would have been delivered in the two cases then pending before the Community courts, Mr Ruiz-Jarabo concludes that there is no such

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[3] Judgment of the Court of First Instance in Case T-310/01, *Schneider Electric* v *Commission* and judgment of the Court of First Instance in Case T-77/02, *Schneider Electric* v *Commission* (see also CP 84/02).

[4] Judgment of the Court of First Instance in Case T-351/03, *Schneider Electric* v *Commission* (see also CP 48/07).

relationship of causality. In particular, he considers that Schneider's loss does not directly, immediately and exclusively arise from the Commission's unlawful act, in a relationship of cause and effect.

First, Mr Ruiz-Jarabo observes that the reduction in the sale price of Legrand conceded by Schneider is not a consequence of the incompatibility decision being declared invalid, but is a matter of Schneider's own free choice in its dealings with the other business. The obligation (ultimately held to be unlawful) to separate the merged undertakings was only the background, and had no direct influence on the terms of the sale-purchase agreement concluded by Schneider and Wendel KKR.

Secondly, he considers that Schneider was under no compulsion to have the sale agreements concluded and finalised at so early a date (specifically, on 26 July 2002) given that the period allowed by the Commission, until 5 February 2003, which might have been extended, appeared adequate for the identification of a suitable purchaser. In the Advocate General's opinion, to have acted in such a way fuels the suspicion that Schneider had intended to give priority to the transaction with Wendel KKR, and regarded continuation of the merger as merely hypothetical. He adds that that conjecture is strengthened by the fact that Schneider, rather than save the merger with Legrand by returning to the investigation commenced by the Commission after annulment of the decisions, preferred to implement the contract entered into with the purchaser.

Lastly, Mr Ruiz-Jarabo considers that Schneider took a considerable risk by relying on one of the exceptions provided for in the regulation on the control of concentrations between undertakings[5] and implementing the merger with Legrand before the Commission had ruled on that transaction. In his view, the risks assumed by companies who rely on such exceptions include the normal vicissitudes associated with mergers. The awarding of compensation for the reduced price agreed by Schneider while waiting for conclusion of the pending cases would provide undertakings exceptionally implementing a merger before a Commission ruling with a guarantee or insurance against additional costs of all kinds which may arise in the event of an infringement, and even an infringement of procedural rules which have no direct bearing on the economic basis of the merger.

Further, Mr Ruiz-Jarabo considers that Schneider broke the chain of causality between the invalidity of the incompatibility decision and the loss caused by the reduced price for the sale of Legrand to Wendel KKR, by selling Legrand when it was not legally obliged to do so and by not acting with due diligence. In his opinion, when on 10 December 2002 Schneider implemented the contract of sale of Legrand, it was bound solely by its contract with Wendel KKR, since the incompatibility and divestiture decisions had been annulled. Consequently, the completion of the sale was a matter of free choice. Furthermore, Mr Ruiz-Jarabo considers that Schneider did not act with diligence since it disregarded the provision in the contract with Wendel KKR which allowed cancellation of the contract upon payment of EUR 180 million. On the assumption that Schneider still wanted to complete the merger with Legrand, it would have been more logical to withdraw from the sale, relying on that provision, to reduce the alleged damage, since the sum of EUR 180 million cannot be compared with the compensation initially claimed by Schneider of approximately EUR 1 700 million.

In consequence of all the foregoing, Mr Ruiz-Jarabo suggests that the Court of Justice should set aside the judgment of 11 July 2007 in which the Court of First Instance ordered

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[5] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [(OJ 1989 L 395, p. 1) corrected (OJ 1990 L 257, p. 13) and amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 10]

the European Community to compensate Schneider for two thirds of the losses sustained as a result of the amount of the reduction in the transfer price of Legrand that Schneider had to concede to Wendel KKR in exchange for the postponement of the actual date of sale of Legrand until 10 December 2002.

IMPORTANT: The Advocate General's Opinion is not binding on the Court. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court of Justice are now beginning their deliberations in this case. Judgment will be given at a later date.

For further information, please contact Christopher Fretwell
Tel: (00352) 4303 3355 Fax: (00352) 4303 2731