THE AMERICAN LAWYER
OCTOBER 2007
www.americanlawyermedia.com
ALM

Belgium

ARNOLD & PORTER LLP

EU merger control: can you be compensated when things go wrong?


Marleen Van Kerckhove

On 11 July 2007, the European Court of First Instance ("CFI") for the first time ever agreed to award damages to a company for the loss it suffered as a result of the European Commission ("Commission") prohibiting its proposed merger, a decision that had subsequently been annulled by the CFI. The case concerned Schneider Electric's ("Schneider") attempt to acquire Legrand, a competing French manufacturer of electrical equipment.

THE FACTS

In October 2001, the Commission had prohibited the acquistion by way of a public bid of Legrand by Schneider. Schneider had previously acquired 98.7% of the shares in Legrand, which is permitted under EU merger control law in case of a public bid and provided the acquiror does not exercise the votes attached to the shares prior to clearance. Therefore, following the prohibition, the Commission in a separate decision had ordered Schneider to divest all of its shares in Legrand. Schneider appealed both decisions. Meanwhile, upon instruction from the Commission and on terms agreed with it, Schneider had appointed a trustee through which it was to exercise its voting rights in Legrand. In an extension of time agreed with the CFI, Schneider was to divest its shares in Legrand by February 2003, unless the CFI would have previously annulled the Commission's prohibition decision.

Uncertain of the outcome of its appeal, Schneider in July 2002 agreed to sell its shares in Legrand to French holding company Wendel Investissement and US equity investment company KKR, but with the right to walk away from the deal should its appeal be successful. The Commission gave unconditional clearance to the proposed sale in October 2002. A week later, the CFI annulled the Schneider prohibition decision and referred the case back to the Commission for re-examination. The Commission again expressed serious concerns and insisted on a series of remedies to cure these concerns. As the Commission was about to open another in-depth enquiry into the acquisition, Schneider decided to abandon the transaction and eventually sold its shares to Wendel/KKR.

In October 2003, Schneider filed an action for damages before the CFI, claiming EUR 1.66 billion for losses suffered as a result of the Commission's wrongful prohibition of its acquisition of Legrand.

THE CFI'S JUDGMENT

For the European Community to incur non-contractual liability there must have been unlawful conduct on the part of the Community's institutions, the criterion being whether there was grave and manifest disregard of the limits of their powers of assessment. The claimant must show a causal link between the unlawful conduct and the damage suffered.

The Commission's prohibition decision had been annulled on account of two main errors: (i) failure in its substantive analysis of alleged concerns regarding certain product markets in which Schneider and Legrand were active outside France; and (ii) failure to protect Schneider's right of defence with respect

to the Commission's substantive concerns regarding the conglomerate effects of the acquisition in certain product markets in France.

The CFI found that this first ground of annulment could not form the basis of a claim in damages. Firstly, it was not sufficiently serious to have changed the outcome of the decision. Secondly, an unduly critical review of the Commission's assessment would jeopardize the effectiveness of the merger control proceedings, bearing in mind also the Commission's wide margin of discretion, the complexity of the procedures and the strict time limits under which they are conducted.

However, the second ground of annulment was sufficient, according to the CFI, to form the basis of a claim in damages. Contrary to its obligation to inform the parties at every stage of the procedure of the objections held against them, the Commission had failed to share with Schneider its concerns regarding possible conglomerate effects in France. Instead, it had focused on the overlaps between the parties' activities in markets outside France. As a result, Schneider had not been able to put together a sufficient package of remedies to seek to address all of the Commission's concerns. This, the CFI held, was sufficient to result in liability in damages. The Commission has no margin of discretion in applying the rules on rights of defence, nor can any failure be justified by reference to the complex or difficult nature of the assessment.

The CFI awarded a right to com–pensation in respect of two categries of financial losses incurred by Schneider: (i) expenses arising from its participation in the resumed merger investigation when the case, following annulment, was referred back to the Commission; and (ii) the reduction in the divestiture price which Schneider had to concede to Wendel/KKR in order to obtain a delay in implementing the divestiture pending the annulment proceedings. The CFI considered that Schneider had contributed to its own loss in respect of this second category of losses by assuming the risk that the prohibition decision would be upheld. Accordingly, it awarded only two-thirds of the latter loss.

THE IMPACT OF THE CFI'S JUDGMENT

The award of damages is a welcome and necessary complement to the CFI's willingess, demonstarted in a series of annulments of merger decisions in recent years, to impose checks and balances on the Commission's merger reveiw process and thereby better protect the rights of the companies involved. At the same time, its impact should not be overstated. The broad discretion that the Commission enjoys in its substantive analysis will often stand in the way of a successful damages claim. It is only in the rare circumstance that a clear and serious breach of the Commission's obligations towards the companies concerned can be shown – such as a flagrant breach of the rights of defence – that such claim will be successful, in whole or in part. Its most immediate impact, therefore, is likely to be at the procedural level, with both the Commission and the parties more keenly aware of the Commission's legal obligation to keep the parties properly informed at every step of the proceedings. ■

About the author

Marleen Van Kerckhove is a partner at Arnold & Porter LLP in Brussels and head of its European Competition Practice.

Marleen.VanKerckhove@aporter.com

Tel: +32 (0)2 517 6317

Fax: +32 (0)2 517 6603

Arnold & Porter LLP

11, Rue des Colonies – Koloniënstraat 11

B-1000 Brussels

BELGIUM

Tel: +32 (0)2 517 6600

Fax: +32 (0)2 517 6603