MERGERS (ELECTRICAL EQUIPMENT): THE SCHNEIDER CASE

Subject: Mergers
Prohibition
Annulment (of Commission's Decision)
Procedure
Statement of Objections

Industry: Electrical equipment
(Some implications for other industries)

Parties: Schneider Electric SA
The Commission of the European Communities

Source: Court Press Release 84/02, dated 22 October 2002, relating to Judgments in Cases T-310/01 and T-77/02, *Schneider Electric SA v Commission*

(Note. The Court of First Instance has annulled the Commission's Decisions prohibiting the concentration between Schneider and Legrand and ordering them to separate accordingly. According to the Court, the Commission's economic analysis is vitiated by errors and omissions which deprive it of probative value, save in relation to French sectoral markets. With regard to French sectoral markets, while acknowledging the anti-competitive effects of the operation, the Court of First Instance finds a serious infringement of the rights of the defence, based on a discrepancy between the Commission's Statement of Objections and the terms of its final Decision, leading the Court to annul the prohibition decision.)

The Court of First Instance delivered two judgments on 22 October 2002, in relation to the actions brought by the French group Schneider Electric against the Commission's veto of its merger with Legrand, another French producer of low-voltage electrical equipment, and against a second Commission decision ordering that the two companies should accordingly be separated. Only a little more than three months have elapsed between the hearings and today's judgments, as a result of the expedited procedure obtained by Schneider in May 2002 in consideration of its reducing the number of arguments in its application. The Commission had postponed the date by which the two undertakings had to be separated, in order to allow the Court of First Instance to rule in time.

According to the Commission, the effects of this operation on competition affect all materials used for the distribution of electricity and the control of electric circuits at various levels (household, office, factory). That covers a large range of products from distribution panels to cable supports to power points and switches.

The annulment of the Commission's first decision results from a twofold assessment by the Court of First Instance:

- in the first part of its assessment, it challenges the Commission's economic analysis in support of its banning of the merger, accepting that analysis only in relation to French sectoral markets;
- in the second part, concerning those markets alone, it considers the procedure followed by the Commission when examining the proposal and finds a procedural irregularity which constitutes an infringement of defence rights, having regard to the discrepancy between the Statement of Objections and the Commission's Decision.

First, the Court of First Instance finds several obvious errors, omissions and contradictions in the Commission's economic reasoning. For example, having cited the national dimension of the geographical markets in order to demonstrate the strengthening or the creation of a dominant position for the merged entity, the Commission bases its assessment of the impact of the concentration operation on transnational, global considerations, extrapolated from a single market without demonstrating its relevance at the national level. Similarly, its demonstration of the key position in relation to wholesalers generated by the merger of the two companies is supported only by general data, whereas more precise analyses on the national scale would have been more relevant and convincing.

Moreover, in the absence of a precise country-by-country examination of the markets affected, the argument based on potential portfolio effects of brands and an unequalled range of products does not convince the Court of First Instance. The fact that Schneider holds large shares in post-terminal wiring accessories markets in Nordic countries, and that Legrand is more established in the South of Europe does not permit the inference that the products of the Schneider-Legrand group will cover all electric products. That led the Commission to overestimate the economic power of the group. Similarly, the Court finds, the Commission overestimated the economic power of the merged entity when assessing the group's market shares in relation to the underestimated shares of its two main competitors (Siemens and ABB), without taking into account the internal sales of components for electric panels which the latter carry out with their specialised subsidiaries.

The figures and data concerning the Italian and Danish markets combine to cast doubt on the Commission's conclusions.

Notwithstanding the gaps found in the assessment of the impact of the operation, the Court of First Instance acknowledges that, in relation to the French sectoral markets where the two companies hold considerable shares, the Commission's conclusion as to the dominant position and the elimination of competition may be accepted, having regard to the factual evidence produced.

It is thus solely in relation to the French markets affected by the concentration that, in the second part of its assessment, the Court of First Instance examines Schneider's argument that there was a substantial change in the nature of the Commission's objections between the statement of those objections which it gave to the parties and the final decision which is being challenged here. The Statement of Objections is designed to allow the undertaking to propose solutions

to the problems identified and to make its defence known before the Commission adopts a final decision. In the Statement of Objections which was notified, the emphasis was placed on the 'overlapping' of Schneider-Legrand's activities in certain markets and the strengthening of Schneider in relation to wholesalers resulting therefrom. In the decision which forms the subject-matter of the dispute, the Commission uses the term 'association', which refers to two preponderant positions held in a single country by two undertakings in two distinct but complementary sectoral markets. The sense of the objection being different, Schneider found itself unable to propose appropriate corrective measures. By proceeding in that way and not allowing Schneider to make appropriate offers to withdraw, the Commission infringed defence rights.

This judgment therefore annuls the prohibition decision. The Court of First Instance adds that, if the issue of the compatibility were to be re-examined (if Schneider maintains its wish to acquire Legrand), the procedure must recommence with the drawing up of a precise Statement of Objections and relate only to French markets, which are the only markets to have been identified as being affected by the implementation of the merger.

As for Case T-77/02, concerning the second Commission decision, requiring Legrand and Schneider to separate and legally based on the decision prohibiting the merger, the annulment of that latter decision automatically entails the annulment of the second decision which is devoid of foundation. ■

BOC / Air Liquide

A curious feature of this case is that it refers to a deal, cleared by the Commission, which will have no impact in Europe: it involves the creation of a joint venture between Air Liquide SA of France and Britain's BOC Group Plc, whereby the two industrial gases companies will merge part of their activities in Japan. In September 2002, the two companies announced that they intended to merge part of the activities of their Japanese subsidiaries: Air Liquide Japan and BOC's Osaka Sanso Kogyo. The joint venture, which will be called Japan Air Gases Ltd, will be active in the manufacturing and sales of industrial or medical gases in tonnage, bulk or cylinders as well as electronic specialty gases. The combined sales of the merged activities amounted to €1.2 billion in 2001. The analysis carried out by the Commission showed that the deal will have no impact in Europe since industrial gases markets are mostly national in scope: this is the case, in particular, of bulk and cylinder sales. The operation has, however, been notified to Japan's competition authority.

Source: Commission Statement IP/02/1455, dated 10 October 2002