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French Competition Law Newsletter

Highlights

— The Paris Court of Appeals rejects private antitrust damage claim against Schneider Electric, despite previous commitments decision

— The French *Conseil d'État* rules out the possibility to challenge the opening of a pre-notification phase in merger control proceedings

The Paris Court of Appeals rejects private antitrust damage claim against Schneider Electric, despite previous commitments decision[1]

In a ruling dated March 9, 2022, the Paris Court of Appeals partially quashed a 2019 judgment in which the Paris Commercial Court had held that Schneider Electric France was in a dominant position in certain markets for the supply of spare parts. The ruling confirms that the burden of proving the existence of a dominant position falls on the claimant, even though the defendant may have previously offered commitments to address concerns of abusive conduct under Article 102 TFEU.

Background

Schneider Electric France ("**Schneider**") is a subsidiary of the Schneider group, which is specialized in electrical distribution, industrial control and automation, and one of the main manufacturers of medium- and low-voltage electrical distribution equipment in France. Schneider Electric also provides maintenance services on electrical distribution equipment, along with subsidiaries of other manufacturers (such as GE Alstom, ABB or Siemens), independent facility managers, electrical contractors and other third party maintenance providers.

In 2012, a third-party maintenance provider, SHB Electric ("**SHB**"), placed an order with Schneider for the supply of Schneider "level 4" maintenance parts.[2] Schneider refused to sell the spare parts to SHB unless the latter agreed to let Schneider's own employees perform the associated maintenance services, ultimately prompting SHB to file a claim against Schneider before the

[1] Paris Court of Appeals ruling of March 9, 2022 (No. 19/19747).

[2] The AFNOR standard defines, at EU level, five levels of industrial maintenance and specifies the persons or companies authorized to intervene at each level. Level 4 covers significant corrective or preventive maintenance work and significant improvements. Only specialized and professional technicians of a central maintenance workshop and/or specialized companies can intervene to perform this type of maintenance.

Nanterre Commercial Court in April 2016. In a judgment issued on September 28, 2016, the Nanterre Commercial Court held that the Paris Commercial Court had jurisdiction on the case.

In parallel, in May 2016, the French Competition Authority ("**FCA**") opened *ex-officio* proceedings in the sector for the maintenance of medium- and low-voltage electrical distribution equipment in France. Following a preliminary assessment, the FCA expressed concerns that Schneider was committing an abuse of dominant position by, engaging in refusals to sell on the same grounds as those faced by SHB. Schneider argued that its conduct aimed at ensuring the safety of property and people and at protecting its business model, in particular its brand image. The FCA, however, took the view that Schneider's policy was not necessary to achieve these objectives and potentially amounted to unlawful tying, thereby preventing third-party maintenance providers from carrying out a full range of maintenance services on Schneider's medium- and low-voltage equipment.[3] Ultimately the case was solved through commitments, as Schneider agreed to authorize for a five year-period the sale of a significant number of spare parts (1506 items) subject to level 4 maintenance, provided that third-party maintenance providers wishing to install these parts undergo mandatory Schneider-organized trainings.[4]

On September 23, 2019, the Paris Commercial Court held that Schneider held a dominant position in the secondary market for the supply of spare parts for Schneider equipment but did not commit any abuse.[5] The judgment was, however, appealed by both SHB and Schneider, with the latter seeking to reverse the Court's findings regarding the existence of a dominant position.

The Paris Court of Appeals' ruling

On March 9, 2022, the Paris Court of Appeals (the "**Court of Appeals**") dismissed SHB's claim on the ground that it had omitted to define the relevant market(s), meaning that the existence of a dominant position held by Schneider could not be established. According to the Court of Appeals, the burden of proof fell on SHB, who should have defined both the relevant product market and the relevant geographic market in which Schneider was alleged to be dominant.

The Court of Appeals further held that neither the judgment issued by the Paris Commercial Court, nor the FCA's commitments decision could compensate for SHB's lack of demonstration on this issue. Specifically, in its ruling, the Court of Appeals noted that the Paris Commercial Court "only stated that Schneider [held] strong positions in the markets for the supply of equipment, providing [Schneider] with an essential leverage over competing third party maintenance providers in the low- and medium-voltage market." Similarly, the FCA had merely "not ruled out" the existence of a secondary market for the provision of in-depth maintenance services on Schneider's medium- and low-voltage equipment, and the possibility that Schneider held a dominant position in this market. According to the Court of Appeals, this was insufficient to conclude on the existence of a dominant position.

The Court of Appeals added that even if it were accepted that the relevant market was the market for the provision of level 4 and 5 maintenance services on Schneider equipment, it was incumbent on SHB to (i) show that these products are substitutable for a specific customer base, namely companies specialized in the installation, maintenance and repair of electrical equipment, and (ii) establish the scope of the relevant geographic market and, should it correspond to the French market, demonstrate that it was

[3] The FCA found that the supply and maintenance of electrical distribution equipment constituted separate markets. The FCA identified (i) potential primary markets for the supply of medium- and low-voltage electrical distribution equipment, (ii) secondary markets for the supply of spare parts for Schneider Electric equipment, on which Schneider Electric was likely to hold a dominant position, and (iii) potential secondary markets for the provision of maintenance services on Schneider Electric equipment.

[4] FCA Decision No 17-D-21 of November 9, 2017, relating to practices in the maintenance of medium- and low-voltage electrical distribution equipment.

[5] Commercial Court of Paris ruling of September 23, 2019 (No. j20190000381).

sufficiently homogenous with respect to the conditions of competition.

The Court of Appeals therefore dismissed SHB's claims. While the ruling's reasoning relies on market definition issues, it may more generally be seen as a reminder that contrary to FCA prohibition decisions, FCA commitments decisions do not significantly alleviate the burden of proof resting on claimants in the context of private antitrust damage actions.

The French *Conseil d'État* rules out the possibility to challenge the opening of a pre-notification phase in merger control proceedings

On March 1, 2022, the Conseil d'État rejected a claim brought by French telecommunications and internet provider Free in connection with the contemplated merger of TF1 and Métropole Télévision ("**M6**"), two of the largest media companies in France. The *Conseil d'État* held that because the opening of a pre-notification phase by the French Competition Authority ("**FCA**") is, by nature, "purely preparatory," an applicant may not seek its annulment.

Background

Under Article L. 430-3 of the French Commercial Code, parties to a reportable merger must submit a notification to the FCA before implementing such merger, and may do so "as soon as they are in a position to present a project that is sufficiently advanced to allow for the examination of the case." Similar to the European Commission, the FCA may, at the request of the notifying parties, initiate the review of a merger case prior to its formal notification, during a so-called "pre-notification" phase[6]. The opening of a pre-notification phase enables the FCA to carry out various investigative measures and in particular to conduct market tests or send requests for information to third parties.

Between the public announcement of the contemplated TF1/M6 merger in May 2021 and its formal notification in February 2022, the FCA had opened such a pre-notification phase, leading to the launch of a market test and to the issuance of requests for information to a number of third parties, including Free and its parent company, Iliad.

Iliad considered that the merger should be assessed not by the FCA but by the European Commission because it would confer joint control over the new entity to Bouygues, TF1's parent company, and RTL Group, M6's parent company—as opposed to an acquisition of sole control by Bouygues as the parties claimed.[7] In this context, in January 2022, both Free and Iliad applied before the *Conseil d'État*, the French supreme administrative court, for the annulment of the FCA's decision to initiate pre-notification proceedings (requête en excès de pouvoir). In their application, Free and Iliad also asked the *Conseil d'État* to make a reference for a preliminary ruling to the French Constitutional Council, arguing that Articles L. 450-8 and L. 464-2, V of the French Commercial Code, which empower the FCA to fine companies for obstruction to an investigation, are incompatible with the French Constitution.

The *Conseil d'État*'s ruling

On March 1, 2022, the *Conseil d'État* dismissed Free and Iliad's claim. It found that the FCA's decision to open a pre-notification phase into a transaction that is likely to be formally notified is a procedural step of a "purely preparatory"

[6] *See* the FCA's Merger control guidelines of July 2020 (*Lignes directrices de l'Autorité de la concurrence relatives au contrôle des concentrations*), paras. 191-200.

[7] Iliad thus argued that the undertakings concerned by the merger were actually Bouygues and RTL Group (itself owned by German mass media company Bertelsmann), meaning that the turnover thresholds set by EU merger control rules would have been met and thereby triggering the European Commission's competence.

nature which, as such, cannot be challenged for annulment. The *Conseil d'État* specified that the "purely preparatory" nature of the pre-notification phase is not called into question by the FCA's powers to send requests for information to third parties and impose fines on companies in the event of a failure to respond.

Free and Iliad's request that the *Conseil d'État* make a reference for preliminary ruling regarding the constitutionality of Articles L. 450-8 and L.464-2, V of the French Commercial Code was also dismissed on the ground that it was only filed in support of the request for annulment, which had itself been rejected.[8]

The contemplated TF1/M6 merger is currently the subject of an in-depth investigation, following the FCA's decision to open "phase 2" proceedings on March 18, 2022.[9]

[8] Under Order No. 58-1067 on the organic law on the Constitutional Council of November 7, 1958, the Cassation Court or State Council must be seized to decide whether preliminary questions on legal provisions shall be sent to the Constitutional Council for it to rule on their compliance with the Constitution. One of the conditions for such question to be referred to the Constitutional Council is that the challenged legal provision must be applicable to, or constitute the legal ground of a claim. In the case at hand, the State Council rejected Free and Iliad's claim; therefore, this condition was no longer met.

[9] See press release from the FCA, available at : https://www.autoritedelaconcurrence.fr/en/press-release/tf1m6-autorite-de-la-concurrence-opens-depth-examination.

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