Commission fines Electrabel for acquiring control of Compagnie Nationale du Rhône without prior Commission approval

On 10 June 2009 the Commission announced that it had fined Electrabel €20 million for acquiring control of Compagnie Nationale du Rhône (CNR) without having received prior approval from the Commission\(^1\). Electrabel’s implementation of the merger without obtaining clearance infringed the ‘standstill obligation’, one of the basic principles of the EU Merger Regulation\(^2\). Transactions falling under the Merger Regulation must be notified to the Commission and cannot be implemented unless and until the Commission declares them compatible with the common market.

The Commission’s powers to impose fines for ‘gun jumping’

Under Article 14 of the Merger Regulation the Commission may impose a fine not exceeding 10% of the aggregate turnover of the undertaking concerned where it intentionally or negligently fails to notify the Commission of a concentration prior to its implementation. Fines of up to 1% of aggregate worldwide turnover may be imposed where an undertaking has submitted false or misleading information or failed to comply with an information request. In fixing the amount of the fine the Commission must have regard to the nature, gravity and duration of the infringement.

Use of fining powers in previous cases

The Commission’s decision in the Electrabel case is the first time the Commission has used its powers to impose fines since the revised Merger Regulation came into force on 1 May 2004. Under the previous Merger Regulation\(^3\) the Commission had made use of the equivalent provisions in only a handful of cases, for example:

> The Commission fined Samsung €33,000 in 1998\(^4\) for failing to notify in due time its acquisition of AST Research. The fine was small because the failure to notify was unintentional and the concentration had no damaging effect on competition.

> A.P. Møller was fined €219,000 in 1999\(^5\) for three separate late notifications. Again, the failures to notify were unintentional and the mergers had no adverse effect on competition.

\(^1\) COMP/M.4994 Electrabel, 10.06.2009
\(^4\) Case IV/M.920 Samsung/AST, 18.02.1998
\(^5\) Case IV/M.969 A.P. Møller, 10.02.1999
More recently the Commission fined Tetra Laval $645,000 in 2004 for each of two separate failures to provide accurate and complete information.

The fine imposed on Electrabel represents the highest fine imposed by the Commission under its Article 14 (or equivalent) powers to date.

The Electrabel fining decision

Electrabel, a Belgian electricity producer, notified the Commission of its proposed acquisition of CNR, the second largest electricity provider in France, on 26 March 2008. The notification followed a period of consultation with the Commission from August 2007, during which the Commission issued a Statement of Objections. The Commission cleared the acquisition, concluding that the parties' activities did not overlap significantly on any relevant markets and that they faced strong competition. However, the Commission left open the exact date on which Electrabel had acquired control of CNR pending further investigation. The Commission has now completed its investigation on the issue (including holding an Oral Hearing in March 2009) and concluded that Electrabel actually acquired de facto sole control of CNR in December 2003, more than four years prior to the notification.

The Commission concluded that, in December 2003, Electrabel acquired close to 50% of CNR's shares from EDF, becoming by far CNR's largest shareholder. Although Electrabel did not hold a majority of CNR's shares, the Commission found that the wide dispersion of the remaining shares, and past attendance rates at CNR shareholder meetings, meant Electrabel nonetheless had a stable majority at those meetings. Electrabel was also the sole industrial shareholder of CNR and, following commitments given by EDF to obtain clearance of its merger with Energie Baden-Württemberg AG in 2001, had taken over EDF's role in the operational management of the power plants and the marketing of electricity. These factors led the Commission to conclude that Electrabel had acquired control of CNR from its December 2003 share purchase.

In deciding to impose the €20 million fine on Electrabel, the Commission took into account the long duration of the infringement and the fact that Electrabel and its parent company, GDF Suez, are large companies with experience in how to deal with EC merger procedures, and thus should have known that the signing of the 2003 share purchase agreement triggered the requirement to notify. The Commission did take into account some mitigating factors: the fact that Electrabel notified the transaction voluntarily (albeit on 26 March 2008) and that the transaction did not give rise to any competition concerns. However, the standstill obligation is a cornerstone of the EC merger control regime and therefore Electrabel's failure to notify and the implementation of the transaction prior to clearance were serious infringements irrespective of the competition assessment.

When announcing the decision, Competition Commissioner Neelie Kroes said “[i]t is essential for effective merger control that companies respect scrupulously the requirement to notify concentrations of a European dimension to the Commission before they are implemented. Implementing a transaction which has not received the clearance foreseen in EU law constitutes a serious breach of the Merger Regulation. This decision sends a clear signal that the Commission will not tolerate breaches of this fundamental rule of the EU merger system.”

Electrabel has the right to appeal the decision to the Court of First Instance within two months of the date it was notified of the Commission decision.

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6 COMP/M.3255 Tetra Laval/Sidel, 07.07.2004
7 COMP/M.4994 Electrabel/Compagnie Nationale du Rhône, 29.04.2008
8 M.1853 EDF/ENBW, 07.02.2001
9 Electrabel and Suez together had already filed six notifications under the EC merger rules
10 The Commission noted that had the transaction had a negative impact on the market the fine would have been considerably higher
11 Article 230 EC Treaty
Sources

EC Treaty

Council Regulation (EC) 139/2004


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Merger Control

Notifications

2. **Simplified procedure cases**

Phase I Clearances
3. **Unconditional clearances: simplified procedure**
   - BNPIP/CAAM/Fund Channel (MEX/09/0710, 10.07.2009).
   - KMG/CNPC/MMG (MEX/09/0710, 10.07.2009)

Court Proceedings/Procedure
4. **ECJ delivers judgment in Commission appeal against CFI judgment in Schneider damages action** – On 16 July 2009, the ECJ set aside the judgment of the CFI in so far as it ordered the Community to make good the loss claimed by Schneider as a result of the reduction in the sale price of Legrand. The Community must, however, pay compensation to Schneider to cover the costs incurred in respect of its participation in the resumed merger control procedure (Case C-440/07P, Commission v Schneider Electric, judgment of 16.07.2009).

5. **CFI order on Impala appeal** – On 14 July 2009, the CFI published an order to the effect that an appeal by the Independent Music Publishers and Labels Association (“Impala”) against a Commission decision clearing the merger of the global recorded music businesses of Sony Corporation and Bertelsmann AG is devoid of purpose. The order follows Impala’s appeal to the CFI and the subsequent setting aside of the CFI’s decision by the ECJ on appeal by Sony and Bertelsmann (Case T-464/04, Impala v Commission, order of 30.06.2009).

Antitrust
6. **Commission confirms sending Statement of Objections to alleged participants in LCD panels cartel** – The Commission confirmed that in May 2009 it sent a Statement of Objections to a number of companies active in the supply of liquid crystal display (LCD) panels, concerning their alleged participation in a cartel in violation of EC Treaty rules on restrictive business practices. The product under investigation is the main component of thin, flat monitors used for example in mobile phones, televisions, computers, digital watches and pocket calculators (MEMO/09/334, 13.07.2009).
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7. **ECJ delivers judgment in Duales System Deutschland GmbH (“DSD”) case** – On 16 July 2009, the ECJ dismissed an appeal brought by DSD against a CFI judgment of 24 May 2007 which ordered DSD to grant a licence on its “Green Dot” trademark to be used on packaging to be disposed of by competitors (Case C-385/07 P, Der Grüne Punkt – Duales System Deutschland v Commission, judgment of 16.07.2009).

8. **ECJ rules in SELEX Sistemi Integrati (“SELEX”) appeal against order of the CFI** – On 16 July 2009 the ECJ dismissed an appeal by SELEX against a CFI order that dismissed SELEX’s action for damages from the European Commission for non-contractual liability as a result of its decision to reject a complaint alleging breach of Article 82 of the EC Treaty by Eurocontrol (Case C-481/07 P, SELEX Sistemi Integrati v Commission (not yet available in English), judgment of 16.07.2009).

**State Aid**

9. **Commission endorses UK Carbon Reduction Commitment Scheme** – The Commission has authorised under state aid rules a scheme proposed by the United Kingdom introducing a trading system for CO2 emissions related to energy consumption. The national system, called “the Carbon Reduction Commitment” (CRC), applies to non energy intensive sectors not covered by the EU Emission Trading system. All allowances in the CRC system would be sold by auction. Participants’ environmental performance would be ranked in a league table, and the auction revenue would be paid back to participants as a subsidy (IP/09/1135, 14.07.2009).

**Miscellaneous**

10. **Bilateral free trade agreement between the EU and the Republic of Korea** – On 13 July 2009 the successful conclusion of a bilateral free trade agreement between the EU and the Republic of Korea was announced at a summit meeting between Korean President Myung-Bak Lee and Swedish Prime Minister Fredrik Reinfeldt. In principle, the two parties have agreed to eliminate over 96% of tariffs within three years and ultimately to remove all tariffs imposed on industrial products within five years from the date the free trade agreement enters into effect. The formal signing will not take place until the text is translated into the 23 languages used by the EU States and ratified by national parliaments. The agreement is expected to come into force in the first half of 2010.