EC Merger Control

European Commission imposes landmark fine for late notification of a merger under the EC Merger Regulation

SUMMARY
On June 10, 2009, the European Commission fined Electrabel EUR 20 million for the late notification of a transaction that the Commission concluded had given Electrabel sole control over Compagnie Nationale du Rhône. The sanction imposed in the Electrabel matter is, by far, the highest fine that the Commission has imposed to date for failure to comply with the notification and waiting period obligations imposed by the EC Merger Regulation (Council Regulation (EC) No. 139/2004).

The substantial amount of the fine reflects the Commission’s determination to ensure that companies comply with the notification and suspensory requirements of the EC Merger Regulation. The Electrabel case also highlights the need for companies to consult promptly with, and receive guidance from, the Commission’s Competition Directorate when they are uncertain whether transactions in which they are involved are subject to notification and approval under the EC Merger Regulation.

FACTS
On March 26, 2008, the Belgian company Electrabel notified under the EC Merger Regulation its acquisition of a 49.98% interest in the shares in Compagnie Nationale du Rhône (“CNR”). The transaction did not raise any substantive competition concerns and was approved unconditionally by the Commission at the end of a Phase I investigation.

Although Electrabel acquired its shares in CNR in June 2003, its initial shareholding did not give Electrabel control (as defined under the EC Merger Regulation) of CNR, and consequently, did not require notification and approval under the EC Merger Regulation. However, in December 2003, two other shareholders disposed of their interests in CNR, leaving Electrabel, one other significant shareholder (with a shareholding of 20-30%) and a fragmented group of smaller shareholders in CNR.
The Commission analysed the rights attaching to Electrabel’s shareholding in CNR and concluded that, although Electrabel did not hold the majority of the shares or votes in CNR, Electrabel nevertheless had acquired sole control of CNR on a de facto basis with effect from December 2003. The Commission based this conclusion on three factors:

- Electrabel owned by far the largest shareholding in CNR, and the remaining shares were held by one significant shareholder (20-30%) and approximately 200 other shareholders with much smaller shareholdings.
- Electrabel appointed the majority of the management board of CNR and, because of the size of Electrabel’s shareholding and attendance levels at CNR’s shareholders meetings, accounted for the majority of shareholders present or represented at all of the annual shareholder meetings of CNR since 2004.
- Electrabel was the only industrial shareholder in CNR and, for that reason, exercised greater influence than the other shareholders, which were primarily financial or governmental institutions.

Although Electrabel had voluntarily disclosed its shareholding in CNR to the Commission and was able to prove that its failure to make a timely notification had not resulted from a deliberate plan to conceal the situation, the Commission considered the matter a serious breach of the EC Merger Regulation.

**COMMENT**

The case sends a clear warning that the Commission will not be sympathetic to companies that fail, even inadvertently, to comply with the notification and waiting period obligations imposed by the EC Merger Regulation. It also emphasizes that delay in disclosing even an inadvertent breach of the EC Merger Regulation will lead to an increase in any fine imposed by the Commission. As Commissioner Neelie Kroes pointed out in the press release announcing the fine: "It 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 clearance foreseen in EU law constitutes a serious breach of the Merger Regulation. Today’s decision sends a clear signal that the Commission will not tolerate breaches of this fundamental rule of the EU merger control system."

The Electrabel case also is a reminder that the Commission may find that “control,” for the purposes of the EC Merger Regulation, can arise on a purely de facto basis and that a shareholder may find itself, through no action on its part, in a position of control because of the departure from an investment of other shareholders. It also appears that the Commission is unlikely to show greater leniency towards parties that fail to notify transactions that confer de facto control than it does towards parties that fail to notify acquisitions of de jure control.
Additionally, the Electrabel enforcement action provides a clear reminder that, when merging parties face uncertainty as to whether their transaction requires notification and approval under the EC Merger Regulation, they may seek guidance from the Commission before implementation of the transaction and in sufficient time to allow for notification under the EC Merger Regulation.

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