

European Commission Fines Electrabel €20 Million for Failure to Notify Under the ECMR

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On 10 June 2009, the European Commission ("Commission") announced that it had imposed a fine of €20 million on Electrabel, an electricity producer and retailer belonging to the Suez Group, for implementing its acquisition of Compagnie Nationale du Rhône ("CNR") without having received prior approval under the European Community Merger Regulation (Regulation (EC) 139/2004, "ECMR"). Although Electrabel had acquired a stake of less than 50 percent in CNR, the Commission determined that Electrabel acquired de facto sole control of CNR, and thus ought to have notified the transaction under the ECMR. Commissioner Neelie Kroes has described the actions of Electrabel as "a serious breach" of the ECMR, noting that "the decision sends a clear signal that the Commission will not tolerate breaches of this fundamental rule of the EU merger control system."

Under the ECMR, "concentrations" having a "Community dimension" must be notified to and cleared by the Commission prior to implementation. This is known as the "standstill obligation."

In this particular case, the key issue for Electrabel was whether the acquisition involved a change of control amounting to a concentration. According to Article 3(2) ECMR, control is constituted by: "rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

- 1) Ownership or the right to use all or part of the assets of an undertaking;
- 2) Rights or contracts which confer **decisive influence** on the composition, voting or decisions of the organs of an undertaking."

In June 2003, Electrabel acquired between 10-20 percent of CNR's outstanding shares. Electrabel acquired further shares in December 2003, bringing Electrabel's minority shareholding in CNR to close to 50 percent. Neither transaction was notified to the Commission. In March 2008, Electrabel voluntarily notified the transactions to the Commission; both were cleared unconditionally on 29 April 2008. The Commission left open the precise date at which Electrabel acquired control of CNR within the meaning of the ECMR.

This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

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Following the completion of its investigation on this issue, the Commission has now determined that Electrabel acquired sole control over CNR as a result of the December 2003 transaction, notwithstanding the fact that Electrabel acquired fewer than 50 percent of both the shares and voting rights in CNR. The following factors were identified by the Commission as significant: Electrabel had become the largest single shareholder; Electrabel had acquired an absolute majority on the board of directors of CNR allowing it to control the operational management of the company; and the fact that Electrabel had commanded more than 90 percent of the votes at the last four CNR annual meetings. This was reinforced by the fact that Electrabel was the sole industrial shareholder of CNR.

As a consequence, the Commission determined that Electrabel had contravened the ECMR in December 2003 and, accordingly, imposed a fine of €20 million for its failure to notify.

The level of this fine is substantially higher than those imposed in other instances of a failure to notify under the ECMR. Furthermore, it seems particularly high in view of the Commission's finding of the complete absence of competitive harm as a result of the minority share acquisition.

The basic lessons are, however, clear: substantial fines will be imposed in the case of failure to notify over benign transactions, and that the obligation to notify can arise even on the acquisition of a minority shareholding.

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