Press and Information

General Court of the European Union
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Judgment in Case T-332/09
Electrabel v Commission

The General Court upholds a fine of €20 million imposed on Electrabel for having put a concentration into effect before notifying it

The Belgian company Electrabel is involved in the fields of electricity and natural gas and has been part of the Gaz de France (GDF) Suez group since 2008.

The Compagnie nationale de Rhône (CNR), which is charged principally with the task of producing and marketing electricity, is a French State-owned undertaking subject to specific legislative regulation, having as its mission the development and operation of the Rhône river under a licence granted by the French State. Until 2003, CNR's capital had been held solely by public bodies or undertakings which were wholly-owned by the State.

On 23 December 2003, Electrabel, having previously acquired 17.86% of CNR's capital corresponding to 16.88% of its voting rights, acquired further shares, bringing its holding to 49.94% of CNR's capital and 47.92% of its voting rights.

On 9 August 2007, Electrabel contacted the Commission, seeking its opinion, under EU law on concentrations, as to whether it had acquired de facto sole control of CNR. As the Commission concluded that it had indeed acquired such control, Electrabel formally notified the concentration transaction on 26 March 2008. By decision of 29 April 2008, the Commission did not oppose the concentration and declared it compatible with the common market. However, it left open the question of the exact date of Electrabel's acquisition of de facto sole control over CNR.

By decision of 10 June 2009[1], **the Commission imposed a fine of €20 million on Electrabel** for having carried out a concentration transaction before having notified the Commission and before the concentration was declared compatible with the common market, for the period from 23 December 2003 to 9 August 2007. Electrabel challenged that decision before the General Court.

In its judgment delivered today, the Court rejects all the arguments put forward by Electrabel in support of its action for annulment of the contested decision, by which it criticised the Commission, among other things, for having categorised the infringement incorrectly and for having failed in its obligation to state reasons for its decision. The Court also refuses to grant the forms of relief sought by Electrabel in the alternative to annul or reduce the amount of the fine, in support of which its arguments included submissions to the effect that the Commission could not categorise the infringement as serious and that it had infringed the rules on limitations, as well as the principles of proportionality, sound administration and legitimate expectations.

The Court rules, firstly, on the existence of a concentration on 23 December 2003[2]. It observes that a concentration takes place either when two or more independent undertakings merge to form

[1] Commission Decision C(2009) 4416 of 10 June 2009 imposing a fine for implementing a concentration in breach of Article 7(1) of Council Regulation (EEC) No 4064/89 and Article 57 of the EEA Agreement (Case COMP/M.4994 — Electrabel/Compagnie Nationale du Rhône) (Summary published OJ 2009 C 279, p. 9).
[2] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (as per corrigendum OJ 1990 L 257, p. 13), as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1).

a new undertaking, or through the acquisition of control of another undertaking, the concept of control covering the possibility of exercising decisive influence over the activity of an undertaking. It adds that, under EU law, even a minority shareholder may be considered to hold de facto sole control of an undertaking, for example, where the shareholder is virtually certain of obtaining a majority at the general meeting because the remaining shareholders are widely dispersed. The presence of shareholders at shareholders' meetings in previous years forms the basis of the assessment of whether or not de facto sole control is being exercised.

Thus, the Court holds that it is only **if Electrabel had not been virtually certain, in December 2003, of obtaining control at future general meetings, that there would have been no concentration and, therefore, no infringement of the obligation not to put the transaction into effect as from that date**. Electrabel has not, however, succeeded in demonstrating that, in December 2003, it was not virtually certain of obtaining a majority at CNR's general meetings, even without holding the majority of the voting rights.

Secondly, the Court endorses the Commission's analysis to the effect that Electrabel held an absolute majority in CNR's Board of Directors as well as the means to retain that majority, rejecting arguments such as Electrabel's submission that, in 2003, CNR was still controlled by the French public authorities in their supervisory capacity. The Court holds that neither the presence of government officials on the supervisory board and at CNR's general meetings nor the role of the State auditor preclude the existence of a situation of control for the purposes of the EU rules on concentrations.

Thirdly, the Court rejects Electrabel's protests about the other indicia relied on by the Commission in support of its finding that Electrabel had the opportunity to exercise decisive influence over CNR, including its central role in the operational management of CNR at the time of the facts of the case.

Fourthly, the Court holds that the Commission did not err in applying a limitation period of five years for the infringement committed by Electrabel. The EU rules[3] provide for two different limitation periods, depending on the nature of the infringement: the first, three years, applies to formal or procedural infringements (applications or notifications of undertakings or associations of undertakings, requests for information, or the carrying out of investigations), whilst the second, five years, applies to all other infringements. Advance putting into effect of a concentration, in violation of EU law, is an infringement liable to bring about significant changes in the competition situation and cannot be categorised as merely formal or procedural.

Fifthly, regarding the calculation of the fine, the Court confirms that the Commission was correct in finding the infringement to be serious, even if it was unintentional. Similarly, the Court considers that the fact that the concentration transaction had no effect on the market is not a decisive factor for determining the gravity of the infringement in ex post facto merger control, and notes that the infringement lasted for a significant time. The Court also considers that the Commission was correct in finding that the fact that the infringement was committed through negligence need not give rise to a reduction in the fine. Regarding the proportionality of the amount of the fine, the Court notes, in particular, in addition to the characteristics of the infringement, first, that the amount of the fine, although high, is at the lower end of the range of amounts that could have been imposed and, secondly, that it does not seem disproportionate in relation to the objective pursued of protection of the system of notification and prior approval of concentrations.

Lastly, the Court concludes **that there is no reason to reduce the amount of the fine in the exercise of its unlimited jurisdiction, as the amount at issue is appropriate in the circumstances of the case, in the light of the gravity and duration of the infringement as established by the Commission and of Electrabel's overall resources**.

The Court accordingly dismisses Electrabel's action.

[3] Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1).

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months of notification of the decision.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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The full text of the judgment is published on the CURIA website on the day of delivery

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