Summary of the Commission Decision

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)

(notified under document C(2009) 4416)

(Only the French text is authentic)

(Text with EEA relevance)

(2009/C 279/08)

On 10 June 2009 the Commission adopted a Decision in a concentration case under Council Regulation (EEC) No 4064/89 ([1]) on the control of concentrations between undertakings, and in particular Article 7(1) of that Regulation. A non-confidential version of the full Decision can be found in the authentic language of the case and in the working languages of the Commission on the website of the Directorate-General for Competition, at the following address:

http://ec.europa.eu/competition/index_en.html

I. INTRODUCTION

(1) On 10 June 2009 the Commission imposed a fine on Electrabel S.A. (Electrabel, Belgium) for having implemented a concentration with a Community dimension before it was notified to and approved by the Commission in breach of Article 7(1) of Regulation (EEC) No 4064/89. The concentration consisted in the acquisition of sole control over Compagnie Nationale du Rhône (CNR, France) on 23 December 2003.

II. CASE DESCRIPTION

1. Procedure

(2) On 9 August 2007 Electrabel contacted the Commission services in order to obtain their opinion on whether Electrabel had acquired de facto sole control over CNR pursuant to Council Regulation (EC) No 139/2004 ([2]) (the New Merger Regulation). The Commission services confirmed that Electrabel had indeed acquired de facto sole control over CNR.

(3) As the thresholds laid down in Article 1 of the New Merger Regulation were exceeded, Electrabel notified the Commission of this concentration on 26 March 2008. The Commission authorised the concentration by a Decision dated 29 April 2008 based on Article 6(1)(b) of the New Merger Regulation.

(4) On 17 December 2008, a Statement of Objections (SO) was sent to Electrabel on the basis of Article 18 of Regulation (EEC) No 4046/89 (the Old Merger Regulation) ([3]). This SO explains how Electrabel acquired sole control over CNR from 23 December 2003, thereby implementing the concentration before it was notified to and approved by the Commission in breach of Article 7(1) of the Old Merger Regulation.

(5) On 16 February 2009 Electrabel replied to the SO asking for a hearing, which was held on 11 March 2009. On 23 March 2009 the Commission sent a letter to Electrabel setting out the facts in order to obtain its position on a number of statements made in connection with CNR in the Suez group's annual report for 2003 and in Electrabel's annual report for 2004. Electrabel replied to this letter on 30 March 2009.

(6) The Advisory Committee on Concentrations was consulted on 14 May 2009 as to whether there had been an infringement and again on 4 June 2009 about the amount of the fine.

2. Facts

(7) On 23 December 2003 Electrabel, a major Belgian electricity company that belongs to the French group Suez (now GDF Suez), acquired shares in CNR, the second

([1]) OJ L 395, 30.12.1989, p. 1.

([2]) OJ L 24, 29.1.2004, p. 1.

([3]) Pursuant to Article 26(2) of the New Merger Regulation, the Old Merger Regulation remains applicable to any concentration in which control was acquired before the New Merger Regulation entered into force. The SO emphasises that that Electrabel acquired control over CNR on 23 December 2003, i.e. before the New Merger Regulation came into force. Proceedings have therefore been conducted under the Old Merger Regulation.

largest electricity company in France, from EDF, thereby increasing its existing share in CNR's capital to 49,95 % and its voting rights to 47,92 %.

(8) Moreover, on 24 July 2003 Electrabel entered into a shareholder voting agreement with CDC, a French State-owned holding company, which is CNR's second largest shareholder with 29,43 % of the capital and 29,80 % of the voting rights. According to this shareholder agreement, Electrabel and CDC agreed to vote at shareholders' general meetings in such a way as to ensure that two of the three members of CNR's board of directors would be Electrabel representatives, thereby guaranteeing Electrabel a majority on the board.

(9) Electrabel is also CNR's only shareholder from the industry and as such has taken over the central role that was previously held by EDF in the operational management of CNR's power stations and the marketing of the electricity they produce. As part of the acquisition of joint control over EnBW (a German electricity company) together with OEW in 2001, EDF committed itself to transforming CNR into a totally independent electricity producer and to withdrawing from the operational management of CNR's power stations and the marketing of the electricity they produce by 1 April 2001.

3. **Legal assessment**

(10) According to its well-established decision-making practice, the Commission considers that, based on the level of attendance at CNR's shareholder meetings in previous years and the fact that CNR's remaining shares are widely dispersed, with 47,92 % of the voting rights Electrabel was certain to have a stable majority at CNR's shareholder meetings. Electrabel therefore acquired de facto sole control over CNR on 23 December 2003.

(11) This conclusion is supported by the following factors: (i) as a result of the shareholder voting agreement concluded with CDC in July 2003 Electrabel was certain to gain control of CNR's board of directors, the corporate body that makes decisions by simple majority on strategic matters (such as the annual budget and CNR's business plan), giving it control over the business; and (ii) as CNR's only shareholder from the industry, Electrabel took over the operational management of CNR's power stations and the marketing of the electricity they generate following EDF's withdrawal.

(12) Several written statements from representatives of both Suez and CNR confirm that as of 2004 CNR was considered de facto part of the Suez group.

(13) On these grounds the Commission considers that Electrabel, by acquiring sole control on 23 December 2003 without having notified the Commission and received its approval in advance, breached Article 7(1) of the Old Merger Regulation, which is the instrument that was applicable at the time.

4. **The fine**

(14) According to Article 14(2)(b) of the Old Merger Regulation, the Commission may impose a fine of up to 10 % of a business's aggregate turnover within the meaning of Article 5 of the Regulation where, either intentionally or negligently, it puts into effect a concentration in breach of Article 7(1) of the Regulation.

(15) As for the nature of the infringement, the provision that was breached by Electrabel is one of the cornerstones of Community merger control, namely the obligation to suspend implementation of a concentration until the Commission has given its authorisation. This is a precondition for all concentrations with a Community dimension. In this context the infringement cannot but be considered serious in nature.

(16) The fact that the concentration has not had an anti-competitive effect is not sufficient to reduce the level of seriousness of the infringement as it affects the very principle of ex ante control, which is essential if the Commission is to fulfil its mission. The absence of an anti-competitive effect was nevertheless taken into account when determining the amount of the fine.

(17) Furthermore, in view of the Commission Notice on the concept of concentration within the meaning of Regulation (EEC) No 4064/89 and the Commission's well-established decision-making practice that was applicable at the time of the infringement, Electrabel must have known that acquiring EDF's share and concluding a shareholders' voting agreement with CDC would have given it de facto sole control.

(18) It must be emphasised that Electrabel is a major company that has vast resources and significant previous experience of Community merger control, and the target of the operation was a major company (second largest producer of electricity in France with a turnover of EUR 553 million in 2003).

(19) Finally, there are precedents in which fines were imposed for breaches of Article 7(1) of the Old Merger Regulation.

(20) The Commission notes an infringement for the period from the date on which Electrabel acquired EDF's shares (23 December 2003) until the day the Commission was made aware of the controlling share (9 August 2007), i.e. 43 months and 17 days.

(21) The Commission recognises as a mitigating circumstance the fact that Electrabel contacted the Commission of its own accord and then cooperated throughout the procedure.

(22) Lastly, the Commission pays particular attention to the need to guarantee the dissuasive nature of the fines it imposes. This aspect is particularly relevant in view of Electrabel's economic importance.

(23) In view of the above, for the purpose of sanctioning Electrabel for the infringement, and taking account of the specific circumstances of the case, the Commission imposed a fine of EUR 20 000 000 under Article 14(2)(b) of Regulation (EEC) No 4064/89.