

EC Win In Merger Fine Case Puts Companies On Notice

By Melissa Lipman

Law360, New York (December 12, 2012, 8:09 PM ET) -- A European Union court upheld a €20 million (\$26 million) fine Wednesday against GDF Suez SA unit Electrabel for failing to alert the bloc's antitrust watchdog when it took control of a French energy company, a ruling attorneys say sets a precedent for the agency to slap companies with big penalties for unintentional merger notification breaches regardless of whether the mergers are anti-competitive.

The EU General Court rejected a request from Electrabel, Belgium's largest electricity supplier, to overturn or trim the 2009 penalty. The European Commission handed down the fine because the company hadn't notified it before taking on a minority stake that gave it effective control of Compagnie Nationale du Rhone.

Electrabel had argued that the penalty should be reduced because it had not realized acquiring just under 50 percent of the state-owned energy producer would trigger the EU's merger filing requirements. But the court concluded the failure was still a serious violation.

The acquisition ultimately didn't harm competition, though, and attorneys said the penalty's size seemed out of step with what Electrabel had done.

"This case sets a worrying precedent which will doubtless encourage the commission to take similar action against other companies who fail to notify mergers that meet the jurisdictional tests under the merger regulation," Allen & Overy LLP partner Mark Friend said. "The commission's press release at the time ... trumpeted the fact that breaching the standstill obligation is a serious infringement. But the reality is that there was no harm done to competition in this case."

The dispute stems from Electrabel's decision to buy up a stake in CNR, which had long been owned solely by French government-held agencies and businesses.

In 2003, the company acquired a 17.86 percent stake in the company. Then in December of that year, Electrabel raised its stake to 49.94 percent, giving it just under 48 percent of the company's voting rights.

But the company didn't broach the acquisition with the EC until August 2007, when it reached out to ask whether the regulator thought it had acquired de facto sole control of the company. When the regulator concluded it had, Electrabel filed notice of the transaction in early 2008.

A month later, the EC cleared the transaction, but it eventually fined the company €20 million for going through with the purchase before notifying it.

On appeal, the General Court rejected Electrabel's challenges, which questioned whether the EC's fine was disproportionate to the violation and whether the deal required notification in the first place.

The court ruled that the only way Electrabel could have been off the hook for seeking clearance from the commission was if it had been uncertain when it boosted its stake that it would be able to win a majority of votes at CNR's general meetings.

That the failure to notify was unintentional and didn't end up affecting competition didn't make up for the fact it was a serious, long-lasting violation, according to the decision.

"The commission advances several arguments in the contested decision, from which it is clear that the negligence alleged against the applicant represented conduct very far from excusable error, and inadequate considering the circumstances," the court said. "The commission therefore legitimately and legally was able to consider that the fact that the infringement had been committed by negligence should not translate into a reduction in the amount of the fine."

The EC applauded the court's decision, saying the ruling shows it "is entitled to adopt effective and deterrent sanctions in case of such infringements."

But attorneys questioned whether the fine made sense for the kind of violation.

"I understand that antitrust authorities need to send the message that merger control needs to be taken seriously, but it doesn't seem to be companies avoiding filing because they want to get a tough deal under the radar," Crowell & Moring LLP counsel Olivier Antoine said. "It's just they weren't quite sure, and they filed too late. So it seems a little excessive to me."

And since Electrabel itself came forward to the commission with the issue, approving such a large penalty may not make sense in light of the agency's other efforts to encourage companies that violate the antitrust rules to turn themselves in, according to Friend.

"If you compare this approach with the policy of granting leniency or immunity to cartel participants who manage to get in the door first to make their confession, you have to ask whether the commission has got the policy right here," Friend said.

The decision could also send the wrong message to other companies, according to Linklaters LLP partner Nicole Kar.

"That the [amount of the] fine was upheld by the court sends a strong message to companies," Kar said, "particularly as the missed filing was brought to the attention of the commission by the company in question and there was no negative competition impact. ... The decision may well chill the incentives of companies who have inadvertently missed EU notifications to self-report."

Though the commission has fined other companies in the past for failure to notify, those penalties have been fairly small compared to Electrabel's, ranging from tens of thousands of euros to hundreds of thousands.

The current case marks the first time an EU court has reviewed this kind of decision, and its ruling underscores the need for companies to take care in reviewing their transactions.

"A failure to notify a relevant change in control cannot be corrected by a later notification," King & Spalding LLP partner Suzanne Rab said. "[The case] emphasizes the importance of the proper determination of what constitutes a relevant change in control, and that for EU merger regulation purposes, 'decisive influence' can be established on the basis of the acquisition of a shareholding of less than 50 percent."

--Editing by Kat Laskowski and Katherine Rautenberg.

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