

# Antitrust Alert: Twenty Million Euro Fine for Failure-to-File Is a Reminder of the EC Merger Rules

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On 10 June 2009, the European Commission (EC) imposed a fine of 20 million euros on Belgian electricity supplier Electrabel for implementing a merger without seeking its prior approval, in breach of the EC Merger Regulation (ECMR). This decision merits attention not only because it is one of only a handful of such decisions in Europe, but also because it serves as a reminder of several key issues often arising in EU merger reviews. In particular, the decision highlights the importance of making a careful assessment of the concept of “control,” which is the trigger for a merger notification under the ECMR.

## Electrabel’s Failure to Notify

In 2003, Electrabel purchased shares in the French electricity generator Compagnie Nationale du Rhône (CNR), with a resulting shareholding of less than 50 percent. This transaction was not notified to the EC or any EC Member State authority. In 2008, proposing to acquire the remaining shares in CNR, Electrabel notified its intentions to the EC, on the basis that the acquisition would result in an acquisition of sole control over CNR. The merger was cleared by the EC, but the Commission then investigated whether Electrabel had in fact obtained control over CNR through the 2003 acquisitions.

Following its investigation, the EC determined that Electrabel had obtained sole control over CNR in 2003 and that therefore under the ECMR Electrabel should have notified the transaction to the EC. The Commission’s conclusion that Electrabel acquired sole control in 2003 was based on the fact that “due to the wide dispersion of the remaining shares and past attendance rates at CNR’s shareholders’ meetings, Electrabel enjoyed a stable majority at such meetings. This was reinforced by other factors, notably the fact that Electrabel was the sole industrial shareholder of CNR and had taken over the role previously held by EDF in the operational management of the power plants and the marketing of electricity of CNR.”

As a consequence of the failure to notify, the EC imposed a 20 million euros fine. The EC commented that “Electrabel, a sophisticated company which is very familiar with the EU merger control rules, should have approached the Commission in 2003 and not more than three and a half years after acquiring control of CNR.”

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## The Trigger for Notifying a Merger

Under the ECMR, acquisitions must be notified to the EC where a party obtains direct or indirect control of another party and certain turnover thresholds are met. If notification is required, a “standstill obligation” arises to prevent parties from completing their merger without EC consent. The test for control is that a party (or two or more parties in the case of joint control) has “the possibility of exercising decisive influence on an undertaking.” It is important therefore to recall that, as explicitly highlighted in the Electrabel decision, although control is presumed upon the acquisition of 50 percent, it is possible to have such decisive influence, and therefore control, even if the

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shareholding is less than 50 percent. The EC looks behind the shareholding and examines if de facto control has been achieved. The EC will consider whether “the remaining shares are widely dispersed, whether other important shareholders have structural, economic or family links with the large minority shareholder or whether other shareholders have a strategic or purely financial interest in the target company.”

Even if the EC does not have jurisdiction, the transaction nevertheless may have to be notified to one or more EC Member States, where similar control assessments are made. In some Member States, the difficulty of determining whether a transaction has to be notified is even more acute. For example, in Spain and the United Kingdom, the jurisdictional thresholds depend respectively on a market share test or a “share of supply” test, both of which presuppose an accurate definition by the parties themselves of the relevant market and market shares.

## Consequences of Failure to Notify

The Electrabel decision is a stark reminder that the obligation to notify changes in control will be enforced.

This decision is only the third fine by the EC for failure to notify, but it is also its largest. In 1998 Samsung was fined 33,000 euros for notifying the acquisition 14 months after its acquisition of AMT, and in 1999 A.P. Møller was fined 219,000 euros for failing to notify a series of three transactions in 1997. While the decision does not necessarily signal a trend of enhanced enforcement by the EC, parties should be alert to the risk of implementing a merger without prior notification.

The ECMR also imposes a “standstill obligation” to refrain from implementing a notified merger until the EC has cleared the arrangement. In theory, parties that breach this duty and “jump the gun” may be fined by the EC up to 10 percent of their annual turnover. To date, the EC has not taken much action. For example in 1998 the parties in Bertelsmann/Kirch/Première were requested to cease behaviour that appeared to be gun jumping, but no fine was ever imposed as the parties ceased the offensive conduct.

Similar caution is required for transactions that may fall within the jurisdiction of one of the EC Member States, which also have imposed fines for failures to file. For example, in 2008 the French competition authority fined SNCF Participations 250,000 euros for its failure to notify its acquisition of Novtrans. In 2008, the German

competition authority fined publishing house Druck und Verlagshaus 4.1 million euros for failing to notify a transaction that took place in 2001. There are also examples of fines being imposed at EC Member State level for gun jumping offences. A prior Jones Day alert discussed the 4.5 million euro fine imposed in 2008 on Mars Inc. by the German competition authority for violating the bar to closing pending the completion of the German merger review process.

Jurisdictions beyond the EC have similar principles and enforcement records in this area. For example, the U.S. Justice Department (DOJ) has enforced breaches of the U.S. waiting-period obligation and failures to notify by imposing substantial fines. In the Gemstar/TV Guide case, Gemstar paid a record \$5.67 million for exercising control over TV Guide prior to expiration of the mandatory waiting period. In 2006, Qualcomm was fined \$1.8 million by the DOJ for gun jumping in its merger with Flarion. Independent of a breach of the merger procedure rules, there is a risk that coordination or cooperation prior to clearance also could be characterized as anticompetitive action and therefore expose the parties to the risk of private actions for damages.

The EC has stated that the decision will be available from its website as soon as possible. □