



EUROPEAN COMMISSION

Hearing Officer

Final Report of the Hearing Officer

Case COMP/M.4994 Electrabel/CNR¹

The draft Decision in Case COMP/M.4994 Electrabel/CNR gives rise to the following observations:

I. BACKGROUND

On 26 March 2008, the Commission received a notification pursuant to Article 4 of Regulation (EC) No. 139/2004, by which Electrabel S.A. ("Electrabel") notified its acquisition of the control of Compagnie Nationale du Rhône S.A. ("CNR"). On 29 April 2008, the Commission declared the concentration compatible with the common market (Case COMP/M.4994). The determination of the exact date on which Electrabel acquired sole control of CNR was, however, left open.

This case concerns an infringement committed by Electrabel in the context of the above-mentioned merger proceedings. The Commission has found that Electrabel had, contrary to the stand-still obligation laid down in Article 7(1) of both Regulation (EEC) No. 4064/89 (the "Former Merger Regulation") and Regulation (EC) No. 139/2004 (the current Merger Regulation), put into effect the concentration prior to its notification.

II. WRITTEN PROCEDURE

On 17 December 2008, the Commission issued a Statement of Objections ("SO"), adopted on the basis of Article 18 of the Former Merger Regulation. In the SO, the Commission set out its view that Electrabel had acquired *de facto* sole control of CNR as of 23 December 2003, i.e. prior to notifying the concentration and thereby infringing Article 7(1) of the Former Merger Regulation. The Commission also notified Electrabel of the potential imposition of a fine for having infringed the stand-still obligation.

Electrabel was granted until 16 February 2009 to reply to the SO, and did so in time.

¹ Pursuant to Articles 15 and 16 of Commission Decision (2001/462/EC, ECSC) of 23 May 2001 on the terms of reference of Hearing Officers in certain competition proceedings – OJ L162, 19.06.2001, p.21.

Access to file

The Commission's investigation file exclusively contained either documents provided by Electrabel or documents internal to the Commission. In other words, all accessible documents were documents which originated from the sole party to the proceedings. DG Competition therefore adopted, for administrative ease, a simplified access to file procedure: Electrabel was provided with an index of the file together with the SO, but not copies of the documents, and was advised that it could access all the accessible documents on a CD-ROM if it so requested. No issue was raised either with me or, I have been informed, with DG Competition, relating to the access to file granted to Electrabel. I consider that Electrabel has been granted access to the file in this case and that Electrabel's rights regarding such access have been respected.

III. ORAL HEARING

Electrabel exercised its right to be heard in an Oral Hearing, which took place on the morning of 11 March 2009. No third parties requested to attend the Hearing. The Oral Hearing was fruitful in that there was good interaction between Electrabel and the Commission services.

Subsequent Letter of Facts

On 23 March 2009, the Commission sent a Letter of Facts to Electrabel, notifying Electrabel of two additional documents that the Commission intended to rely on in support of certain conclusions drawn in the SO (one of which had been referred to by the Commission services during the Oral Hearing). Electrabel was granted a deadline of 30 March 2009 to submit its comments on these documents, which it did in time.

By letter of 30 March 2009 addressed to the Hearing Officer, Electrabel asserted that as the Commission had notified the documents to it only after the Oral Hearing had been held, it had been prevented from addressing these documents during the Oral Hearing. In my view, the Letter of Facts was sufficient to ensure that Electrabel's right to be heard was respected as regards these documents.

IV. DRAFT DECISION

No additional queries or submissions have been made to the Hearing Officer by Electrabel. In view thereof, and taking into account the observations set out above, I consider that no further comments with regard to the right to be heard need to be made in the present case.

The draft Decision does not contain any objections on which Electrabel has not been given the opportunity to make known its views.

Brussels, 29 May 2009

(signed)

Karen WILLIAMS