

€20 million: the going rate for gun-jumping fines under the EU Merger Regulation

The European Commission (EC) has imposed a fine of €20 million on Marine Harvest (MH) for implementing its acquisition of Morpol prior to receiving clearance under the EU Merger Regulation (EUMR). The amount of this fine is identical to the previous gun-jumping fine, imposed by the EC on Electrabel in 2009. It seems that MH had mistakenly relied on an exception to the EUMR's prohibition on implementation prior to clearance that applies to acquisitions of listed securities.

Like shooting fish in a barrel

The EC takes a strict approach to breaches of the prohibition on early implementation, also known as the "standstill obligation". It is irrelevant that an implemented transaction had no anticompetitive effects (although this may mitigate the amount of the fine). Similarly, the fact that the gun-jumper's breach was inadvertent and caused by a misunderstanding of the EC's (sometimes complex) rules on jurisdiction and procedure will not usually prevent a fine from being imposed, as the EC expects large companies to be familiar with EUMR requirements.

The infringing transaction

MH is the leading salmon farmer in the EEA. Its breach arose from its acquisition of a 48.5% stake in Morpol – the largest EEA salmon processor –



on 18 December 2012. The acquisition was completed eight months before it was formally notified to the EC, and over nine months before the EC cleared it.

That shareholding conferred on MH de facto sole control over Morpol, as it enjoyed a stable majority at the shareholders' meetings, because of the wide dispersion of the remaining shares and previous attendance rates at these meetings. Crucially, it is the acquisition of an *ability* to exercise control which amounts to implementation for the purposes of the EUMR. Consequently, a breach

Key issues

- When are acquisitions of listed securities subject to a standstill obligation under the EU Merger Regulation?
- How high are the fines imposed by the European Commission for gun-jumping breaches?
- What mitigating and aggravating factors does the European Commission take into account?

arose notwithstanding the fact that MH had not exercised its voting rights during the nine months between acquisition and clearance.

Listed securities exception not available

Under the EUMR, an exception to the standstill obligation applies for public bids and series of transactions in securities admitted to trading on a

market such as a stock exchange. Purchasers wishing to take advantage of this exception are required to notify the acquisition "without delay" and to refrain from exercising their voting rights except with the express consent of the EC.

While the text of the EC's decision has not yet been published, the fact that MH refrained from exercising its voting rights suggests that it was relying on this exception. However, both the EUMR and previous case law of the EC are clear that the exception applies only where listed shares are bought from "various sellers", whereas MH acquired its shares in Morpol from a single seller.

The fine

MH's fine equates to less than 1% of its 2013 turnover, significantly less than the 10% maximum fine permitted by the EUMR.

In setting the amount of the fine at €20 million, the EC took into account certain mitigating factors, including the relatively short duration of the infringement (nine months), the non-exercise of voting rights by MH and the fact that MH informed the EC of the transaction, through pre-notification contacts, shortly after having closed it. However, it also considered that the infringement was particularly serious because the transaction raised serious competition concerns and was only cleared after the submission of significant remedies.

This contrasts with the Electrabel case, in which an equivalent fine was imposed for an infringement that was much longer in duration (around five years) but in which the transaction gave rise to no competition concerns.

Another contrast is with the

notification in 2013 by IFP&C of its acquisition of control over Topdanmark, through a 26.5% voting interest. In that case, the EC appears to have decided not to impose a fine, despite concluding that IFP&C had acquired control before submitting its filing. The difference may have been that IFP&C acquired control not through any actions of its own, but rather as a result of a share buyback programme put in place by Topdanmark. Accordingly, the Commission may have viewed that case as falling into the very limited category of breaches that are neither intentional nor negligent, and therefore not subject to fines.



Comment

MH's fine holds the joint record (along with that of Electrabel) for the highest reported gun-jumping fine imposed by any merger control authority to date. However, numerous other authorities are active enforcers of their respective standstill obligations: the US, Germany, Austria, Spain, Norway and Greece have all imposed fines running into millions of Euros in recent years.

The continuing proliferation of merger control regimes, each with differing jurisdictional and procedural requirements, means that there are increasing inconsistencies between the ways that standstill obligations and exceptions to those obligations are applied.

For instance, stake-building in a listed company that falls short of the control threshold that triggers a filing is not usually considered to be a gun-jumping breach, even if a full takeover is subsequently launched, yet Thomas Cook was recently fined for doing just that by the Indian Competition Commission. Moreover, some jurisdictions purport to require filings of intra-group transactions, or of deals involving targets with no conceivable nexus with the jurisdiction in question (the EU itself falls into the latter category with regard to joint ventures, but is proposing to rectify that anomaly).

Tentative suggestions recently published by the EC may, in time, lead to jurisdictional convergence between merger regimes in the EU, but even if that does happen the dominant global trend is likely to be towards growing inconsistencies and greater complexity.

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