

The European Commission has announced a fine of €20 million (US\$27 million) for what it describes as a “negligent” breach of EU merger control law. The scale of the fine highlights the Commission’s strict application of the rules that require transactions to be both notified and approved before they are implemented.

Marine Harvest ASA, the EU’s largest salmon farmer, entered into a Share Purchase Agreement on 14 December 2012 to acquire 48.5% of its listed Norwegian rival Morpol ASA, at the time the EU’s largest salmon processor. The acquisition was closed four days later. On 15 January 2013, Marine Harvest submitted a mandatory public offer to acquire the remaining shares in Morpol. Following settlement and completion of the public offer on 12 March 2013, Marine Harvest increased its total shareholding to 87.1%.

Marine Harvest notified the European Commission of the transaction in August 2013. The Commission approved the deal the following month on the condition that Marine Harvest divest the largest part of Morpol’s salmon farming operations in Scotland, addressing fears that the merged entity would have very high shares in the markets for farming and processing Scottish salmon. In its clearance decision, the Commission noted that Marine Harvest may have breached Articles 4 (1) and 7 (1) of the EU Merger Regulation, which require parties to notify acquisitions that meet the EU’s turnover thresholds before they are implemented and to suspend implementation until they are approved, respectively.

On further investigation, the Commission has confirmed that Marine Harvest did breach the rules. Marine Harvest sought to rely on Article 7 (2) of the EU Merger Regulation, which allows acquirers to implement “creeping bids” by which they purchase shares in listed companies through a series of transactions, provided that the transaction is notified as soon as possible and the buyer does not exercise voting rights attached to the shares.

However, the exception in Article 7 (2) applies only where listed shares are acquired from “various” sellers. In this case, Marine Harvest had acquired shares in Morpol from two holding companies, one a subsidiary of the other and both under the ultimate control of Morpol’s founder. On this basis, the Commission ruled that the exception to the notification and stand-still rules did not apply. Moreover, the Commission considered that the 48.5% stake that Marine Harvest acquired in December 2012, ten months before clearance, gave it *de facto* sole control over Morpol at that time.

In announcing the fine, the Commission noted that Marine Harvest is “a large European company with wide previous experience” of merger control rules that “should have been aware of its obligations”. Its failure to comply was therefore considered “negligent conduct”. The Commission also deemed this infringement “particularly serious” given that the Morpol acquisition gave rise to competition concerns that had to be remedied through divestment. In mitigation, the Commission acknowledged that Marine Harvest had not exercised its voting rights in Morpol and had engaged the Commission in pre-notification discussions soon after closing the transaction.

When the Commission fined Electrabel €20 million for early implementation in 2008, in a decision that was upheld by Europe’s highest court earlier this month, the size of the penalty was unprecedented. That the same fine has been imposed a second time, with the Commission once again emphasizing that the company in question should have known better, sends out a very clear message about the authority’s enforcement policy. The case of Marine Harvest also serves as a reminder to all companies to thoroughly check their merger control obligations before implementing any transaction, and not least when acquiring a minority interest.

A full copy of the Commission’s press release is [available online](#).

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