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EU Fires Warning Shot Against Gun-Jumping In M&A

Law360, New York (July 30, 2014, 10:17 AM ET) -- On July 23, 2014, the European Commission imposed a fine of €20 million (\$26.9 million) on Marine Harvest ASA, the leading salmon farming and processing company in the European Economic Area, for acquiring its rival Morpol ASA without having received prior authorization under the EU Merger Regulation. This enforcement action once again highlights the commission's determined efforts to significantly fine companies that do not comply with the standstill obligation of the European competition merger rules.



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Norway-based Marine Harvest was already the leading salmon farmer in the European Economic Area when, on Dec. 18, 2012, it acquired a 48.5 percent stake in Norway-based Morpol ASA, the largest salmon processor in the EEA at the time. According to the commission, Marine Harvest had acquired de facto sole control over Morpol. Because Morpol was listed on the Oslo stock exchange, and because of the wide dispersion of its remaining shares and the previous attendance rates at its shareholder meetings, Marine Harvest would be able to enjoy a stable majority at Morpol's shareholders' meetings with such stake.

Following the acquisition of the 48.5 percent stake in Morpol, Marine Harvest submitted a mandatory public offer for the remaining shares in Morpol on Jan. 15, 2013, pursuant to the Norwegian Securities Trading Act. Following the settlement and completion of this mandatory offer in March 2013, Marine Harvest possessed 87.1 percent of the shares in Morpol.

On Aug. 9, 2013, eight months after the acquisition of the 48.5 percent stake in Morpol in December 2012, Marine Harvest notified the commission of the transaction. The commission raised concerns that the transaction, as originally consummated in December 2012 and as notified in August 2013, would significantly reduce competition in the market for the farming and primary processing of Scottish salmon. After the merging parties offered certain commitments, the commission cleared the acquisition of Morpol on Sept. 30, 2013. The clearance was conditional upon the divestment of the majority of Morpol's salmon-farming activities in Scotland.

Under the EU Merger Regulation, transactions that meet the turnover thresholds of the regulation must be notified to and authorized by the commission before they are implemented (a so-called "standstill obligation"). However, pursuant to the EU competition rules, companies are able to acquire shares from listed companies at the stock exchange prior to obtaining merger control clearance for acquisition of joint or sole control, as long as the acquirer does not exercise the voting rights attached to the stock.

Nevertheless, the 48.5 percent stake in Morpol had not been acquired via the stock

exchange, but from companies controlled by Jerzy Malek of Poland, the founder of Morpol. Therefore, the commission determined that the above-mentioned "stock exchange exemption" did not apply to the December 2012 share acquisition.

The commission also concluded that Marine Harvest should have been aware of its obligations to notify and await clearance from the commission before proceeding with its acquisition.

This finding fits alongside the commission's decision in Electrabel/Compagnie Nationale du Rhone. On June 10, 2009, the commission decided to impose a fine, also of €20 million, for jumping the gun. At that time the commission ruled that Electrabel, the leading energy company in Belgium and Benelux, had acquired sole control over Compagnie Nationale du Rhone (CNR), despite being a minority shareholder. The commission's conclusion rested on several considerations, including that Electrabel was assured of a de facto majority at CNR's general meetings. As the concentration had not been implemented, but sole control had been acquired, Electrabel was fined because of its breach of the standstill obligation. The commission's €20 million fine against Electrabel was confirmed by the Court of Justice of the European Union on July 3, 2014 (C-84/13 P).

It has to be noted that the commission has even executed dawn raids of companies to check whether the merging parties were implementing their respective transactions in breach of the EU Merger Regulation. In the 2008 case Ineos/Kerling, the commission had received allegations that the acquiring party had intervened in the management of the target — its competitor at that time — through the appointment of managers and by giving certain instructions.

Gun-jumping is a global issue — antitrust watchdogs around the world are developing an appetite for investigating and prosecuting companies for failing to notify reportable transactions or for implementing a notified transaction in breach of "standstill obligations."

Germany's antitrust watchdog, the Bundeskartellamt, for instance, has imposed a fine of €4.5 million against the U.S. company Mars Inc. for implementing its acquisition of U.S.-based Nutro Products Inc. without clearance from the Bundeskartellamt in 2008. And in 2009, the Bundeskartellamt imposed a fine of €4.13 million on Druck und Verlagshaus, a German printing and publishing company, for "jumping the gun" in connection with an acquisition that had been completed since January 2001.

In the United States, a similar issue has become important to deal attorneys as antitrust enforcers are lately challenging certain transactions, even though such deals were not subject to the procedural provisions of the Hart-Scott-Rodino Act. This type of challenge has been seen recently in regard to the acquisitions of PowerReviews by Bazaarvoice, Saltzer Medical Group by St. Luke's Health System, and Midwest Instrument Co. by Heraeus Electro-Nite Co. — all transactions from 2012.

With this decision against Marine Harvest, the European Union's antitrust watchdog again fired a heavy warning shot at merging companies to keep the European merger control regime in mind at any time during corporate transactions. Companies are well advised to keep — at minimum — the following points in mind:

- Increased enforcement efforts show the need for early awareness of merger control rules, as well as the need for a robust and principled evaluation of the risks of failing to notify a transaction.
- Corporate attorneys and managers should be trained to identify the key issues before it's too late. Furthermore, an early involvement of merger control specialists can ensure that a notification does not delay closing, or can enable the deal to be restructured if necessary.

- Companies should keep in mind that there are currently more than 100 different jurisdictions worldwide that have to be monitored, checked and considered with regard to competition merger control rules during M&A activities.
- And finally, even small deals, which do not hit the formal filing thresholds, can have big antitrust repercussions (see above regarding Bazaarvoice, St. Luke's Health System, and Heraeus Electro-Nite in the U.S.).

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