

Marine Harvest

The EU's General Court upholds another Commission €20m gun-jumping fine and clarifies the application of the public bid exception

Summary

On 26 October 2017, the EU's General Court upheld the European Commission's decision to impose a fine of €20 million on Marine Harvest for acquiring control over Morpol before the Commission had cleared the deal under the EUMR.¹ This is the second time in recent years that the Luxembourg court has rejected an appeal against a Commission decision imposing a €20 million penalty for gun-jumping; the first appeal, by Electrabel, also related to an acquisition of de facto control without prior approval.²

This judgment is another reminder that bidders should be cautious when they engage in stake-building prior to a public bid, particularly when this is done by means of share purchases off the stock exchange, such as through transactions with a limited number of major shareholders.

The facts and the ruling

In December 2012, Marine Harvest entered into a share purchase agreement with Morpol's founder for the acquisition of a 48.5% stake in Morpol and completed the sale a few days later. Only after the closing of this share transaction did Marine Harvest contact the Commission to inform its staff that it planned to notify what it regarded as the relevant concentration: it confirmed that it would seek to complete the takeover through a public bid and that it would not exercise any voting rights in the target pending EUMR clearance. The notification was only filed in August 2013, and the Commission cleared the case in Phase I subject to conditions.

The Commission then initiated separate gun-jumping proceedings against Marine Harvest, and took the view that the 48.5% private share acquisition gave rise to de facto control. A *de facto* control situation arises when, in a publicly-held company, a shareholding below 50% gives the main shareholder in the company a stable majority of the votes at a shareholders' meeting based

¹ The judgment can be found [here](#).

² See Case T-332/09 *Electrabel v. Commission*, and Case C-84/13 P *Electrabel v. Commission*.

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on past attendance and voting records and thus the right to appoint the board of directors.³

Marine Harvest argued that even if the private share acquisition conferred *de facto* control, it benefitted from the “public bid” exception, as it was an integral part of a “creeping and public takeover” aimed at acquiring all the remaining shares in the target. Pursuant to that exception, a bidder can acquire the shares in a target company listed on the stock market without breaching the suspension obligation, provided that (i) the acquisition is carried out through a public bid or a series of transactions in securities; and (ii) the bidder does not vote the shares prior to EUMR clearance. Ryanair had in fact given an identical commitment in connection to the minority stake that it had acquired prior to launching its public bid for Aer Lingus.⁴

However, the Commission concluded that neither of the two exceptions available under Article 7(2) of the EUMR was applicable here, given that the private acquisition of the 48.5% stake was not a public bid, and the fact that Marine Harvest acquired that stake from a single seller. The fact that this initial acquisition was part of an overall plan involving a public bid to acquire the target was rejected as a basis for extending the public bid exception to the private share acquisition of the 48.5%, because the private share acquisition on its own conferred *de facto* control, a fact that Marine Harvest acknowledged.⁵ As a result, in July 2014, the Commission found that Marine Harvest had negligently breached Articles 4(1) (the requirement to notify concentrations prior to their implementation) and 7(1) EUMR (the standstill obligation), and imposed a fine of €10 million for each of these violations, amounting to a total fine of €20 million.

Marine Harvest appealed the decision and claimed, among other grounds, that the Commission had committed a manifest legal and factual error by deciding that the public bid exception did not apply to the initial acquisition. Marine Harvest did not contest that the 48.5% acquisition conferred *de facto* control, but it argued the acquisition was the first step in - and an integral part of - a public take-over, and as a result it was part of one single concentration that should as a whole benefit from the public bid exception. The General Court rejected this claim on the following grounds:

- > The public bid exception should be interpreted narrowly as it is an exception to the suspension obligation contained in Article 7(1) EUMR.
- > The acquisition of the 48.5% stake was not the result of a public bid but of a negotiated private transaction with a single seller. As a result neither of the two exceptions under Article 7(2) EUMR was available.
- > The 48.5% stake in itself conferred *de facto* control. As a result, the private acquisition could not be viewed as part of the public bid, despite the fact that they were allegedly inter-conditional. The Court stated in this connection that “the relevant issue is not when the acquisition of all

³ See Consolidated Jurisdictional Notice para. 59.

⁴ See *Aer Lingus vs. Commission*, Case T-411/07, para. 14.

⁵ See [Commission Decision Marine Harvest/Morpol](#), Case COMP/M.7184, para. 63.

shares of a target undertaking took place, *but when the acquisition of control took place.*"⁶

- > The Court also rejected Marine Harvest's argument that the Commission's refusal to apply the public bid exception was inconsistent with the rationale of Article 7(2), which was to facilitate creeping takeovers. It mentioned that there was no "creeping takeover" in this case, given that control was acquired in one go through the acquisition of the 48.5% stake.⁷ The Court further noted that if Marine Harvest's reasoning were followed to its logical conclusion, all private acquisitions of controlling stakes would automatically be covered by the public bid exception as long as a public bid followed shortly afterwards. The Court considered this too much of a stretch.⁸

The General Court also identified several ways in which Marine Harvest could have implemented the transaction without committing a gun-jumping violation, which included:

- > launching the public bid first, without acquiring the 48.5% stake; or
- > acquiring the 48.5% stake through a private transaction before the public bid, but conditioning the private transaction on EUMR clearance; or
- > seeking a derogation from the suspension obligation, which according to both the Court and the Commission was a realistic scenario in this case, if there were plausible stock market manipulation concerns. The Court noted that this was the basis on which the Commission had granted a derogation in *Orkla/Elkem*.⁹

Comment

The judgment and size of the fine upheld is a sobering reminder of the care which needs to be exercised with stake-building in a publicly-owned company before a public bid is launched.

This is the second time that the Luxembourg Court has upheld a major fine imposed by the Commission for early implementation on the basis of *de facto* control. Companies need to be aware that in a publicly-owned company, where a good part of the shares are usually widely dispersed, *de facto* control will often be triggered well below 50%. As a result, before any stake-building occurs, particular care should be taken to ensure that the *de facto* control threshold is not crossed. This requires a careful assessment, including of the particular voting history at past shareholders' meetings of the target company in question.

This case is also another piece in the puzzle of stake-building associated with public takeovers.

⁶ See para. 116 of the judgment.

⁷ See para. 175 of the judgment.

⁸ See para. 186 of the judgment.

⁹ See paras 216-219 of the judgment.

It is clear from this judgment that the acquisition through a private transaction of a large minority stake conferring *de facto* control prior to EUMR approval will be treated as a violation of the standstill obligation. The General Court explicitly held that, based on the wording of Article 7(2) alone, it is clear that the “public bid” exception does not apply to negotiated transactions.¹⁰

We also know from the *Aer Lingus* case that a series of open market acquisitions of securities that lead to the build-up of a non-controlling minority stake close to the launch of a public bid will most likely be viewed as part of a single concentration that benefits from the public bid exception.¹¹ In this case, the bidder can acquire the shares without breaching the standstill obligation provided that it does not vote the shares.

Particular caution should also be exercised for the acquisition of shares through one or several private transactions (as opposed to open market purchases), particularly if they lead to significant shareholdings (such as the 48.5% stake in Marine Harvest) that risk crossing the *de facto* control threshold. However, even if a bidder engages in a series of private transactions (as opposed to open market purchases) that do not in themselves lead to a controlling shareholding, but are part of a plan to acquire a controlling interest, there is a risk that the Commission may require (under Recital 20 EUMR¹²) that such acquisitions should not have been completed prior to EUMR clearance.

¹⁰ See para. 71 of the judgment.

¹¹ See para. 191 of the judgment.

¹² Recital 20 states that “it is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time.” Para. 48 of the Consolidated Jurisdictional Notice provides that in these scenarios the concentration is not limited to the acquisition of the “one and decisive” share, but will cover all the acquisitions of securities which take place in a reasonably short period of time.

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