WHITE & CASE

Technical infringements receive stiff fines from the European Commission

August 2014

Background

Both the *Electrabel* case[1] and the *Marine Harvest* case[2] serve as harsh wake-up calls that companies and their antitrust advisers must adopt a high level of caution when analysing whether a transaction must be notified under the EU Merger Regulation ("EUMR") and approach the European Commission ("Commission"), if in doubt.

In both cases, the Commission imposed stiff fines on companies for breaching the "standstill" obligation contained in Article 7(1) EUMR and, in both cases, the companies were reproached for failing to notify acquisitions of *de facto* sole control, upon which it can be notoriously difficult to make a call in certain cases.

The "standstill" obligation states that a transaction which is notifiable under the EUMR "*shall not be implemented either before its notification or until it has been declared compatible with the common market*" by the Commission. The rationale behind this rule – which is arguably less evident in cases which obviously do not raise competition concerns – is that the Commission aims to avoid any permanent and irreparable damage to effective competition in the internal market and the early implementation of a notifiable transaction may make it more difficult for the Commission to restore effective competition, where necessary.[3]

Where this obligation is breached either intentionally or negligently (in antitrust parlance, known as "gun jumping"), the Commission may, under Article 14(2) EUMR, impose a fine "*not exceeding 10% of the aggregate turnover*" on the company in breach. According to Article 14(3) EUMR, "*in fixing the amount of the fine, regard shall be had to be nature, gravity and duration of the infringement*".

In the *Electrabel* case, Electrabel, a Belgian electricity provider, acquired a shareholding of 49.95% (which conferred voting rights of 47.92%) in CNR, France's second largest electricity producer, in December 2003. When Electrabel notified the transaction to the Commission in 2008, the Commission cleared it unconditionally, finding that it did not raise any antitrust concerns.

However, the Commission subsequently found that Electrabel had acquired *de facto* exclusive control of CNR in December 2003, rather than in 2007

For more information on the topics discussed in this alert, please contact:

Mark Powell
Partner, Brussels
mpowell@whitecase.com

James Killick
Partner, Brussels
jkillick@whitecase.com

Pontus Lindfelt
Partner, Brussels
plindfelt@whitecase.com

Axel Schulz
Partner, Brussels
aschulz@whitecase.com

Assimakis Komninos
Local Partner, Brussels
akomninos@whitecase.com

[1] Case COMP/M.4994 *Electrabel/Compagnie nationale du Rhône*, decision of 10 June 2009; judgment in *Electrabel SA v European Commission*, T-332/09, EU:T:2012:672; judgment in *Electrabel SA v European Commission*, C- 84/13 P, EU:C:2014:2040.

[2] Case COMP/M.6850 – Marine Harvest/Morpol, 30 September 2013. See also the Commission press release, IP/14/862, 23 July 2014.

[3] While this rationale is less obvious in cases which raise few or no antitrust concerns, the Commission draws no distinction and views any infringement of the "standstill" obligation as serious, since it undermines the very essence of EU merger control (see, indicatively, the Commission's Statement of Objections in the *Marine Harvest* case).

when Electrabel finally contacted the Commission to notify the acquisition. Electrabel purported to raise arguments to show that its *de facto* sole control only arose in 2007, which the Commission dismissed as irrelevant[4].

By acquiring the 49.95% shareholding in December 2013, the Commission noted that in December 2013 Electrabel became by far CNR's largest shareholder with close to 50% of CNR's shares and, based on the findings of its investigation, enjoyed a stable majority at the shareholders' general meeting given the wide dispersion of the remaining shares and past attendance rates. The Commission observed further that this conclusion was reinforced by other factors, notably the fact that Electrabel was CNR's sole industrial shareholder and had taken over the role – previously held by CNR's former parent company, EDF – in the operational management of CNR's power plants and the marketing of CNR's electricity. Accordingly, the Commission imposed a fine of EUR 20 million on Electrabel for breaching the "standstill" obligation under Article 7 EUMR.

Electrabel's subsequent appeals against the imposition of this fine, first, before the General Court of the European Union[5] ("General Court") and, second, before the Court of Justice of the European Union[6] ("CJEU") were rejected. In particular, the General Court found that it was "*highly likely that* [Electrabel] *would obtain a majority at the shareholders' general meeting, even without holding a majority of the voting rights*", and would have required shareholder attendance of 95.84% or greater and for all other shareholders in attendance to adopt a common position against the applicant.[7]

While the outcome in the *Electrabel* case was arguably unsurprising based on the facts, the fairness of the Commission's decision to impose the same fine of EUR 20 million in the recent *Marine Harvest* case is far from clear. In that case, the Commission found that Norwegian company, Marine Harvest, the largest salmon farmer and processor in the EEA based in Norway, had implemented an acquisition of a 48.5% shareholding in Norwegian competitor, Morpol, in December 2012 without prior notification.

According to the Commission, the acquisition of the 48.5% shareholding gave Marine Harvest *de facto* sole control of Morpol, since it enjoyed a stable majority at the shareholders' meetings as a result of the wide dispersion of the remaining shares and previous attendance rates at these meetings.[8]

Marine Harvest only notified the transaction eight months later in August 2013 following its acquisition of the remaining 51.5% shareholding in Morpol as part of a mandatory public offer. In its response to the Commission's decision, Marine Harvest has stated that the takeover of Morpol was clearly structured as an acquisition of an initial shareholding followed by an immediate mandatory offer and that its decision to notify only after full takeover was in accordance with the exception applying to public takeovers (under the EUMR, the "public bid" exception is contained in Article 7(2)). In addition, it says it made clear that no control would be exercised over Morpol until the Commission had cleared the transaction. It will "*more than likely*" appeal against the Commission's decision.

While the facts were somewhat clear-cut in the *Electrabel* case, the outcome might seem harsh, given the absence of competition concerns.[9] By contrast, the transaction in the *Marine Harvest* case gave rise to competition concerns and divestment remedies had to be offered before clearance was granted. In this respect, the case exemplifies the rationale for having a "standstill" obligation under the EUMR. That said, the outcome seems far harsher, given that the company believed it was availing of the "public bid" exception and was transparent about its intention. If the decision is subsequently appealed, it is likely to hinge on the parameters of the "public bid" exception and the

---

4 Case COMP/M.4994 *Electrabel/Compagnie nationale du Rhône*, decision of 10 June 2009, para. 167.

5 Judgment in *Electrabel SA v European Commission*, T-332/09, EU:T:2012:672.

6 Judgment in *Electrabel SA v European Commission*, C- 84/13 P, EU:C:2014:2040.

7 Judgment in *Electrabel SA v European Commission*, T-332/09, EU:T:2012:672, paras. 75, 81.

8 See Commission's press release. The Commission's decision is not yet available and its press release does not shed sufficient light on the Commission's reasoning. Marine Harvest has announced publicly that it is likely to appeal the Commission's decision before the General Court.

9 Admittedly, since the Commission's decision in the *Marine Harvest* case has not yet been published, it is not clear how strong the Commission's case is.

proportionality of the penalty.

In any event, both cases highlight the inherent risks involved in the acquisition of large minority shareholdings and the caution which companies and their advisers must take when analysing the "control" question under the EUMR. The larger the minority shareholding, the greater the risks and the greater the degree of caution that must be adopted.

How did the Commission decide on the level of fine in these cases?

In both cases, the Commission imposed a fine of EUR 20 million, which it deemed both proportionate and adequate to ensure sufficient deterrence.

In the *Electrabel* case, the Commission found that the infringement was a serious one, even despite the absence of competition concerns. It held further that Electrabel was a large company that should be familiar with the EU merger control rules and that, irrespective of the complexity of the "control" question, Electrabel should have at least consulted the Commission prior to implementation. Finally, it found that the infringement began with the acquisition of *de facto* control in December 2003 and ended when Electrabel approached the Commission in August 2007. The Commission viewed as mitigating circumstances the fact that Electrabel brought the matter to its attention, cooperated with it throughout the process and did not conceal the level of its shareholding.

In the recent *Marine Harvest* case, the Commission also took into account that, due to its size and previous experience with EU merger control rules, Marine Harvest should have been aware of its obligations. As regards gravity, the Commission considered that the infringement was a particularly serious one, given the acquisition raised doubts as to its compatibility with the internal market. The Commission viewed as mitigating circumstances the fact that Marine Harvest had not exercised its voting rights in Morpol after the acquisition of control and had itself approached the Commission shortly after closing.

How in these cases did the failure to notify come to light, and are there any lessons for merging parties going forward?

In the *Electrabel* case, it is not quite clear how the failure to notify came to light. Electrabel first acquired a shareholding of 17.86% in CNR in June 2003 and increased this to 49.95% in December 2003 (by acquiring further shares from EDF). Yet it only approached the Commission in August 2007 to obtain the Commission's opinion on whether it had acquired *de facto* sole control. Electrabel pointed to a number of circumstances to show that its *de facto* sole control only arose in 2007: a change in way its accounting department consolidated its shareholding in CNR; a letter from the French energy regulator from July 2007 in which Electrabel and CNR were considered linked companies; and the general meeting of 8 June 2007, which confirmed that Electrabel had a *de facto* majority. The Commission dismissed each of these "new" circumstances as irrelevant[10].

Marine Harvest initially acquired a 48.5% shareholding in Morpol from one shareholder and then acquired the remaining 51.5% of shares from multiple public shareholders and approached the Commission after having done so. As above, subsequent to the Commission's decision, Marine Harvest has announced publicly that its decision to notify only after full takeover was in accordance with the exception applying to public takeovers. If it appeals the Commission's decision, the appeal will likely hinge on this question.

How does the limitation period (as expressed by the Court of Justice in Electrabel) work?

Article 1(1) of Regulation 2988/74 states as follows:

> "*The power of the Commission to impose fines or penalties for infringements of the rules of the* [European Union] *relating to transport or competition shall be subject to the following limitation*

[10] Case COMP/M.4994 *Electrabel/Compagnie nationale du Rhône*, decision of 10 June 2009, para. 167.

periods:

(a) three years in the case of infringements of provisions concerning applications or notifications of undertakings or associations of undertakings, requests for information, or the carrying out of investigations;

(b) five years in the case of all other infringements."

Article 2(1) of Regulation 2988/74 states further:

"*Any action taken by the Commission, or by any Member State, acting at the request of the Commission, for the purpose of the preliminary investigation or proceedings in respect of an infringement shall interrupt the limitation period in proceedings. The limitation period shall be interrupted with effect from the date on which the action is notified to at least one undertaking or association or undertakings which have participated in the infringement…*"

In its decision in the *Electrabel* case, the Commission found that the limitation period of 5 years under Article 1(1)(b) of Regulation 2988/74 applied to infringements of the "standstill" obligation under Article 7(1) EUMR, as such infringements concerned not only an "*absence of notification, but also conduct that produces a structural change in the conditions of competition*".[11]

Before the CJEU, Electrabel argued that the infringement of Article 7(1) EUMR was instantaneous, rather than continuous, in nature. The CJEU dismissed this and held in any event that the Commission's request for infringement on 17 June 2008 and its statement of objections on 17 December 2008 interrupted the five-year limitation period, in accordance with Article 2 of Regulation 2988/74.[12]

As well as fines, what other risks do parties run for failing to notify transactions (e.g. future relationship with the Commission)?

In addition to the major risk of fines of up to 10% of infringing company's aggregate turnover under Article 14 EUMR, companies run the risk that "unnotified" and implemented transactions could be declared invalid under Article 7(4) EUMR and, if declared incompatible with the internal market, be dissolved or subject to other measures that the Commission deems appropriate under Article 8(4) EUMR. The *Marine Harvest* case was one which raised preliminary competition concerns and required Marine Harvest to offer divestitures in order to obtain clearance and avoid dissolution of the transaction.

Will the Commission's proposals to claim jurisdiction over some minority shareholdings increase the likelihood of penalties for failing to inform the Commission of transactions?

The Commission's recent proposal to claim jurisdiction over non-controlling minority shareholdings in certain, specific circumstances should not automatically increase the likelihood of penalties for failure to notify transactions, although the details of this proposal still need to be thrashed out.[13] That said, borderline cases creating new law and making an example of the infringer cannot obviously be excluded. If the *Electrabel* and *Marine Harvest* cases have taught us anything it is to approach the Commission in case of doubt to avoid the unduly harsh consequences of deterrent fines. It is questionable whether the Commission's scarce resources are attuned to such requests. In some respects, the Commission may have created a rod for its own back by coming down so heavily on technical infringements.

---

11 Case COMP/M.4994 *Electrabel/Compagnie nationale du Rhône*, decision of 10 June 2009, para. 182.

12 Judgment in *Electrabel SA v European Commission*, C- 84/13 P, EU:C:2014:2040, paras. 60-63.

13 See Commission's White Paper "*Towards more effective EU merger control*" dated 9 July 2014.