

Kluwer Competition Law Blog

Beware of “gun jumping”: EU court confirms EUR 20 million fine imposed on Norwegian seafood company

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Between 2012 and 2013, Marine Harvest ASA (“**Marine Harvest**”), a Norwegian seafood company, acquired Morpol ASA (“**Morpol**”), a Norwegian producer and processor of salmon. Marine Harvest notified the transaction to the European Commission under the European Union’s Merger Regulation (“**EUMR**”), but implemented it prior to the European Commission having granted clearance. The European Commission imposed in 2014 a EUR 20 million fine on Marine Harvest for “jumping the gun”. On 26 October 2017, the General Court of the European Union (“**General Court**”) confirmed the European Commission’s decision (“**Decision**”).

WHAT HAPPENED:

On 14 December 2012, Marine Harvest entered into a share and purchase agreement (“**SPA**”) with companies owned by Jerzy Malek, the founder and former CEO of Morpol. Under the SPA, Marine Harvest acquired 48.5% of the shares in Morpol (“**Initial Transaction**”). The Initial Transaction was closed on 18 December 2012. On 15 January 2013, Marine Harvest submitted a mandatory public offer for the remaining 51.5% of the shares in Morpol (“**Public Offer**”). Following settlement and completion of the Public Offer in March 2013, Marine Harvest owned a total of 87.1% of the shares in Morpol (together the “**Transaction**”).

Marine Harvest established a first contact with the European Commission on 21 December 2012 by submitting a “Case Team Allocation Request”, which initiates the pre-notification process under the EUMR. After submitting various drafts and answers to requests for information, Marine Harvest formally notified the Transaction on 9 August 2013. On 30 September 2013, the European Commission cleared the Transaction subject to conditions.

On 31 March 2014, the European Commission formally launched a separate investigation into alleged “gun jumping” by Marine Harvest, and by decision of 23 July 2014, the European Commission imposed a fine of EUR 20 million on Marine Harvest (“**Fining Decision**”). The European Commission held that Marine Harvest, by implementing the Initial Transaction, had acquired de facto control over Morpol. By acquiring de facto control, Marine Harvest had infringed Art. 7(1) EUMR (“**Standstill**”).

Obligation"). Under the Standstill Obligation, transactions requiring notification to and clearance by the European Commission may not be implemented prior to clearance.

The European Commission rejected Marine Harvest's argument that the implementation of the Initial Transaction was covered by an exemption provided for in Art. 7(2) EUMR ("**Public Bid Exemption**"). Under the Public Bid Exemption, the acquisition of control from various sellers through a public bid or a series of transactions in securities can be implemented prior to clearance. However, this applies only if the transaction is notified without delay to the European Commission, and if the acquirer does not exercise the respective voting rights. According to the European Commission, the Public Bid Exemption is not intended to cover situations involving the acquisition, from a single seller, of a "significant block of shares" which in itself confers de facto control.

Marine Harvest appealed against the Fining Decision to the General Court. However, with the Decision, the General Court confirmed the European Commission findings, both on substance and with respect to the level of the fine.

WHAT THIS MEANS:

The Decision is an impressive reminder that gun jumping, i.e. the implementation of transactions prior to clearance by the competent antitrust authorities, can entail severe consequences. Under European merger control law, the European Commission can impose fines of up to 10% of the group's total turnover on companies infringing the Standstill Obligation. Antitrust authorities in most other major antitrust jurisdictions have comparable sanctioning tools.

The Decision also confirms that the acquisition of a minority stake may well be considered as conferring de facto control. This applies in particular to situations where the minority shareholder is highly likely to achieve a majority at the shareholders' meetings, taking account of the size of its shareholding and the level of attendance of other shareholders at shareholders' meetings in preceding years. The General Court furthermore emphasises that the mere possibility to exercise control is sufficient for a breach of the Standstill Obligation. Whether the acquirer actually makes use of that possibility (Marine Harvest argued it did not) is of no relevance.

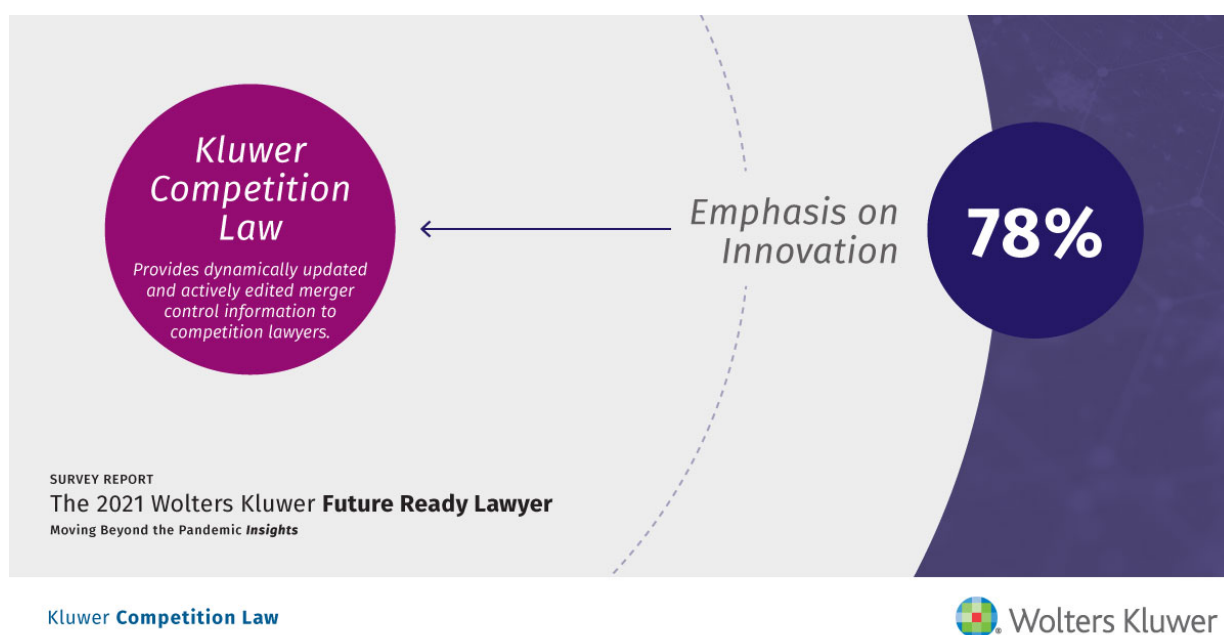
Finally, the Decision clarifies that the European Commission is entitled to apply a narrow interpretation of the Public Bid Exemption. Parties who intend to rely on the Public Bid Exemption for (partly) implementing transactions prior to clearance should do so, if possible, only after consulting with the European Commission. Indeed, the European Commission, confirmed by the General Court, held that Marine Harvest acted negligently by not having consulted with the European Commission. Marine Harvest's negligence was a main factor for the European Commission to conclude that a significant fine should be imposed - even though, as Marine Harvest argued throughout the proceedings, the European Commission did not impose a fine in a very similar, previous merger case.

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