Gun jumping: AG Tanchev tells European Court of Justice that Marine Harvest should receive one fine, not two

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There has been an important milestone in the search for more legal certainty in gun-jumping cases: On September 26, 2019, Advocate General (AG) Tanchev issued his opinion in the *Marine Harvest* case (C-10/18 P) and recommended that the European Court of Justice (CoJ) partially annul Marine Harvest's gun-jumping fine.
Below we take a look at the opinion as well as its potential implications for businesses engaging in M&A activity in the EU.

Run up to the case

The case relates to the acquisition of sole control of Morpol by Marine Harvest. The acquisition took place in two phases: On December 18, 2012, Marine Harvest acquired a 48.5% shareholding in Morpol (the first phase of the transaction). It then made a bid for the remaining shares of the target (a mandatory step under Norwegian law), which it acquired on November 15, 2013 (the second phase of the transaction).

On August 9, 2013 – that is, between the two phases of the transaction – Marine Harvest formally notified it to the European Commission (EC). The EC cleared the transaction on September 30, 2013.

However, in a decision of July 23, 2014, the EC found that the first phase of the transaction already conferred upon Marine Harvest sole control over Morpol, in violation of:

- the notification obligation set forth in Article 4 of the EU Merger Regulation (EUMR); and
- the standstill obligation, i.e. the prohibition to implement the concentration either before its notification or until it has been cleared by the EC, set forth in Article 7 EUMR.

As a result, the EC imposed two fines of €10 million on Marine Harvest, i.e. one for each infringement (this was not a first for Marine Harvest, which had already been fined €57,700 in 2007 for failing to notify a transaction in France – the company was then called Pan Fish).

Marine Harvest challenged the decision before the General Court (GC) – unsuccessfully. It then brought an appeal before the CoJ. Among other pleas, Marine Harvest argued that, by imposing two separate fines, one for breach of the notification obligation and one for breach of the standstill obligation, the EC breached the principle *ne bis in idem*, the set-off principle or the principles governing concurrent offences in EU Member States.

Non-applicability of the principle *ne bis in idem* and the set-off principle

AG Tanchev sides with the GC regarding the principle *ne bis in idem* and the set-off principle. None of them applies in the present case, as:

- The principle *ne bis in idem*, which is enshrined in Article 50 of the Charter of Fundamental Rights of the EU and the related case law, precludes an undertaking from being found liable on the grounds of anticompetitive conduct for which it has been penalised or declared not liable by an earlier decision that can no longer be challenged. However, in the present case, the requirement that there is an earlier decision imposing a fine on the same person in respect of the same conduct is not met – therefore, *ne bis in idem* does not apply. As a side note, this conclusion is consistent with a judgment of April 2019, where the CoJ found that the principle *ne bis in idem* did not apply in a case where the Polish competition authority imposed two fines in one decision: one for infringement of national law prior to the accession of Poland to the EU and one for infringement of EU competition law post accession (see C-617/17).
- The set-off principle means that, when setting fines, the Commission must take into account penalties that EU national competition authorities have already imposed on the same undertaking for the same conduct. Therefore, in the absence of parallel competition proceedings in another EU Member state, the set-off principle is not applicable here.

AG Tanchev's view: the infringement of the standstill obligation subsumes the infringement of the notification obligation

But AG Tanchev does agree with Marine Harvest on one key point: the principles that govern concurrent offences apply. Broadly speaking, these principles mandate that, where the same conduct is caught by more than one statutory provision, but one provision is more specific than the other, only the former must be applied.

In this regard, AG Tanchev notes that:

- The conduct that breaches the notification obligation and the standstill obligation is one and the same, namely, the closing of the first phase of the transaction.
- While there is no rule governing concurrent offences in EU competition law, such rules do exist in the criminal legislation of certain EU Member States, notably Germany and France. For instance, in France, where one conduct infringes several provisions, one provision will typically subsume the others, e.g. because (i) it is sanctioned by the highest penalty, (ii) the others were mere preliminary steps, committed for the sole purpose of committing the main infraction; or (iii) it is most specific. By exception, more than one statutory provision may apply where they protect different social values.
- By analogy with these national principles, the standstill obligation should subsume the notification obligation, notably because:
- The two provisions protect the same value, namely, avoiding any damage to competition that may arise from an early implementation;
- The failure to notify is a preliminary step to the breach of the standstill obligation;
- The standstill obligation is more specific that the notification obligation, because it include all the elements of the latter plus an additional element (namely, the implementation of the transaction in the absence of a notification).

In conclusion, AG Tanchev proposes to sanction only the breach of the standstill obligation, not the breach of the notification obligation – thus limiting Marine Harvest's fine to €10 million instead of €20 million.

Good news for businesses engaged in M&A operations in the EU?

After decades of very limited enforcement in the field of gun jumping, the EC and national competition authorities have recently become much tougher on infringing companies and are prosecuting an increasing number of cases.

The level of fines has also significantly gone up, with notorious examples including Altice (€80 million in France and €125 million at EC level – concentration notified but implemented ahead of clearance) and Facebook (€110 million at EC level for providing misleading information about WhatsApp's takeover).

Against this background, the solution advocated by AG Tanchev would be a breath of fresh air for businesses engaged in M&A activities in the EU, as it would essentially result in a limitation of fines in cases where businesses infringe both Article 4 and Article 7 EUMR. So stay tuned for the judgment of the CoJ, which should settle the debate soon.