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CJEU Confirms Double Trouble for Gun Jumpers

Jakob Dewispelaere (Sidley Austin LLP) · Wednesday, May 6th, 2020

On 4 March 2020, the European Court of Justice (“**CJEU**”) rendered its judgment in the *Marine Harvest* case.[1] The CJEU dismissed Marine Harvest’s appeal against a European Commission (“**Commission**”) decision in which the Commission imposed two separate fines of EUR 10 million each for failure to notify a transaction[2] *and* for implementing that transaction prior to clearance[3] in violation of the EU Merger Regulation (“**EUMR**”).

The judgment contains important rulings on the notion of a “single concentration” under EU merger control rules and on the application of the principles of “*ne bis in idem*” and “concurrent offences”. The judgment is a strong reminder that the Commission takes procedural obligations under EU merger control very seriously. The policy stance towards gun jumping has definitely shifted and enforcement has ramped up. The Commission (like other competition authorities around the world) is cracking down on companies who fail to notify and/or (partially) implement the transaction before obtaining clearance. It is not shy to impose hefty fines, thereby making examples of companies committing these procedural offences. Businesses engaging in M&A activity should tread carefully when assessing EU notification and standstill obligations.

Background

The takeover of Morpol

Marine Harvest is a Norwegian seafood company active in salmon and halibut farming and processing. Morpol is also a Norwegian producer and processor of salmon. On 14 December 2012, Marine Harvest entered into a share purchase agreement (the “**Initial Transaction**”), pursuant to which it acquired 48.5% of the share capital of Morpol when the Initial Transaction closed on 18 December 2012.

Under Norwegian law, the acquirer of more than one third of the shares in a listed company is obliged to make a bid for the remaining shares in the company. Marine Harvest launched a public bid in compliance with that requirement and acquired a further 38.6% of Morpol’s shares in March 2013 and the remaining 12.9% in November 2013.

The Commission's conditional clearance decision

On 21 December 2012 – *i.e.* three days after the Initial Transaction closed – Marine Harvest started the pre-notification process and sent a case team allocation request (“CTAR”) to the Commission regarding the acquisition of sole control over Morpol. In the CTAR, Marine Harvest informed the Commission that the Initial Transaction had already closed, but stated that it would not exercise its voting rights over Morpol pending the Commission’s decision.

On 9 August 2013, Marine Harvest formally notified the transaction to the Commission and, on 30 September 2013, the Commission cleared it, subject to the divestiture of approximately three quarters of the overlap between the Scottish salmon farming capacities of the parties.[4]

In its conditional clearance decision, however, the Commission already flagged its view that the pre-notification closing of the Initial Transaction had conferred upon Marine Harvest *de facto* sole control over Morpol. The Commission noted that it could not exclude that Marine Harvest had infringed the standstill obligation in Article 7(1) EUMR and the notification requirement in Article 4(1) EUMR and that it might examine in a separate procedure whether a sanction under Article 14(2) EUMR[5] would be appropriate.

The Commission's infringement decision

On 23 July 2014, the Commission adopted a decision finding that Marine Harvest had indeed infringed Articles 4(1) and 7(1) EUMR and imposed separate fines of EUR 10 million for each those infringements.[6] The Commission found that Marine Harvest had acquired *de facto* sole control over Morpol when the Initial Transaction closed in December 2012. The Initial Transaction constituted a concentration subject to the EUMR, and Marine Harvest should have notified it for clearance prior to closing. Marine Harvest had therefore violated Article 4(1) EUMR, which requires the parties to notify the Commission before they implement such a concentration. Moreover, in closing the Initial Transaction in December 2012, Marine Harvest implemented it both before its notification (in August 2013) and before the Commission’s conditional clearance (in September 2013). Marine Harvest had therefore violated the standstill obligation in Article 7(1) EUMR, which requires the parties not to implement the concentration prior to notifying and obtaining the Commission’s clearance.

In the Commission’s proceedings, Marine Harvest claimed that the Initial Transaction and the subsequent public bid benefitted from the exemption from the standstill obligation in Article 7(2) EUMR. Subject to the satisfaction of two requirements, that exemption applies to the implementation of a public bid or a series of transactions by which an acquirer obtains control through acquisitions of shares from various sellers (so called “creeping bids”). The two requirements are, first, that the acquirer notifies the acquisition of control to the Commission without delay and, second, does not exercise the voting rights pending the Commission’s clearance, or does so only to maintain the full value of the investment. Marine Harvest argued that its acquisition of Morpol’s shares through the Initial Transaction and its public bid met those requirements and therefore benefitted from the exemption.

The Commission, however, disagreed. It noted that Article 7(2) covers situations where it is challenging to determine which particular shares or block of shares acquired from a number of previous shareholders will put the acquirer in a situation of *de facto* control over the target

company. According to the Commission, Article 7(2) does not apply to situations like the present one, where the acquirer initially procures a significant block of shares from just one seller (the Initial Transaction) and where it is straightforward to establish that the acquisition of this block of shares will confer *de facto* sole control over the target company.

Marine Harvest appealed the case to the General Court, which confirmed the Commission's decision.^[7] Marine Harvest then further appealed the General Court's judgment to the CJEU.

The CJEU's judgment

Marine Harvest relied on two grounds of appeal.^[8] First, it argued that the General Court erred in finding that Article 7(2) EUMR did not apply. Second, it submitted that the General Court erred in failing to apply the principle *ne bis in idem* and the principles governing concurrent offences.

A "single" concentration and Article 7(2) EUMR

First, Marine Harvest argued that the General Court had misinterpreted the notion of a single concentration under the EUMR. In Marine Harvest's view, recital 20 of the EUMR makes clear that transactions linked by condition constitute a "single" concentration for the EUMR's purposes. Marine Harvest submitted that the Initial Transaction and the public bid were linked by condition and therefore constituted a single concentration benefitting from the Article 7(2) exemption. They were linked by condition, because, under Norwegian law on securities trading, completion of the Initial Transaction made Marine Harvest's launch of the public bid compulsory. Marine Harvest argued that the conclusion of the Initial Transaction and the announcement of the public bid were considered and decided simultaneously and had the same economic objective, *i.e.* Marine Harvest's acquisition of all of the outstanding shares of Morpol. It claimed those facts supported their conditionality.

Marine Harvest further argued that the General Court had incorrectly rejected the application of Article 7(2) to a transaction structure where the acquirer obtained a controlling shareholding before launching the public bid. In Marine Harvest's view, the Court made a formalistic differentiation between transaction structures, raising uncertainty about which transactions fall within or outside the exemption.

The CJEU rejected Marine Harvest's arguments. The CJEU noted that the concept of a single concentration appears only in recital 20, and not in the articles of the EUMR. Recitals have no binding legal force of their own, and parties cannot rely on them either as a ground for derogating from the actual provisions of the EUMR or for interpreting those provisions in order to extend their scope.

The CJEU further stated that the General Court was right to conclude that Article 7(2) is irrelevant in a situation in which an acquirer of shares obtains control in an initial private transaction, even if the acquirer follows that transaction with a public bid, because the bid is not necessary to achieve the change of control. As Marine Harvest launched the public bid after the *de facto* change of control over Morpol, the General Court did not have to examine the conditionality between the two transactions.

Ne bis in in idem and concurrent offences

By its second ground of appeal, Marine Harvest argued that the General Court infringed the *ne bis in idem* principle by finding that the Commission could impose separate fines for a breach of the notification obligation and for a breach of the standstill obligation.

The *ne bis in idem* principle encompasses both a prohibition on double proceedings and a prohibition on double penalties, so that no one should be punished twice for the same offence. In Marine Harvest's view, the *ne bis in idem* principle covers any double punishment, irrespective of whether it is imposed in the same or separate proceedings. The CJEU disagreed and held that the principle of *ne bis in idem* did not apply in this case, because the same authority imposed both penalties in a single decision.

Marine Harvest also argued that the international principles of concurrent offences require 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. Interestingly, Advocate General Tanchev sided with Marine Harvest on this one, stating that the standstill obligation in Article 7(1) contains all the elements of the notification obligation in Article 4(1).[9] Consequently, according to the Advocate General, a breach of the notification obligation is "subsumed" by the breach of the standstill requirement, so that the implementation of a concentration before it is notified and declared compatible amounts to an infringement of Article 7(1) alone.

The CJEU did not follow the Advocate General's advice. It first observed that there are no specific rules concerning concurrent offences in EU competition law. It further held that the EU legislature has not defined one offence as being more serious than the other and that they are both subject to the same level of fines. It also noted that, although there is a link between Article 4(1) and Article 7(1), in that an infringement of Article 4(1) automatically results in an infringement of Article 7(1), the converse is not true. It concluded by stating that both provisions pursue autonomous objectives and that the Commission was indeed entitled to impose separate fines for violations of the notification and standstill obligations.

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[1] Judgment of 4 March 2020, *Marine Harvest*, C-10/18 P, EU:C:2020:149.

[2] Article 4(1) EUMR provides that "*concentrations with a Community dimension [...] shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest*".

[3] Article 7(1) EUMR provides that “*a concentration with a Community dimension [...] shall not be implemented either before its notification or until it has been declared compatible with the common market [...]*”.

[4] Case COMP/M.6850 – Marine Harvest/Morpol.

[5] Article 14(2) EUMR provides that the Commission may impose a fine not exceeding 10% of the aggregate turnover of a company *inter alia* when the company in question, intentionally or negligently, fails to notify a concentration prior to its implementation or implements a concentration in breach of the standstill obligation.

[6] Case COMP/M.7184 – Marine Harvest/Morpol.

[7] Judgment of 26 October 2017, *Marine Harvest v Commission*, T-704/17, EU:T:2017:753.

[8] Marine Harvest presented a third ground of appeal, but only at the time of the hearing. It was therefore inadmissible.

[9] Opinion by AG Tachev of 26 September 2019, EU:C:2019:795.

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