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EU Competition Law Newsletter

Highlights

— Court Of Justice Upholds Commission's Two Fines Against Marine Harvest For Gun-Jumping

— DG COMP Responds To The COVID-19 Outbreak

Court Of Justice Upholds Commission's Two Fines Against Marine Harvest For Gun-Jumping

On March 4, 2020, the Court of Justice dismissed Mowi ASA (formerly Marine Harvest ASA)'s appeal against two fines for having acquired control over salmon producer Morpol prior to the European Commission's (the "Commission") merger control approval.[1] The judgment clarifies the scope of Article 7(2) of the EU Merger Regulation (the "EUMR"), which allows an acquisition of control to be notified after the fact, if it takes place in the context of a public bid. The judgment explains that the exemption does not apply if the public bid follows an initial, separate, transaction which already gave rise to an acquisition of control. The judgment also confirms that the Commission is allowed to impose two separate fines when a transaction is implemented before the merger notification. This article updates our analysis of the General Court judgment as reported in our European Competition Report of Q4, 2017.

Factual background

In December 2012, Marine Harvest acquired and paid for 48.5% of Morpol's shares from two legal entities controlled by Morpol's founder. As Morpol was listed on the Oslo Stock Exchange, this acquisition triggered a requirement to launch a public tender offer,[2] after which Marine Harvest acquired a further 38.6% of the company in March 2013. In November 2013, Marine Harvest purchased the remaining shares and Morpol was de-listed. The transaction was notified to the Commission in August 2013, and was conditionally cleared the following month.

The Commission found that Marine Harvest had acquired control over Morpol with the first purchase of 48.5% of the shares, since this allowed it to obtain a clear majority at shareholders' meetings

[1] *Mowi v. Commission* (Case C-10/18 P) EU:C:2020:149 ("*Mowi*").

[2] Under the Norwegian Securities Trading Act, a person who acquires more than one third of the shares in a listed company must make a mandatory bid for the remaining shares in the company.

based on historic attendance rates. The Commission issued two EUR 10 million fines against Marine Harvest for violating: (i) Article 4(1) of the EUMR, which requires a concentration to be notified before it is implemented, and (ii) Article 7(1) of the EUMR, which prohibits a concentration from being implemented before it has received Commission approval.[3]

On appeal, the General Court agreed with the Commission and upheld the decision.[4] Marine Harvest appealed to the Court of Justice and challenged both of the grounds considered in the General Court's judgment.

Public bid exception does not apply if there was already an acquisition of control

Concentrations cannot be implemented until the Commission has given its approval or the administrative deadlines have expired. This mandatory obligation enables the Commission to maintain effective control, since mergers can be difficult to unwind and can impact competition before they are reversed.

Article 7(2) of the EUMR provides a narrow exception to this rule for public bids or securities. It is intended to cover acquisitions involving multiple sellers, where it can be challenging to determine which individual share or block of shares will put the acquirer in a position of control over the target company. In this respect, Article 7(2) seeks to provide legal certainty, by exempting such multistage transactions from the obligation to notify before the conclusion of the entire transaction (and is subject to a standstill obligation not to vote the shares until clearance).

In *Mowi*, the Court of Justice emphasized that the Article 7(2) exception must be interpreted narrowly, and could not be used to cover any earlier transaction that had already given rise to a change of control. Only transactions which are "necessary to achieve a change of control" will be viewed as part of a single concentration that could qualify for exemption under Article 7(2).

In this case, Marine Harvest did not notify its initial acquisition of 48.5% of the shares in December 2012 and only notified the transaction after the public bid was completed in March 2013. Marine Harvest claimed that the December 2012 acquisition did not constitute a separate transaction but was the triggering event of the public bid, and as an integral part of the creeping and public takeover of Morpol, fell within the exception of Article 7(2) of the EUMR.

The Court of Justice rejected Marine Harvest's arguments that there was a single concentration. The subsequent public bid had "no direct functional link" with the private acquisition of shares in December 2012. Since this initial acquisition conferred control over Morpol, this triggered the notification requirement. The fact that the transaction was followed by a mandatory public bid, and that Marine Harvest had not exercised its voting rights in accordance with Article 7(2), was irrelevant.

Gun-jumping can result in two separate violations and two fines

Mowi argued that the Commission was wrong to impose two separate fines: the first for failure to file and the second for failure to wait for approval, for the same unlawful act—its failure to notify the December 2012 acquisition of control. Mowi claimed that this conflicted with several principles of EU law, including: (i) *ne bis in idem*, that nobody should be punished twice for the same conduct, (ii) the set-off principle, that the first penalty must be taken into account when determining the second penalty, and (iii) 'concurrent offences,' that a company should not be penalized for committing two offences which have the same objective (in criminal law, for example, an offender committing both theft and burglary will only be sanctioned once since theft is part of the definition of burglary).

[3] *Marine Harvest/Morpol* (Case COMP/M.7184), Commission decision of July 23, 2014.

[4] *Marine Harvest v. Commission* (Case T-704/14) EU:T:2017:753.

The Court of Justice clarified that Article 4(1) and Article 7(1) of the EUMR establish two distinct obligations which pursue different objectives. Article 4(1) obliges an undertaking to notify a concentration prior to implementation (a 'notification obligation'), whereas Article 7(1) prohibits an undertaking from implementing a transaction before it has been approved (a 'standstill obligation'). A company can infringe Article 7(1) without infringing Article 4(1), by notifying the transaction at the appropriate time, but then proceeding to implement it before the Commission has issued its decision.[5]

The Commission must be able to impose penalties that distinguish between these situations, as is also reflected in Article 14(2) of the EUMR on fines. Thus, the Court of Justice held that, even assuming the principle of concurrent offences applied, there was no infringement that is "primarily applicable"[6] and should "subsume"[7] the other. In reaching this conclusion, the Court of Justice disagreed with Advocate General Tanchev's opinion. The Advocate General took the view that Article 4(1) and Article 7(1) define the same offence, and in any event that Article 7(1) subsumes the former since any damage to competition arises from the early implementation of a transaction, rather than the failure to notify.

As regards *ne bis in idem*, the Court of Justice held that the principle did not apply in this case, because it protects an entity from being held liable in fresh proceedings, whereas Mowi had received the two fines in the same decision.[8] As to the set-off principle, the Court of Justice found that Mowi had failed to demonstrate that the Commission had not adequately taken the first fine into account when setting the second.

The Court of Justice confirms the Commission's strict approach to gun-jumping

This judgment is significant and will have implications for other gun-jumping cases currently before the General Court (*Altice*[9] and *Canon/Toshiba*[10]). It confirms the Commission's competence to impose two fines for a failure to notify prior to implementation, which is also a subject of challenge in the two pending appeals.

The *Mowi* judgment illustrates that companies should exercise caution before seeking to rely on the Article 7(2) exemption. When planning a transaction, companies should map out the trajectory of the deal and assess if the various steps are truly connected or if there could be a distinct stage that is capable of conferring control. A company may even consider providing the Commission with advance notice of its intentions, before seeking to launch and complete a multistage acquisition of securities.

DG COMP Responds To The COVID-19 Outbreak

The COVID-19 pandemic has caused significant economic disruption, including supply shortages, cost increases, and liquidity constraints resulting from a prolonged shutdown. As EU Member States and businesses respond to these challenges, their actions could raise potential issues under competition law.

In response to that, since March 12, the Commission has issued various antitrust and State aid measures:

— **Antitrust.** The Commission has affirmed it will not actively pursue necessary and temporary measures to avoid a shortage of supply during the COVID-19 pandemic. It has published guidance on how it will analyze such business

[5] At the same time, the Court of Justice acknowledged that an infringement of Article 4(1) automatically results in an infringement of Article 7(1).

[6] *Mowi*, para. 118.

[7] *Mowi*, para. 112.

[8] This conclusion follows the recent ruling in P*owszechny Zakład Ubezpieczeń na Życie* (Case C-617/17) EU:C:2019:283, paras. 28 and 29, where the Court of Justice held that *ne bis in idem* principle does not apply to two fines imposed in a single decision.

[9] *Altice v. Commission* (Case T-425/18), decision pending.

[10] *Canon v. Commission* (Case T-609/19), decision pending.

cooperation and has offered to provide informal guidance for specific situations if businesses request.

— **State aid.** The Commission has issued four Communications to relax State aid rules and facilitate approval for COVID-19 related public support measures, and has further proposed to include corporate recapitalizations within this framework. The Commission has already cleared more than 60 Member State measures under these rules, including from France, Germany, Denmark, Spain, Belgium, and Luxembourg.

These initiatives mirror actions by national competition agencies and other enforcers globally. These developments are monitored in our COVID-19 Resource Center.

Antitrust	
European Competition Network joint statement on the application of competition law during the COVID-19 crisis (March 23, 2020)	Link
Commission Communication on the Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak (April 8, 2020)	Press Release, Communication
DG Competition page on antitrust rules and coronavirus	Link
State aid	
Commission press release on the State aid framework and use of Article 107(3)(b) TFEU to counter the economic impact of the COVID-19 outbreak (March 13, 2020)	Link
Commission Communication on the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (March 19, 2020)	Press Release, Communication
Commission Communication amending the Annex to the Commission's Communication on the application of Articles 107 and 108 TFEU to short-term export-credit insurance in light of economic impact of coronavirus outbreak (March 27, 2020)	Press Release, Communication
Commission Communication on amendments to the Temporary Framework to enable Member States to accelerate production of COVID-19 relevant products and protect jobs in the current COVID-19 outbreak (April 3, 2020)	Press Release, Communication
Commission Statement on consulting Member States on proposal to further expand State aid Temporary Framework to recapitalisation measures (April 9, 2020)	Link
Notification template for aid measures introduced under the Temporary Framework	Link
Notification template for aid measures introduced under Article 107(2)(b) TFEU	Link
DG Competition page on State aid rules and coronavirus	Link
List of Member State measures approved under Article 107(2)b TFEU, Article 107(3)b TFEU and under the Temporary State Aid Framework	Link

News

Commission Updates

Commission Conditionally Approves Joint Venture Between Telecom Italia And Vodafone To Share Telecoms Towers

On March 6, 2020, the Commission approved Telecom Italia and Vodafone's acquisition of joint control over INWIT, which will combine the companies' 22,000 telecommunication towers in Italy.[11] The approval was obtained during Phase I and is conditioned on third-party access to the infrastructure.

Merger control approval for the INWIT joint venture

The joint venture consolidates Telecom Italia's and Vodafone's 'passive' tower infrastructure, *i.e.*, the network elements which do not process or convert signals, such as towers, poles, masts and unpowered transmission elements, into one entity. This is intended to help achieve a quicker and more economical roll-out of 5G infrastructure in Italy.

The Commission found that the creation of such a large tower pool could reduce competition or shut out rival operators from renting space on the towers in municipalities with more than 35,000 inhabitants. The Commission's concerns did not extend to rural regions, which may be because physical space for tower infrastructure is more readily accessible in these areas, there is limited overlaps in the parties' networks in these districts and/or a finding of greater efficiencies when sharing infrastructure in areas with a lower population density.

To address the Commission's concerns, Telecom Italia and Vodafone offered a set of commitments which essentially guarantee, for a period of eight years, competitors' access to the joint venture's towers in these more populated areas. Specifically, they undertook to offer space on 4,000 towers on reasonable and non-discriminatory terms and in accordance with a transparent procedure.

Tacit approval of network-sharing agreements

On January 17, 2020, the Commission also opened a preliminary investigation into a broader network-sharing agreement between the companies, which had been announced with the joint venture. Telecom Italia and Vodafone proposed to share the 'active' parts of their 2G, 4G and 5G networks (the signal processing equipment), while continuing to separately manage their spectrum rights and network performance, and to independently develop new products and services.

After engaging with the Commission, the companies agreed to limit their active sharing to smaller cities, towns and rural zones, omitting the most densely populated areas, on the basis that network sharing agreements create more efficiencies in less built-up areas. In less populated areas operators have fewer incentives to build separate networks, and network coverage would consequently become more limited.

The Commission, without formally closing its investigation, observed that the adjustments "seem *prima facie* appropriate to alleviate possible concerns." In coming to this conclusion, the Commission specifically noted, amongst other observations, that there are five mobile network operators in Italy, more than in most other Member States. The Commission observed that while it is "generally supportive" of network sharing agreements, which can facilitate the roll-out of new technologies by alleviating the heavy cost of infrastructure investments, these arrangements also present competition risks as they require competitors to coordinate closely and exchange detailed information. Accordingly, "an appropriate balance must be found [...] on a case-by-case basis," taking into account several factors, including "the extent of sharing, the content of contractual arrangements as well as [the] specific market circumstances."[12]

[11] *Vodafone/TIM/INWIT JV* (Case COMP/M.9674), decision not yet published. *See* Commission Press Release IP/20/414.

[12] Commission Press Release IP/20/414.

Close scrutiny of telecoms mergers and network sharing agreements

This decision along with the Commission's accompanying remarks on network sharing agreements are a reminder of the potential challenges telecoms businesses will encounter when contemplating network sharing plans, either through consolidation or cooperation.

The Commission's merger commitments in this case are relatively light compared to previous decisions in this sector, many of which involved four-to-three mergers and required extensive access remedies or divestitures.[13] This likely reflects the limited nature of the transaction, which only combined the parties' passive network infrastructure, as opposed to their entire mobile telephony businesses. Even so, the Commission required the parties to provide access commitments in metropolitan areas.

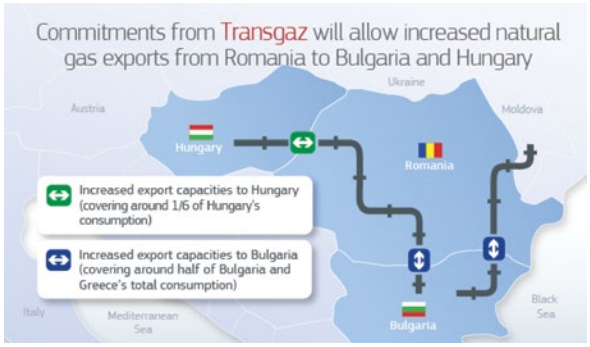
Similarly, the Commission required Telecom Italia and Vodafone to scale back the geographic coverage of their broader network sharing agreement to the areas where they were most needed. This is in line with the Commission's guidance on the need to balance the competition risks, and its approach in other cases. The Commission recently issued preliminary objections against a network sharing agreement between the two largest Czech operators, which covered all mobile technologies (2G, 3G and 4G) and the entire country excluding Prague and Brno.[14]

Commission Accepts Transgaz's Commitments To Facilitate Natural Gas Exports To Neighboring Member States

On March 6, 2020, the Commission approved commitments presented by Transgaz, the state-owned operator of Romania's natural gas transmission system, to address alleged restrictions on gas exports from Romania.[15]

The Commission claimed Transgaz had abused its dominant position by restricting exports of natural gas from Romania by: (1) underinvesting in or delaying infrastructure for gas exports; (2) imposing interconnection tariffs that made exports commercially unviable; and (3) using technical pretexts to prevent or delay exports. Such practices potentially hindered the free flow of natural gas from Romania to Hungary and Bulgaria, and presented barriers to cross-border competition in the supply of energy resources in an integrated Energy Union.

To address the Commission's concerns, Transgaz gave various undertakings to facilitate gas exports. Specifically, Transgaz committed to ensure minimum export capacities of 1.75 and 3.7 billion cubic meters per year at Romania's interconnection points with Hungary and Bulgaria respectively (as shown in the figure below). Transgaz also committed to ensure no discrimination between export and domestic tariffs and to refrain from using any other activities hindering exports. These commitments are to apply for six years, until December 31, 2020.



Source: European Commission Press Release

The present decision is the latest in a series of Commission enforcement actions aimed at achieving an internal energy market. It follows commitment decisions involving other gas and energy operators, from: (i) TenneT to increase the

[13] *See* Concurrences, Mobile telecommunications mergers in the EU – Remedies revisited, February 15, 2020, co-authored by Bernd Langeheine, Beatriz Martos Stevenson, and Jan Przerwa, available at: https://www.concurrences.com/en/review/issues/no-1-2020/articles/mobile-telecommunications-mergers-in-the-eu-remedies-revisited-92671-en.

[14] *See* Commission Press Release of August 7, 2019, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_5110, covered in our August/September 2019 EU Competition Law Newsletter, Similarly, the Belgian competition authority has issued interim measures while it investigates a network sharing partnership between Orange and Proximus, *see*, Belgian Competition Authority Press Release of January 10, 2020, available at: https://www.belgiancompetition.be/sites/default/files/content/download/files/20200110_press_release_2_bca.pdf.

[15] *Romanian gas interconnectors* (Case COMP/AT.40335), decision not yet published. Commission Press Release IP/20/407, "Antitrust: Commission accepts commitments by Transgaz to facilitate natural gas exports from Romania," March 6, 2020.

capacity of the Germany-West Denmark electricity interconnector,[16] (ii) Gazprom to remove contractual restrictions and adopt mechanisms to integrate gas markets in Central and Eastern European Member States,[17] and (iii) Bulgarian Energy Holding to remove destination clauses in wholesale gas contracts, to set up a new power exchange, and to guarantee minimum volumes on the exchange.[18]

These cases affirm that unilateral conduct which gives rise to market partitioning can constitute violations of Article 102 TFEU, in a similar manner to export bans which are treated strictly under Article 101 TFEU.[19] In resolving these cases through commitments, the Commission is able to secure investments in new infrastructure, potentially going further than what could have been achieved through a prohibition decision. These enforcement activities support the EU's objectives to establish an Energy Union in order to secure more competitive energy prices, enhance security of supply, and to contribute to its long-term climate action strategy.

Court Updates

The Court Of Justice Confirms The Commission's Broad Margin Of Appraisal In Rejecting Complaints

On March 12, 2020, the General Court confirmed the Commission's decision to reject a complaint brought by LL-Carpenter ("Carpenter"), a Czech distributor of motor vehicles, against Subaru for alleged anti-competitive conduct. The judgment serves as a reminder of the Commission's wide discretion to evaluate and reject complaints.

Background

Carpenter lodged a complaint against Subaru before the Commission in 2012. This followed a narrower complaint to the Czech Competition Authority ("CSA") in 2010 on some of the same grounds. Carpenter claimed that Subaru had infringed Articles 101 and 102 TFEU by, among other things, refusing to make it an authorized distributor, restricting its authorized distributors from dealing with Carpenter, and refusing to provide spare parts and technical information to Carpenter.

The CSA ended its investigation in 2014 after finding there was insufficient evidence of an infringement. In turn, the Commission rejected the complaint in 2018: (i) with respect to the allegations that had been included in the CSA complaint, on the ground that these had already been dealt with by the CSA, and (ii) for the other allegations, on the basis of the Commission's discretion in setting enforcement priorities. Carpenter appealed to the General Court, which upheld the Commission's rejection decision.

The Commission's discretion to reject complaints already considered by another agency

Under Article 13(2) of Regulation No 1/2003, the Commission may reject a complaint if a national competition authority ("NCA") has already dealt with the practices at issue. The Commission found that the allegations included in Carpenter's complaint to the CSA had already been dealt with by that agency, and could therefore be rejected.[20]

The General Court confirmed that the Commission has a broad margin of discretion in applying Article 13(2).[21] The General Court clarified that Article 13(2) covers situations where the NCA

[16] *DE/DK Interconnector* (Case COMP/AT.40461), Commission decision of December 7, 2019, as reported in our February 2019 EU Competition Law Newsletter.

[17] *Upstream gas supplies in Central and Eastern Europe* (Case COMP/AT.39816), Commission decision of May 24, 2018.

[18] *BEH Electricity* (Case COMP/AT39767), Commission decision of December 10, 2015.

[19] *See* the Commission's decisions fining Nike and Guess for imposing territorial restrictions in their distribution agreements for consumer goods, as reported in our March 2019 EU Competition Law Newsletter, and December 2018 EU Competition Law Newsletter, respectively. *See also*, the Commission's decision to accept commitments from Sky and certain US studios on cross-border sales of Pay-TV services, also reported in our March 2019 EU Competition Law Newsletter, and the Commission's decision fining AB InBev for restricting beer sales between Belgium and the Netherlands, reported in our May 2019 EU Competition Law Newsletter.

[20] *LL-Carpenter s. r. o. v. European Commission* (Case T-531/18) ECLI:EU:T:2020:91, para. 20 ("*Carpenter v. Commission*").

[21] *Carpenter v. Commission*, para. 42.

has effectively dealt with the complaint, and for this to be the case, that the NCA must have taken certain active steps beyond receiving the complaint.[22] However, it did not require the NCA to adopt a formal decision. In this case, the CSA had invited Subaru to submit observations on the alleged practices and had informed Carpenter of the results of its investigation. Accordingly, the Commission was right to conclude the CSA had dealt with the case. [23]

The Commission's discretion to prioritize complaints

With respect to allegations that had not been dealt with by the CSA, the Commission dismissed the complaint after finding that there were insufficient grounds to establish an infringement,[24] and that an in-depth investigation would require considerable resources and was disproportionate given the limited likelihood of finding an infringement.[25]

The General Court confirmed that the Commission is entitled to assign different levels of priority to the complaints it receives, in its role in defining and enforcing EU competition policy.[26] In so doing, the Commission must evaluate the importance of the alleged infringement against the probability of establishing an infringement.[27] The General Court found that Carpenter had failed to demonstrate a manifest error of appraisal in the Commission's finding that the probability of establishing the existence of the alleged infringement at issue was limited.[28]

Conclusion

The judgment confirms that the Commission enjoys a wide margin of discretion in deciding whether to pursue an antitrust complaint. Given the time-intensive nature of antitrust investigations and the Commission's need to ensure effective use of its limited resources, some prioritization is inevitable, and there will continue to be many complaints that are not taken further.

To improve the chance of having a complaint accepted, companies should always provide as much evidence as possible to demonstrate the infringement and its impact on consumers. Companies may also show how the case is relevant to the Commission's current enforcement priorities, or is otherwise deserving of Commission attention, *e.g.*, because there is a need to resolve conflicting application of EU law by national authorities.

[22] *Carpenter v. Commission*, para. 48.

[23] *Carpenter v. Commission*, para. 51.

[24] *Subaru* (Case COMP/AT.40037) Commission decision of 26 June 2018 ("*Carpenter v. Subaru*"), recital 29.

[25] *Carpenter v. Subaru*, recital 51.

[26] *Carpenter v. Commission*, para. 64.

[27] *Carpenter v. Commission*, para. 69.

[28] *Carpenter v. Commission*, para. 76.

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