

# Antitrust Alert

A Global Resource for Compliance Officers & Legal Advisors

---

## Beware of “Gun Jumping”: EU Court Upholds EUR 20 Million Fine Imposed On Norwegian Seafood Company

By Daniel von Brevern & Patryk Wcislo on October 31, 2017

POSTED IN EC DEVELOPMENTS, EU DEVELOPMENTS, MERGERS & ACQUISITIONS

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. In 2014, the European Commission imposed 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 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 some conditions.

On 31 March 2014, the European Commission formally launched a separate investigation into alleged "gun jumping" by Marine Harvest, and in the 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 on 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 relevant 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 in 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.



#### **Daniel von Brevern**

Daniel von Brevern focuses his practice on competition / antitrust law, with particular emphasis on merger control, cartel proceedings and European state aid. Daniel has represented a number of clients before both the German Federal Cartel Office and the European Commission. He has a wealth of experience across a number of industries, including financial services, energy, pharmaceutical/health care and automotive. [Read Daniel von Brevern's full bio.](#)



#### **Patryk Wcislo**

Patryk Wcislo advises clients in antitrust and competition law, including litigation. Through his work at various prominent international law firms in Germany and the US, Patryk has gained experience in litigation and arbitration, antitrust and merger control. [Read Patryk Wcislo's full bio.](#)

## Related Posts

Three Things To Know About French Merger Control

Significant Fine Imposed by the French Competition Authority in Floor Coverings Cartel

Five Things To Know About German Merger Control

THE LATEST: European Court of Justice Clarifies Application of European Union Merger Control Rules to Joint Ventures

Antitrust M&A Snapshot: April – June 2017 Update

---



Copyright © 2017, McDermott Will & Emery. All Rights Reserved.