October 30, 2017

EU Merger Control

Recent EU General Court Judgments on Merger Control

SUMMARY

On October 26, 2017, the EU General Court handed down two important judgments relating to the EU Commission's enforcement of the EU Merger Regulation (Council Regulation (EC) 139/2004 on the control of concentrations between undertakings).

In *KPN BV* v *European Commission*, the Court annulled the EU Commission's decision to approve Liberty Global plc's acquisition of Ziggo NV. The litigation was started by KPN BV, which is one of Liberty Global and Ziggo's competitors. KPN BV alleged (successfully) that the decision was vitiated by the Commission's failure to carry out a properly reasoned analysis of the vertical effects of the transaction in premium pay TV sports channels. It is extremely rare for the General Court to annul a merger approval decision, particularly when the litigation seeking annulment is brought by one of the merging parties' competitors.

In *Marine Harvest ASA* v *European Commission*, the Court confirmed that the EU Commission had acted lawfully when it fined Marine Harvest ASA EUR 20 million for acquiring a block of shares in its competitor Morpol ASA before the Commission had approved the transaction under the EU Merger Regulation. The judgment highlights the need for merging parties to comply scrupulously with the EU Merger Regulation or face heavy fines.

FACTS

KPN BV v. *European Commission*

On October 10, 2014, the European Commission cleared the acquisition of Ziggo NV ("Ziggo") by Liberty Global plc ("Liberty") under the EU Merger Regulation. KPN BV ("KPN") subsequently challenged this decision in the EU General Court. KPN argued, among other things, that the Commission had erred by failing to assess possible vertical effects of the transaction on the market for premium pay TV sports channels, and, consequently, the Commission had breached its legal obligation to give reasons for its assessment.[1]

The General Court found in favour of KPN and annulled the Commission's decision. The Court emphasised that the importance of the obligation to state reasons should not be underestimated. Nevertheless, it noted that the need to state reasons must be balanced against the requirement for efficient decision-making, especially in light of the short timescale presented under the EU Merger Regulation for the Commission to make decisions. The Court confirmed that the duty to state reasons does not apply to irrelevant, insignificant or plainly secondary aspects of a Commission decision.

The Commission had decided that there was no need to define the precise market for the wholesale supply and acquisition of premium pay TV sports channels because, in its view, no horizontal competition concerns arose. The Court held that this conclusion required the Commission to explain, at least briefly, why no such concerns, including any vertical effects, arose, particularly given the submissions by KPN during the Commission's review alleging the likelihood of such concerns. Moreover, the Court found that the Commission was wrong to conclude that the existence of a competing supplier of premium pay TV sports channels automatically ruled out the possibility of upstream market power by Liberty. The Court concluded that the Commission had erred by failing to carry out an analysis of the merging parties' respective market positions and their competitive relationship.

Marine Harvest ASA* v *European Commission

Marine Harvest ASA ("Marine Harvest"), active in salmon and white halibut farming and primary processing, acquired Morpol ASA ("Morpol"), a producer and processor of salmon, in three steps from December 2012 to November 2013.

On December 14, 2012, Marine Harvest entered into a share purchase agreement with Morpol's principal shareholder to acquire 48.5% of the shares in Morpol. The transaction completed on December 18, 2012. Under Norwegian law, this triggered a mandatory public offer for the remaining 51.5% of the shares in Morpol. Upon completion of this offer on March 12, 2013, Marine Harvest owned 87.1% of the shares in Morpol. It acquired the remaining shares on November 12, 2013.

Under Article 4(1) of the EU Merger Regulation any merger or agreement whereby one undertaking acquires control of another must be notified to the EU Commission before its implementation. Article 7(1) of the EU Merger Regulation provides that any such transaction may be implemented only after the EU Commission has granted approval. However, Article 7(2) of the EU Merger Regulation creates an exception to this "waiting period" rule, stating that public bids may be implemented provided that the transaction is notified to the Commission without delay and that the acquirer does not exercise any of the voting rights attached to the acquired securities until the Commission has approved the transaction.

It was only Marine Harvest had acquired the 48.5% block of shares in Morpol that Marine Harvest contacted the EU Commission regarding the transaction. Following various requests for information by the Commission, and the submission of a draft notification, Marine Harvest formally notified the transaction on August 9, 2013, some 9 months after its acquisition of the 48.5% block of shares. Because of this late notification, and implementation of the transaction, the Commission imposed two

fines on Marine Harvest amounting to EUR 10 million each for infringing the standstill obligations in Articles 4(1) and 7(1) of the EU Merger Regulation.

Marine Harvest appealed against this decision. The General Court ruled in favour of the Commission, upholding the decision. Firstly, the Court dismissed Marine Harvest's argument that the Commission had wrongfully concluded that the exception for public bids contained in Article 7(2) of the EU Merger Regulation did not apply. The fines had not been imposed in relation to the subsequent mandatory public offer, but in relation to Marine Harvest's failure to notify the December 2012 share purchase. This constituted a single private acquisition from one seller and not a public offer. Moreover, because Marine Harvest had obtained *de facto* control over Morpol as a consequence of the first acquisition alone, the Court did not accept that the December 2012 share purchase constituted a single transaction together with the March 2013 public offer.

Secondly, the Court held that Marine Harvest was in a position to easily predict that it would acquire *de facto* control of Morpol by purchasing 48.5% of its shares, especially in light of Marine Harvest's stock exchange announcement of December 17, 2017 that the transaction would trigger a notification obligation, its size, and past experience in merger proceedings. The Court noted that in case of doubt, Marine Harvest should have contacted the Commission for guidance.

Thirdly, the Court held that the imposition of two separate fines (for breach of Article 4(1) of the EU Merger Regulation, on the one hand, and Article 7(1) of the EU Merger Regulation, on the other) did not breach the principle of not being sanctioned twice for the same offence (*non bis in idem*). Moreover, the application of Article 4(1), and the subsequent imposition of a fine, did not preclude the additional applicability of Article 7(1) as the two provisions contain separate and equally binding obligations.

Fourthly, the Court dismissed Morpol's argument that the fines infringed principles of legal certainty. They had been imposed in accordance with the EU Merger Regulation enabling Marine Harvest to ascertain that failure to obtain the Commission's approval prior to the acquisition was punishable by fines. The Court noted that the fact that other undertakings had, in the past, not been fined, or fined less by the Commission, for similar infringements in the past this could not lead to an automatic immunity from fines for Marine Harvest.

Finally, the Court also dismissed Marine Harvest's argument that the Commission failed to give reasons in its decision. The Commission's decision revealed clearly and unequivocally the elements taken into account in setting the fine, including Marine Harvest's turnover, size, and the gravity of the infringement, given Marine Harvest's negligence and the substantive competitive concerns raised by the transaction. Consequently, the Court upheld the fines, dismissing Marine Harvest's argument that they were disproportionate.

COMMENT

The two judgments add to the relatively sparse case law from the EU General Court relating to the EU Merger Regulation. They are noteworthy for several reasons.

The KPN judgment highlights that the so-called "duty of reasoning" imposed by Article 296 TFEU requires the Commission to include in its merger decisions a properly reasoned analysis of all competitive concerns raised by the merging parties' competitors and other third parties. A collateral effect of the judgment could be more burdensome information requests from the Commission to merging parties and third parties when the Commission is seeking information to analyse competitive concerns raised by third parties.

The Marine Harvest judgment breaks new ground because it is the first endorsement by the General Court of the Commission's analysis of how the EU Merger Regulation suspensory obligation applies to acquisitions of publicly listed companies structured as the sale of a block of shares in the target followed by a public bid for the target's remaining shares. It is also an example of how misjudging the relatively vague legal standard of *de facto* control can have severe consequences and attract hefty fines. It is crucial, in this regard, to consider whether the acquirer will be able to exert decisive influence over the target even when its shareholding remains below 50%, and, if any doubt exists, to seek informal guidance from the Commission. Finally, the case illustrates the General Court's reluctance to overturn decisions by the Commission to fine companies that fail to comply with the EU Merger Regulation. It therefore serves as a warning to merging parties to comply scrupulously with the EU Merger Regulation.

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ENDNOTES

[1] Article 296 of the Treaty on the Functioning of the European Union requires legal acts by the EU Commission and other EU institutions to state the reasons on which they are based.

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