

Case No COMP/M.7184 – Marine Harvest/ Morpol

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 14(2)
Date: 23/07/2014



EUROPEAN COMMISSION

Brussels, 23.7.2014
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PUBLIC VERSION

COMMISSION DECISION

of 23.7.2014

addressed to:

MARINE HARVEST ASA

imposing a fine for putting into effect a concentration in breach of Article 4(1) and Article 7(1) of Council Regulation (EC) No. 139/2004 (Case M.7184 – Marine Harvest / Morpol (Art. 14(2) proc.))

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings¹, and in particular Articles 4(1), 7(1) and 14(2) thereof,

Having provided Marine Harvest ASA the opportunity to make known its views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations²,

Having regard to the final report of the Hearing Officer in this case³,

Whereas:

1. FACTUAL BACKGROUND

1.1. The Undertakings Concerned and the Concentration

- (1) **Marine Harvest ASA ("Marine Harvest")** is a Norwegian seafood company listed on the Oslo and New York Stock Exchanges. It produces farmed salmon and white halibut and offers a wide range of value added products of various seafood species. It carries out salmon farming and primary processing activities in Norway, Chile, Scotland, Canada, Ireland and the Faroe Islands, as well as white halibut farming and primary processing activities in Norway. Marine Harvest also engages in secondary processing activities in Norway, Chile, Ireland, Belgium, France, the Netherlands, Poland, the United States, Japan and the Czech Republic.⁴
- (2) **Morpol ASA ("Morpol")** is a Norwegian producer and processor of salmon. It produces farmed salmon and offers a broad range of value added salmon products, such as smoked, marinated, fresh and frozen salmon products. It carries out salmon farming and primary processing activities in Norway and Scotland. It also carries out

¹ OJ L 24, 29.1.2004, p. 1 ("the Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

² OJ C200. , p....

³ OJ C200. , p....

⁴ Primary processing includes harvesting and slaughtering of the salmon, head-on/head-off, gutting, and sometimes filleting of the salmon. In the secondary processing, salmon is further processed into other products such as fillets, portions, smoked salmon or ready meal products.

secondary processing activities in Poland, Vietnam and the United Kingdom. Prior to its acquisition by Marine Harvest, Morpol was listed on the Oslo Stock Exchange.

- (3) On 9 August 2013, the European Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertaking Marine Harvest intended to acquire within the meaning of Article 3(1)(b) of the Merger Regulation sole control of Morpol by way of purchase of shares (the "Transaction"). Marine Harvest and Morpol are hereinafter referred to as "the Parties" or "the Merged Entity" and Marine Harvest is also referred to as "the Notifying Party".
- (4) The Transaction had a Union dimension within the meaning of Article 3(1)(b) of the Merger Regulation.⁵
- (5) After the first phase market investigation, the Commission expressed serious doubts as regards the compatibility of the Transaction with the internal market with respect to the EEA market for Scottish salmon. The Commission had concerns that the Transaction as originally notified would have combined two of the largest farmers and primary processors of Scottish salmon and as such would have significantly impeded effective competition on the market for farming and primary processing of Scottish salmon.
- (6) On 9 September 2013, the Notifying Party submitted remedies with a view to removing the Commission's serious doubts. On 25 September 2013, the Notifying Party submitted an amended remedy package.
- (7) On 30 September 2013, the Commission declared the Transaction compatible with the internal market in accordance with Articles 6(1)(b) and 6(2) of the Merger Regulation ("the Clearance Decision"), subject to full compliance by the Parties with the commitments annexed to the Clearance Decision.
- (8) In Recital 8 of the Clearance Decision, the Commission considered that the acquisition by Marine Harvest of a 48.5% stake in Morpol on 18 December 2012 (the "December 2012 Acquisition"), i.e. several months before the Clearance Decision, had already conferred upon Marine Harvest *de facto* sole control over Morpol.⁶
- (9) The Commission therefore took the view in its Clearance Decision that an infringement of the stand-still obligation in Article 7(1) and the notification requirement in Article 4(1) of the Merger Regulation could not be excluded. The Commission noted that it might examine in a separate procedure whether a sanction under Article 14(2) of the Merger Regulation was appropriate.⁷

⁵ The undertakings concerned had a combined aggregate worldwide turnover of more than EUR 2 500 million (Marine Harvest: EUR [...]*; Morpol: EUR [...]*). Each undertaking had an EU-wide turnover in excess of EUR 100 million (Marine Harvest: EUR [...]*; Morpol: EUR [...]*). The Parties achieved a combined aggregate turnover of more than EUR 100 million, while also achieving separately an aggregate turnover of more than EUR 25 million each, [...]*. Neither of the Parties achieved more than two-thirds of its Union-wide turnover within one and the same Member State.

⁶ Clearance Decision, paragraph 8.

⁷ Clearance Decision, paragraph 9.

* Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

1.2. Procedure leading to the Clearance Decision

The December 2012 Acquisition

- (10) On 14 December 2012, Marine Harvest entered into a Share Purchase Agreement (the "SPA") with Friendmall Ltd. ("Friendmall") and Bazmonta Holding Ltd. ("Bazmonta") for the sale of the shares these companies owned in Morpol.
- (11) Friendmall and Bazmonta were private limited liability companies incorporated and registered in Cyprus. Both companies were controlled by a single individual, Mr Jerzy Malek, founder and former Chief Executive Officer (CEO) of Morpol.⁸
- (12) [...]*
- (13) Through the December 2012 Acquisition, therefore, Marine Harvest acquired an interest in Morpol amounting to approximately 48.5% of Morpol's share capital. The closing of the December 2012 Acquisition took place on 18 December 2012.

Further steps in Marine Harvest's complete take-over of Morpol

- (14) On 15 January 2013 and pursuant to the Norwegian Securities Trading Act,⁹ Marine Harvest submitted a mandatory public offer (the "Public Offer") for the remaining shares in Morpol, representing 51.5% of the shares in the company.¹⁰
- (15) On 23 January 2013, the Board of Morpol ASA appointed Mr John-Paul McGinley, a former [...] of Marine Harvest from 2004 to 2008, as the new CEO to replace Mr Malek, who had in the meantime resigned with effect from 1 March 2013 pursuant to a commitment to that effect which had been included in the SPA.¹¹
- (16) On 18 February 2013, Morpol's board of directors recommended its shareholders to accept Marine Harvest's Public Offer.
- (17) Following the settlement and completion of the Public Offer on 12 March 2013, Marine Harvest owned a total of 87.1% of the shares in Morpol. Therefore, through the Public Offer, Marine Harvest acquired shares representing about 38.6% of Morpol, in addition to the shares representing 48.5% of Morpol already acquired through the December 2012 Acquisition.
- (18) The acquisition of the remaining shares in Morpol was completed on 12 November 2013. On 15 November 2013, an extraordinary general meeting resolved to apply for de-listing of the shares, to reduce the number of board members and to decide that the company would no longer have a nomination committee.¹² On 28 November 2013, Morpol was delisted from the Oslo Stock Exchange.¹³

⁸ In particular, Mr Malek owned 85.5% of the shares in Friendmall. Bazmonta was a fully-owned subsidiary of Friendmall.

⁹ According to the provisions of Norwegian law, an acquirer of more than one third of the shares in a listed company is obliged to make a mandatory bid for the remaining shares in the company.

¹⁰ Marine Harvest announced the mandatory offer on 17 December 2012, and published it on 15 January 2013.

¹¹ See SPA, clause 12-1-1.

¹² See <http://morpol.com/news/press-releases.html>.

¹³ See http://www.oslobors.no/ob_eng/Oslo-Boers/About-us/Press-room/News-from-Oslo-Boers/Morpol-to-be-delisted-from-Oslo-Boers.

Pre-notification phase

- (19) Already on 17 December 2012, extensive press coverage of the acquisition of Morpol by Marine Harvest foresaw that the Transaction could potentially be problematic from a competition perspective, particularly in view of previous decisions of national competition authorities in the same sector. The press also anticipated that an investigation from competition authorities would probably focus on salmon of Scottish origin and that remedies would be needed in order to obtain clearance.¹⁴
- (20) On 21 December 2012, three days after the closing of the December 2012 Acquisition, Marine Harvest sent a case team allocation request¹⁵ to the Commission regarding the acquisition of sole control over Morpol (the "Case Team Allocation Request"). In the Case Team Allocation Request, Marine Harvest informed the Commission that the December 2012 Acquisition had been closed, and that Marine Harvest would not exert its voting rights pending the decision of the Commission.
- (21) In the absence of any contact initiated by Marine Harvest after the submission of the Case Team Allocation Request, the Commission requested a conference call, which took place on 25 January 2013. During the call, the Commission requested information on the deal structure and clarifications as to whether the December 2012 Acquisition could have already conferred on Marine Harvest control over Morpol. As a response, Marine Harvest submitted a memorandum on the structure of the transaction on 4 February 2013. The memorandum only dealt with procedural and jurisdictional issues and did not touch upon any substantive point regarding the competitive impact of the Transaction.
- (22) On 12 February 2013, the Commission sent a request for information to Marine Harvest relating to a possible acquisition of *de facto* control over Morpol as a result of the December 2012 Acquisition. It also asked to be provided with the agenda and minutes of the General Meetings of Morpol and the meetings of the Morpol Board of Directors for the last three years. Marine Harvest submitted a partial response to this request on 19 February 2013 (which only included Morpol's Articles of Association and Morpol's list of shareholders following the December 2012 Acquisition), and a full response on 25 February 2013.
- (23) On 5 March 2013, Marine Harvest submitted a first draft Form CO (the "First Draft Form CO"). While focussing on an overall market for farming, primary processing and secondary processing of salmon of all origins, the Draft Form CO did not refer to possible separate markets for Norwegian and Scottish salmon, nor to possible separate upstream (farming and primary processing) and downstream markets (secondary processing).¹⁶ That is to say, the First Draft Form CO did not contain any specific information on the market with regard to which the Commission ultimately raised serious doubts after its subsequent Phase I investigation (farming and primary processing of Scottish salmon).

¹⁴ <https://www.undercurrentnews.com/2012/12/17/marine-harvest-morpol-uk-likely-to-be-competition-focus-on-deal-made-in-heaven/>.

¹⁵ The case team allocation request is filed by the notifying party to request the Commission to engage in the pre-notification stage. The case team allocation request form, available on DG Competition's website, invites the notifying party to provide information on (i) the companies involved and their country of origin, role and turnover figures, (ii) the main product(s) /economic activities involved, (iii) a brief description of the parties, the transaction and the markets involved, (iv) the complexity of the case and (v) the expected date of notification.

¹⁶ See in particular Marine Harvest's submission of 5 March 2013, ID.115.

- (24) The Commission considered that more detailed information was essential to determine the impact of the Transaction on competition. This approach was in line with the Commission's practice to ask for market information on plausible markets, and was also supported by previous decisions of the French and UK competition authorities on the merger between Marine Harvest and Pan Fish, in which both authorities assessed potential separate markets or segments according to a segmentation by origin (e.g. Norwegian and Scottish salmon), and between separate upstream (farming and primary processing) and downstream markets (secondary processing).¹⁷ The press also highlighted possible competition concerns with respect to the combination of the Parties' farming activities in Scotland.
- (25) Since the assessment of such potential separate markets necessitated further information as regards the above-mentioned segmentation which the Parties had not so far provided, and also in order to assist Marine Harvest in preparing a complete file for notification, on 14 March 2013 the Commission sent to Marine Harvest a request for additional information on the First Draft Form CO. On 16 April 2013, Marine Harvest responded to the Commission's request for information. That reply was incomplete. Given that most of the information needed for the assessment was still outstanding, i.e. information on potential separate markets including the market for the farming and primary processing of Scottish salmon, and since not all the relevant internal documents had been produced, the Commission sent further requests for information on 3 May, 14 June and 10 July 2013. Marine Harvest responded to those requests respectively on 6 June, 3 July and 26 July 2013.
- (26) In the meantime, upon receipt of authorisation from Marine Harvest and Morpol, the Commission started contacting the Parties' customers and competitors already in the pre-notification stage, in order to obtain preliminary feedback on the proposed Transaction from those market players, and to anticipate possible competition problems. During pre-notification, the Commission also carried out a site visit at Marine Harvest's processing facilities in Bruges and Ostend (Belgium).
- (27) The information required for the assessment, such as complete market data and market shares taking into account the distinctions between Scottish and Norwegian salmon, was only submitted on 26 July 2013.¹⁸

¹⁷ See C2006-47 / Lettre du ministre de l'économie, des finances et de l'industrie du 1er décembre 2006, aux conseils de la société Pan Fish, relative à une concentration dans le secteur du saumon see, http://www.economie.gouv.fr/files/files/directions_services/dgcrf/boccrf/2007/07_01bis/c2006_47_decision_panfish_marineharvest.pdf and UK Competition Commission, Final Report of 18 December 2006 on the Pan Fish ASA/Marine Harvest N.V. merger inquiry http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2006/fulltext/520.pdf. Both decisions made use of sophisticated economic parameters to assess whether a distinction between Scottish and Norwegian salmon would have been appropriate in those cases. See also See Nutreco Holding NV and Hydro Seafood GSP Ltd: A report on the proposed merger, available at: http://webarchive.nationalarchives.gov.uk/20050301220241/http://www.competition-commission.org.uk/rep_pub/reports/2000/451nutreco.htm#full

¹⁸ See in particular submission of Marine Harvest of 26 July 2013 .

Phase I investigation and conditional clearance

- (28) On 9 August 2013, the Transaction was formally notified to the Commission.
- (29) The Parties were informed during a state of play meeting on 3 September 2013 that the Commission had serious doubts with respect to the compatibility of the Transaction with the internal market as regards a possible market for Scottish salmon.
- (30) In order to render the concentration compatible with the internal market and to eliminate the serious doubts identified by the Commission, the Notifying Party submitted commitments under Article 6(2) of the Merger Regulation on 9 September 2013. These initial commitments were market tested by the Commission. Following certain modifications, a final set of commitments was submitted on 25 September 2013. The Notifying Party committed to divest approximately three quarters of the overlap between the Parties' Scottish salmon farming capacity, thereby dispelling the serious doubts identified by the Commission.
- (31) On 30 September 2013, the Commission adopted the Clearance Decision pursuant to Articles 6(1)(b) and 6(2) of the Merger Regulation, which approved the concentration subject to the Parties' full compliance with their commitments.
- (32) As mentioned above in Recital (8), the Commission concluded in the Clearance Decision that the December 2012 Acquisition had already conferred upon Marine Harvest *de facto* sole control over Morpol.¹⁹ The Commission therefore took the preliminary view that an infringement of the stand-still obligation in Article 7(1) of the Merger Regulation and the notification requirement in Article 4(1) of the Merger Regulation could not be excluded. The Commission also stated that it might examine in a separate procedure whether a sanction under Article 14(2) of the Merger Regulation would be appropriate.²⁰

2. PROCEDURE

- (33) In a letter dated 30 January 2014, the Commission informed Marine Harvest of the on-going investigation on the possible infringements of Article 7(1) and Article 4(1) of the Merger Regulation.
- (34) By email of 11 February 2014, Marine Harvest confirmed the reception of the Commission's letter of 30 January 2014.
- (35) On 6 March 2014, a state of play meeting between the Commission's services and Marine Harvest was held.
- (36) On 31 March 2014, the Commission issued a statement of objections ("SO") addressed to Marine Harvest pursuant to Article 18 of the Merger Regulation. In the SO, the Commission reached the preliminary conclusion that Marine Harvest had intentionally or at least negligently breached Article 4(1) and Article 7(1) of the Merger Regulation, and therefore the Commission considered imposing fines in accordance with Article 14(2)(a) and (b) of the Merger Regulation.
- (37) On 23 April 2014, Marine Harvest asked for and obtained from the Commission an extension of the deadline to respond to the SO. On 30 April 2014, Marine Harvest submitted its response to the SO (the "Response").

¹⁹ Clearance Decision, paragraph 8.

²⁰ Clearance Decision, paragraph 9.

- (38) On 6 May 2014, Marine Harvest presented the arguments contained in the Response in the course of an oral hearing (the "Hearing").
- (39) On 7 July 2014, an Advisory Committee meeting was held.

3. LEGAL ASSESSMENT

3.1. Legal framework

- (40) Pursuant to Article 3(1)(b) of the Merger Regulation, "A concentration shall be deemed to arise where a change of control on a lasting basis results from [...]"
- (a) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings."*
- (41) Pursuant to Article 3(2) of the Merger Regulation "Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking".
- (42) Article 4(1), first paragraph of the Merger Regulation states that "Concentrations with a [Union] dimension defined in this Regulation 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".
- (43) Article 7(1) of the Merger Regulation states that "A concentration with a [Union] dimension as defined in Article 1, or which is to be examined by the Commission pursuant to Article 4(5), shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6)."
- (44) According to Article 7(2) of the Merger Regulation "Paragraph 1 shall not prevent the implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control within the meaning of Article 3 is acquired from various sellers, provided that:
- (a) the concentration is notified to the Commission pursuant to Article 4 without delay; and*
- (b) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission under paragraph 3"*
- (45) Finally, Article 14(2)(a) and (b) of the Merger Regulation states that "The Commission may by decision impose fines not exceeding 10% of the aggregate turnover of the undertaking concerned within the meaning of Article 5 on the persons referred to in Article 3(1)(b) or the undertakings concerned where, either intentionally or negligently, they:
- (a) fail to notify a concentration in accordance with Articles 4 or 22(3) prior to its implementation, unless they are expressly authorised to do so by Article 7(2) or by a decision taken pursuant to Article 7(3).*
- (b) implement a concentration in breach of Article 7".*

- (46) It follows from these provisions that a concentration with a Union dimension shall not be implemented before the concentration has been formally notified to, and cleared by, the Commission (“standstill obligation”). The Commission may by decision impose fines on undertakings breaching these provisions.

3.2. Application in the present case

- (47) The Commission considers, for reasons set out in this Decision, that (i) the December 2012 Acquisition conferred on Marine Harvest sole control over Morpol and constituted a concentration of Union dimension in its own right within the meaning of Article 3(1)(b) of the Merger Regulation; (ii) the concentration has been implemented in contravention of Articles 4(1) and 7(1) of the Merger Regulation; and (iii) the exception provided for by Article 7(2) of the Merger Regulation does not apply.

(i) Acquisition of control

- (48) In the following, the Commission will set out the basis for which it may be considered that: (1) Mr Malek exercised *de facto* control over Morpol before the December 2012 Acquisition; (2) and Marine Harvest has acquired control over Morpol as a result of the December 2012 Acquisition.

1. Prior to the December 2012 Acquisition, Mr Malek exerted *de facto* sole control over Morpol through his 48.5% shareholding in Morpol.

- (49) For the purposes of assessing whether Mr Malek – Morpol's founder and CEO until his resignation on 23 January 2013 – had been exercising *de facto* control over Morpol prior to the closing of the December 2012 Acquisition, reference needs to be made to different periods.
- (50) First, before being listed on the Oslo Stock Exchange as of 28 June 2010, Morpol was a wholly-owned subsidiary of Friendmall which, as already explained in Recital (11) was solely controlled by Mr. Malek. The Commission therefore considers that Mr Malek enjoyed *de jure* sole control over Morpol until 28 June 2010.²¹
- (51) Second, subsequent to its listing on the Oslo Stock Exchange and before the December 2012 Acquisition, the ownership of Morpol's share capital was altered.
- (52) At the time of the December 2012 Acquisition's closing (18 December 2012), [...]*. Together Friendmall and Bazmonta owned approximately 48.5% of Morpol.
- (53) The remainder of the shareholdings in Morpol was widely dispersed among a large number of shareholders. As of 18 February 2013, i.e. after the December 2012 Acquisition, the top 19 shareholders in Morpol after Marine Harvest, which took over Mr Malek's stake, consisted mainly of financial investors such as Goldman Sachs, ABN Amro and Morgan Stanley. These shareholders accounted together for only 39.5% of Morpol's shares. None of them individually held a stake above 6%.
- (54) With respect to the time period between Morpol's listing on 28 June 2010 and the December 2012 Acquisition, only four shareholders (apart from Mr Malek) had a substantial participation (i.e. above 2%) and attended at least one general shareholders meeting (see table 1).

²¹ [...]*

Table 1 – List of shareholders with more than 2% of shares in Morpol attending general shareholders' meetings (GSM) between 2010 and 2012.

Shareholders	Odin Norge	Skagen Vest	Kverva AS	Verdipapirfondet Handelsbanken
Extraordinary GSM of 22/12/2010	[...]*	[...]*	[...]*	[...]*
Ordinary GSM of 19/05/2011	[...]*	[...]*	[...]*	[...]*
Extraordinary GSM of 22/08/2011	[...]*	[...]*	[...]*	[...]*
Extraordinary GSM of 13/10/2011	[...]*	[...]*	[...]*	[...]*
Ordinary GSM of 23/05/2012	[...]*	[...]*	[...]*	[...]*

Source: Marine Harvest

- (55) It must be noted that at the time of the December 2012 Acquisition, Morpol was a Norwegian public limited company and as such the voting rights were allocated according to the “one share carries one vote” principle.²² A simple majority of the shares present and voting at shareholder meetings was sufficient to carry a motion, such as the election of the board of directors²³ or the approval of dividends. A qualified majority of two thirds of the shares present and voting in a shareholder meeting was only required to change the articles of association as well as for capital changes, mergers and demergers.
- (56) Whilst the 48.5% stake enjoyed by Mr. Malek in Morpol at the time of the December 2012 Acquisition did not account for a majority of voting rights and as such did not confer to Mr Malek *de jure* control over Morpol, the Commission considers for the reasons set out in Recitals (57) to (64) below that Mr. Malek exercised *de facto* control over Morpol.
- (57) It must be borne in mind that a minority shareholder may be deemed to have sole control on a *de facto* basis, particularly where the shareholder is highly likely to achieve a majority at the shareholders' meetings, taking account of its shareholding percentage and the attendance of other shareholders at previous years' meetings.²⁴
- (58) The Commission has assessed the attendance rate at the ordinary and extraordinary general meetings of Morpol in the period between Morpol's listing²⁵ and its acquisition by Marine Harvest, with a view to establishing whether Mr Malek

²² On 28 November 2013, Morpol was delisted from the Oslo Stock Exchange. At the time of the decision, Morpol is a 100% subsidiary of Marine Harvest.

²³ See Articles of association of Morpol.

²⁴ See paragraph 59 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ("Jurisdictional Notice"), OJ C 95, 16.4.2008, p.1.

²⁵ Morpol was listed on the Oslo stock exchange on 28 June 2010. Before then, Mr Malek owned 100% of the shares in Morpol. See paragraphs 49 and following.

exercised sole *de facto* control over Morpol at the time of the sale of his stake in Morpol to Marine Harvest.

- (59) The table below provides such attendance rate as well as the percentage of represented votes held by Mr Malek through Friendmall and Bazmonta.²⁶

Table 2 – Attendance at Morpol's general shareholders' meetings (GSM) in the period 2010-2012

	Total votes represented at GSM	Votes held by Friendmall	% of votes held by Friendmall	Votes held by Bazmonta	% of votes held by Bazmonta	Total % of votes held by Mr Malek
Extraordinary GSM of 22/12/2010	[...]*	[...]*	[...]*	[...]* ²⁷	[...]*	[...]*
Ordinary GSM of 19/05/2011	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Extraordinary GSM of 22/08/2011	[...]*	[...]*	[...]*	[...]* ²⁸	[...]*	[...]*
Extraordinary GSM of 13/10/2011	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Ordinary GSM of 23/05/2012	[...]*	[...]*	[...]*	[...]* ²⁹	[...]*	[...]*

Source: Marine Harvest

- (60) As can be seen from the table 2 above, Friendmall and Bazmonta always represented a very large majority of votes cast at shareholders' meetings.
- (61) Even after Morpol's listing on the Oslo stock exchange, Mr Malek (through Friendmall and Bazmonta) always accounted for a clear majority of votes cast at shareholders' meetings. In this respect, the Commission also considers that the very fact that the remainder of the capital in Morpol was significantly dispersed³⁰ implies that the remaining shareholders would not have been able to form a blocking minority capable of overcoming Mr Malek's decision power, not least due to – as table 2 shows – the low number of them attending the general meetings.
- (62) The Commission notes in this respect that the decisions taken by Morpol's general shareholders' meetings determined Morpol's strategic commercial decisions. In particular, the shareholders' meeting appointed the members of the board of directors, which in turn carried out the day-to-day administration of Morpol's business.³¹
- (63) The fact that Mr Malek was in a position to exert *de facto* control over Morpol prior to the Transaction is not disputed by Marine Harvest, which explained in a response

²⁶ See annexes 3-1 to 3-7 and annexes 4-1 to 4-16 to the reply to a request for information by the Commission dated 12 February 2013.

²⁷ Bazmonta Holdings Limited was not present at the Extraordinary General Meeting of 22 December 2010.

²⁸ Bazmonta Holdings Limited was not present at the Extraordinary General Meeting of 22 August 2011.

²⁹ Bazmonta Holdings Limited was not present at the Ordinary General Meeting of 23 May 2012.

³⁰ See paragraph 59 of the Jurisdictional Notice.

³¹ See for example the minutes of general shareholders' meeting of 23 May 2012.

to a Commission's request for information that "*Based on the shares represented in the annual and extraordinary general meetings in the last three years, we understand that Morpol was solely controlled by Friendmall*".³²

- (64) On the basis of the above, the Commission considers that, prior to the December 2012 Acquisition, Mr Malek was exercising sole *de facto* control over Morpol through its interests in Friendmall and Bazmonta.

2. Marine Harvest acquired *de facto* sole control over Morpol through the December 2012 Acquisition

- (65) For the following reasons, the Commission considers that Marine Harvest has acquired *de facto* sole control over Morpol through the December 2012 Acquisition.

Through the December 2012 Acquisition, Marine Harvest has acquired the same rights and possibilities as Mr Malek

- (66) As mentioned above, on 14 December 2012, Marine Harvest entered into a SPA with Friendmall and Bazmonta with a view to purchasing the latter's 48.5% shareholding in Morpol. The December 2012 Acquisition was closed four days later, on 18 December 2012.³³

- (67) As a preliminary remark, the Commission notes that, in the absence of contrary evidence in the SPA or any exceptional circumstances, the acquisition of Friendmall's and Bazmonta's shareholdings is deemed to have conferred on Marine Harvest the same rights and possibilities of exercising decisive influence over Morpol as those previously enjoyed by Mr Malek through Friendmall and Bazmonta.

- (68) Given that, as discussed above and as acknowledged by Marine Harvest,³⁴ Mr Malek already exercised sole *de facto* control over Morpol prior to the December 2012 Acquisition, Marine Harvest is deemed to have acquired such control over Morpol after the completion of the December 2012 Acquisition.

Marine Harvest's arguments

- (69) In its reply to the Commission's request for information dated 12 February 2013, Marine Harvest argued that the December 2012 Acquisition did not confer on Marine Harvest control over Morpol, neither from a company law nor from a competition law perspective. Marine Harvest referred to the definition of control included in Section 17 of the Norwegian Competition Act, and stated that, on the basis of the SPA, Marine Harvest was not entitled to exercise any voting rights, until the transaction had been cleared by the competent competition authorities.

Commission's assessment

- (70) The Commission does not share Marine Harvest's arguments according to which Marine Harvest did not acquire control over Morpol through the December 2012 Acquisition.

- (71) First, contrary to Marine Harvest's claim, the SPA did not prevent in any way Marine Harvest from exercising the voting rights attached to the 48.5% shareholding in Morpol pending the clearance decision of the competent competition authorities.

³² See reply to a request for information by the Commission dated 12 February 2013.

³³ According to clause 7.1 of the SPA, the closing of the December 2012 Acquisition had to take place no later than three business days following the date of signature.

³⁴ See reply to a request for information by the Commission dated 12 February 2013.

- (72) The SPA appears to assume, in certain occasions, that Marine Harvest would only exercise its voting rights in Morpol after having obtained clearance from competition authorities. A number of obligations, indeed, would be triggered according to the SPA only "*Immediately after the Buyer's acquisition of the Shares has been cleared by relevant competition authorities and the Buyer has become entitled to vote for the Shares in the Company's shareholder meeting*" (clause 12-6 of the SPA).
- (73) However, there is no obligation in the SPA that prevents Marine Harvest from exercising its voting rights pending clearance. Marine Harvest would have been therefore free to exercise its votes in Morpol at any time after closing of the December 2012 Acquisition.
- (74) The only obligation of Marine Harvest as regards antitrust scrutiny contained in the SPA was to make, "*within applicable deadlines, all required notifications and applications to such competition authorities as will have jurisdiction over the transaction contemplated in this agreement*".³⁵
- (75) The closing of the December 2012 Acquisition, however, was not conditional upon clearance by the competition authorities. Indeed the acquisition was closed only four days after signing, and therefore well before the notification and the adoption of the Clearance Decision in September 2013. Marine Harvest could have therefore exercised its voting rights at Morpol's shareholders' general meeting at any time after 18 December 2012.
- (76) The lack of any provisions suspending the implementation of the concentration is particularly striking in this case, where the transaction gave rise to competition concerns of which Marine Harvest was aware, as discussed below.
- (77) Second, pursuant to Article 3(2) of the Merger Regulation, "*Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking*" (emphasis added). This is also confirmed in paragraph 16 of the Commission's Jurisdictional Notice. In conclusion, it is not necessary to show that the decisive influence is or will be actually exercised.
- (78) In this case, Marine Harvest had acquired a stake which in itself was sufficient to grant it control over Morpol on the basis of previous attendance at general shareholders' meetings, as discussed above.³⁶ Marine Harvest, however, refrained from exercising its voting rights pending clearance from the Commission. In particular, Marine Harvest did not attend, nor exercise its voting rights at, Morpol's general shareholders' meeting of 23 May 2013.³⁷
- (79) Likewise, no representative of Marine Harvest participated in the meeting of the Board of Morpol ASA on 23 January 2013 when its former employee Mr John-Paul McGinley was appointed as the new CEO of Morpol to replace Mr Malek, who had in the meantime resigned with effect from 28 February 2013.³⁸

³⁵ The transaction was also reviewable by the competition authority of Ukraine.

³⁶ Recitals 49-64.

³⁷ See the minutes of Morpol's general shareholders meeting of 23 May 2013, available at <http://hugin.info/143208/R/1704126/563429.pdf>.

³⁸ See above paragraph 15.

- (80) The Commission needs therefore to assess the relevance of an abstention in the exercise of voting rights for the purposes of establishing control within the meaning of Article 3(2) of the Merger Regulation.
- (81) In this respect, the Commission notes that in Case *Yara / Kemira GrowHow*,³⁹ Yara acquired on 24 May 2007 a 30.05% controlling stake in GrowHow from the State of Finland. Yara stated that pending the Commission's examination of the transaction it would not exercise the voting rights conferred with the 30.05% shareholding. The Commission, however, concluded in that case that Yara's acquisition of the 30.05% stake in GrowHow had conferred on Yara *de facto* sole control over GrowHow, regardless of whether or not Yara had exercised its voting rights in GrowHow pending the decision of the Commission.
- (82) In the case at hand, the Commission considers that the acquisition of a 48.5% shareholding in Morpol conferred on Marine Harvest *the possibility* to obtain a clear majority at general shareholders' meetings of Morpol, and therefore *the possibility* to exercise decisive influence on Morpol. Such possibility is sufficient to establish control within the meaning of Article 3(2) of the Merger Regulation. The actual exercise of voting rights by Marine Harvest in Morpol is not relevant for the purposes of establishing control of the former over the latter. Such abstention from the exercise of voting rights could only be relevant as a condition in the case of application of the exemption under Article 7(2) of the Merger Regulation. However, as the Commission will further explain below, Article 7(2) of the Merger Regulation does not apply to this case.⁴⁰
- (83) Neither in its Response nor at the Hearing did Marine Harvest insist upon the argument outlined in its reply to the Commission's request for information dated 12 February 2013 and the fact that the December 2012 Acquisition conferred on Marine Harvest *de facto* sole control over Morpol.

3. Conclusion

- (84) In light of the foregoing, and in line with the Clearance Decision, the Commission concludes that the December 2012 Acquisition conferred upon Marine Harvest *de facto* sole control over Morpol. Such acquisition of sole control constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation, and has a Union dimension pursuant to Article 1(3) of the Merger Regulation.

(ii) Early implementation

- (85) The December 2012 Acquisition was signed on 14 December 2012, and closed on 18 December 2012. The Commission therefore considers that the concentration was implemented at the time of closing, i.e. on 18 December 2012.⁴¹
- (86) The Commission also notes that Marine Harvest's acquisition of control over Morpol was notified as late as on 9 August 2013. The Transaction was cleared subject to conditions on 30 September 2013.
- (87) Marine Harvest has not disputed these conclusions in its Response or at the Hearing.

³⁹ Decision M.4730 – *Yara / Kemira GrowHow* of 21 September 2007 Recitals (6) and (7).

⁴⁰ See in this respect Recitals 89 - 118.

⁴¹ See by analogy paragraph 172 of the Jurisdictional Notice.

- (88) In light of the foregoing, the Commission concludes that Marine Harvest implemented a concentration of Union dimension before its notification and clearance under the Merger Regulation.

(iii) Applicability of Article 7(2) of the Merger Regulation

- (89) For the following reasons, the Commission considers, in line with the Clearance Decision,⁴² that the December 2012 Acquisition does not benefit from the exemption under Article 7(2) of the Merger Regulation. For the avoidance of doubt, the Commission also notes that, assuming that Marine Harvest could benefit from the standstill obligation pursuant to Article 7(3) of the Merger Regulation (*quod non*), it has never requested such a derogation.

1. Legal basis

- (90) As stated at Recital (43) above, Article 7(1) of the Merger Regulation provides that "*A concentration with a [Union] dimension as defined in Article 1, or which is to be examined by the Commission pursuant to Article 4(5), shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6).*"

- (91) Article 7(2) of the Merger Regulation provides for an exception to Article 7(1), and states that "*Paragraph 1 shall not prevent the implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control within the meaning of Article 3 is acquired from various sellers, provided that:*

(a) the concentration is notified to the Commission pursuant to Article 4 without delay; and

(b) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission under paragraph 3".

2. Marine Harvest's arguments

- (92) First, while acknowledging that Article 7(2) applies only to transactions entailing the acquisition of control by means of purchase of shares from various sellers, Marine Harvest essentially argues that the takeover of Morpol falls within the scope of the exemption from suspension provided for in Article 7(2) of the Merger Regulation.
- (93) In support of such a conclusion, Marine Harvest submits that the December 2012 Acquisition did not constitute a separate transaction but the triggering event of the Public Offer and, as such, an integral part of the "creeping and public takeover" of Morpol by Marine Harvest.
- (94) In the view of Marine Harvest, the SPA for the initial shareholding and the Public Offer for the remainder constituted two intrinsically and inextricably linked steps of one single unitary transaction. This would be in line with Chapter 6 of the Norwegian Securities Trading Act according to which a company which becomes the owner of shares representing more than one third of the voting rights in a Norwegian company is obliged to make a public bid for the remaining shares of the company.

⁴² See Clearance Decision, paragraph 7.

- (95) Marine Harvest takes the view that the two steps of the proposed concentration were not only legally inter-conditional, but also commercially interdependent with each other. In this regard, Marine Harvest submits that it was necessary that both steps of the acquisition were taken in a very close, quick material and temporal course, given that the price increase of the shares of both companies would have otherwise accelerated.
- (96) In addition, Marine Harvest considers that the completion of the overall transaction was dependent on reaching an initial agreement with Mr Malek, being the former largest indirectly controlling shareholder of Morpol, given that the related shareholdings of Mr Malek were capable of blocking the intended takeover of Morpol by Marine Harvest.
- (97) Given that, according to Marine Harvest, the Public Offer and the December 2012 Acquisition constitute two intrinsically linked transactions, and given that Article 7(2) of the Merger Regulation provides for an exemption from the standstill obligation for public bids, both transactions would have to be exempted under Article 7(2).
- (98) Marine Harvest also refers to the Commission's Consolidated Jurisdictional Notice and to the case-law of the Union Courts according to which transactions consisting of several unitary steps, which are closely connected as they are linked by conditions, or where none of the transactions would take place without the others, are considered as one single concentration.⁴³ Marine Harvest also submits that such interpretation is confirmed by the fact that in *Yara / Kemira GrowHow*, where a situation similar to this case arose, the Commission did not issue any decision imposing fines on Yara.
- (99) Finally, Marine Harvest submits that it has fully complied with the conditions under Articles 7(2) of the Merger Regulation. According to Marine Harvest, its objective was to notify the transaction to the Commission without undue delay, and the Case Team Allocation Request was therefore promptly submitted. Furthermore, Marine Harvest was not entitled to exercise any voting rights, until the concentration was approved by the competent competition authorities. In the meantime, Morpol was managed in the ordinary course of business by the existing management and was entirely separate from Marine Harvest.⁴⁴

3. Commission's assessment

- (100) The Commission does not share Marine Harvest's arguments with respect to the applicability of Article 7(2) of the Merger Regulation to this case for the reasons outlined below.
- (101) At the outset, the Commission notes that Marine Harvest no longer persist in contesting that it acquired control of Morpol through the December 2012 Acquisition. As explained above in Recital 91, Article 7(2) applies only to public bids or series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control within the meaning of Article 3 is acquired "*from various sellers*". In this case it is not contested that control has been acquired from one seller, by means of the December 2012 Acquisition.

⁴³ In particular, Marine Harvest refers to the Recital (20) of the Merger Regulation; paragraphs 43 and following of the Consolidated Jurisdictional Notice, and to Case T-282/02 *Cementbouw v. Commission* [2006], ECR II-00319, paragraphs 105 and following.

⁴⁴ See reply to a request for information by the Commission dated 12 February 2013.

- (102) This interpretation is also confirmed by the rationale of Article 7(2) of the Merger Regulation, which is to cover 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. In this respect, Article 7(2) serves the purpose of providing a sufficient degree of legal certainty in the case of public bids or creeping takeovers, thereby preserving the liquidity of stock markets, and protecting bidders from unintended and unforeseen breaches of the standstill obligation.
- (103) By contrast, Article 7(2) of the Merger Regulation is not intended to apply to situations where the procurement of a significant block of shares is carried out from just one seller and where it is straightforward to establish, on the basis of votes cast at previous ordinary and extraordinary general meetings, that this block of shares will confer *de facto* sole control over the target company.
- (104) In the present case, Marine Harvest has acquired a controlling stake from one single seller, i.e. Mr Malek through Friendmall and Bazmonta.⁴⁵ The acquisition of control was easily foreseeable, as it was possible for Marine Harvest to clearly establish, on the basis of public information, or information available to it, that it would acquire *de facto* sole control over Morpol. As such, the application of Article 7(2) of the Merger Regulation to the December 2012 Acquisition is excluded by both the wording and the rationale of this provision.
- (105) Moreover, with particular regard to the Public Offer, the Commission notes that the December 2012 Acquisition was not part of the implementation of such Public Offer. The December 2012 Acquisition was closed on 18 December 2012, before the launch of the Public Offer, which has been implemented between 15 January and 26 February 2013. In this regard, the fact that the December 2012 Acquisition may have triggered the obligation for Marine Harvest to launch the Public Offer on the outstanding shares of Morpol is irrelevant, given that *de facto* control was already acquired from one seller. Similarly, it is considered irrelevant that the December 2012 Acquisition and the following steps of Marine Harvest's takeover of Morpol may have been seen as economically part of the same transaction by Marine Harvest.
- (106) In fact, Marine Harvest could have launched the Public Offer without having acquired Mr Malek's shares beforehand. In this case, Mr Malek would then have had to decide whether to sell his stake in the context of the Public Offer, depending on the price and conditions proposed by the potential acquirer. Alternatively, Marine Harvest could have signed an agreement with Mr Malek for the purchase of Friendmall's and Bazmonta's shares in Morpol before the launch of the Public Offer, postponing however closing until clearance from competition authorities, and potentially the achievement of the Public Offer procedure.
- (107) Finally, the Commission notes that it is irrelevant to establish whether Marine Harvest has complied with the conditions prescribed by Article 7(2) of the Merger Regulation, such as swift notification and abstention to exercise the voting rights attached to the shareholdings in Morpol, given that such Article does not apply to the December 2012 Acquisition.
- (108) Marine Harvest can also not draw any conclusion from the absence of proceedings according to Article 14 of the Merger Regulation launched against the acquirer in the *Yara / Kemira Growhow* case.

⁴⁵ See Clearance Decision, paragraph 7.

- (109) In *Yara / Kemira Growhow*, Yara acquired on 24 May 2007 a 30.05% controlling stake in GrowHow from the State of Finland. Yara submitted that this acquisition represented the first step of the public bid for GrowHow that was announced on 18 July 2007, and argued that the acquisition of its 30.05% stake in GrowHow would be covered by the exception of Article 7(2) of the Merger Regulation.
- (110) In that case, the Commission rejected Yara's arguments and concluded that the exemption of Article 7(2) of the Merger Regulation did not apply in that case, where a controlling stake is acquired by the purchaser of a single package of shares from one seller.
- (111) According to Article 14(2) of the Merger Regulation, the Commission *may* impose fines when companies infringe Article 4(1) and Article 7(1) of the Merger Regulation. The Commission has therefore discretion as to whether to pursue possible infringements of Article 4(1) and Article 7(1) of the Merger Regulation.
- (112) The existence of a margin of discretion for the Commission to pursue an infringement implies that third parties are not entitled to rely on the Commission's decision in a specific case not to open proceedings pursuant to Article 14 of the Merger Regulation.⁴⁶ This is particularly the case where a final Commission decision declaring a concentration compatible with the internal market states that an infringement of the stand-still obligation in that case could not be excluded. If anything, the presence of such statement in the *Yara / Kemira Growhow* decision should have led Marine Harvest to the conclusion that it was at the very least possible that its planned acquisition would have been illegal.⁴⁷
- (113) Lastly, the Commission considers that Marine Harvest's references to legal sources according to which "several unitary steps" would be considered as one single concentration when they are conditional upon each other on a *de jure* or *de facto* basis appear to be misplaced.
- (114) As explained in paragraphs 44 and 45 of the Commissions' consolidated Jurisdictional Notice, these references mainly address the situation where one purchaser acquires control of a single business or undertaking via several legal transactions of different companies or assets of these companies and the assets form a single economic entity, or when several acquisitions of control over different targets can be considered as one single concentration because these transactions fulfil the same economic purpose.
- (115) In the case at hand, as explained above in Recital 66 and acknowledged by Marine Harvest, Marine Harvest acquired control over Morpol through one single purchase of 48.5% of the shares of Morpol and not through several partial transactions of assets forming *in fine* a single economic entity.
- (116) The reference to the *Cementbouw* judgment⁴⁸ does not seem to be relevant either as the conditions governing the application of Article 7(2) of the Merger Regulation are not discussed in this judgment. In the *Cementbouw* judgment, the question to be

⁴⁶ See by analogy Case T-332/09 *Electrabel v Commission* judgment [2012] ECR II-0000, paragraph 63, Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, paragraphs 118 to 120, and *Sun Chemical Group and Others v Commission*, [2007] ECR II-2149, paragraph 88 and the case-law cited.

⁴⁷ As discussed more in detail below in Section 4.ii.A, in case of doubt Marine Harvest could and should have approached the Commission's services with a request for clarifications on the scope of application of Article 7(2) of the Merger Regulation.

⁴⁸ Case T-282/02, *Cementbouw Handel & Industrie BV v Commission* [2006] ECR II-00319.

determined was whether a number of distinct transactions could be regarded as giving rise to a single concentration or whether, on the contrary, those transactions gave rise to several concentrations.⁴⁹ In its judgment, the Court clarified the conditions under which the Commission is entitled to treat several distinct transactions as one single concentration pursuant to Article 3 of the Merger Regulation.

- (117) Marine Harvest also refers to the assessment of so-called creeping bids, i.e. where an acquirer purchases progressive stakes within a target. Typically, creeping bids imply gradual acquisitions from various sellers of the shares of a company over a long period of time in an effort to keep the share price down. In this case, however, as already noted above, Article 7(2) of the Merger Regulation does not apply, given that it applies only when control is acquired *from various sellers*.
- (118) In light of the foregoing, the Commission concludes that the December 2012 Acquisition does not benefit from the exemption under Article 7(2) of the Merger Regulation.
- (119) For the avoidance of doubt, the Commission also notes that, assuming that Marine Harvest could benefit from the standstill obligation pursuant to Article 7(3) of the Merger Regulation (*quod non*), it has never requested such a derogation.

(iv) Conclusion on the legal assessment of the infringement

- (120) On the basis of Recitals (40) to (119), the Commission concludes first that the December 2012 Acquisition conferred on Marine Harvest *de facto* sole control over Morpol through the transfer of Mr Malek's indirect shareholding in the latter, and constitutes a concentration of Union dimension pursuant to Article 3(1)(b) of the Merger Regulation.
- (121) Second, the December 2012 Acquisition was implemented on 18 December 2012, before the notification of 9 August 2013 and the subsequent Clearance Decision of 30 September 2013.
- (122) Third, the December 2012 Acquisition does not benefit from the exemption under Article 7(2) of the Merger Regulation and Marine Harvest did not request a derogation from the standstill obligation pursuant to Article 7(3) of the Merger Regulation.
- (123) In conclusion, the Commission considers that Marine Harvest, by implementing this concentration prior to the notification and clearance infringed the notification requirement in Article 4(1) and also infringed the standstill obligation in Article 7(1) of the Merger Regulation.

4. DECISION TO IMPOSE FINES

- (124) Article 14 (2)(a) and (b) of the Merger Regulation state that "*The Commission may by decision impose fines not exceeding 10 % of the aggregate turnover of the undertaking concerned within the meaning of Article 5 on the persons referred to in Article 3(1)b or the undertakings concerned where, either intentionally or negligently, they:*

⁴⁹ Case T-282/02, *Cementbouw Handel & Industrie BV v Commission* [2006] ECR II-00319, paragraph 119.

(a) fail to notify a concentration in accordance with Articles 4 or 22(3) prior to its implementation, unless they are expressly authorised to do so by Article 7(2) or by a decision taken pursuant to Article 7(3).

(b) implement a concentration in breach of Article 7”.

- (125) According to Article 14(3) of the Merger Regulation “*In fixing the amount of the fine, regard shall be had to the nature, gravity and duration of the infringement*”.
- (126) Having established that Marine Harvest has infringed both Article 4(1) and Article 7(1) of the Merger Regulation, the Commission will outline the factors that it considers relevant for the purposes of fixing the amount of the fine for these two infringements.
- (127) Given that the conduct giving rise to these two infringements is one and the same (i.e. implementation of a concentration with Union dimension before notification and clearance), the Commission will present its assessment referring to both infringements at the same time.
- (128) The Commission will, however, assess the duration of the two infringements separately. On the one hand, an infringement of Article 4(1) is an instantaneous infringement which is committed by failing to notify a concentration before notification. As such, Marine Harvest infringed Article 4(1) on the day of closing, i.e. 18 December 2012. On the other hand, an infringement of Article 7(1) is a continuous infringement which remains on-going for as long as the transaction is not declared compatible with the internal market by the Commission in accordance with the Merger Regulation.⁵⁰ Given that, as discussed more in detail below, an infringement of Article 7(1) comes to an end only with the Commission decision declaring the proposed transaction compatible with the internal market, Marine Harvest's infringement ended on the date of the Clearance Decision, i.e. 30 September 2013.
- (129) Pursuant to Article 1 of Council Regulation No 2988/74,⁵¹ the limitation period for the Commission to pursue an infringement is (i) three years in the case of infringements of provisions concerning applications or notifications of undertakings or associations of undertakings, requests for information, or the carrying out of investigations, and (ii) five years in the case of all other infringements.
- (130) It follows from this provision that the limitation period is three years for an infringement of Article 4(1) of the Merger Regulation and it is five years for an infringement of Article 7(1) of Merger Regulation.⁵² As a result, these two infringements are not prescribed.

4.1. The nature of the infringement

- (131) With respect to the nature of the infringement, the Commission considers the following.

⁵⁰ See Judgment of the General Court of 12 December 2012 in Case T-332/09 *Electrabel v Commission* (not yet reported), paragraph 246 (the “Electrabel Judgment”), as confirmed by the Court of Justice in its Judgement of 3 July 2014.

⁵¹ Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ L 319, 29.11.1974, p. 1).

⁵² See *Electrabel Judgment*, paragraph 213.

- (132) Marine Harvest implemented a concentration with a Union dimension as of 18 December 2012 in contravention of Articles 4(1) and 7(1) of the Merger Regulation.
- (133) Recital (34) of the Merger Regulation states: "*To ensure effective control, undertakings should be obliged to give prior notification of concentrations with a Community dimension following the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest*".
- (134) By making concentrations with a Union dimension conditional upon notification and prior authorisation, the Union legislator wanted the European merger control to be able to prevent undertakings from implementing such transactions before it has taken a final decision, with a view to avoiding any permanent and irreparable damage to effective competition.⁵³
- (135) The Commission therefore regards the infringements committed by Marine Harvest as serious in that they can undermine the effectiveness of the Merger Regulation.
- (136) In conclusion, the Commission considers that any infringement of Article 4(1) and Article 7(1) of the Merger Regulation is, by nature, a serious infringement.

4.2. The gravity of the infringement

(A) Marine Harvest's infringement was negligent

- (137) As to whether Marine Harvest has intentionally or negligently infringed Articles 4(1) and 7(1) of the Merger Regulation, the Commission considered in the SO that Marine Harvest's infringement was intentional or at the very least negligent.
- (138) In its Response of 30 April 2014, Marine Harvest argued that the infringements in question cannot be considered as intentional, and have to be considered, if at all, negligent.
- (139) In particular, Marine Harvest submits that the alleged infringement of Article 7(1) of the Merger Regulation was based on an inevitable and excusable misinterpretation of the applicability of the exemption from the suspension obligation under Article 7(2) of the Merger Regulation by the external legal advisors to Marine Harvest. To prove this, Marine Harvest submitted a legal memorandum dated 18 December 2012 where it is stated, *inter alia*, that "*Marine Harvest may take over the shares in Morpol, but cannot vote for the shares until the transaction is cleared by the Commission. Thus, Marine Harvest may not exercise its rights as a shareholder in Morpol and will thus, in practice, not control the company until clearance has been obtained.*"⁵⁴
- (140) Marine Harvest also argues that it has fully complied with the requirements of Article 7(2) of the Merger Regulation by not exercising voting rights in Morpol, keeping it as a separate entity, ring-fenced from Marine Harvest, and by promptly entering into pre-notification discussions with the Commission. According to Marine Harvest this behaviour provides for additional evidence that Marine Harvest was genuinely convinced that Article 7(2) of the Merger Regulation would have applied to this case.
- (141) At the outset, and for the avoidance of doubt, the Commission notes that according to Marine Harvest the existence of legal advice is a factor which has to be taken into account only for the purposes of determining the level of the fine. Marine Harvest,

⁵³ See Electrabel Judgment, paragraph 235.

⁵⁴ See Annex 4 to the Response.

therefore, has not argued that the existence of such advice has an impact on the assessment as to whether Marine Harvest has actually infringed Articles 4(1) and 7(1) of the Merger Regulation – either intentionally or negligently. In this regard, the Commission finds that the existence of legal advice has no impact on the conclusion that an infringement has in fact occurred.⁵⁵

- (142) The Commission takes the view, however, that in certain cases the existence of legal advice can be taken into account in deciding whether the infringement has been intentional or not. In this regard, the Commission considers that the factual elements submitted by Marine Harvest in the present case are sufficient to consider that the infringements of Article 4(1) and Article 7(1) of the Merger Regulation have not been intentional.
- (143) In any event, the Commission considers that Marine Harvest's infringements of Article 4(1) and Article 7(1) of the Merger Regulation have been caused by Marine Harvest's negligent conduct.
- (144) First, Marine Harvest is a large European company with significant previous experience in merger proceedings and notification to the Commission and national competition authorities. Marine Harvest has recently been involved in several merger control filings at European and national level.⁵⁶
- (145) The assessment of acquisition of *de facto* control contained in Section 3 above is entirely based on public information or information available to Marine Harvest. In this case, the assessment of *de facto* control appears to be straightforward, given that the attendance rate at Morpol's shareholders meetings did not exceed 72% since 2010, and shareholdings in Morpol were very dispersed, with the exception of the stake held by Mr Malek (later acquired by Marine Harvest). Marine Harvest therefore was or should have been aware that by acquiring a 48.5% stake in Morpol it was acquiring *de facto* control over the latter.
- (146) Second, as regards the applicability of Article 7(2) of the Merger Regulation, the Commission notes that Marine Harvest already entered into the bidding process to acquire Morpol in early October 2012. However, the legal memorandum containing legal advice on the applicability of Article 7(2) is dated 18 December 2012, i.e. the same date as closing of the December 2012 Acquisition. The Commission considers that a diligent bidder would have assessed the regulatory aspects of the acquisition and concluded on the applicability of Article 7(2) of the Merger Regulation much before the date of closing. Marine Harvest has not submitted any evidence proving that it has received an assessment on the applicability of Article 7(2) before that date.
- (147) Third, the existence of a precedent on the interpretation of Article 7(2) (*Yara / Kemira Growhow*) should have led Marine Harvest to the conclusion that the implementation of the December 2012 Acquisition would likely have resulted in the infringement of Articles 4(1) and 7(1) of the Merger Regulation, or at the very least that the applicability of Article 7(2) to the present case was not straightforward. In

⁵⁵ See by analogy Case C-681/11 *Schenker v Commission* ECLI:EU:C:2013:404, paragraph 38: "[...] *the fact that the undertaking concerned has characterised wrongly in law its conduct upon which the finding of the infringement is based cannot have the effect of exempting it from imposition of a fine in so far as it could not be unaware of the anti-competitive nature of that conduct.*"

⁵⁶ See Case M.3722 *Nutreco/Stolt Nielsen/Marine Harvest JV*. See also C2006-47 / Lettre du ministre de l'économie, des finances et de l'industrie du 1er décembre 2006, aux conseils de la société Pan Fish, relative à une concentration dans le secteur du saumon and UK Competition Commission, Final Report of 18 December 2006 on the Pan Fish ASA/Marine Harvest N.V. merger inquiry.

case of doubt, Marine Harvest could and should have approached the Commission through the process for consultation on the applicability of Article 7(2) or by asking for a derogation from the standstill obligation under Article 7(3) of the Merger Regulation. Marine Harvest has not taken any of these steps.

- (148) Fourth, as discussed more in detail below, Marine Harvest had already been fined for early implementation at national level in the context of its acquisition of Fjord Seafood. A high level of diligence has to be expected from a company which has already been fined for negligent conduct in the context of merger control proceedings at national level in a Member State of the EEA.
- (149) In view of these factors, the Commission considers that Marine Harvest should have known that the closing of the December 2012 Acquisition before the clearance decision would constitute an infringement of the notification requirement and of the standstill obligation. The Commission therefore considers that Marine Harvest's infringements have to be considered as negligent.

(B) Marine Harvest's acquisition of Morpol raised serious doubts as to its compatibility with the internal market

- (150) Marine Harvest's acquisition of Morpol has been cleared following the submission by Marine Harvest of wide-ranging remedies to remove the serious doubts raised by the Commission as regards the possible market for Scottish salmon. As mentioned above, in this possible market the transaction would have combined two of the largest farmers and primary processors in the EEA.
- (151) In this context, the Commission considers that the implemented merger could have impacted adversely upon competition in the possible market for Scottish salmon for the whole duration of the infringement. In spite of Marine Harvest not exercising its voting rights in Morpol, it is at least possible that the competitive interaction between Marine Harvest and Morpol has been affected as a result of the December 2012 Acquisition. In this respect, the Commission considers the following:
- (a) Morpol's former CEO, Mr Malek, resigned with effect from 1 March 2013 as a result of a provision included in the SPA signed with Marine Harvest. Marine Harvest's acquisition of a 48.5% stake in Morpol appeared therefore capable of influencing strategic decisions at Morpol such as the replacement of the CEO, regardless of the actual exercise of voting rights at general shareholders' meetings. In its Response, Marine Harvest stated that "*Jerzy Malek decided to resign as chief executive officer of Morpol as well as to retire from the related salmon business for personal reasons, [...]*". The Commission considers that these statements are not substantiated, and cannot be considered sufficient to prove that Marine Harvest has not had any influence on Mr Malek's decision to resign from his position as CEO of Morpol, considering Mr Malek's resignation was explicitly included as a condition in the SPA.⁵⁷
 - (b) Marine Harvest has internalised a large share of Morpol's profits through the December 2012 Acquisition. This implies that competition in the market could have been affected by that acquisition, in that Marine Harvest's incentives to compete against Morpol has probably diminished as of December 2012. Even leaving aside the exercise of voting rights, therefore, the likely financial effects of the December 2012 Acquisition

⁵⁷ See SPA, clause 12-1-1.

which eliminated Marine Harvest's incentives to maintain the pre-acquisition competitive constraint on Morpol are considered sufficient to have given rise to potential competition harm.

- (c) Moreover, it cannot be excluded that Marine Harvest, in its capacity as the largest shareholder of Morpol, has acquired privileged access to market information of Morpol in the period between closing of the December 2012 Acquisition and of the Clearance Decision. This could have had a further dampening effect on remaining competition between the two parties of the concentration, in particular increasing the potential scope for coordination in the relevant market.
- (152) In its Response, Marine Harvest argued that pending the merger control review process, the business activities of Marine Harvest and Morpol have been kept independent and completely autonomous from each other and that Marine Harvest was neither involved nor informed of the business activities of Morpol. As such, no competition problem could have materialised in the interim of the merger control proceedings. As regards the internalisation of profits that resulted from the December 2012 Acquisition, Marine Harvest argued during the Hearing that the situation is not different from a merger which has not been implemented given that after the clearance acquiring companies often retroactively recover the profits resulting from the activities between the signing of the agreement and closing.
- (153) The Commission notes that the objective of the EU rules on the control of concentrations is the prevention of irreparable and permanent damage to competition.⁵⁸ The effectiveness of that system is ensured by the introduction of *ex ante* control of the effects of concentrations with a Union dimension.⁵⁹
- (154) The system for the control of concentrations established by the Merger Regulation is designed to allow the Commission to exercise effective control on all concentrations with an EU dimension from the point of view of their effect on the structure of competition, regardless of their impact on competition.⁶⁰
- (155) In this context, it is even more important to ensure that a transaction which is potentially problematic is not implemented before scrutiny, insofar as this would in all likelihood result in an irreparable damage to the competitive structure of the market.
- (156) Therefore, whilst damage to competition is not decisive to establish the existence of an infringement of Articles 4(1) and 7(1) of the Merger Regulation, the presence of such damage is likely to render the infringement even more serious.⁶¹
- (157) In this regard, the Commission considers that an *ex post* analysis of the effect of a concentration on the market cannot reasonably be a decisive factor for the characterisation of the gravity of the breach of the system of *ex ante* control.⁶² As such, the mere fact that the Transaction gave rise to serious doubts as to the compatibility with the internal market is in itself a factor which makes the infringement more serious. In these cases, it is important to ensure legal certainty and a high level of deterrence, regardless of the merits of an *ex post* assessment.

⁵⁸ See Electrabel Judgment, paragraph 245.

⁵⁹ See Electrabel Judgment, paragraph 246.

⁶⁰ See Electrabel Judgment, paragraph 246.

⁶¹ See Electrabel Judgment, paragraphs 246 and 247.

⁶² See by analogy Electrabel Judgment, paragraph 246.

(158) The Commission therefore considers that the fact that the Transaction raised serious doubts as to its compatibility with the internal market make the infringement more serious, and will be taken into account in the determination of the amount of the fine. The fact that Marine Harvest has not exercised its voting rights, and has ring-fenced Morpol as a separate and independent entity, will nevertheless be taken into account as mitigating circumstances.

(C) On the existence of previous procedural infringement cases concerning Marine Harvest as well as other companies

(159) Marine Harvest (at the time Pan Fish) has been already fined in 2007 by the French Competition Authority for infringement of the standstill obligation with respect to its acquisition of Fjord Seafood. This means that this is not the first time that Marine Harvest infringes the standstill obligation in the context of merger control proceedings.⁶³

(160) In this regard, the Commission notes that the Merger Regulation has already been in force for more than ten years. Similar provisions as regards the standstill obligation existed in the preceding Regulation 4064/89, which had been in force for more than thirteen years. The Commission had already proceeded against other companies and imposed fines on them for breach of Article 7(1) of the Merger Regulation.⁶⁴ The Commission has also adopted a number of other decisions on the basis of Article 14 of the Merger Regulation.⁶⁵ Thus, Marine Harvest should have been fully aware of the legal framework and the application of these rules by the Commission.

(161) In its Response, Marine Harvest considers that the failure to notify the acquisition of Fjord Seafood by Pan Fish to the French Competition Authority was based on an error in calculating the turnover, which was based on publicly available information and the information directly received by Pan Fish from Fjord Seafood, leading to the assessment that the transaction did not need to be notified to the French Competition Authority.

(162) However, it is clear from the wording of the decision of the French Competition Authority that Marine Harvest's failure to determine that the turnover of Fjord Seafood triggered the notification obligation in France, even though this information was available to Marine Harvest, amounted to serious negligence, which led to the imposition of a fine by a decision that has become final.

(163) The Commission considers that the previous sanction should have induced Marine Harvest to apply particular care in the assessment of its obligations as regards merger control at the time of the December 2012 Acquisition. As such, the existence of an infringement of the standstill obligations at national level makes the infringement more serious.

⁶³ See C2006-103 / Lettre de sanction du ministre de l'économie, des finances et de l'industrie du 8 décembre 2007, à Monsieur le Président de la société Pan Fish, relative à une concentration dans le secteur du saumon
http://www.economie.gouv.fr/files/files/directions_services/dgccrf/boccrf/2007/07_01bis/c2006_103_decisionsanction_panfish_fjordseafood.pdf.

⁶⁴ Decision M.920 *Samsung/AST* of 26 May 1997, M.969 *AP Moller* of 10 February 1999 and M.4994 *Electrabel/CNR* of 10 June 2009, which was confirmed by the Electrabel Judgment.

⁶⁵ See Decisions in cases M.1543 *Sanofi/Synthelabo* (1999); M.1608 *KLM/Martinair* (1999); M.1610 *Deutsche Post/Trans-O-Flex* (2001); M.1634 *Mitsubishi Heavy Industries* (2000); M.2624 *BP/Erdölchemie* (2002); M.3255 *Tetra Laval/Sidel* (2004).

iii. The duration of the infringement

- (164) With respect to the duration of the infringement, the Commission has regard to the following factors.
- (165) First, the Commission notes that an infringement of Article 4(1) of the Merger Regulation is an instantaneous infringement, which is committed by failing to notify a concentration. Such infringement has been committed on the date of implementation of the concentration (18 December 2012).
- (166) Second, the infringement of Article 7(1) of the Merger Regulation is a continuous infringement which remains on-going for as long as the transaction is not cleared by the Commission. In the following, the Commission will outline the criteria it considers relevant for the assessment of the duration of such infringement.
- (167) As already pointed out in Recital (13), the December 2012 Acquisition was implemented on 18 December 2012. This is therefore the date considered for the start of the infringement of Article 7(1).
- (168) Marine Harvest has submitted a Case Team Allocation Request on 21 December 2012. The transaction was formally notified on 9 August 2013 and authorized on 30 September 2013. The Commission considers the latter as the date of the end of the infringement of Article 7(1), as it was only with the clearance of the proposed transaction that the unlawful behaviour put in practice by Marine Harvest came to an end.
- (169) Marine Harvest's second infringement lasted for nine months and twelve days. This period can be considered as particularly long, especially as regards a merger with potential anti-competitive effects.
- (170) The Commission further notes that even if the December 2012 Acquisition had been made known to the Commission within a short timeframe from closing, it had only been notified to the Commission eight months later.
- (171) In the exercise of its discretion, the Commission considers it justified to take into account for the purposes of calculating the duration of the infringement of Article 7(1) the pre-notification period, as well as the extended Phase I investigation.
- (172) The Commission recalls that the proposed transaction raised serious doubts in the possible market for Scottish salmon as it combined the activities of the main farmers and primary processors in this market. As stated above, it cannot be excluded that competitive harm has materialised at least to some extent after implementation and before clearance of the proposed transaction. A fine in these circumstances has therefore to achieve the maximum deterrence possible.
- (173) The Commission also considers that Marine Harvest's behaviour has not been sufficiently forthcoming in the course of the pre-notification phase to justify the exclusion of the pre-notification period from the overall duration of the infringement.
- (174) In this respect, the Commission considers that Marine Harvest has not provided the Commission's services with the necessary information to enable it to assess the transaction in the most expedient and accurate manner, in light of its own previous decisions as well as previous decisions of national competition authorities.
- (175) First, on the basis of Marine Harvest's internal documents, it appears that Marine Harvest had been contemplating Morpol's acquisition since at least the beginning of

October 2012,⁶⁶ and it could have therefore started pre-notification contacts if it so wished with the Commission well before the end of December 2012.

- (176) Second, at the time of committing the infringement Marine Harvest should have known that pre-notification could have lasted for a certain period of time, depending inter alia on its willingness to promptly provide the information required for the completeness of the filing and the Commission's assessment of the impact of the transaction on competition.
- (177) In this respect, the Commission considers that, after the submission of the Case Team Allocation Request, pre-notification discussions were delayed by the submission of a First Draft Form CO as late as 5 March 2013 (i.e. more than two months after the first contact with the Commission's services), and by Marine Harvest's apparent reluctance to provide the Commission with the necessary information to assess the concerned operation.
- (178) The Commission notes in this regard that Marine Harvest did not include in the First Draft Form CO the information relevant for the assessment of the effects of the transaction on the area where the competition problem ultimately arose (i.e. farmed Scottish salmon). As mentioned above, the Commission had to send to Marine Harvest four requests for information⁶⁷ between March and July 2013 in order to gather the relevant information that it deemed necessary to be able to assess the transaction. Marine Harvest provided such information only upon request, and with significant delay. For example Marine Harvest only submitted complete market shares and other market data on the market for farmed Scottish salmon on 26 July 2013.
- (179) In its Response, Marine Harvest does not argue that the pre-notification and phase I periods should be excluded from the overall duration of the infringement.
- (180) Marine Harvest however considers that it was justified, on the basis of precedents of the Commission and national competition authorities, to exclude from its first Draft Form CO information related to a possible segment for Scottish salmon, and that this should not be seen as a sign of a lack of cooperation. In fact, according to Marine Harvest, both the Commission and national competition authorities have concluded in recent cases that Norwegian and Scottish salmon form part of one and the same relevant market, and Marine Harvest was entitled to rely on these previous decisions.
- (181) The Commission notes that Marine Harvest was well aware that the Transaction could have raised concerns on a potential market or segment for Scottish farmed salmon.
- (182) [...] *⁶⁸ [...] *⁶⁹.
- (183) Second, while in its 2005 precedent the Commission has not looked in depth into a distinction between Norwegian and Scottish salmon,⁷⁰ both the French and UK

⁶⁶ See Annex 4 to Marine Harvest's response to the Commission's request for information of 3 May 2013.

⁶⁷ See Commission's requests for information of 14 March, 3 May, 14 June and 10 July 2013.

⁶⁸ [...] *.

⁶⁹ [...] *.

⁷⁰ In the Response, Marine Harvest referred also to Commission Regulation (EC) No 206/2005 of 4 February 2005 imposing definitive safeguard measures against imports of farmed salmon (OJ L 33, 5.2.2005, p. 8) where it is explained that the product concerned is "all farmed salmon". However, this Regulation is intended to define the product for which imports from outside the EEA will be subject to definitive safeguarding measures and not to define relevant product markets for the application of EU competition law.

competition authorities have carried out in 2006 a detailed assessment of the impact on competition of the *Pan Fish / Marine Harvest* transaction in a "segment" for Scottish salmon. Both authorities concluded that producers of farmed salmon can price discriminate against customers with a preference for Scottish salmon and therefore exercise market power against them. The decisions of both Authorities have not been appealed and became final.

- (184) For example, the UK Competition Commission explained that "*Although we considered that Scottish and Norwegian farmed salmon from part of the same market, we recognize that, in view of strong customer preferences, Scottish salmon may form a relevant market segment. We discuss the effect of the merger on these customers in paragraphs 8.52 to 8.71*" (emphasis added)
- (185) Likewise, the French Competition Authority acknowledged that "*To conclude, the above shows that the main product market affected by the merger is the fresh farmed Atlantic salmon market, all conditioning methods and all origins combined. This market is composed of three imperfectly substitutable products, each corresponding to three main geographic origins of salmon (Norway, Scotland, Ireland) which are important differentiation factors for the products concerned.*" (emphasis added)
- (186) The French Competition Authority also added that "*To conclude, two markets were demarcated for the products. [...] Secondly, a market for the production and the sale of fresh farmed Atlantic salmon in the European Economic Area. This market which is mainly concerned by the merger, comprises imperfectly substitutable products which will be as many segments over which market power can be exercised. The competitive analysis must therefore not only examine this market as defined in a broad sense, but also the segment(s) on which the new entity will hold a significant position after the merger." (emphasis added)*
- (187) As a result, the French and UK competition authorities have looked in depth at the potential effects on Scottish salmon caused by the *Pan Fish / Marine Harvest* transaction, and dedicated the largest parts of their respective decisions to the assessment of the Scottish salmon "segment". The French Competition Authority has only cleared the *Pan Fish / Marine Harvest* transaction subject to remedies (divestment of salmon farms in Scotland) to remove competition problems in the Scottish salmon "segment".
- (188) Third, the extensive press coverage which closely followed the announcement of the deal had clearly pointed at the possible competition issues that could have resulted in Scotland (or the UK, where Scotland is the only salmon producer). For example, an article titled "*Marine Harvest – Morpol: UK likely to be competition focus on deal made in heaven*" stated:

"The UK is "certainly going to be the main focus" if the deal goes through and the European competition authority starts to look into it, said a source who knows both companies. "When Marine Harvest bought Panfish in 2006, they had to spin off Lighthouse Caledonia, which then ultimately became The Scottish Salmon Company," the source told Undercurrent News. It remains to be seen if this will happen in this case, the source said. "It will go through, but it remains to be seen how long it takes, [and what conditions will be imposed].""⁷¹

⁷¹ <https://www.undercurrentnews.com/2012/12/17/marine-harvest-morpol-uk-likely-to-be-competition-focus-on-deal-made-in-heaven/>.

- (189) Press reports also highlighted that the *Marine Harvest / Morpol* transaction would have likely raised similar competition issues in Scottish salmon as the *Pan Fish / Marine Harvest* transaction:

*"The objection from France over the Marine Harvest and Panfish deal was based on dominance of the supply of Scottish salmon to the French market and that is 'very relevant with this', he told Undercurrent. 'When Marine Harvest was formed after the merger of three companies, it was required to spin off 20,000t. This might also be the case this time, although a conclusion is not expected until well into 2013,' he said."*⁷²

- (190) For the reasons set out in Recitals (183) to (190) of this Decision, Marine Harvest was aware of the likelihood, or at the very least the possibility, that the Commission would have focussed its assessment on a possible market for Scottish salmon.
- (191) The Commission also notes that, assuming that Marine Harvest was indeed convinced that Article 7(2) of the Merger Regulation applied to the concentration, Marine Harvest should have notified the concentration "*without delay*", pursuant to Article 7(2), point a).
- (192) In addition, on 12 February 2013 the Commission sent to Marine Harvest a detailed request for information on the possible early implementation of the Transaction. Even assuming that at the time of the closing of the December 2012 Acquisition, Marine Harvest was not aware that it was committing an infringement, Marine Harvest must have become aware of that possibility at the very latest as of 12 February 2013.
- (193) In this context, the Commission considers that Marine Harvest's behaviour in pre-notification cannot be considered sufficiently forthcoming to ensure that the Commission was able to assess the Transaction in the most expedient manner. This is even more the case when one considers that Marine Harvest (at the time Pan Fish) has been already subject to in-depth investigations by national authorities, and was therefore in the position to understand the kind of information that the Commission would have required for a quick assessment of the deal.
- (194) Taking into account Marine Harvest's awareness of possible competition problems, its assumed obligation to notify the deal "*without delay*" and its awareness of having committed a possible infringement of the standstill obligation at the latest as of 12 February 2013, Marine Harvest should have included all the information needed for the assessment of a possible market for Scottish salmon already in the First Draft Form CO or should have at the very least promptly provided such information as soon as possible in the process.
- (195) In view of these factors, the Commission considers that the pre-notification period should be included in the period of the second infringement of Article 7(1) of the Merger Regulation. As such, Marine Harvest's infringement had a duration of nine months and twelve days. The Commission however has taken into account Marine Harvest's prompt start of pre-notification discussions as a mitigating circumstance for the purposes of setting the fine.

⁷²

Ibid.

iv. Mitigating circumstances

- (196) The Commission notes that Marine Harvest had not exercised its voting rights in Morpol after acquiring control over the latter, and had kept Morpol as a ring-fenced entity, separate from Marine Harvest in the interim of the merger review process.
- (197) As noted above in Section 4 ii), the Commission considers that these measures do not have any impact on the assessment of the existence of an infringement. Moreover, these measures are also insufficient to exclude that the Transaction was capable of resulting in an irreparable damage to competition.
- (198) Nevertheless, the Commission considers that these measures are likely to have reduced the possible anti-competitive impact of Marine Harvest's illegal conduct. The Commission therefore considers Marine Harvest's abstention from the exercise of voting rights at Morpol's general shareholders' meetings and the ring-fencing of Morpol's activities as mitigating circumstances.
- (199) The Commission also notes that Marine Harvest submitted a Case Team Allocation Request a few days after the closing of the December 2012 Acquisition. As noted below in Section 4 iii), the Commission considers in this case that the prompt start of pre-notification discussions by Marine Harvest is not in itself an element justifying the exclusion of the pre-notification stage from the overall duration of the infringement.
- (200) The Commission, however, considers that Marine Harvest's willingness to promptly inform the Commission of its acquisition of Morpol is an element which is considered as a mitigating factor.

v. Aggravating circumstances

- (201) There are no aggravating circumstances in this case. The fact that the transaction raised serious doubts as to its compatibility with the internal market has been taken into account for the purposes of assessing the gravity of the infringement.

vi. Conclusion

- (202) In view of the above, the Commission considers that Marine Harvest has, through negligence, infringed Article 4(1) and Article 7(1) of the Merger Regulation. Both infringements are serious in light of the negligent conduct of Marine Harvest, the fact that the Transaction raised serious doubts as regards its compatibility with the internal market and the existence of precedents of fines for early implementation at national level.
- (203) The infringement of Article 4(1) of the Merger Regulation is an instantaneous infringement whereas the infringement of Article 7(1) of the Merger Regulation had a duration of nine months and twelve days.
- (204) The Commission considers that Marine Harvest's abstention from the exercise of voting rights at Morpol's general shareholders' meetings and the ring-fence of Morpol's activities are considered as mitigating circumstances. Moreover, Marine Harvest's willingness to promptly inform the Commission of its acquisition of Morpol is also an element which is considered as a mitigating factor.
- (205) Finally, the Commission considers that there are no aggravating circumstances in this case.

5. AMOUNT OF THE FINES

- (206) When imposing penalties, the Commission takes into account the need to ensure that fines have a sufficiently deterrent effect. In the case of an undertaking of the size of Marine Harvest, the amount of the penalty must be significant in order to have a deterrent effect. This is even more the case when the transaction which has been implemented before clearance raised serious doubts as to its compatibility with the internal market.
- (207) In order to impose a penalty for the infringement and prevent it from recurring, therefore, and given the specific circumstances of the case at hand, the Commission considers it appropriate to impose fines under Article 14(2) of the Merger Regulation of EUR 10,000,000 for the infringement of Article 4(1) of the Merger Regulation, and of EUR 10,000,000 for the infringement of Article 7(1) of the Merger Regulation,

HAS ADOPTED THIS DECISION:

Article 1

By putting into effect a concentration with a Union dimension in the period from 18 December 2012 to 30 September 2013, before it was notified and before it was declared compatible with the internal market, Marine Harvest ASA has infringed Article 4(1) and Article 7(1) of Regulation (EC) No 139/2004.

Article 2

A fine of EUR 10,000,000 is hereby imposed on Marine Harvest ASA for the infringement of Article 4(1) of Regulation (EC) No 139/2004 referred to in Article 1.

Article 3

A fine of EUR 10,000,000 is hereby imposed on Marine Harvest ASA for the infringement of Article 7(1) of Regulation (EC) No 139/2004 referred to in Article 1.

Article 4

The fines imposed in Articles 2 and 3 shall be credited, in euros, within a period of three months from the date of notification of this Decision to the following bank account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT
1-2, Place de Metz
L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000
BIC: BCEELULL
Ref.: European Commission – BUFI/M.7184

After the expiry of this period, interest will automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where an undertaking referred to in Article 1 lodges an appeal, that undertaking must cover the fine by the due date, either by providing an acceptable financial guarantee, or by making a provisional payment of the fine in accordance with Article 90 of Commission Delegated Regulation (EU) No 1268/2012⁷³.

Article 5

This Decision is addressed to:

Marine Harvest ASA
Tordenskioldsgate 8-10
0160 Oslo, Norway

This Decision shall be enforceable pursuant to Article 299 of the TFEU.

Done at Brussels, 23.7.2014

For the Commission
(Signed)
Joaquín ALMUNIA
Vice-President

⁷³ OJ L 362, 31.12.2012, p. 1.