JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

26 October 2017 (*)

(Competition — Concentrations — Decision imposing a fine for putting into effect a concentration prior to its notification and authorisation — Article 4(1), Article 7(1) and (2) and Article 14 of Regulation (EC) No 139/2004 — Negligence — Principle ne bis in idem — Gravity of the infringement — Amount of the fine)

In Case T-704/14,

Marine Harvest ASA, established in Bergen (Norway), represented by R. Subiotto QC,

applicant,

v

European Commission, represented by M. Farley, C. Giolito and F. Jimeno Fernández, acting as Agents,

defendant,

APPLICATION based on Article 263 TFEU and seeking, principally, annulment of Commission Decision C(2014) 5089 final of 23 July 2014 imposing a fine for putting into effect a concentration in breach of Article 4(1) and Article 7(1) of Regulation (EC) No 139/2004 (Case COMP/M.7184 — Marine Harvest/Morpol), and, in the alternative, annulment or reduction of the fine imposed on the applicant,

THE GENERAL COURT (Fifth Chamber),

composed of A. Dittrich (Rapporteur), President, J. Schwarcz and V. Tomljenović, Judges,

Registrar: C. Heeren, Administrator,

having regard to the written part of the procedure and further to the hearing on 15 September 2016,

gives the following

Judgment

I. Background to the dispute

1 The applicant, Marine Harvest ASA, is a company governed by Norwegian law and listed on the Oslo (Norway) Stock Exchange and the New York (United States) Stock Exchange, which carries out salmon farming and primary processing activities in Canada, Chile, the Faroe Islands, Ireland, Norway and Scotland, and white halibut farming and primary processing activities in Norway. The applicant also carries out secondary processing activities in Belgium, Chile, the Czech Republic, France, Ireland, Japan, the Netherlands, Norway, Poland and the United States.

A. Acquisition of Morpol by the applicant

2 On 14 December 2012, the applicant entered into a share purchase agreement ('the SPA') with Friendmall Ltd. and Bazmonta Holding Ltd. for the sale of the shares which those companies owned in Morpol ASA.

3 Morpol is a Norwegian producer and processor of salmon. It produces farmed salmon and offers a broad range of value added salmon products. It carries out salmon farming and primary processing activities in Norway and Scotland. It also carries out secondary processing activities in Poland, the United Kingdom and Vietnam. Prior to its acquisition by the applicant, Morpol was listed on the Oslo Stock Exchange.

4 Friendmall and Bazmonta Holding were private limited liability companies incorporated and registered in Cyprus. Both companies were controlled by a single individual, Mr M., the founder and former chief executive officer (CEO) of Morpol.

5 Through the SPA, the applicant acquired an interest in Morpol amounting to approximately 48.5% of Morpol's share capital. The closing of that acquisition ('the December 2012 Acquisition') took place on 18 December 2012.

6 On 17 December 2012, the applicant made a stock exchange announcement of its intention to submit a public offer for the remaining shares in Morpol. On 15 January 2013, pursuant to the Norwegian Law on securities trading, the applicant submitted the mandatory public offer for the remaining shares in Morpol, representing 51.5% of the shares in the company. 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.

7 On 23 January 2013, the board of directors of Morpol appointed a new CEO to replace Mr M., who had in the meantime resigned with effect from 1 March 2013, following a commitment to that effect which had been included in the SPA.

8 Following the settlement and completion of the public offer on 12 March 2013, the applicant owned a total of 87.1% of the shares in Morpol. Thus, through the public offer, the applicant acquired shares representing approximately 38.6% of Morpol, in addition to the shares representing 48.5% of Morpol which the applicant had already acquired by means of the December 2012 Acquisition.

9 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 the shares to be de-listed from the Oslo Stock Exchange, to reduce the number of members of the board of directors and to eliminate the nomination committee. On 28 November 2013, Morpol was de-listed from the Oslo Stock Exchange.

B. Pre-notification phase

10 On 21 December 2012, the applicant sent a request to the European Commission for the allocation of a case team in respect of the acquisition of sole control over Morpol. In that request, the applicant informed the Commission that the December 2012 Acquisition had been closed and that it would not exercise its voting rights pending the decision of the Commission.

11 The Commission requested a conference call with the applicant, which took place on 25 January 2013. During the conference call, the Commission requested information on the

deal structure and clarification as to whether the December 2012 Acquisition might have already conferred control over Morpol on the applicant.

12 On 12 February 2013, the Commission sent a request for information to the applicant relating to the 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 board of directors of Morpol for the last three years. The applicant submitted a partial response to that request on 19 February 2013 and produced a full response on 25 February 2013.

13 On 5 March 2013, the applicant submitted a first draft notification form as contained in Annex I to Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2004 L 133, p. 1) ('the First Draft Form CO'). The First Draft Form CO focused on an overall market for farming, primary processing and secondary processing of salmon of all origins.

14 On 14 March 2013, the Commission sent the applicant a request for additional information concerning the First Draft Form CO. On 16 April 2013, the applicant responded to that request for information. The Commission considered that response to be incomplete and sent further requests for information on 3 May, 14 June and 10 July 2013. The applicant replied to those requests on 6 June, 3 July and 26 July 2013 respectively.

C. Notification and decision authorising the concentration subject to compliance with certain commitments

15 On 9 August 2013, the transaction was formally notified to the Commission.

16 At a state of play meeting on 3 September 2013, the Commission informed the applicant and Morpol that it had serious doubts as to the compatibility of the transaction with the internal market as regards a possible market for Scottish salmon.

17 In order to eliminate the serious doubts identified by the Commission, the applicant proposed commitments under Article 6(2) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1) on 9 September 2013. Those initial commitments were market-tested by the Commission. Following certain modifications, a final set of commitments was submitted on 25 September 2013. The applicant committed itself to divesting approximately three quarters of the overlap between the Scottish salmon farming capacity of the parties to the concentration, thereby dispelling the serious doubts identified by the Commission.

18 On 30 September 2013, the Commission adopted Decision C(2013) 6449 (Case COMP/M.6850 — Marine Harvest/Morpol) ('the Clearance Decision') pursuant to Article 6 (1)(b) and 6(2) of Regulation No 139/2004, approving the concentration subject to full compliance with the proposed commitments.

19 The Commission concluded in the Clearance Decision that the December 2012 Acquisition had already conferred upon the applicant de facto sole control over Morpol. It stated that an infringement of the standstill obligation in Article 7(1) of Regulation No 139/2004 and of the notification requirement in Article 4(1) of that regulation could not be excluded. It also stated that it might examine in a separate procedure whether a penalty under Article 14(2) of Regulation No 139/2004 would be appropriate.

D. Contested decision and procedure leading to its adoption

20 In a letter dated 30 January 2014, the Commission informed the applicant of an ongoing investigation concerning possible infringements of Article 7(1) and Article 4(1) of Regulation No 139/2004.

21 On 31 March 2014, the Commission issued a statement of objections to the applicant pursuant to Article 18 of Regulation No 139/2004 ('the Statement of Objections'). In the Statement of Objections, the Commission reached the preliminary conclusion that the applicant had intentionally or at least negligently infringed Article 4(1) and Article 7(1) of Regulation No 139/2004.

22 On 30 April 2014, the applicant submitted its response to the Statement of Objections. On 6 May 2014, the applicant presented the arguments set out in its response in the course of an oral hearing. On 7 July 2014, a meeting of the Advisory Committee on Concentrations was held.

23 On 23 July 2014, the Commission adopted Decision C(2014) 5089 final imposing a fine for putting into effect a concentration in breach of Article 4(1) and Article 7(1) of Regulation No 139/2004 (Case COMP/M.7184 — Marine Harvest/Morpol) ('the Contested Decision').

24 The first three articles in the operative part of the Contested Decision are worded as follows:

'*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, [the applicant] 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 [the applicant] 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 [the applicant] for the infringement of Article 7(1) of Regulation (EC) No 139/2004 referred to in Article 1.'

25 In the Contested Decision, the Commission, first of all, considered that the applicant had acquired de facto sole control of Morpol after the closing of the December 2012 Acquisition because the applicant was highly likely to achieve a majority at the shareholders' meetings, given the size of its shareholding (48.5%) and the level of attendance of other shareholders at shareholders' meetings in previous years.

26 The Commission further considered that the December 2012 Acquisition did not benefit from the exemption under Article 7(2) of Regulation No 139/2004. In that regard, it noted that Article 7(2) of Regulation No 139/2004 applied only to public bids or to a series of transactions in securities by which control within the meaning of Article 3 of Regulation No 139/2004 was acquired 'from various sellers'. According to the Commission, in this case, the controlling stake was acquired from a single seller, namely Mr M., through Friendmall and Bazmonta Holding, by means of the December 2012 Acquisition.

27 According to the Commission, Article 7(2) of Regulation No 139/2004 is not intended to apply to situations where a significant block of shares is acquired from a single seller and where it is straightforward to establish, on the basis of votes cast at previous ordinary and extraordinary general meetings, that that block of shares will confer de facto sole control of the target company.

28 Moreover, the Commission noted that the December 2012 Acquisition, which was closed on 18 December 2012, was not part of the implementation of the public offer, which was implemented between 15 January and 26 February 2013. It considered that the fact that the December 2012 Acquisition might have triggered the obligation for the applicant to launch the public offer on the outstanding shares of Morpol was irrelevant, given that de facto control had already been acquired from a single seller.

29 The Commission further considered that the applicant'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 appeared to be misplaced. It pointed out that the applicant had acquired control over Morpol through a single purchase of 48.5% of the shares of Morpol and not through several partial transactions of assets ultimately forming a single economic entity.

30 The Commission noted that, according to Article 14(3) of Regulation No 139/2004, in fixing the amount of the fine, regard was to be had to the nature, gravity and duration of the infringement.

31 It considered that any infringement of Article 4(1) and Article 7(1) of Regulation No 139/2004 was, by nature, a serious infringement.

32 In its assessment of the gravity of the infringement, the Commission took into account the fact that, in its view, the infringement was committed by the applicant as a result of negligence, that the concentration at issue raised serious doubts as to its compatibility with the internal market, and the fact that there were previous procedural infringement cases concerning the applicant and other companies.

33 With respect to the duration of the infringement, the Commission noted that an infringement of Article 4(1) of Regulation No 139/2004 was an instantaneous infringement, committed in the present case on 18 December 2012, that is to say, on the date of implementation of the concentration. It considered, moreover, that an infringement of Article 7(1) of Regulation No 139/2004 was a continuous infringement which, in the present case, had lasted from 18 December 2012 to 30 September 2013, that is to say, from the date on which the December 2012 Acquisition was implemented until the date on which it was authorised. According to the Commission, that period of 9 months and 12 days was particularly long.

34 The Commission regarded as a mitigating circumstance the fact that the applicant had not exercised its voting rights in Morpol and had kept Morpol as an entity separate from the applicant during the merger review process.

35 It also regarded as a mitigating circumstance the fact that the applicant had submitted a case team allocation request a few days after the closing of the December 2012 Acquisition.

36 On the other hand, the Commission did not find that there were any aggravating circumstances.

37 The Commission considered that, in the case of an undertaking of the size of the applicant, the amount of the penalty had to be significant in order to have a deterrent effect. This was particularly the case where the concentration at issue had raised serious doubts as to its compatibility with the internal market.

II. Procedure and forms of order sought

38 The applicant brought the present action by application lodged at the General Court Registry on 3 October 2014.

39 By a separate document, lodged at the Court Registry on the same date, the applicant requested that the Court adjudicate under an expedited procedure, pursuant to Article 76a of the Rules of Procedure of the General Court of 2 May 1991. By letter of 17 October 2014, the Commission submitted its observations on that request. By decision of 23 October 2014, the Court refused the request for an expedited procedure.

40 Acting on a report from the Judge-Rapporteur, the Court decided to open the oral part of the procedure. By way of measures of organisation of procedure under Article 89 of its rules of procedure, the Court put written questions to the parties and requested that the Commission produce certain documents. The parties replied to the written questions and the Commission produced the documents requested.

41 The applicant claims that the Court should:

– annul the Contested Decision;

– alternatively, annul the fines imposed on the applicant pursuant to the Contested Decision;

– in the further alternative, substantially reduce the fines imposed on the applicant pursuant to the Contested Decision;

– in any event, order the Commission to pay the costs;

– take any other measures that the Court considers appropriate.

42 The Commission contends that the Court should:

– dismiss the action in its entirety;

– order the applicant to pay the costs.

III. Law

43 The applicant puts forward five pleas in law in support of the action. The first plea alleges a manifest error of law and fact in that the Contested Decision rejected the applicability of Article 7(2) of Regulation No 139/2004. The second plea alleges a manifest error of law and fact in that the Contested Decision concludes that the applicant was negligent. The third plea alleges breach of the general principle *ne bis in idem*. The fourth plea alleges a manifest error of law and fact in the imposition of fines on the applicant. Lastly, the fifth plea alleges a manifest error of law and fact and a failure to state reasons in relation to the setting of the levels of the fines.

A. First plea in law, alleging a manifest error of law and fact in that the Contested Decision rejected the applicability of Article 7(2) of Regulation No 139/2004

44 The first plea in law is in four parts. The first part alleges that the Contested Decision errs in law and in fact by disregarding the notion of a single concentration in interpreting Article 7 (2) of Regulation No 139/2004. The second part alleges an erroneous interpretation, in fact and in law, of the wording of Article 7(2) of Regulation No 139/2004. The third part alleges an erroneous interpretation of the rationale of Article 7(2) of Regulation No 139/2004. Lastly, it is argued in the fourth part that the applicant complied with Article 7(2) of Regulation No 139/2004.

45 It is appropriate, in the present case, to examine the first three parts of the first plea together; all of these concern the interpretation of Article 7(2) of Regulation No 139/2004.

1. The first three parts of the first plea in law

(a) Preliminary observations

46 It should be noted, first of all, that Article 14(2)(a) and (b) of Regulation No 139/2004 provides as follows:

‘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’.

47 According to the first subparagraph of Article 4(1) of Regulation No 139/2004, ‘concentrations with a Community 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’.

48 According to Article 7(1) of that regulation, ‘a concentration with a Community dimension … shall not be implemented either before its notification or until it has been declared compatible with the [internal] 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)’.

49 In addition, according to Article 3(1) of Regulation No 139/2004:

‘1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:

…

(b) 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.’

50 Lastly, Article 3(2) of Regulation No 139/2004 provides that ‘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’.

51 In the present case, it must be noted at the outset that, by means of the December 2012 Acquisition, the applicant acquired an interest in Morpol that amounted to approximately 48.5% of Morpol’s share capital.

52 As the Commission noted in paragraph 55 of the Contested Decision, without being contradicted in that regard by the applicant, 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. A simple majority of the shares present and voting at shareholder meetings was therefore sufficient to carry a motion, apart from certain procedures that required a qualified majority of two thirds.

53 The Commission also correctly stated, in paragraph 57 of the Contested Decision, 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 the size of its shareholding and the level of attendance of other shareholders at shareholders’ meetings in preceding years (see, to that effect, judgment of 12 December 2012, *Electrabel* v *Commission*, T-332/09, EU:T:2012:672, paragraphs 45 to 48).

54 Next, the Commission stated that Mr M. (through Friendmall and Bazmonta Holding) always accounted for a clear majority of votes cast at shareholders’ meetings and that the remainder of the capital in Morpol was significantly dispersed, which implied that the remaining shareholders would not have been able to form a blocking minority capable of overcoming Mr M.’s power of decision, not least due to the low number of them attending the general meetings.

55 The Commission therefore concluded, without being contradicted in that regard by the applicant, that Mr M. exercised sole de facto control over Morpol through its interests in Friendmall and Bazmonta Holding before the December 2012 Acquisition.

56 Lastly, the Commission concluded, correctly, that the December 2012 Acquisition had conferred on the applicant the same rights and possibilities of exercising decisive influence over Morpol as those previously enjoyed by Mr M. through Friendmall and Bazmonta Holding.

57 It follows from the foregoing that the Commission correctly found, in paragraph 68 of the Contested Decision, that the applicant had acquired control over Morpol after the closing of the December 2012 Acquisition.

58 The applicant repeatedly states, albeit in other contexts, that it did not exercise its voting rights before the concentration was cleared by the Commission. In that regard it must be noted that, according to Article 3(2) of Regulation No 139/2004, control is to be constituted, inter alia, by rights which confer the ‘possibility’ of exercising decisive influence on an undertaking. The decisive event is therefore the acquisition of that control in the formal sense and not the actual exercise of such control (see, by analogy, judgment of 12 December 2012, *Electrabel* v *Commission*, T-332/09, EU:T:2012:672, paragraph 189). The fact that the holding of voting rights conferred on the applicant de facto control over Morpol is not called in question by the fact that the applicant did not exercise its voting rights prior to clearance of the concentration.

59 As the Commission stated in paragraphs 72 and 73 of the Contested Decision, some clauses of the SPA seemed to imply that the applicant would exercise its voting rights in Morpol only after having obtained clearance from competition authorities. However, there is nothing in the SPA that prevents the applicant from exercising its voting rights pending clearance. The applicant would, therefore, have been free to exercise its voting rights in Morpol at any time after the closing of the December 2012 Acquisition.

60 The applicant confirmed, moreover, in reply to a question put to it by the Court at the hearing, that it did not deny that the acquisition of the 48.5% stake in Morpol had conferred on it control over Morpol within the meaning of Regulation No 139/2004.

61 As the Commission noted in paragraphs 8, 13 and 66 of the Contested Decision, the closing of the December 2012 Acquisition took place on 18 December 2012. The applicant concedes in paragraph 13 of the application that, on 18 December 2012, the SPA was closed and Mr M.'s shares in Morpol were transferred to the applicant.

62 The applicant does not dispute the fact that the concentration at issue was a concentration with a Community dimension.

63 Given that the applicant acquired control over Morpol by means of the December 2012 Acquisition, it would, in principle, have been obliged, pursuant to the first subparagraph of Article 4(1) and Article 7(1) of Regulation No 139/2004, to notify that concentration to the Commission before implementing it, and not to implement it until it had been declared compatible with the internal market by the Commission.

64 It follows from the above findings that the relevant question for the purposes of the Court's examination of the first three parts of the first plea in law is whether the exception provided for in Article 7(2) of Regulation No 139/2004 was applicable in the present case.

(b) The applicability of Article 7(2) of Regulation No 139/2004

65 Article 7(2) of Regulation No 139/2004 provides as follows:

'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.'

66 Article 7(2) of Regulation No 139/2004 thus envisages two possible situations: one linked to a public bid (first situation), the other linked to a series of transactions in securities (second situation).

67 In reply to a question on that point at the hearing, the applicant explained that its reasoning was based on the first situation in Article 7(2) of Regulation No 139/2004, and formal note of this was taken in the minutes of the hearing.

(1) The fact that the concentration at issue is not covered by the wording of Article 7(2) of Regulation No 139/2004

68 It will be recalled that, according to the first situation as outlined in Article 7(2) of Regulation No 139/2004, 'paragraph 1 shall not prevent the implementation of a public bid', provided that the concentration is notified without delay and the acquirer does not exercise its voting rights prior to clearance of the concentration.

69 In the present case, it must be noted that the Commission did not find that the applicant had infringed Article 7(1) of Regulation No 139/2004 by implementing the public bid. It found that the applicant had infringed Article 7(1) and Article 4(1) of Regulation No 139/2004 by the December 2012 Acquisition. It must be borne in mind that the public bid was not submitted until 15 January 2013, that is after the closing of the December 2012 Acquisition.

70 The fact that, according to Article 7(2) of Regulation No 139/2004, paragraph 1 of that article is not to prevent the implementation of a public bid is therefore, in principle, irrelevant in the present case.

71 The first situation envisaged in Article 7(2) of Regulation No 139/2004 permits, in certain circumstances, the implementation of a public bid before notification and authorisation, even if it constitutes a concentration with a Community dimension. According to the wording of that provision, it does not, however, permit the implementation of a private acquisition.

72 It must therefore be held that, according to the wording in respect of the first situation envisaged in Article 7(2) of Regulation No 139/2004, that situation does not apply in the present case.

73 Although the applicant indicated at the hearing that it was relying on the first situation envisaged in Article 7(2) of Regulation No 139/2004, it should be pointed out that the concentration at issue also falls outside the wording of the second situation envisaged in Article 7(2) of Regulation No 139/2004.

74 In the second situation envisaged in Article 7(2) of Regulation No 139/2004, 'paragraph 1 shall not prevent the implementation ... 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 certain conditions are fulfilled.

75 It must be noted that, in the present case, the applicant acquired control of Morpol from one seller by means of a single transaction in securities, that is the December 2012 Acquisition, as the Commission pointed out in paragraph 101 of the Contested Decision.

76 Given that Mr M. controlled Friendmall and Bazmonta Holding at that time, Mr M. was the sole seller of Morpol shares.

77 The applicant submitted at the hearing that, in its decision of 26 February 2007 (Case COMP/M.4521 — LGI/Telenet) ('the LGI/Telenet decision'), the Commission had not queried who ultimately controlled the entities which had sold the shares in Telenet. According to the applicant, those entities — *intercommunales* (associations of local authorities) — were actually controlled by the Flemish Region. The applicant submitted that, in the present case, the Commission had relied on the fact that Friendmall and Bazmonta Holding were both controlled by Mr M. and therefore the applicant had not, according to the Commission, acquired control from various sellers, yet the Commission had not raised the same question in the case that gave rise to the LGI/Telenet decision.

78 In the first place, it must be noted that the Court is not bound by the Commission's previous practice in taking decisions. In the second place, it is apparent from the table showing participation in general shareholders' meetings, in paragraph 59 of the Contested Decision, that Friendmall by itself held a clear majority of votes in all those general meetings. The applicant thus acquired sole de facto control of Morpol just through the acquisition of only the shares that belonged to Friendmall. In addition, as the Commission found in paragraph 63 of the Contested Decision, the applicant acknowledged, in reply to the Commission's request for information of 12 February 2013, that, on the basis of the shares represented in the annual and extraordinary general meetings, Morpol was solely controlled by Friendmall. It is not necessary, therefore, to analyse in detail, in that context, the facts underlying the LGI/Telenet decision (see paragraph 77 above).

79 As the Commission noted, in paragraph 66 of the Contested Decision, the December 2012 Acquisition was closed on 18 December 2012.

80 The public offer was not submitted until 15 January 2013, by which time the applicant already had sole de facto control over Morpol.

81 While it is true that the complete takeover of Morpol by the applicant took place in several stages and involved various sellers, control was acquired by means of a single transaction and from just one seller. Control was not, therefore, acquired either from various sellers or by means of a series of transactions.

82 It follows from this that, according to the wording in respect of the second situation envisaged in Article 7(2) of Regulation No 139/2004, that situation also does not apply in the present case.

83 It must therefore be held that, according to the wording of Article 7(2) of Regulation No 139/2004, the December 2012 Acquisition is not covered by that provision.

84 The applicant's reasoning is based on the existence of a single concentration, in the sense that the December 2012 Acquisition and the subsequent public offer constitute a unity. The Court must therefore examine the merits of that argument.

(2) The applicant's arguments in relation to the alleged existence of a single concentration

(i) Preliminary observations

85 The applicant submits that the Contested Decision ignores the key legal nexus and conditionality between the December 2012 Acquisition and the public offer, and that it displays reasoning that contradicts Regulation No 139/2004, the General Court's case-law, the Commission's Consolidated Jurisdictional Notice under Regulation No 139/2004 (OJ 2008 C 95, p. 1; 'the Consolidated Jurisdictional Notice'),the Commission's previous practice in taking decisions and the practice in the Member States.

86 According to the applicant, the Commission ought to have concluded that the December 2012 Acquisition and the subsequent public offer were steps in a single concentration.

87 It should be borne in mind in that context that the applicant stated at the hearing that it was basing its reasoning on the first situation envisaged in Article 7(2) of Regulation No 139/2004. It follows that the applicant is, in essence, claiming that, despite pre-dating the launch of the public offer, the December 2012 Acquisition was part of that offer, and that the Commission therefore, according to the applicant, in essence identified an infringement consisting in the implementation of a public offer, even though it was apparent from the first

situation provided for in Article 7(2) of Regulation No 139/2004 that Article 7(1) of that regulation was not to prevent such implementation.

88 The Court must examine whether or not the December 2012 Acquisition and the public offer may be regarded as a single concentration.

89 It must be pointed out first of all that the concept of 'single concentration' did not appear in Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1), which preceded Regulation No 139/2004.

90 The Commission has relied on the concept of a 'single concentration' in a number of decisions and the General Court has endorsed that concept, notably in the judgment of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission* (T-282/02, EU:T:2006:64).

91 As regards Regulation No 139/2004, it must be noted that the concept of 'single concentration' appears only in recital 20, and not in the articles of that regulation.

92 The third sentence of recital 20 of Regulation No 139/2004 is worded as follows:

'It is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time.'

93 In practice, the Commission has relied on the concept of a single concentration in two situations.

94 In that regard, the Consolidated Jurisdictional Notice states, in paragraph 44:

'The principle that several transactions can be treated as a single concentration under the mentioned conditions only applies if the result is that control of one or more undertakings is acquired by the same person(s) or undertaking(s). First, this may be the case if a single business or undertaking is acquired via several legal transactions. Second, also the acquisition of control of several undertakings — which could constitute concentrations in themselves — can be linked in such a way that it constitutes a single concentration.'

95 There are therefore two situations: first, the acquisition of a single business or undertaking via several legal transactions and, second, the acquisition of control of several undertakings, which could constitute concentrations in themselves.

96 Furthermore, the third sentence of recital 20 of Regulation No 139/2004 mentions two possibilities for establishing the existence of a single concentration. The transactions must be closely connected in that either they are linked by condition or they take the form of a series of transactions in securities taking place within a reasonably short period of time.

97 In reply to a question on that point at the hearing, the applicant confirmed that it was relying on the first possibility mentioned in the third sentence of recital 20 of Regulation No 139/2004, relating to transactions that are linked by condition, and formal note of this was taken in the minutes of the hearing.

98 The Court must therefore examine the question whether, in the present case, the existence of a single concentration can be established on the basis of the first possibility mentioned in the third sentence of recital 20 of Regulation No 139/2004.

99 The concentration at issue in the present case clearly does not fall within the second situation as defined in paragraph 95 above, that of the acquisition of control of several undertakings.

100 It is necessary, therefore, to examine whether the concentration at issue falls within the first situation as defined in paragraph 95 above, that of the acquisition of a single undertaking via several legal transactions.

101 The applicant submits that several transactions constitute a single concentration if those transactions are interdependent in such a way that one transaction would not have been carried out without the other. It maintains, in essence, that the mere fact that several transactions are linked by condition is sufficient in order for them to be considered to form part of a single concentration. Thus, it states that the Commission should have concluded that the December 2012 Acquisition and the public offer were 'unitary in nature' both *de jure* and de facto, requiring them to be considered and assessed together as part of one concentration.

102 By contrast, the Commission stated, in paragraph 105 of the Contested Decision, that it was considered 'irrelevant that the December 2012 Acquisition and the following steps of [the applicant's] takeover of Morpol may have been seen as economically part of the same transaction by [the applicant]'. The Commission also stated, in paragraph 113 of the Contested Decision, that '[the applicant'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[ed] to be misplaced', which it explained in more detail in paragraphs 114 to 117 of the Contested Decision. The Commission did not make a finding, in the Contested Decision, as to whether or not there was any conditionality *de jure* or de facto between the December 2012 Acquisition and the subsequent public offer.

103 It is necessary, therefore, to examine the question whether, in the context of the first situation — the acquisition of a single undertaking via several legal transactions — the mere existence of conditionality *de jure* or de facto is sufficient to establish the existence of a single concentration, even where control of the target undertaking is acquired via a single private transaction before the launch of a public offer.

104 In that context, the Court must examine (i) the applicant's arguments to the effect that the Commission's position contradicts the Consolidated Jurisdictional Notice; (ii) the applicant's arguments to the effect that the Commission's position contradicts the General Court's case-law and the Commission's previous practice in taking decisions; (iii) the applicant's arguments to the effect that the Commission's position contradicts recital 20 of Regulation No 139/2004; (iv) the applicant's arguments to the effect that the Commission's position contradicts the practice in the Member States; and (v) the applicant's arguments to the effect that the Commission's interpretation of the rationale of Article 7(2) of Regulation No 139/2004 was erroneous.

(ii) The applicant's arguments to the effect that the Commission's position contradicts the Consolidated Jurisdictional Notice

105 The applicant submits that the position adopted by the Commission in the Contested Decision contradicts the Consolidated Jurisdictional Notice. According to the applicant, the Consolidated Jurisdictional Notice states, in paragraph 43, that 'two or several transactions constitute a single concentration where they are linked *de jure*, i.e., the agreements themselves are linked by *"mutual conditionality"*, or *de facto, …*'.

106 However, the applicant's argument is based on a misreading of paragraph 43 of the Consolidated Jurisdictional Notice. That paragraph is worded as follows:

'The required conditionality implies that none of the transactions would take place without the others and they therefore constitute a single operation. Such conditionality is normally demonstrated if the transactions are linked *de jure*, i.e. the agreements themselves are linked by mutual conditionality. If de facto conditionality can be satisfactorily demonstrated, it may also suffice for treating the transactions as a single concentration. This requires an economic assessment of whether each of the transactions necessarily depends on the conclusion of the others. Further indications of the interdependence of several transactions may be the statements of the parties themselves or the simultaneous conclusion of the relevant agreements. A conclusion of de facto interconditionality of several transactions will be difficult to reach in the absence of their simultaneity. A pronounced lack of simultaneity of legally inter-conditional transactions may likewise put into doubt their true interdependence.'

107 As regards the concept of 'single concentration', that paragraph contains only the statement that de facto conditionality 'may' also suffice for treating the transactions as a single concentration. It does not follow from that wording that conditionality always suffices for several transactions to be capable of being treated as a single concentration.

108 It should be noted that the first sentence of paragraph 45 of the Consolidated Jurisdictional Notice is worded as follows:

'A single concentration may therefore exist *if* the same purchaser(s) *acquire control* of a single business, i.e. a single economic entity, *via several legal transactions* if those are inter-conditional' (emphasis added).

109 That paragraph relates, as its title indicates, to the 'acquisition of a single business' (that is to say, the first situation as defined in paragraph 95 above). According to paragraph 45 of the Consolidated Jurisdictional Notice, in order for it to be possible for a single concentration to exist in the first situation, control must be acquired via several legal transactions. However, in the present case, control was acquired via the December 2012 Acquisition only, and that acquisition was closed before the launch of the public offer for the outstanding shares of Morpol.

110 The applicant relies also on paragraph 40 of the Consolidated Jurisdictional Notice, which states in the first sentence that, 'under [Regulation No 139/2004] transactions which stand or fall together according to the economic objectives pursued by the parties should also be analysed in one procedure'. It must be noted, however, that the second sentence of paragraph 40 of the Consolidated Jurisdictional Notice makes clear that, 'in these circumstances, the change of the market structure is brought about by these transactions together'. Paragraph 40 of the Consolidated Jurisdictional Notice thus relates to situations in which the change of the market structure is brought about by transactions together, and not to situations in which the change of market structure, that is to say, the acquisition of control of a single target undertaking, is effected by means of a single transaction.

111 According to the Consolidated Jurisdictional Notice, where control of a single undertaking is acquired by means of several transactions, it is possible, under certain conditions, to treat those transactions as a single concentration. The acquisition of control by means of several transactions is therefore, according to the Consolidated Jurisdictional Notice, a condition for the ability to apply the concept of a single concentration in the first situation as defined in paragraph 95 above, that of the acquisition of a single business or undertaking via several legal transactions.

112 The applicant maintains, in essence, that, since the December 2012 Acquisition and the subsequent public offer are linked by conditionality, they constitute a single concentration, and concludes from this that it acquired control over Morpol by means of several transactions.

113 However, the acquisition of a single undertaking by means of several transactions is, according to the Consolidated Jurisdictional Notice, a condition for the ability to treat several transactions as a single concentration, and not a consequence of the fact that those transactions constitute a single concentration.

114 In the present case, that condition is not fulfilled, as control of Morpol was not acquired by means of several transactions.

115 At the hearing, the applicant also relied on paragraph 38 of the Consolidated Jurisdictional Notice. It submitted that it was evident from that paragraph that the crucial question for the purpose of assessing whether several transactions constituted a single concentration was whether the 'end result' was a single concentration. According to the applicant, the 'end result' must be considered to be the acquisition of 100% of the shares in Morpol which had been the applicant's intention from the outset.

116 It should be pointed out in that regard that paragraph 38 of the Consolidated Jurisdictional Notice is in essence a summary of paragraphs 104 to 109 of the judgment of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission* (T-282/02, EU:T:2006:64), to which reference is made in footnote 43 of that notice. As is apparent from paragraph 128 below, it follows from paragraph 104 of that judgment that the relevant issue is not when the acquisition of all the shares of a target undertaking took place but when the acquisition of control took place. There is nothing in paragraph 38 of the Consolidated Jurisdictional Notice to permit the inference that, when an undertaking intends from the outset to acquire all the shares of a target undertaking, the 'end result' must be determined in relation to the acquisition of all the shares and not in relation to the acquisition of control.

117 On the contrary, the first sentence of paragraph 38 of the Consolidated Jurisdictional Notice, in common with paragraph 104 of the judgment of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission* (T-282/02, EU:T:2006:64), clearly refers to the definition of a concentration set out in Article 3(1) of Regulation No 139/2004, the result being 'control' of one or more undertakings. Furthermore, according to the third sentence of paragraph 38 of the Consolidated Jurisdictional Notice, 'it should therefore be determined whether the result leads to conferring one or more undertakings direct or indirect economic control over the activities of one or more other undertakings'. That sentence confirms that the 'result' must be defined in relation to the acquisition of control of the target undertaking.

118 In the present case, that result, namely the acquisition of control, was obtained following the December 2012 Acquisition alone.

119 Contrary to the applicant's assertion, the Contested Decision is therefore consistent with the Consolidated Jurisdictional Notice.

(iii) The applicant's arguments to the effect that the Commission's position contradicts the General Court's case-law and the Commission's previous practice in taking decisions

120 The applicant also claims that the Commission's reasoning in the Contested Decision contradicts the General Court's case-law and the Commission's previous practice in taking decisions.

121 The following must be stated in that regard.

122 The applicant relies, in the first place, on the judgment of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission* (T-282/02, EU:T:2006:64).

123 In the case that gave rise to that judgment, the question arose as to whether several groups of transactions constituted several separate concentrations or a single concentration (judgment of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission*, T-282/02, EU:T:2006:64, paragraphs 8, 45 and 91). The case thus falls within the second situation as defined in paragraph 95 above, that of the acquisition of control of several undertakings, which could constitute concentrations in themselves. It should be borne in mind in that regard that the present case does not fall within that second situation (see paragraph 99 above).

124 The Court held that it was for the Commission to ascertain whether several transactions '[were] unitary in nature, so that they constitute[d] a single concentration for the purposes of Article 3 of Regulation No 4064/89' (judgment of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission*, T-282/02, EU:T:2006:64, paragraph 105). It also noted that, 'in order to determine the unitary nature of the transactions in question, it [was] necessary, in each individual case, to ascertain whether those transactions [were] interdependent, in such a way that one transaction would not have been carried out without the other' (judgment of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission*, T-282/02, EU:T:2006:64, paragraph 107).

125 The applicant relies on paragraph 107 of the judgment of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission* (T-282/02, EU:T:2006:64), and asserts that it follows from this that several legally distinct transactions are unitary in nature and therefore constitute a single concentration under Regulation No 139/2004 if 'those transactions are interdependent, in such a way that one transaction would not have been carried out without the other'.

126 However, it cannot be inferred from the judgment of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission* (T-282/02, EU:T:2006:64) that whenever several transactions are interdependent, they necessarily constitute a single concentration.

127 It must be noted that, in paragraph 104 of the judgment of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission* (T-282/02, EU:T:2006:64), the Court held as follows:

'That general and teleological definition of a concentration — the result being control of one or more undertakings — implies that it makes no difference whether the direct or indirect *acquisitionof control* was acquired in one, two or more stages by means of one, two or more transactions, provided that the end result constitutes a single concentration' (emphasis added).

128 The applicant's argument, put forward at the hearing, that it is apparent from paragraph 104 of the judgment of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission* (T-282/02, EU:T:2006:64) that the issue is whether control is acquired at the end of a series of transactions, regardless of when that control is acquired, must be rejected. It must be pointed out in that regard that paragraph 104 of that judgment mentions not the acquisition of the target undertaking which may proceed in one or more stages, but the acquisition of control which may proceed in one or more stages. The relevant question is not, therefore, when the acquisition of all the shares of a target undertaking took place but when the acquisition of control took place. It must be noted that where, as in the present case, the acquisition of de facto sole control of a single target undertaking took place by means of an

initial transaction alone, subsequent transactions by which the acquirer obtains additional shares in that undertaking are no longer relevant for the purpose of acquiring control and thus of implementing the concentration.

129 In paragraph 108 of the judgment of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission* (T-282/02, EU:T:2006:64), the Court held that the approach of ascertaining whether the transactions were interdependent tended, in particular, 'to ensure that undertakings which notif[ied] a concentration [had] the advantage of legal certainty for all the transactions which complete[d] that operation'.

130 In this instance, it is not a case of all the transactions 'which complete [the] operation[, that is to say, the concentration]', as the concentration was completed by the December 2012 Acquisition alone.

131 Lastly, the Court noted, in paragraph 109 of the judgment of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission* (T-282/02, EU:T:2006:64), that a concentration could 'be deemed to arise even in the case of a number of formally distinct legal transactions, provided that those transactions [were] interdependent in such a way that none of them would be carried out without the others *and that the result consist[ed] in conferring on one or more undertakings* direct or indirect economic *control* over the activities of one or more other undertakings' (emphasis added).

132 That paragraph of the judgment of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission* (T-282/02, EU:T:2006:64) confirms that the result of a 'number of formally distinct legal transactions' must consist in conferring economic control over the activities of one or more undertakings. In the present case, the acquisition of control is the result of one transaction, the December 2012 Acquisition, not of several transactions.

133 It follows from the foregoing that it cannot be inferred from the judgment of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission* (T-282/02, EU:T:2006:64) that, in a situation in which control of a single target undertaking has been acquired by means of one operation, that operation must be considered to form part of a single concentration where the purchase of shares that resulted in the taking of control and a subsequent mandatory public offer are interdependent.

134 In the second place, the applicant relies on the judgment of 6 July 2010, *Aer Lingus Group* v *Commission* (T-411/07, EU:T:2010:281), and on the Commission decision at issue in the case giving rise to that judgment. It states that, in that case, Ryanair Holdings plc ('Ryanair') had acquired approximately 19% of shares of Aer Lingus Group plc and Aer Lingus Ltd (together 'Aer Lingus') and had subsequently initiated a public bid, and that the Commission, upheld in that respect by the General Court, viewed both transactions as forming a single concentration. According to the applicant, it follows from this that an acquisition of shares before a public bid and the public bid itself must be viewed as a single concentration.

135 It is apparent from paragraph 16 of the judgment of 6 July 2010, *Aer Lingus Group* v *Commission* (T-411/07, EU:T:2010:281) that, in its decision declaring the proposed concentration incompatible with the internal market, the Commission had concluded as follows:

'As Ryanair acquired the first 19% of the share capital of Aer Lingus within a period of less than 10 days before launching the public bid, and the further 6% shortly thereafter, and in view of Ryanair's explanations of the economic purpose it pursued at the time it concluded the transactions, the entire operation comprising the acquisition of shares before and during

the public bid period as well as the public bid itself is considered to constitute a single concentration within the meaning of Article 3 of the merger regulation.'

136 In that case, Ryanair had not acquired control of Aer Lingus by means of a single transaction before launching the public bid. As the Commission submits, it was the acquisition of the first 19% of the share capital of Aer Lingus, together with the acquisition of shares that Ryanair hoped to obtain by way of the public bid, which would have conferred control over Aer Lingus on Ryanair. Ultimately, Ryanair never acquired control over Aer Lingus, as the public offer lapsed following the Commission's decision to initiate the procedure provided for in Article 6(1)(c) of Regulation No 139/2004.

137 It cannot therefore be concluded from that Commission decision that the Commission considered that the acquisition of part of the capital of an undertaking by means of a private transaction and a public offer for the outstanding shares always had to be viewed as a single concentration, even where the acquisition of part of the capital by means of a private transaction conferred on the buyer sole control of the target undertaking before the launch of the public offer.

138 Nor, in the judgment of 6 July 2010, *Aer Lingus Group* v *Commission* (T-411/07, EU:T:2010:281), did the Court rule on whether the acquisition of sole control via a single private transaction and a subsequent mandatory public offer must be viewed as a single concentration.

139 The applicant submits that if the Commission had applied the reasoning in paragraph 101 of the Contested Decision to the case giving rise to the judgment of 6 July 2010, *Aer Lingus Group* v *Commission* (T-411/07, EU:T:2010:281), it would have disregarded Ryanair's purchases of shares via a private agreement prior to the launch of the public bid, particularly given that such private purchases did not result in the acquisition of control of the target undertaking.

140 That argument is not persuasive. It is precisely the fact that, in the case giving rise to the judgment of 6 July 2010, *Aer Lingus Group* v *Commission* (T-411/07, EU:T:2010:281), the private purchase did not result in the acquisition of control of the target undertaking that meant that control, had it been obtained, would have been obtained via several transactions.

141 In the third place, the applicant relies on the LGI/Telenet decision.

142 However, that case did not involve an initial transaction by which a buyer had already acquired control of a target undertaking, followed by a second transaction by which the same buyer acquired additional shares of the same target undertaking.

143 In the case that gave rise to the LGI/Telenet decision, the first transaction was the 'Telenet transaction', by which Telenet acquired UPC Belgium. That first transaction did not have to be notified, as it did not meet the thresholds (see paragraph 6 of the LGI/Telenet decision). The second transaction was the 'LGE transaction', by which LGE acquired sole control of Telenet, including UPC Belgium (see paragraph 7 of the LGI/Telenet decision). The Commission concluded that those transactions, which were linked by de facto conditionality, constituted a single concentration.

144 The facts of the case giving rise to the LGI/Telenet decision were thus completely different from those of the present case. The applicant cannot therefore properly rely on the fact that, in the case giving rise to the LGI/Telenet decision, the Commission found that there was a single concentration, or draw any conclusions from that for the present case.

145 In the fourth place, the applicant invokes the Commission decision of 20 October 2011 (Case COMP/M.6263, Aelia/Aéroports de Paris/JV). The applicant submits that, in that case, the Commission found the first two steps of the transaction to constitute a single concentration.

146 It must be noted that that case did not concern a situation in which the first transaction was sufficient to bring about a change of control of a target undertaking and in which the subsequent transactions merely consisted in the acquisition of additional shares of the same target undertaking. The fact that the Commission found, in that case, that the first two transactions constituted a single concentration does not mean, therefore, that it considered that the acquisition of sole control of a target undertaking by means of a single purchase of shares from a single seller, on the one hand, and subsequent transactions to purchase additional shares of the target undertaking, on the other, could constitute a single concentration.

147 It must be pointed out that the applicant does not identify any example from previous decisions taken by the Commission or in the case-law of the Courts of the European Union in which it has been held that a private acquisition from a single seller conferring by itself sole control of a target undertaking, on the one hand, and a subsequent public offer for the outstanding shares of that target undertaking, on the other, constituted a single concentration. More generally, the applicant has not put forward any example in which several purchases in relation to the shares of a single target undertaking have been considered to constitute a single concentration where sole control of the target undertaking was acquired by means of the initial purchase.

(iv) The applicant's arguments to the effect that the Commission's position contradicts recital 20 of Regulation No 139/2004

148 The applicant also asserts that the Commission's reasoning in the Contested Decision contradicts recital 20 of Regulation No 139/2004. It submits that recital 20 states that 'it is moreover appropriate to treat as a single concentration transactions that are *closely connected* in that they *are linked by condition* or take the form of a series of transactions in securities taking place within a reasonably short period of time'. According to the applicant, that recital confirms the legislature's intention that the Commission take account of the substantive connection between the various steps forming one transaction rather than its formal structure.

149 It should be borne in mind that the applicant is relying on the first possibility mentioned in the third sentence of recital 20 of Regulation No 139/2004, relating to transactions that are linked by condition (see paragraph 97 above).

150 It must be held that the single, very short, sentence cited in paragraph 148 above is not an exhaustive definition of the circumstances in which two transactions constitute a single concentration. It should be noted in that regard that whilst a recital of a regulation may cast light on the interpretation to be given to a legal rule, it cannot in itself constitute such a rule (see judgment of 11 June 2009, *X*, C-429/07, EU:C:2009:359, paragraph 31 and the case-law cited). The preamble to an EU act has no binding legal force (see judgment of 19 June 2014, *Karen Millen Fashions*, C-345/13, EU:C:2014:2013, paragraph 31 and the case-law cited).

151 Furthermore, if the sentence cited in paragraph 148 above were regarded as being an exhaustive definition of the circumstances in which two transactions constitute a single concentration, the effect of that would be that any transactions which are linked by condition or which take the form of a series of transactions in securities taking place within a

reasonably short period of time should be treated as a single concentration, even if those transactions, taken as a whole, are not sufficient to transfer control of the target undertaking, which would make no sense.

152 It is apparent from recital 20 of Regulation No 139/2004 that the legislature intended to endorse the concept of a single concentration. It is not, however, apparent from that recital that the legislature wished to expand the concept.

153 The applicant's arguments to the effect that the Commission's position contradicts recital 20 of Regulation No 139/2004 must therefore be rejected.

(v) The applicant's arguments to the effect that the Commission's position contradicts the practice in the Member States

154 The applicant submits that the Commission's reasoning in the Contested Decision contradicts 'the practice in the Member States'. The applicant asserts that 'national laws also reflect the principle that a private acquisition of a controlling shareholding followed by a public bid for the remaining shares must be treated as a single concentration'.

155 However, the only national law to which the applicant specifically refers is French law. It notes that, according to a letter from the French Minister for the Economy, Finance and Industry of 18 November 2002 to the board of the company Atria Capital Partenaires, relating to a concentration in the home hairdressing sector (Case C2002-39), 'the acquisition ..., pursuant to a private agreement, of a so-called "controlling" stake leading to an obligation to make a [public bid] for the remaining shares' are two steps in the same concentration.

156 The Commission contends in that regard that the French authorities were commenting on the scope of Article 6 of décret n° 2002-689 du 30 avril 2002 fixant les conditions d'application du livre IV du code de commerce relatif à la liberté des prix et de la concurrence (Decree No 2002-689 of 30 April 2002 laying down the conditions for the application of Book IV of the Commercial Code on freedom of pricing and competition (*JORF* of 3 May 2002, p. 8055) ('the Decree'), which it maintains is materially broader in scope than Article 7(2) of Regulation No 139/2004. Thus, the fact that the French authorities considered that Article 6 of the Decree applied to the acquisition of shares on a regulated market pursuant to a private agreement that triggered a public bid has no bearing, according to the Commission, on the interpretation of Article 7(2) of Regulation No 139/2004.

157 The applicant counters that, in the letter of 18 November 2002 from the French Minister for the Economy, Finance and Industry, the Minister first of all established that the initial acquisition and the mandatory public bid which followed it constituted a single concentration, and only then was Article 6 of the Decree examined.

158 The applicant goes on to argue that, according to the case-law, in particular the judgment of 7 November 2013, *Romeo* (C-313/12, EU:C:2013:718, paragraph 22), 'concepts taken from [EU] law should be interpreted uniformly, where, in regulating situations outside the scope of the [EU] measure concerned, national legislation seeks to adopt the same solutions as those adopted in that measure', and that the underlying rationale is 'to ensure that internal situations and situations governed by [EU] law are treated in the same way, *irrespective of the circumstances in which the provisions or concepts taken from [EU] law are to apply*'.

159 In that regard, it should be pointed out that paragraph 22 of the judgment of 7 November 2013, *Romeo* (C-313/12, EU:C:2013:718) must be read in the light of paragraph 23 of the same judgment, in which it is stated that 'such is the case where the provisions of [EU] law

at issue have been made directly and unconditionally applicable by national law to such situations'.

160 The applicant has not submitted anything that would permit the inference that that is the case here. It merely refers, in paragraph 19 of the reply, to certain efforts of the French legislature and the French competition authorities to align certain notions relating to the control of concentrations used in the French Commercial Code with those used in Regulation No 139/2004 and in the various notices published by the Commission. Such alignment efforts do not mean that provisions of EU law have been made directly and unconditionally applicable.

161 In any event, the national law of a Member State or its previous practice in taking decisions cannot bind the Commission or the Courts of the European Union. According to the case-law, the EU legal order does not, in principle, aim to define concepts on the basis of one or more national legal systems unless there is express provision to that effect (see judgment of 22 May 2003, *Commission* v *Germany*, C-103/01, EU:C:2003:301, paragraph 33 and the case-law cited).

162 Furthermore, it should be noted in this instance that the legal framework that exists in France diverges from that of EU law.

163 Article 6 of the Decree is worded as follows:

'Where a concentration is implemented by a purchase or exchange of securities on a regulated market, its actual implementation, within the meaning of Article L. 430-4 of the Commercial Code, shall occur when the rights attached to the securities are exercised. The absence of a ministerial decision shall not prevent the transfer of those securities.'

164 Thus, on that point, French law diverges significantly from EU law. According to EU law, the transfer of the securities is sufficient for the implementation of a concentration (see paragraph 58 above), whereas, under French law, implementation occurs only when the rights attached to the securities are exercised.

165 The effect of the stance taken in the letter of 18 November 2002 from the French Minister for the Economy, Finance and Industry is therefore not that, through the application of the concept of a single concentration, an operator is permitted to acquire control of a target undertaking without prior authorisation. It is clear from that letter that 'the suspension of effective implementation of the transaction within the meaning of Article 6 ... applies to the exercise of rights attached to securities acquired off the market as well as to the exercise of rights attached to securities which are the object of the public offer'.

166 However, in the present case, the applicant relies on the concept of 'single concentration' precisely in order to claim that it was entitled to implement the December 2012 Acquisition without prior notification or authorisation.

167 The applicant cannot, therefore, properly rely on the practice followed in France.

(vi) The applicant's arguments to the effect that the Commission's interpretation of the rationale of Article 7(2) of Regulation No 139/2004 was erroneous

168 The applicant claims that the Commission erred in concluding, in paragraph 103 of the Contested Decision, that Article 7(2) of Regulation No 139/2004 was not intended to apply to situations where establishing de facto control was straightforward.

169 It should be noted that paragraph 103 of the Contested Decision is worded as follows:

‘By contrast, Article 7(2) of [Regulation No 139/2004] 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.’

170 The Commission did not therefore claim that the mere fact that it is straightforward to establish the acquisition of control generally precludes the application of Article 7(2) of Regulation No 139/2004. In paragraph 103 of the Contested Decision, the Commission also relied on the fact that the procurement of a significant block of shares conferring de facto sole control of the target company had been carried out from just one seller.

171 It should also be noted that, in paragraph 102 of the Contested Decision, the Commission stated that Article 7(2) of Regulation No 139/2004 was intended ‘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’, and that it served 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’.

172 However, it must be noted that, in so doing, the Commission did not state that the application of Article 7(2) of Regulation No 139/2004 had to be limited to situations in which there were actual difficulties in establishing which shares acquired from a number of previous shareholders would put the acquirer in a situation of de facto control over the target company. In the Contested Decision, the Commission did not rely solely on the fact that it was straightforward to establish that the December 2012 Acquisition conferred on the applicant sole de facto control of Morpol in order to rule out the application of Article 7(2) of Regulation No 139/2004.

173 The applicant provides several examples to show that, even where Article 7(2) of Regulation No 139/2004 is applicable, it may be easy to establish the acquisition of control. However, given that the Commission did not assert, in the Contested Decision, that the mere fact that it is straightforward to establish the acquisition of control precludes the application of Article 7(2) of Regulation No 139/2004, the arguments which the applicant raises in that regard are not capable of establishing that the Commission made an error in the Contested Decision.

174 The applicant also argues that the true rationale of Article 7(2) of Regulation No 139/2004 corresponds to that which the Commission itself explicitly articulated in paragraph 66 of the explanatory memorandum in its Proposal for a Council Regulation on the control of concentrations between undertakings (COM(2002) 711 final) (OJ 2003 C 20, p. 4) (‘the Proposal for a Regulation’). That paragraph reads:

‘In line with what had been proposed in the Green Paper, it is proposed to enlarge the scope of application of the automatic derogation in Article 7(2) (ex-Article 7(3)) beyond public bids, so as to cover all acquisitions made from various sellers through the stock market, e.g. the so-called “creeping takeovers”, and thereby remove any legal uncertainty caused by Article 7(1) in relation to such acquisitions.’

175 It is apparent from that proposal that the Commission was suggesting enlarging the scope of application of Article 7(2) of Regulation No 139/2004 to ‘creeping takeovers’. However, in

the present case, the applicant's takeover of Morpol was not 'creeping'. The acquisition of control of Morpol did not proceed in several stages. On the contrary, control was acquired via a single private purchase from just one seller, which was completed before the public offer for the remaining Morpol shares was launched.

176 It should also be borne in mind that the applicant explained that it was basing its reasoning on the first situation envisaged in Article 7(2) of Regulation No 139/2004, that is to say, that linked to a public bid (see paragraphs 66 and 67 above). By contrast, it is apparent from paragraph 66 of the explanatory memorandum in the Proposal for a Regulation that the Commission proposed adding the second situation which is now provided for in Article 7(2) of Regulation No 139/2004, and which relates to a series of transactions in securities, in order to remove any legal uncertainty. In view of the fact that the concentration at issue falls, according to the applicant, within the scope of the first situation envisaged in Article 7 (2) of Regulation No 139/2004, it is not clear what argument the applicant seeks to derive from the fact that the Commission proposed adding the second situation in order to remove any legal uncertainty.

177 The applicant also relies on paragraph 134 of the Green Paper on the review of Regulation No 4064/89 (COM/2001/0745 final) ('the Green Paper'), which is worded as follows:

'"Creeping" takeovers via the stock exchange is another example of multiple transaction concentrations. Such transactions can be implemented in a number of more or less sophisticated ways, ranging from relatively straightforward direct share purchases from a number of previous shareholders to transaction structures that involve any number of financial intermediaries using a variety of financial instruments … In such scenarios, it will normally be both impractical and artificial to consider the concentration as occurring via the acquisition of the particular share or block of shares that will put the acquirer in a situation of (de facto) control over the target company. Instead, it will normally be clear from the viewpoint of all parties involved that a number of legally separate acquisitions of rights, from an economic viewpoint, form a unity, and that the intention is to acquire control over the target company …'

178 First of all, it must be observed that the purpose of a document such as the Green Paper is merely to stimulate discussion on given topics at European level.

179 It should also be noted that it is evident from the first sentence of paragraph 134 of the Green Paper that that paragraph concerns 'creeping' takeovers, which are an 'example of multiple transaction concentrations'. However, it must be borne in mind that, in the present case, the concentration was not 'creeping' and that control of Morpol was acquired via a single transaction and not by means of multiple transactions.

180 Furthermore, paragraph 134 of the Green Paper mentions 'the intention … to acquire control over the target company' in relation to 'a number of legally separate acquisitions of rights'. In the present case, only the December 2012 Acquisition was implemented with the intention of acquiring control of Morpol. Admittedly, the applicant carried out a complete takeover of Morpol and, in order for it to do so, a number of purchases were necessary, notably the December 2012 Acquisition and purchases from various Morpol shareholders in the context of the public offer. However, given that the applicant had sole control of Morpol once the December 2012 Acquisition was implemented, the subsequent purchases were not carried out with the intention of acquiring control over the target company.

181 It must also be noted that the Green Paper correctly states that, 'in such scenarios, it will normally be both impractical and artificial to consider the concentration as occurring via the acquisition of the particular share or block of shares that will put the acquirer in a situation

of (de facto) control over the target company'. However, that statement relates only to the scenario of a 'creeping' takeover. Indeed, where several acquisitions of shares or blocks of shares are necessary in order to acquire control of the target company, it would be artificial to regard the purchase of the 'decisive' share or package of shares in insolation as a concentration.

182 Nevertheless, in a situation such as that of the present case, in which sole control of the only target undertaking was acquired from one seller by means of a single initial transaction, it is certainly not artificial to regard that transaction as constituting, by itself, a concentration.

183 The applicant emphasises, moreover, that the objective of extending the derogation provided for in Article 7(2) of Regulation No 139/2004 was to remove any legal uncertainty (see paragraph 174 above). According to the applicant, it is apparent from paragraph 134 of the Green Paper that Article 7(2) of Regulation No 139/2004 must apply even to a straightforward transaction structure in order to facilitate public bids and creeping takeovers.

184 In that regard, it should be noted that Article 7(2) of Regulation No 139/2004 can indeed apply even to a case of a straightforward transaction structure. However, in the present case, it is not the straightforwardness of the transaction as such that precludes Article 7(2) of Regulation No 139/2004 from being applicable, but the fact that control had already been acquired from a single seller by means of the initial transaction.

185 It must also be pointed out that, in accordance with Article 5 of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (OJ 2004 L 142, p. 12), Member States are to ensure that a person who has acquired control of a company by means of an acquisition of securities is required to make a bid as a means of protecting the minority shareholders of that company. That bid must be addressed to all the holders of those securities for all their holdings. It follows from this that the obligation of an undertaking which has acquired securities conferring on it control of a target company via a private acquisition to submit a public bid in respect of the remainder of the target company's shares concerns all the Member States of the European Union.

186 The effect of following the applicant's reasoning, according to which the acquisition of control by means of a single private transaction followed by a mandatory public offer constitutes a single concentration, would be that, in the case of concentrations involving listed companies located in Member States, the private acquisition of securities conferring control would always be covered by the exception provided for in Article 7(2) of Regulation No 139/2004. There is always an obligation to submit a public bid which, according to the applicant's reasoning, is part of a single concentration encompassing the purchase conferring control as well as the public offer. The effect of that would be to overextend the scope of application of the exception provided for in Article 7(2) of Regulation No 139/2004.

187 As regards the applicant's argument that the rationale of Article 7(2) of Regulation No 139/2004 is to facilitate public bids and creeping takeovers, in the first place, it should be borne in mind that the Commission did not impose a fine on the applicant because of the implementation of the public offer but because of the implementation of the December 2012 Acquisition. In the second place, it should be borne in mind that, as stated in paragraph 175 above, the takeover was not 'creeping', in this case.

188 It does not appear that the stance taken by the Commission in the Contested Decision is contrary to the principle of legal certainty. It will be recalled that the situation in the present case is not covered by the wording of Article 7(2) of Regulation No 139/2004 (see paragraphs 68 to 83 above). The fact that the Commission did not extend the scope of

application of the concept of ‘single concentration’ to cover situations in which control of a single target undertaking is acquired by means of an initial transaction does not conflict with the principle of legal certainty.

189 Even if one refers to the Green Paper in order to determine the rationale of Article 7(2) of Regulation No 139/2004, as suggested by the applicant, it does not appear to be contrary to the rationale of that provision to exclude from its scope of application a situation in which an undertaking acquires sole control of the single target undertaking by means of an initial private purchase of shares from a single seller, even if that is followed by a mandatory public offer.

190 The applicant also claims that the Commission’s interpretation, in paragraphs 102 and 103 of the Contested Decision, of the rationale of Article 7(2) of Regulation No 139/2004 is incompatible with the General Court’s interpretation in the judgment of 6 July 2010, *Aer Lingus Group* v *Commission* (T-411/07, EU:T:2010:281, paragraph 83). The applicant notes that, in that judgment, the General Court ‘upheld the Commission’s approach of applying Article 7(2) of [Regulation No 139/2004] to a purchase of a minority stake of 19% in Aer Lingus made prior to a launch of a public bid, which it considered to be unitary in nature and to constitute one single concentration, even though it was presumably straightforward to conclude that such minority stake did *not* confer control’.

191 In that regard, it should be noted that, in the judgment of 6 July 2010, *Aer Lingus Group* v *Commission* (T-411/07, EU:T:2010:281, paragraph 83), the Court stated that ‘the acquisition of a shareholding which does not, as such, confer control for the purposes of Article 3 of [Regulation No 139/2004] may fall within the scope of Article 7’. What is apparent from that judgment is merely that it is possible that the acquisition of a minority stake which does not confer control of the target undertaking, followed by a public bid, may form part of a single concentration which falls within the scope of Article 7(2) of Regulation No 139/2004. The Court was not, however, required to rule on a situation in which the first transaction had already conferred control over the target undertaking (see paragraph 138 above).

192 It must be held that, in the case of an acquisition of a minority stake, which does not confer control over the target undertaking and which is followed by a public bid, the two transactions may be implemented with the intention of acquiring control of the target undertaking. However, since, in the present case, the first transaction had already conferred sole de facto control of Morpol on the applicant, it cannot be accepted that the public bid was launched with the intention of acquiring control of Morpol (see paragraph 180 above).

193 The applicant’s arguments based on the judgment of 6 July 2010, *Aer Lingus Group* v *Commission* (T-411/07, EU:T:2010:281) must therefore be rejected.

194 The applicant further claims that Article 7(2) of Regulation No 139/2004 must be interpreted in its favour because of the criminal nature of the fine, within the meaning of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (‘the ECHR’). In its view, the Contested Decision contradicts the principle that the criminal law must not be extensively construed to an accused’s detriment. The interpretation of Article 7(2) of Regulation No 139/2004 in the Contested Decision involved the use of such broad notions and such vague criteria that the criminal provision in question was not of the quality required under the ECHR in terms of its clarity and the foreseeability of its effects.

195 The Commission contends that, according to Article 14(4) of Regulation No 139/2004, fines imposed under that article are not to be criminal in nature.

196 It should be stated that, even if it were to be assumed that the penalties provided for in Article 14(2) of Regulation No 139/2004 are of a criminal law nature, the applicant's arguments would have to be rejected.

197 In the first place, the applicant's argument that the provision in question was not of the quality required under the ECHR in terms of its clarity and the foreseeability of its effects concerns, in essence, the alleged breach of the principle *nullum crimen, nulla poena sine lege*, put forward by the applicant in the context of the first part of the fourth plea in law, which will be examined in paragraphs 376 to 394 below.

198 In the second place, as regards the applicant's argument that the Contested Decision contradicts the principle that the criminal law must not be extensively construed to an accused's detriment, the Court notes the following.

199 As the Commission correctly states, the applicant was not fined for having infringed Article 7(2) of Regulation No 139/2004. Rather, it was fined, in accordance with Article 14 (2)(a) and (b) of Regulation No 139/2004, for having infringed Article 4(1) and Article 7(1) of Regulation No 139/2004.

200 It should also be borne in mind that Article 7(2) of Regulation No 139/2004 lays down an exception to Article 7(1) of Regulation No 139/2004.

201 The Commission rightly emphasises that it is settled case-law that exceptions must be interpreted narrowly (see, to that effect, judgments of 17 June 2010, *Commission* v *France*, C-492/08, EU:C:2010:348, paragraph 35, and of 23 October 2014, *flyLAL-Lithuanian Airlines*, C-302/13, EU:C:2014:2319, paragraph 27). As regards competition law specifically, and notably the interpretation of the provisions of block exemption regulations, the Court confirmed, in paragraph 48 of the judgment of 8 October 1996, *Compagnie maritime belge transports and Others* v *Commission* (T-24/93 to T-26/93 and T-28/93, EU:T:1996:139), that, having regard to the general principle of the prohibition of agreements restricting competition, provisions derogating therefrom in an exempting regulation had, by their nature, to be strictly interpreted. The mere fact that the Commission can impose severe penalties for infringement of a provision of competition law does not, therefore, call in question the fact that provisions derogating therefrom must be strictly interpreted. Furthermore, in the judgment of 22 March 1984, *Paterson and Others* (90/83, EU:C:1984:123), which concerned questions referred for a preliminary ruling in criminal proceedings (see paragraph 2 of that judgment), the Court of Justice held, in paragraph 16, that an article which envisages derogations from the general rules contained in a regulation cannot be interpreted so as to extend its effects further than is necessary for the protection of the interests which it is intended to safeguard. That judgment confirms that the principle that exceptions must be interpreted narrowly applies even in criminal cases.

202 In any event, it should be noted that, according to the wording of Article 7(2) of Regulation No 139/2004, that provision is not applicable to situations such as those at issue in the present case (see paragraphs 68 to 83 above).

203 The applicant is endeavouring, in essence, to expand the scope of application of the concept of 'single concentration' in order to expand the scope of application of the exception provided for in Article 7(2) of Regulation No 139/2004.

204 Even if the fines imposed under Article 14 of Regulation No 139/2004 were of a criminal law nature, it cannot be concluded in the present case that the Commission applied the criminal law extensively to the accused's detriment. The Commission merely refused to extend the scope of application of the exception provided for in Article 7(2) of Regulation

No 139/2004 beyond its wording and to apply the concept of ‘single concentration’ to a situation in which sole control of the single target undertaking was acquired by means of a single private purchase from one seller, prior to the launch of a mandatory public bid.

205 The applicant’s argument must, therefore, be rejected.

206 The applicant further claims that the Contested Decision is incompatible with the purpose of Article 7(2) of Regulation No 139/2004, ‘which is to facilitate takeovers and ensure the liquidity of stock markets’. According to the applicant, the Contested Decision negatively impacts only companies that have a corporate governance model that is typically used by companies based in continental Europe and Scandinavia, thereby de facto discriminating between companies established there and companies based in the United Kingdom and the United States, by making it more difficult to acquire, and hence hindering investment in, companies based in continental Europe and Scandinavia, and detrimentally impacting capital markets and companies based there. The reason for this, it claims, is that companies in continental Europe and Scandinavia are typically characterised by large and concentrated shareholders as opposed to United Kingdom and United States companies, which tend to have a dispersed shareholding structure. The refusal, in the Contested Decision, to apply the public bid exemption under Article 7(2) of Regulation No 139/2004 to an initial acquisition of a controlling stake as well as to the ensuing mandatory public bid is relevant only for companies that have ‘concentrated’ shareholders.

207 It should be noted that, in claiming discrimination between companies established in continental Europe and Scandinavia and companies established in the United Kingdom and the United States, the applicant relies, in essence, on the principle of equal treatment. According to settled case-law, the general principle of equal treatment and non-discrimination requires that comparable situations are not treated differently unless differentiation is objectively justified (see judgment of 11 July 2007, *Centeno Mediavilla and Others* v *Commission*, T-58/05, EU:T:2007:218, paragraph 75 and the case-law cited).

208 In the present case, it must be stated that the two situations — on the one hand, the acquisition of control of a single target undertaking by means of a single purchase of shares from a single seller, followed by a mandatory public bid, and, on the other, the acquisition of control by means of a public bid or from various sellers in a series of transactions — are not comparable, and there is therefore nothing to preclude a difference in treatment. In a situation in which sole control of a single target undertaking is acquired by means of the initial transaction alone, it is certainly not artificial to regard that transaction as constituting, by itself, a concentration (see paragraph 182 above). The mere fact that the first situation may be more common in continental Europe and Scandinavia than in the United Kingdom or United States does not mean that those situations must be treated identically.

209 Moreover, the mere fact that Article 7(2) of Regulation No 139/2004 is intended to facilitate takeovers and ensure the liquidity of stock markets, as the applicant submits, does not mean that it is necessary to extend the scope of that provision beyond its wording in order to further facilitate takeovers.

210 In the Contested Decision and in the defence, the Commission indicates several ways in which the applicant could have implemented the concentration at issue without infringing Article 4(1) and Article 7(1) of Regulation No 139/2004. Thus, it states, in paragraph 106 of the Contested Decision, that the applicant could have launched the public offer without having acquired Mr M.’s shares beforehand (first option), and that the applicant could have signed an agreement with Mr M. for the purchase of shares before the launch of the public

offer, postponing closing, however, until clearance from the competition authorities (second option).

211 The applicant submits in this regard that those options could harm the target company's minority shareholders, facilitate market abuse and frustrate the aims of Directive 2004/25. With regard to the first option, it emphasises that the Commission's policy actively seeks to prevent the acquirer from replacing a mandatory bid structure with a voluntary bid because that would allow offerors to avoid having to launch a mandatory bid for an equitable price. Furthermore, in the case of Morpol, the launch of a voluntary bid would not have been practically feasible because the acquisition of Morpol was commercially linked with the acquisition of auxiliary companies controlled by Mr M. and those legal entities could not have been transferred as part of a voluntary bid. With regard to the second option, the applicant submits that it would create a floor price that could be manipulated and artificially increased contrary to the objective of Directive 2004/25, which seeks to prevent the risk of market abuse.

212 It must be noted in that regard that it was for the applicant to structure the concentration in such a way as would, in its view, best meet its needs, while complying with its obligations under Article 4(1) and Article 7(1) of Regulation No 139/2004. As the Commission states, it does not in any way recommend or prescribe a particular way in which the applicant must structure its transaction.

213 In addition, as regards the second option set out in paragraph 210 above, the following should be noted in relation to the applicant's argument concerning a risk of manipulation of the share price.

214 The approach taken in the Contested Decision does not give rise to any difficulty as regards the protection of the rights of minority shareholders. As the applicant points out, under Norwegian takeover rules, the offeror must pay for the remaining shares at a price that is the higher of: (i) the price that the offeror has paid or agreed in a six-month period prior to the time the mandatory bid is triggered (that is to say, the price agreed in the SPA); or (ii) the market price existing at the time the mandatory bid obligation is triggered. Minority shareholders can certainly therefore obtain an equitable price for their shares.

215 The applicant submits however that, should Article 7(2) of Regulation No 139/2004 not be applicable, the offeror would have to postpone the public bid until he receives the Commission's merger clearance, when the floor price may have increased as a result of the quoted market price exceeding the price agreed in the SPA. The floor price is thus prone to manipulation and inflation, potentially requiring the offeror to purchase the remaining shares at a price exceeding the SPA price, that is to say, the equitable price.

216 In that regard, it must be noted that there may, in principle, be a risk of upward manipulation of the share price. However, if the applicant had considered that there was such a risk in the present case, it could have asked the Commission to grant it a derogation under Article 7(3) of Regulation No 139/2004. According to that provision, the Commission may, on request, grant a derogation from the obligations imposed in Article 7(1) and (2) of Regulation No 139/2004.

217 The Commission states in that regard that it has previously granted derogations under Article 7(3) of Regulation No 139/2004 precisely in situations where a delay in launching a public bid could have resulted in market manipulation. It presents as an example its decision of 20 January 2005 (Case COMP/M.3709 — Orkla/Elkem) ('the Orkla/Elkem decision'), taken pursuant to Article 7(3) of Regulation No 139/2004. In the case that gave rise to that decision, Orkla, which already held 39.85% of Elkem's shares, entered into individual

agreements with three other Elkem shareholders. Pursuant to those agreements, Orkla was to acquire sole control of Elkem. Implementation of the transaction would have obliged Orkla to make a mandatory public offer for Elkem's remaining shares under Norwegian law.

218 Prior to implementing each of those agreements, Orkla applied to the Commission for a derogation pursuant to Article 7(3) of Regulation No 139/2004. It emphasised that, due to the very limited free float of Elkem shares, it would not be very difficult to push the market price of those shares to a higher level. Within six days of receiving Orkla's request, the Commission granted a derogation, stating that 'the suspension of the operation may have the effect on Orkla that, when complying [with] the applicable Norwegian securities legislation, Orkla would incur a considerable risk [of having] to make an offer for the outstanding shares in Elkem for a considerably higher price after the operation has been declared compatible with the [internal] market'. The Commission conducted a balancing exercise in respect of the interests and noted that the suspension obligation could seriously affect the financial interests of Orkla, the transaction did not seem to pose a threat to competition and a derogation did not affect any legitimate right of any third party.

219 The case that gave rise to the Orkla/Elkem decision shows, therefore, that the possibility of applying for derogations under Article 7(3) of Regulation No 139/2004 represents an efficient means of responding to situations in which there is a risk of share price manipulation.

220 The applicant submits, in essence, that the (theoretical) existence of risks of upward share price manipulation obliges the Commission to interpret Article 7(2) of Regulation No 139/2004 broadly. However, that argument must be rejected, as Article 7(3) of Regulation No 139/2004 enables a satisfactory response to be given in situations in which there is such a risk.

221 Article 7(3) of Regulation No 139/2004 provides for the possibility that the Commission may derogate from the obligation of suspension in a particular case, after weighing the interests at issue. Such a derogation in a particular case is a more appropriate tool for responding to any risks of manipulation that may exist than a broad application of Article 7 (2) of Regulation No 139/2004, which would involve the exception being applied automatically without any opportunity for a weighing-up of interests.

222 At the hearing, the applicant submitted that, in the Orkla/Elkem decision, the Commission recognised the need for speed and the need to avoid market manipulation in circumstances similar to those of the present case.

223 However, the fact that, in that case, the Commission took into account the need for speed and the need to avoid market manipulation in granting a derogation pursuant to Article 7(3) of Regulation No 139/2004 does not mean that Article 7(2) of Regulation No 139/2004 must be interpreted broadly.

224 Lastly, the applicant argued at the hearing that, under Article 7(3) of Regulation No 4064/89, which preceded Article 7(2) of Regulation No 139/2004, it was necessary to notify a public offer within the time limit laid down by Article 4(1) of Regulation No 4064/89, that is within one week, and that, under Article 7(2) of Regulation No 139/2004, the requirement is only that the concentration be notified to the Commission 'without delay'. According to the applicant, that change attests to an intention on the part of the legislature to prioritise the public takeover process over the merger control process.

225 In that regard, it should be noted that Article 4(1) of Regulation No 139/2004 no longer prescribes, for the notification of concentrations, the time limit of one week after conclusion

of the agreement or announcement of the public bid that was provided for in Article 4(1) of Regulation No 4064/89.

226 The reasons for the removal of that time limit are apparent from paragraphs 61 to 64 of the explanatory memorandum in the Proposal for a Regulation, in which the Commission stated, inter alia, that 'practice over the last 12 years [had] shown that a strict enforcement of the one-week deadline for submitting notifications … [was] neither realistic nor necessary', and that, 'given the suspensive effect of Article 7(1), it [was] in the undertakings' own commercial interest to obtain regulatory clearance from the Commission as soon as possible, so as to be able to complete their concentration'.

227 Contrary to the applicant's submission, the reasons for the removal of that time limit are not, therefore, attributable to an intention on the part of the legislature to prioritise the public takeover process over the merger control process.

228 The applicant's arguments, by which it seeks to establish that the Commission's interpretation of Article 7(2) of Regulation No 139/2004 is contrary to the rationale of that provision, must therefore be rejected.

229 In the light of the foregoing, the Court must reject the applicant's argument that the December 2012 Acquisition and the public offer constituted a single concentration. The concept of a single concentration is not intended to apply in a situation in which sole de facto control of the only target company is acquired from one seller by means of a single initial private transaction, even where it is followed by a mandatory public offer.

230 It is not necessary, therefore, to examine the parties' arguments as to whether or not there is any conditionality *de jure* or de facto between the December 2012 Acquisition and the public offer.

2. The fourth part of the first plea in law, alleging that the applicant complied with Article 7(2) of Regulation No 139/2004

231 In the context of the fourth part of the first plea, the applicant submits that it complied with the conditions laid down in Article 7(2)(a) and (b) of Regulation No 139/2004 by notifying the concentration to the Commission without delay and by not exercising its voting rights in Morpol prior to the Commission's clearance of the concentration.

232 Suffice it to note in that regard that Article 7(2) of Regulation No 139/2004 is not applicable in the present case, as is apparent from the examination of the first three parts of the first plea. The question whether the applicant complied with the conditions laid down in Article 7(2)(a) and (b) of Regulation No 139/2004 is therefore irrelevant.

233 It follows from all of the foregoing that the first plea in law must be rejected in its entirety.

B. Second plea in law, alleging a manifest error of law and fact in that the Contested Decision concludes that the applicant was negligent

234 The applicant maintains that the Commission was wrong to consider, in the Contested Decision, that the applicant was negligent. In its submission, no normally informed and sufficiently attentive company could reasonably have foreseen that the December 2012 Acquisition had to be notified and that the corresponding shareholding could not be transferred to the applicant until clearance. The applicant claims that its interpretation of Article 7(2) of Regulation No 139/2004 was reasonable, which is confirmed by the legal advice provided by the applicant's external legal counsel.

235 The Commission disputes the applicant's arguments.

236 It must be noted that, according to Article 14(2) of Regulation No 139/2004, the Commission may impose fines only for infringements which have been committed 'either intentionally or negligently'.

237 In relation to the question whether an infringement has been committed intentionally or negligently, it follows from the case-law that that condition is satisfied where the undertaking concerned cannot be unaware of the anticompetitive nature of its conduct, whether or not it is aware that it is infringing the competition rules (see, with regard to infringements liable to be punished by a fine in accordance with the first subparagraph of Article 23(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1), judgment of 18 June 2013, *Schenker & Co. and Others*, C-681/11, EU:C:2013:404, paragraph 37 and the case-law cited).

238 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 anticompetitive nature of that conduct (see, by analogy, judgment of 18 June 2013, *Schenker & Co. and Others*, C-681/11, EU:C:2013:404, paragraph 38). An undertaking may not escape imposition of a fine where the infringement of the competition rules has resulted from that undertaking erring as to the lawfulness of its conduct on account of the terms of legal advice given by a lawyer (see, by analogy, judgment of 18 June 2013, *Schenker & Co. and Others*, C-681/11, EU:C:2013:404, paragraph 43).

239 The Court must examine in the light of those considerations whether the Commission was right to conclude, in the Contested Decision, that the applicant was negligent in putting into effect the December 2012 Acquisition in breach of Article 4(1) and Article 7(1) of Regulation No 139/2004.

240 It should be noted, first of all, that the Commission took into account the existence of legal advice when it found, in paragraph 142 of the Contested Decision, that the applicant had committed the infringements negligently, not intentionally.

241 In paragraphs 144 to 148 of the Contested Decision, the Commission based its conclusion that the applicant had been negligent on the following factors:

– the applicant is a large European company with significant previous experience in merger proceedings and notification to the Commission and national competition authorities;

– the applicant was or should have been aware that, by acquiring a 48.5% stake in Morpol, it was acquiring de facto control over it;

– the applicant had not proved that it had received an assessment from its lawyers, as regards the applicability of Article 7(2) of Regulation No 139/2004, before 18 December 2012, the date of closing of the December 2012 Acquisition;

– the existence of a precedent on the interpretation of Article 7(2) of Regulation No 139/2004 (Commission Decision of 21 September 2007 (Case COMP/M.4730 — Yara/Kemira GrowHow) ('the Yara/Kemira GrowHow decision')) should have led the applicant to conclude that the implementation of the December 2012 Acquisition was likely to result in the infringement of Article 4(1) and Article 7(1) of Regulation

No 139/2004, or at the very least that the applicability of Article 7(2) to the present case was not straightforward, and the applicant could and should have approached the Commission through the process for consultation on the applicability of Article 7(2) of Regulation No 139/2004 or by asking for a derogation from the standstill obligation under Article 7(3) of Regulation No 139/2004;

– the applicant had already been fined at national level for early implementation of a concentration in the context of its acquisition of the company Fjord Seafood, and a high level of diligence was thus to be expected of the applicant.

242 The applicant disputes the relevance of all those points.

243 It must be held that, in the present case, the applicant was easily able to foresee that, by acquiring 48.5% of the shares in Morpol, it was acquiring sole de facto control of that company. The applicant does not claim to have been unaware of certain facts and that it was therefore not possible for it to understand that, by putting into effect the December 2012 Acquisition, it was implementing a concentration with a Community dimension.

244 It is, moreover, apparent from the stock exchange announcement on 17 December 2012, mentioned in paragraph 6 above, that the applicant was aware of the fact that the purchase of Morpol constituted a concentration which had a Community dimension. In it, the applicant stated the following:

‘The purchase will most likely trigger the requirement for a filing to the EU competition authorities, in which case Marine Harvest will not be eligible to vote for its Morpol shares until the transaction has been cleared.’

245 The mere fact that the applicant wrongly regarded its obligations as being limited to not exercising its voting rights prior to clearance does not call in question the fact that it was fully aware that this was a concentration with a Community dimension.

246 It must be borne in mind that it is clear from the wording of Article 4(1) and Article 7(1) of Regulation No 139/2004 that a concentration with a Community dimension must be notified prior to its implementation and that it is not to be implemented without prior notification and clearance.

247 The applicant could not have been unaware of those provisions and, moreover, does not claim to have been unaware of them.

248 It should also be borne in mind that, according to the wording of Article 7(2) of Regulation No 139/2004, that provision is not applicable to situations such as those at issue in the present case (see paragraphs 68 to 83 above).

249 The applicant asserts that its interpretation of Article 7(2) of Regulation No 139/2004 was at least reasonable, and that it did not, therefore, act negligently.

250 It should be recalled that, by the reasoning applied in the context of the first plea, the applicant is endeavouring, in essence, to expand the scope of application of the concept of ‘single concentration’ in order to expand the scope of application of the exception provided for in Article 7(2) of Regulation No 139/2004 (see paragraph 203 above). It should also be borne in mind that the applicant does not identify any example in the Commission’s previous practice in taking decisions or in the case-law of the Courts of the European Union in which several purchases in relation to the shares of a single target undertaking have been

considered to constitute a single concentration, where sole control of the target undertaking was acquired by means of the initial purchase (see paragraph 147 above).

251 By contrast, there was a Commission decision, the Yara/Kemira GrowHow decision, in which the Commission had established, in paragraphs 6 and 7, the following:

> ‘6. On 24 May 2007 Yara acquired a 30.05% shareholding in GrowHow from the State of Finland. Yara considers that this acquisition represents the first step of the public bid for GrowHow that was announced on 18 July 2007 and as such would be covered by the exception of Article 7(2) of [Regulation No 139/2004] from the prohibition of implementing a concentration. Yara states that pending the Commission’s examination of the transaction it will not exercise the voting rights conferred with the 30.05% shareholding. The information provided by the parties indicates that Yara acquired control of GrowHow by the purchase of the stake of 30.05%.
>
> 7. Article 7(2) [of Regulation No 139/2004] applies to acquisitions of packages of shares from “various sellers”, the so-called “creeping bids”. The Commission considers that the exemption of Article 7(2) [of Regulation No 139/2004] is therefore not applicable in a case where a controlling stake is acquired by the purchaser of a single package of shares from one seller. The Commission therefore takes the view that an infringement of the standstill obligation in Article 7(1) [of Regulation No 139/2004] and of the notification requirement in Article 4(1) [of that regulation] cannot be excluded in the present case and may examine in a separate procedure whether a sanction under Article 14(2) [of Regulation No 139/2004] is appropriate.’

252 It is true that, as the applicant submits, the finding that an infringement of Article 4(1) and Article 7(1) of Regulation No 139/2004 could not be excluded is an *obiter dictum* in the Yara/Kemira GrowHow decision, which is a decision authorising a concentration subject to compliance with certain commitments. Ultimately, the Commission did not initiate a procedure for the imposition of a fine pursuant to Article 14(2) of Regulation No 139/2004. The applicant correctly states that such an *obiter dictum* has no binding legal effects and could not be subject to review by the Courts of the European Union.

253 The fact remains, however, that such an *obiter dictum* is capable of giving operators an indication as to the Commission’s interpretation of Article 7(2) of Regulation No 139/2004. The existence of the Yara/Kemira GrowHow decision, which concerned a situation comparable to that of the present case and in which the Commission had stated that it considered the exception provided for in Article 7(2) of Regulation No 139/2004 to be inapplicable, does make it more difficult for undertakings to establish that an error made in interpreting Article 7(2) of Regulation No 139/2004 did not constitute negligent conduct.

254 Admittedly, as the applicant submits in connection with the fourth plea, the Yara/Kemira GrowHow decision was not published in the *Official Journal of the European Union*,and the full version is available only in English.

255 However, a notice was published in the *Official Journal of the European Union* (OJ 2007 C 245, p. 7) in all official languages including an internet link giving access to the full decision in English. The Commission also states, correctly, that the Yara/Kemira GrowHow decision, and in particular the interpretation of Article 7(2) of Regulation No 139/2004 in that decision, has been quoted in practitioners’ works. A diligent operator could therefore have been aware of that decision and of the Commission’s interpretation of Article 7(2) of Regulation No 139/2004.

256 It is also appropriate to take into consideration the fact that the applicant could have consulted the Commission on the question of the interpretation of Article 7(2) of Regulation No 139/2004. If it is in any doubt as to its obligations under Regulation No 139/2004, the appropriate course of conduct for an undertaking is to contact the Commission (see, to that effect, judgment of 12 December 2012, *Electrabel* v *Commission*, T-332/09, EU:T:2012:672, paragraph 255). The applicant does not claim to have been unaware of that possibility.

257 The Commission was also entitled to take into consideration, as it did in paragraph 144 of the Contested Decision, the fact that the applicant was a large European company with significant experience in merger proceedings and notification to the Commission and national competition authorities. Thus, it is apparent from paragraph 252 of the judgment of 12 December 2012, *Electrabel* v *Commission* (T-332/09, EU:T:2012:672) that the experience of an undertaking in the field of concentrations and in notification procedures is a relevant factor in assessing negligence.

258 The Commission was also entitled to take into consideration, as it did in paragraph 148 of the Contested Decision, the fact that the applicant (at that time, Pan Fish) had already been fined at national level for the early implementation of a concentration in the context of its acquisition of the company Fjord Seafood. It is true that the decision of the French Minister for the Economy of 8 December 2007 (Pan Fish/Fjord Seafood case) ('the Pan Fish/Fjord Seafood decision') did not concern the interpretation of Article 7(2) of Regulation No 139/2004. Nevertheless, particular diligence must be expected of a large European company which has already been fined, albeit at national level, for the early implementation of a concentration.

259 In the present case, it must be held that the applicant acted negligently by interpreting Article 7(2) of Regulation No 139/2004 in a way that is covered neither by its wording nor by the Commission's previous practice in taking decisions or the case-law of the Courts of the European Union, and which is not consistent with what the Commission found, albeit in an *obiter dictum*, in the Yara/Kemira GrowHow decision, and by doing so without first contacting the Commission in order to determine whether its interpretation was correct. In so doing, the applicant acted at its own risk and cannot legitimately rely on the allegedly 'reasonable' nature of its interpretation.

260 The Court must therefore reject the applicant's argument that 'no normally informed and sufficiently attentive company could reasonably have foreseen that the December 2012 Acquisition needed to be notified and the corresponding shareholding not transferred to [the applicant] until clearance'.

261 As regards the applicant's arguments based on the assessment of its external legal counsel, the Court notes the following.

262 First, the applicant asserts that its external legal counsel, who are highly experienced in matters of competition law, were agreed that the December 2012 Acquisition and the public offer formed a single concentration falling within the scope of Article 7(2) of Regulation No 139/2004, which confirms the reasonableness of its interpretation. Second, it states that its experience in connection with the transaction that gave rise to the Pan Fish/Fjord Seafood decision is one of the factors that led it to seek and obtain assurances on several occasions that the acquisition of a 48.5% stake in Morpol would fall within the scope of Article 7(2) of Regulation No 139/2004. Lastly, the applicant states that the Commission wrongly inferred, in paragraph 146 of the Contested Decision, that the applicant had not sought or received

any advice on the scope of Article 7(2) of Regulation No 139/2004 prior to 18 December 2012.

263 It is accordingly necessary to examine the content of the advice given by the applicant's external legal counsel.

264 The applicant relies on an email which its Norwegian legal counsel sent to it on 29 November 2012. This stated as follows:

'6. Competition

The acquisition of Friendmall's shares in [Morpol] will trigger notification to the relevant competition authorities.

We lack an overview of the turnover of the two companies divided between jurisdictions and other information necessary to make an analysis of how and where such notice must be given.

We strongly recommend that you put all efforts to establish this as a priority as it will enable us to draft and submit notifications relatively quickly after a possible purchase date.

Our experience shows that getting the necessary approvals of such purchases will take time. It cannot be excluded that you may be ordered to sell parts of the business in order to obtain necessary approval in certain jurisdictions. You should, as soon as you know where this may be necessary, draw up strategies for how to deal with such objections.

As previously mentioned, [Marine Harvest] will not be able to exercise any shareholder rights in [Morpol] arising from the acquired shares until you have received all competition law approvals.'

265 It is clear from that email that the applicant's Norwegian legal counsel did not have the necessary information in relation to the turnover of the undertakings concerned and that he was, as a result, not in a position to analyse which competition authorities were required to be notified of the transaction. The applicant could not expect its Norwegian legal counsel to have carried out an exhaustive analysis of the implications of the concentration from the aspect of EU law before he had the information enabling him to address the issue as to whether this was a concentration with a Community dimension.

266 It must also be pointed out that the few paragraphs of that email that are concerned with competition law, as cited in paragraph 264 above, cannot be considered a proper analysis of the applicant's notification obligations and possible standstill obligations. The applicant could not infer *a contrario* merely from the sentence: 'as previously mentioned, [Marine Harvest] will not be able to exercise any shareholder rights in [Morpol] arising from the acquired shares until you have received all competition law approvals' that it was entitled to complete the December 2012 Acquisition without prior notification or authorisation.

267 The existence of that email from its Norwegian legal counsel can in no way absolve the applicant of responsibility.

268 The same legal counsel sent an email, on 14 December 2012 at 10.02, to legal counsel of F., a firm of lawyers, in the following terms:

'Negotiations on Project [Morpol] are now almost concluded and we are reasonably sure that agreement will be reached during the day and the [SPA] signed late in the afternoon.

The latest draft is attached for your review and comments from a competition law point of view.

Not unusually, no one has focused much on this particular aspect up until now. We have also reached a stage where I would very much prefer not to make any further changes to the text as this easily may distract the parties.

Can you therefore take a look at this and only revert with such comments or proposed changes as you find absolutely necessary in relation to the EU competition clearance process?

Naturally, this is a bit urgent and I would thus greatly appreciate if you could give it your immediate attention.'

269 This email clearly shows that the applicant did not behave as a diligent operator would have done. It is apparent from this email that 'no one [had] focused much' on the competition law aspect until the day on which that email was sent, that is to say, the very day on which the SPA was signed. A diligent operator would have focused on the implications of the transaction from a competition law point of view at a much earlier stage.

270 When asked about this at the hearing, the applicant stated that the author of the email of 14 December 2012 was also the author of the email of 29 November 2012 and that the latter email established that he had already considered competition law at that stage. It also stated that its Norwegian legal counsel was a corporate law specialist, not an antitrust law specialist,and that he had sought specialist advice from law firm F. on 14 December 2012.

271 It should be borne in mind that the email of 29 November 2012 does not contain a proper analysis of the applicant's notification obligations and possible standstill obligations (see paragraph 266 above). While it is true that the Norwegian legal counsel considered the competition law aspect, it must be noted that, by his own admission in the email of 14 December 2012, no one had 'focused much' on that aspect until then.

272 It should also be noted that, by stating at the hearing that the applicant's Norwegian legal counsel was a corporate law specialist and not an antitrust law specialist, the applicant, to say the least, qualified vis-à-vis that legal counsel the assertion made in paragraph 71 of the application that its external legal counsel were highly experienced in matters of competition law.

273 At 22.36 on 14 December 2012, legal counsel from law firm F. replied to the email referred to in paragraph 268 above, noting in particular the following:

'Just one question: we couldn't find any provision covering the question of exercising voting rights as long as clearance is still outstanding. Clearly, the buyer cannot exercise voting rights prior to clearance.'

274 That email, between two external legal counsel to the applicant, cannot be considered a proper analysis of the implications of the concentration from the aspect of competition law, and legal counsel of law firm F. did not, moreover, have sufficient time to conduct such an analysis.

275 It should also be noted that neither the email of 29 November 2012 nor those of 14 December 2012 mention Article 7(2) of Regulation No 139/2004.

276 The first document that expressly mentions Article 7(2) of Regulation No 139/2004 is a memorandum from the applicant's Norwegian legal counsel dated 18 December 2012.

277 In that memorandum, after quoting Article 7(1) and (2) of Regulation No 139/2004, the Norwegian legal counsel stated as follows:

'Following from the above, 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.'

278 The memorandum does not, however, include a proper analysis of the applicability of Article 7(2) of Regulation No 139/2004. Merely quoting Article 7(1) and (2) of Regulation No 139/2004, and stating that the applicant could take over the shares in Morpol if it did not exercise the voting rights, cannot be treated as such an analysis, particularly in view of the fact that, according to the wording of Article 7(2) of Regulation No 139/2004, that provision is not applicable. The applicant's Norwegian legal counsel notably did not rely in the memorandum on the existence of a single concentration in order to justify the alleged applicability of Article 7(2) of Regulation No 139/2004.

279 Furthermore, it should be borne in mind that the SPA had already been signed on 14 December 2012. The SPA provided, in clause 7.1, that closing would take place as soon as possible and no later than three business days after signing. Further, it provided in clause 7.2 that, at closing, the applicant would be required to demonstrate that it had paid the purchase price. Lastly, the SPA provided in clause 7.3 that, on that date, the sellers would be required to demonstrate that they had transferred the shares to the applicant.

280 The memorandum of 18 December 2012 was therefore drawn up at a time when the applicant had already committed itself to closing the acquisition no later than three business days after the signing of the SPA.

281 As regards the Commission's finding, in paragraph 146 of the Contested Decision, that the applicant had not submitted any evidence proving that it had received an assessment of the applicability of Article 7(2) of Regulation No 139/2004 from its legal counsel before 18 December 2012, which the applicant disputes, the Court notes the following.

282 It is certainly true that the applicant had implicitly indicated, on page 14 of its response of 30 April 2014 to the Statement of Objections, that it had received from its Norwegian legal counsel, before 18 December 2012, the information that the conditions for the application of Article 7(2) of Regulation No 139/2004 were fulfilled. The applicant stated that this information had been 'repeated in writing' in that counsel's memorandum of 18 December 2012.

283 However, the Commission's finding that the applicant had 'not submitted any evidence proving' that it had received such an assessment before 18 December 2012 is correct. Although the applicant implicitly stated, in its response to the Statement of Objections, that it had received from its Norwegian legal counsel, before 18 December 2012, the information that the conditions for the application of Article 7(2) of Regulation No 139/2004 were fulfilled, it did not submit proof in that regard. In particular it did not append to its response to the Statement of Objections the emails of 29 November and 14 December 2012 referred to in paragraphs 264, 268 and 273 above, which it annexed to the application.

284 In any event, those emails do not call in question the applicant's negligence. As regards the email of 29 November 2012 produced before the General Court, it should be borne in mind

that it does not mention Article 7(2) of Regulation No 139/2004 and does not contain a proper analysis of the applicant's obligations (see paragraphs 264 to 266 above). The same applies to the email from legal counsel of law firm F. of 14 December 2012 (see paragraphs 273 to 275 above).

285 In any event, even on the assumption that the applicant did obtain from its legal counsel, before 18 December 2012, the information that Article 7(2) of Regulation No 139/2004 was applicable, that would not call in question the finding that the applicant's conduct was negligent.

286 First, it will be recalled that an undertaking may not escape imposition of a fine where the infringement of the competition rules has resulted from that undertaking erring as to the lawfulness of its conduct on account of the terms of legal advice given by a lawyer (see paragraph 238 above).

287 Second, far from confirming that the applicant had demonstrated diligence, the email from the applicant's Norwegian legal counsel of 14 December 2012, on which the applicant relies, reveals the applicant's negligence, as it is apparent from that email that 'no one [had] focused much' on the competition law aspect until the very day on which the SPA was signed.

288 If the applicant had behaved like a diligent operator, it would have satisfied itself that a full analysis of the implications of the SPA from the aspect of competition law had been conducted before the SPA was signed, particularly as the SPA provided that the closing of the acquisition had to take place not later than three business days after its signing.

289 The applicant also relies on an email which the lawyer from law firm F. sent to it on 27 January 2013. It must be noted that that email was sent after the closing of the December 2012 Acquisition and that it cannot, therefore, in any event, absolve the applicant of responsibility. Furthermore, that email does not contain a proper analysis of the conditions laid down in Article 7(2) of Regulation No 139/2004, but in essence merely reproduces the wording of that provision. The email notably does not mention the notion of 'single concentration'.

290 It follows from all of the foregoing that the Commission was correct in finding that the infringement of Article 4(1) and Article 7(1) of Regulation No 139/2004 was committed as a result of negligence.

291 The second plea in law must therefore be rejected.

C. Third plea in law, alleging breach of the principle non bis in idem

292 The applicant submits that the Commission imposed on it, in the Contested Decision, two fines for the same conduct, contrary to the general principle *ne bis in idem*. It states that a breach of the notification obligation laid down in Article 4(1) of Regulation No 139/2004 necessarily entails an infringement of the standstill obligation laid down in Article 7(1) of the same regulation. According to the applicant, infringing Article 4(1) of Regulation No 139/2004 is the more specific offence, whereas the breach of Article 7(1) of that regulation is the more general offence, with the result that the breach of Article 4(1) of Regulation No 139/2004 subsumes the breach of Article 7(1) of that regulation, or at the very least precludes the Commission from imposing a distinct fine for the latter breach.

293 The Commission disputes the applicant's arguments.

1. Preliminary observations on the relationship between Article 4(1), Article 7(1) and Article 14(2)(a) and (b) of Regulation No 139/2004

294 It must be stated that, as the applicant submits and the Commission concedes, an infringement of Article 4(1) of Regulation No 139/2004 automatically results in an infringement of Article 7(1) of Regulation No 139/2004. The effect of an undertaking infringing the obligation under Article 4(1) of Regulation No 139/2004 to notify a concentration before its implementation is to put the undertaking in breach of the prohibition against implementing a concentration before it has been notified and authorised.

295 The converse is not true, however. Where an undertaking notifies a concentration prior to its implementation, but implements that concentration before the concentration has been declared compatible with the internal market, the undertaking infringes Article 7(1) but not Article 4(1) of Regulation No 139/2004.

296 It must also be borne in mind that Article 14(2)(a) and (b) of Regulation No 139/2004 provides for the possibility of fines being imposed, on the one hand, for infringement of the notification obligation laid down in Article 4 of that regulation and, on the other, for implementation of a concentration in breach of Article 7 of the regulation.

297 It follows from the foregoing that where an undertaking infringes Article 4(1) of Regulation No 139/2004, it automatically infringes Article 7(1) of the same regulation, which leads, according to the wording of the regulation, to the possibility that the Commission may impose fines under both Article 14(2)(a) and Article 14(2)(b) of Regulation No 139/2004.

298 It should be pointed out that this situation has existed only since the entry into force of Regulation No 139/2004. It will be recalled that Article 4(1) of Regulation No 139/2004 no longer prescribes, for the notification of concentrations, the time limit of one week after conclusion of the agreement or announcement of the public bid that was provided for in Article 4(1) of Regulation No 4064/89 (see paragraph 225 above).

299 It was possible, under Regulation No 4064/89, to infringe Article 4(1) of that regulation without infringing Article 7(1) thereof. An undertaking which notified a concentration more than one week after concluding the agreement, but which waited for the Commission's approval before putting it into effect, infringed Article 4(1) of Regulation No 4064/89 but not Article 7(1) thereof.

300 As regards the penalties provided for, it must be noted that, according to Article 14(1)(a) of Regulation No 4064/89, a failure to notify in accordance with Article 4 of that regulation was punishable by fines ranging from ECU 1 000 to 50 000 only. Putting into effect a concentration in breach of Article 7(1) of Regulation No 4064/89 was, under Article 14(2)(b) of that regulation, punishable by fines not exceeding 10% of the aggregate turnover of the undertakings concerned.

301 By contrast, in Regulation No 139/2004, breach of the notification obligation provided for in Article 4 is no longer referred to in Article 14(1) but in Article 14(2) of that regulation, which means that the scale of fines for infringement of Article 4(1) and the scale of fines for infringement of Article 7(1) of that regulation are now the same, and fines not exceeding 10% of the aggregate turnover of the undertaking concerned may be imposed.

302 Although Article 4(1) of Regulation No 139/2004 lays down an obligation to act (to notify a concentration prior to its implementation) and Article 7(1) of that regulation lays down an obligation not to act (not to implement a concentration before its notification or authorisation), an infringement of the obligation to act automatically results in an

infringement of the obligation not to act provided for in Article 7(1) of Regulation No 139/2004. The current legal framework is such that it is only when a concentration is put into effect that it is possible to know definitively whether an undertaking has failed to notify the concentration prior to its implementation.

303 It follows that when an undertaking infringes Article 4(1) of Regulation No 139/2004, an infringement of Article 7(1) of Regulation No 139/2004 is triggered automatically. At the point at which the concentration is put into effect, the undertaking concerned infringes the obligation to notify the concentration prior to its implementation laid down in Article 4(1) of Regulation No 139/2004, and the corresponding prohibition against implementing a concentration before notification, provided for in the first situation in Article 7(1) of Regulation No 139/2004. At the same time, it infringes the prohibition against implementing a concentration before its authorisation, as provided for in the second situation in Article 7 (1) of Regulation No 139/2004, because a concentration which has not been notified cannot be declared compatible with the internal market.

304 In that context, it should be noted that it is not disputed in this case that an infringement of Article 4(1) of Regulation No 139/2004 is an instantaneous infringement. However, an infringement of Article 7(1) of Regulation No 139/2004 is a continuous infringement which remains ongoing for as long as the transaction is not declared compatible with the internal market by the Commission, as the Commission noted in paragraphs 128, 165 and 166 of the Contested Decision (see, with regard to Article 7(1) of Regulation No 4064/89, judgment of 12 December 2012, *Electrabel* v *Commission*, T-332/09, EU:T:2012:672, paragraph 212).

305 In the present case, the Commission stated, in paragraph 127 of the Contested Decision, that the conduct giving rise to the infringement of Article 4(1) of Regulation No 139/2004 and to the infringement of Article 7(1) of that regulation was one and the same, namely implementation of a concentration with a Community dimension before notification and clearance. In reply to a written question put by the Court, the Commission confirmed that it did not deny that the facts that gave rise to the infringement of those two provisions were identical in the present case.

306 It must be noted that the current legal framework is unusual, in that there are two articles in Regulation No 139/2004 infringement of which is punishable by fines on the same scale of penalties, but where infringement of the first necessarily entails infringement of the second. It must, however, be pointed out that that is the legal framework which the Commission had to apply and the applicant has not raised an objection of illegality in respect of particular provisions of Regulation No 139/2004.

2. Applicability in the present case of the principle ne bis in idem

307 According to settled case-law, the principle *ne bis in idem* must be observed in proceedings for the imposition of fines under competition law. That principle thus precludes an undertaking being found liable or proceedings being brought against it afresh on the grounds of anticompetitive conduct for which it has been penalised or declared not liable by an earlier decision that can no longer be challenged (see judgment of 14 February 2012, *Toshiba Corporation and Others*, C-17/10, EU:C:2012:72, paragraph 94 and the case-law cited).

308 The Court has held, in competition law cases, that the application of the principle *ne bis in idem* is subject to the threefold condition that in the two cases the facts must be the same, the offender the same and the legal interest protected the same (see judgment of 14 February 2012, *Toshiba Corporation and Others*, C-17/10, EU:C:2012:72, paragraph 97 and the case-law cited).

309 It is apparent from the case-law cited in paragraph 307 above that the principle *ne bis in idem* has two elements. It precludes ‘proceedings being brought’ against an undertaking afresh and that undertaking ‘being found liable’ afresh. However, according to the wording set out in paragraph 307 above, the two elements presuppose that the undertaking in question has been penalised or declared not liable ‘by an earlier decision that can no longer be challenged’.

310 It should also be observed that Article 50 of the Charter of Fundamental Rights of the European Union is worded as follows:

‘No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law’.

311 That article also contains both elements: the prohibition against proceedings being brought twice and the prohibition against double punishment (tried or punished). It should, moreover, be pointed out that that article clearly mentions a person being ‘finally’ acquitted/convicted, without differentiating between the two elements. Furthermore, it mentions the fact that the person concerned has ‘already’ been acquitted or convicted, which confirms that the acquittal or conviction must have been by an earlier judgment.

312 It is true that the principle *ne bis in idem* applies in proceedings for the imposition of fines under competition law, and that it does so irrespective of whether or not those fines are regarded as being of a criminal nature. Moreover, in the field of competition law, in which fines are imposed by the Commission, it is not necessary for there to be a judgment imposing a fine. As reflected in the wording set out in paragraph 307 above, it is sufficient for there to be an earlier ‘decision’ that can no longer be challenged. Accordingly, the mere existence of a Commission decision imposing a fine, which has not been disputed within the prescribed time limits and can therefore no longer be challenged, is sufficient for the principle *ne bis in idem* to be applied. However, the element encapsulated by the word ‘finally’ which stems from Article 50 of the Charter of Fundamental Rights also applies in competition law, as is evident from the words ‘earlier decision that can no longer be challenged’.

313 Further, Article 4(1) of Protocol No 7 to the ECHR is worded as follows:

‘No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.’

314 That provision also contains both elements: the prohibition against proceedings being brought twice and the prohibition against double punishment (tried or punished), and it too presupposes that judgment has been ‘finally’ given. Furthermore, it mentions the fact that the person concerned has ‘already’ been acquitted or convicted, which confirms that there must be a previous judgment.

315 The wording of those provisions does not therefore cover situations in which an authority imposes two penalties in a single decision, as is the case here.

316 That is consistent with the rationale of the principle *ne bis in idem*. According to that principle, when the offender is prosecuted and punished, he must know that, by paying the punishment, he has expiated his guilt and need not fear further sanction (Opinion of Advocate General Ruiz-Jarabo Colomer in *Gözütok and Brügge*, C-187/01 and C-385/01, EU:C:2002:516, point 49).

317 The imposition of two penalties in a single decision does not conflict with that objective. As the Commission stated in reply to a written question put to the parties, where two penalties are imposed in a single decision, the person concerned can continue safe in the knowledge that no further punishment will be applied in respect of the same offence.

318 Admittedly, in the application, the applicant did not expressly invoke the principle *ne bis in idem* but the principle *nemo debet bis puniri pro uno delicto*. The applicant confirmed, however, in reply to a written question put by the Court, that the principle it was invoking corresponded to the second part of the principle *ne bis in idem*, that is to say, the prohibition against double punishment, and that it was not invoking a principle distinct from the principle *ne bis in idem*. The Commission also confirmed, in reply to the written questions put by the Court, that the principle *nemo debet bis puniri pro uno delicto* corresponds to the second part of the principle *ne bis in idem*.

319 It must be held that the principle *ne bis in idem* does not apply in the present case, as the penalties were imposed by the same authority in a single decision.

320 That approach is not called in question by the applicant's arguments or by the case-law of the Courts of the European Union or the European Court of Human Rights ('the ECtHR').

321 The applicant stated, in reply to the written questions put by the Court, that there were well-established precedents in the competition law area in which the Courts of the European Union had applied the principle *ne bis in idem* to several fines imposed in a single decision.

322 In the first place, the applicant relies in that regard on the judgment of 21 July 2011, *Beneo-Orafti* (C-150/10, EU:C:2011:507). It submits that it is apparent from paragraph 68 of that judgment that the Court of Justice applied the principle *ne bis in idem* by analysing whether that principle precluded the cumulative application of the measures set out in Article 26(1) and Article 27 of Commission Regulation No 968/2006 of 27 June 2006 laying down detailed rules for the implementation of Council Regulation (EC) No 320/2006 establishing a temporary scheme for the restructuring of the sugar industry in the Community (OJ 2006 L 176, p. 32).

323 It must be noted however that, in that case, the Court of Justice held that the principle *ne bis in idem* did not apply because only one of the three measures at issue in that case could be regarded as a penalty (judgment of 21 July 2011, *Beneo-Orafti*, C-150/10, EU:C:2011:507, paragraph 74). Since the Court of Justice found the principle *ne bis in idem* to be inapplicable for another reason, it simply did not rule on whether that principle applies where several penalties are imposed in a single decision, or where a second penalty is imposed but the decision imposing the first penalty has not yet become final.

324 In so far as the applicant relies on the Opinion of Advocate General Bot in *Beneo-Orafti* (C-150/10, EU:C:2011:164), suffice it to note that the Court of Justice did not follow that Opinion with regard to the applicability of the principle *ne bis in idem*.

325 In the second place, the applicant invokes the judgment of 13 December 2006, *FNCBV and Others* v *Commission* (T-217/03 and T-245/03, EU:T:2006:391). The applicants in the case that gave rise to that judgment claimed that the Commission had breached the principle *ne bis in idem* by imposing, in a single decision, fines on a number of associations, the members of which were in some instances identical. According to those applicants, those members were therefore indirectly subject to several fines.

326 The General Court merely found, in paragraph 344 of the judgment of 13 December 2006, *FNCBV and Others* v *Commission* (T-217/03 and T-245/03, EU:T:2006:391), that the

offenders were not identical, as the contested decision did not penalise the same entities more than once or the same persons for the same acts, and therefore the principle *ne bis in idem* was not breached. It did not, therefore, rule on whether the principle *ne bis in idem* may be applied where several penalties have been imposed in a single decision.

327 In the judgment on the appeal in that case, namely the judgment of 18 December 2008, *Coop de France bétail et viande and Others* v *Commission* (C-101/07 P and C-110/07 P, EU:C:2008:741, paragraph 130), which the applicant also cites, the Court of Justice merely confirmed the General Court's approach.

328 In the third place, the applicant relies on the judgment of 5 October 2011, *Transcatab* v *Commission* (T-39/06, EU:T:2011:562). In that judgment, the Court concluded that there was no breach of the principle *ne bis in idem* because there was no identity of the facts or unity of offender (see paragraphs 255 to 259 of that judgment). The Court did not rule on the question whether the principle *ne bis in idem* applies in a situation in which several fines have been imposed in a single decision.

329 Lastly, the applicant relies on the judgment of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72). It submits that, in that judgment, the principle *ne bis in idem* was applied to a decision of the Commission dated 24 January 2007 which was not yet final, at least with respect to Toshiba and other major addressees, even at the time when the judgment of the Court of Justice was delivered on 14 February 2012.

330 It must be noted however that, in the judgment of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72, paragraphs 98 to 103), the Court of Justice found the principle *ne bis in idem* to be inapplicable for another reason: that the facts were not the same.

331 The applicant also claims that, in the judgment of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72), the Court of Justice applied the principle *ne bis in idem* as of the time 'a Commission decision [was] taken'. It must be noted that, in paragraph 103 of that judgment, the Court of Justice does indeed mention a 'Commission decision taken before the decision of the said national competition authority was adopted', and not a decision that had 'become final' before that date. Nevertheless, in paragraph 94 of that judgment, the Court of Justice clearly states that the principle *ne bis in idem* precludes 'an undertaking being found liable or proceedings being brought against it afresh on the grounds of anticompetitive conduct for which it has been penalised or declared not liable by an earlier decision that can no longer be challenged'. It is therefore clear from that judgment that the principle *ne bis in idem* does not apply in the absence of an earlier final decision.

332 It must be noted that the applicant has not identified any judgment of the Courts of the European Union in which a breach of the principle *ne bis in idem* was established in a situation in which several penalties were imposed in a single decision, or in which a second penalty was imposed before the decision imposing the first had become final.

333 As regards the case-law of the ECtHR, it is clear from that that the principle *ne bis in idem* does not apply in a situation in which several penalties are imposed in a single decision.

334 Thus, it is apparent from the judgment of the ECtHR of 7 December 2006, *Hauser-Sporn v. Austria* (CE:ECHR:2006:1207JUD003730103), that the mere fact that one act constitutes more than one offence is not contrary to Article 4 of Protocol No 7 to the ECHR. According to that judgment, it is only where different offences based on one act are prosecuted consecutively, one after the final decision of the other, that it is necessary, according to the ECtHR, to examine whether or not such offences have the same essential elements.

335 Furthermore, in the judgment of the ECtHR of 17 February 2015, *Boman v. Finland* (CE:ECHR:2015:0217JUD004160411), the ECtHR stated that:

‘The aim of Article 4 of Protocol No 7 [to the ECHR] is to prohibit the repetition of criminal proceedings that have been concluded by a “final” decision.

...

Decisions against which an ordinary appeal lies are excluded from the scope of the guarantee contained in Article 4 of Protocol No 7 [to the ECHR] as long as the time limit for lodging such an appeal has not expired.’

336 The applicant conceded, in reply to the written questions put by the Court, that, in cases of sequentially imposed punishments, the ECtHR applies the principle *ne bis in idem* if a decision imposing the first punishment has become final.

337 The applicant maintains, however, that the case-law of the Courts of the European Union provides more extensive protection against double punishment, by applying that principle as of the time a decision has been taken, even if that decision has not yet become final.

338 That argument cannot be accepted. It is clear from the case-law cited in paragraph 307 above that the principle *ne bis in idem* ‘precludes an undertaking being found liable or proceedings being brought against it afresh on the grounds of anticompetitive conduct for which it has been penalised or declared not liable by an earlier decision that can no longer be challenged’. As is apparent from paragraphs 322 to 332 above, that principle is not called in question by the case-law on which the applicant relies.

339 Lastly, it must be observed that the applicant also mentioned in the application the set off principle (in German: *Anrechnungsprinzip*). In reply to the written questions put by the Court, the applicant explained that the third plea in law was based on a breach of the principle *ne bis in idem*, the set off principle being separate from, but related to, the principle *ne bis in idem*, and that the set off principle had been applied in circumstances in which the principle *ne bis in idem* did not fully apply. The applicant went on to explain that, in its view, the set off principle did not need to come into play in the present case, as the principle *ne bis in idem* did apply. It maintains that, in any event, even if the Court were to find that there are grounds to apply the set off principle in the present case, the outcome should arguably be the same, namely that the second fine should be reduced by the amount of the first fine.

340 It must be noted that the set off principle has been discussed, in the field of competition law, in situations concerning fines imposed in a Member State or in a third State.

341 In the judgment of 13 February 1969, *Wilhelm and Others* (14/68, EU:C:1969:4), which was delivered at a time when Regulation No 1/2003 was not yet in force (see, with regard to the situation after the establishment of the European competition network, judgment of 13 July 2011, *ThyssenKrupp Liften Ascenseurs* v *Commission*, T-144/07, T-147/07 to T-150/07 and T-154/07, EU:T:2011:364, paragraph 187), the Court of Justice ruled as follows. The competition authorities of the Member States may, in principle, take action against an agreement in accordance with their national law, even when a parallel procedure concerning that agreement is pending before the Commission. It also stated, in paragraph 11 of that judgment, that if the possibility of two procedures being conducted separately were to lead to the imposition of consecutive sanctions, a general requirement of natural justice demanded that any ‘previous punitive decision’ must be taken into account in determining any sanction which is to be imposed (see also, to that effect, judgment of 6 April 1995,

Sotralentz v *Commission*, T-149/89, EU:T:1995:69, paragraph 29). The Court of Justice also noted, in paragraph 3 of the judgment of 14 December 1972, *Boehringer Mannheim* v *Commission* (7/72, EU:C:1972:125), that, in fixing the amount of a fine the Commission had to take account of penalties which had 'already' been borne by the same undertaking for the same action, where penalties had been imposed for infringements of the cartel law of a Member State.

342 The principle is thus one that applies where there is a 'previous punitive decision' or, in other words, where penalties for infringements of the cartel law of a Member State have 'already' been borne by the same undertaking for the same action, and not where two fines have been imposed by the same authority in a single decision. It is, moreover, entirely appropriate to treat those types of situations differently. Where the Commission and the authority of a Member State impose penalties in respect of the same agreement, there is a risk that each fine, taken in isolation, will be proportionate, but that the two fines taken together will be disproportionate, if the existence of the first fine is not taken into account when fixing the second. However, when fixing several fines in a single decision, the Commission can ensure that those fines, taken together, are proportionate, and the Court may also examine that issue.

343 Lastly, the applicant submitted, in reply to the written questions put by the Court, that, in the light of the principles of equal treatment and proportionality, double punishment for the same conduct is as unjust in parallel proceedings as in sequential proceedings. That argument cannot be accepted. Where two penalties are imposed by the same authority in a single decision, that authority can ensure that, taken together, the penalties are proportionate, and the court can also verify the proportionality of the penalties taken together (see paragraph 342 above). The imposition of two penalties for the same conduct, by the same authority in a single decision cannot therefore be considered, as such, to be contrary to the principles of equal treatment and proportionality.

344 In the light of all of the foregoing, the principle *ne bis in idem* and the set off principle do not apply to a situation in which several penalties are imposed in a single decision, even if those penalties are imposed for the same actions. In fact, where the same conduct infringes several provisions punishable by fines, the question whether several fines may be imposed in a single decision falls not within the scope of the principle *ne bis in idem* but within the scope of the principles governing concurrent offences (see, in regard to the problems associated with concurrent offences, paragraphs 345 to 373 below).

3. The applicant's arguments concerning concurrent offences

345 The applicant submits that, under international law and German law, the principle of 'apparent' or 'false concurrence' (in German: *unechte Konkurrenz*) means that where one act appears to be caught by two statutory provisions, the primarily applicable provision excludes all others on the basis of the principles of subsidiarity, consumption or speciality, and that numerous other Member States apply the principle of apparent concurrence in one form or another. According to the applicant, a number of other Member States do not explicitly resort to the concept of apparent or false concurrence but do also prohibit double penalties for a greater offence and a lesser offence included in the first offence.

346 With regard to the provisions at issue in the present case, the applicant submits, more particularly, that the infringement of Article 4(1) of Regulation No 139/2004 is the more specific offence, whereas the infringement of Article 7(1) of that regulation is the more general offence, with the result that the breach of Article 4(1) of Regulation No 139/2004

subsumes the breach of Article 7(1) of that regulation, or at the very least precludes the Commission from imposing a distinct fine for the latter breach.

347 The Commission disputes the applicant's arguments.

348 It must be noted that, in EU competition law, there are no specific rules concerning concurrent offences. It is appropriate, therefore, to examine the applicant's arguments in relation to principles of international law and the legal orders of the Member States.

349 It will be recalled that, according to the applicant's reasoning (see paragraph 345 above), the 'primarily applicable provision' excludes all others.

350 The Commission correctly contends in that regard that the legislature has not defined one offence as being more serious than the other, both of them being subject to the same cap under Article 14(2)(a) and (b) of Regulation No 139/2004. It is not appropriate, therefore, to regard one of those provisions as being 'primarily applicable'.

351 With regard to the applicant's argument that the infringement of Article 4(1) is the more specific offence which subsumes the infringement of Article 7(1) of Regulation No 139/2004, the following should also be noted.

352 It must be borne in mind that an infringement of Article 4(1) of Regulation No 139/2004 is an instantaneous infringement, whereas an infringement of Article 7(1) of Regulation No 139/2004 is a continuous infringement which is triggered when the infringement of Article 4(1) of Regulation No 139/2004 is committed (see paragraph 304 above).

353 Furthermore, it must be noted that, according to Article 1(1)(a) of 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 1974 L 319, p. 1), the limitation period is three years in the case of infringements of provisions concerning notifications of undertakings. It follows from this that the limitation period is three years for infringements of Article 4(1) of Regulation No 139/2004. By contrast, infringements of Article 7(1) of Regulation No 139/2004 are, in accordance with Article 1(1)(b) of Regulation No 2988/74, subject to a limitation period of five years (see, by analogy, judgment of 12 December 2012, *Electrabel* v *Commission*, T-332/09, EU:T:2012:672, paragraph 209).

354 To follow the applicant's reasoning would mean that an undertaking which infringes both the notification obligation and the prohibition against implementing a concentration prior to clearance is in a more favourable position than an undertaking which infringes only the prohibition against implementing a concentration prior to clearance.

355 An undertaking which notifies a concentration prior to implementing it, but which implements it before having obtained clearance, is liable to be fined under Article 14(2)(b) of Regulation No 139/2004, read in conjunction with Article 7(1) thereof. It can therefore be penalised for a continuous infringement, which lasts for so long as the transaction is not declared compatible with the internal market by the Commission, and which is subject to a limitation period of five years.

356 If that same undertaking had not even notified the concentration prior to implementing it, the Commission could, according to the applicant's reasoning, only impose a fine under Article 14(2)(a) of Regulation No 139/2004, read in conjunction with Article 4(1) thereof. The undertaking could therefore be penalised only for an instantaneous infringement, which is subject to a limitation period of three years. That would mean that an undertaking would

be put at an advantage by infringing not only the prohibition against implementing a concentration prior to clearance but also the obligation to notify it.

357 It cannot, however, be accepted that Regulation No 139/2004 should be interpreted in such a way as to lead to such an absurd outcome.

358 The applicant's argument that the infringement of Article 4(1) of Regulation No 139/2004 is the more specific offence which subsumes the infringement of Article 7(1) of Regulation No 139/2004 cannot succeed, therefore.

359 That outcome is not affected by the arguments put forward by the applicant at the hearing to challenge the fact that infringements of Article 4(1) of Regulation No 139/2004 are subject to a limitation period of only three years. According to the very clear wording of Article 1(1)(a) of Regulation No 2988/74, the limitation period is three years in the case of infringements of provisions concerning notifications of undertakings.

360 The fact, emphasised by the applicant, that the legislature increased the cap on fines laid down for infringement of the notification obligation, by providing, in Article 14(2) of Regulation No 139/2004, for a cap of 10% of the aggregate turnover of the undertaking concerned, as against the cap of ECU 50 000 provided for in Article 14(1)(a) of Regulation No 4064/89 (see paragraph 300 above), cannot modify the limitation period, which is still governed by Article 1(1)(a) of Regulation No 2988/74.

361 In any event, even if the limitation period for infringement of Article 4(1) of Regulation No 139/2004 and the limitation period for infringement of Article 7(1) of that regulation were the same, that would not alter the fact — which, moreover, is not disputed by the applicant — that an infringement of Article 4(1) of Regulation No 139/2004 is an instantaneous infringement, whereas an infringement of Article 7(1) of that regulation is a continuous infringement. Even in that situation, regarding the infringement of Article 4(1) of Regulation No 139/2004 as the more specific infringement which subsumes the infringement of Article 7(1) of that regulation would therefore result in an undertaking being put at an advantage by infringing not only the prohibition against implementing a concentration prior to clearance but also the obligation to notify it. To follow the applicant's reasoning would mean that an undertaking which infringes only the prohibition against implementing a concentration before having obtained clearance could be penalised for a continuous infringement, which lasts for so long as the transaction is not declared compatible with the internal market, whereas an undertaking which also infringes the obligation to notify the concentration before its implementation could only be penalised for an instantaneous infringement. The latter undertaking would therefore be in a more favourable position than the former, first, as regards the duration of the infringement and, second, as regards the point at which the limitation period starts to run. The applicant's argument cannot therefore be accepted.

362 Accordingly, it must be held that the Commission correctly penalised the applicant for infringement of both provisions.

363 That approach is not called in question by the other arguments put forward by the applicant.

364 The applicant asserts that 'the international courts' settled case-law ... forbids the double punishment of a person for violating a provision that cannot be violated without violating another provision'. It cites, in that respect, judgments of the International Criminal Tribunal for the former Yugoslavia ('ICTY') and of the International Criminal Tribunal for Rwanda.

365 The applicant relies, in particular, on the judgment of the ICTY, *Prosecutor v. Vidoje Blagojević & Dragan Jokić*, Case No IT-02-60-T, 17 January 2005, paragraph 799, which states as follows:

'[M]ultiple convictions entered under different statutory provisions, but based on the same conduct, are permissible only if each statutory provision has a materially distinct element not contained within the other. … The more specific offence subsumes the less specific one, because the commission of the former necessarily entails the commission of the latter'.

366 It is apparent from the judgment of the ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No IT-96-23 & IT-96-23/1-A, 12 June 2002, paragraph 168, that that approach is one that is heavily indebted to the judgment of the Supreme Court of the United States in *Blockburgerv.United States*, 284 U.S. 299 (1932).

367 It should also be noted that, in the judgment *Alfred Musema v. Prosecutor*, Case No ICTR-96-13-A, 16 November 2001, paragraph 360, the International Criminal Tribunal for Rwanda found that national approaches to the issue of multiple convictions based on the same facts varied.

368 It must be stated that the fact that the ICTY applies a certain examination criterion, derived from United States law, for the purposes of its judgments imposing criminal sanctions, in no way implies that the Commission or the Courts of the European Union are obliged to apply the same criterion. It should be pointed out that the ICTY does not examine whether decisions taken or judgments delivered at a national level are compatible with fundamental rights. It confines itself to setting out, for the purposes of the criminal sanctions which it imposes itself, the principles it applies where the same action breaches several penal provisions. The ICTY has therefore merely determined, for the purposes of its own judgments, the approach it considers the most appropriate. That does not mean that the ICTY has set out a general principle of international law which all States and the European Union must observe. The same applies to the case-law of the International Criminal Tribunal for Rwanda.

369 The applicant's arguments based on the case-law of the ICTY and of the International Criminal Tribunal for Rwanda must therefore be rejected.

370 The applicant further states that the very purpose of the principle *ne bis in idem* is 'to prevent cumulative punishment for conduct that, as here, concurrently breaches distinct legal provisions'.

371 It should be borne in mind in that regard that the issue is not one that falls within the scope of the principle *ne bis in idem*. In addition, the rules on concurrent offences do not in general terms preclude an undertaking from being penalised for an infringement of several distinct legal provisions, even if those provisions have been infringed by virtue of the same conduct.

372 The applicant merely refers to the principle of 'apparent concurrence' or 'false concurrence', which means that where one act appears to be caught by two statutory provisions, the primarily applicable provision excludes all others (see paragraph 345 above). The application of that principle presupposes however that there is a 'primarily applicable provision'. If no such provision exists, as is the case here, the simultaneous infringement of distinct legal provisions constitutes a notional concurrence.

373 Given that, in the present case, there is no primarily applicable provision, the applicant's arguments must be rejected.

374 It follows from all of the foregoing that the Court must reject the third plea in law.

D. Fourth plea in law, alleging a manifest error of law and fact in imposing fines on the applicant

375 The fourth plea is expressed in two parts, the first alleging breach of the principles of legal certainty and *nullum crimen, nulla poena sine lege*, and the second, breach of the general principle of equal treatment.

1. The first part, alleging breach of the principles of legal certainty and nullum crimen, nulla poena sine lege

376 The applicant claims that the imposition of a fine in the present case infringes Article 49(1) of the Charter of Fundamental Rights and Article 7(1) of the ECHR, which require that offences and the relevant penalties must be clearly defined by law. According to the applicant, the interpretation of Article 7(2) of Regulation No 139/2004 in the Contested Decision involves the use of such broad notions and such vague criteria that the criminal provision in question is not of the quality required under the ECHR in terms of its clarity and the foreseeability of its effects.

377 It should be borne in mind, first of all, that, according to the case-law, the principle of the legality of offences and penalties (*nullum crimen, nulla poena sine lege*) requires the law to give a clear definition of offences and the penalties which they attract. That requirement is satisfied where the individual concerned is in a position to ascertain from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable (see judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 40 and the case-law cited).

378 Likewise it is clear from the case-law that the principle of legality must be observed in relation to provisions of a criminal nature as well as specific administrative instruments imposing or permitting the imposition of administrative penalties, and that it applies not only to provisions establishing the elements which constitute an offence, but also to those specifying the consequences arising from an offence (see judgment of 27 September 2006, *Jungbunzlauer* v *Commission*, T-43/02, EU:T:2006:270, paragraph 72 and the case-law cited).

379 In the present case, it should be noted that the applicant was fined, in accordance with Article 14(2)(a) and (b) of Regulation No 139/2004, for having infringed Article 4(1) and Article 7(1) of Regulation No 139/2004 (see paragraph 199 above). The wording of those provisions is clear. None of those provisions contains broad notions or vague criteria.

380 The applicant relies, in essence, on a lack of clarity in Article 7(2) of Regulation No 139/2004, which provides for an exception.

381 It should be noted in that regard that even on the assumption that the requirement of clarity that flows from the principle of legality of penalties applies to provisions laying down an exception to a prohibition the infringement of which is punishable by fines, Article 7(2) of Regulation No 139/2004 is not, according to its wording, applicable to situations such as that at issue here (see paragraphs 68 to 83 above).

382 The applicant was thus in a position to ascertain from the wording of the relevant provisions that the implementation of the December 2012 Acquisition without prior notification and authorisation was punishable by fines.

383 Given that the applicant was in a position to ascertain this from the wording of the relevant provisions, it was not necessary for them to have been interpreted by the courts. As expressed in paragraph 377 above, the individual concerned must be in a position to ascertain from the wording of the relevant provision and, 'if need be', with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.

384 It is true that the *obiter dictum* in the Yara/Kemira GrowHow decision does not amount to an interpretation by the courts, much less to 'settled and published case-law'. In that respect it should be noted that, apart from the text of the law itself, account must be taken of whether the indeterminate concepts used have been defined by consistent and published case-law (see judgment of 28 April 2010, *Amann & Söhne and Cousin Filterie* v *Commission*, T-446/05, EU:T:2010:165, paragraph 129 and the case-law cited).

385 However, the applicant's arguments in that respect are ineffective, as definition by case-law is unnecessary where the wording of the provisions at issue is clear and does not include indeterminate concepts that require definition.

386 It should be recalled in that context that the applicant is endeavouring, in essence, to expand the scope of application of the concept of 'single concentration', and thereby to expand the scope of application of the exception provided for in Article 7(2) of Regulation No 139/2004 (see paragraph 203 above).

387 The principle of legality of offences and penalties does not mean that it is necessary to give a broad interpretation to the scope of application of a concept which is not included in the wording of a provision establishing an exception to a prohibition the infringement of which is punishable by fines, so as to expand the scope of that exception beyond its wording.

388 The existence of an infringement and the imposition of fines were foreseeable by the applicant. It should be borne in mind that the negligence in the applicant's conduct has already been established in the context of the examination of the second plea.

389 Furthermore, the mere fact that, at the time when an infringement is committed, the Courts of the European Union have not yet had the opportunity to rule specifically on particular conduct does not preclude, as such, the possibility that an undertaking may have to expect its conduct to be declared incompatible with the EU competition rules (see, to that effect, judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 43).

390 It is also apparent from the case-law of the ECtHR that the novelty, in the light in particular of the case-law, of the legal question raised does not in itself constitute a breach of the requirements of accessibility and foreseeability of the law, in so far as the approach taken was among the possible and reasonably foreseeable interpretations (ECtHR, 1 September 2016, *X and Y v. France*, CE:ECHR:2016:0901JUD004815811). It is apparent, moreover, from paragraph 60 of that judgment, that even where the structure of the provisions at issue in a particular case may present a serious difficulty in terms of interpretation, that does not mean that it is impossible for the competent authority to characterise in law the offences committed in a particular case.

391 The applicant's argument that the Commission's approach in the present case was inconsistent with the approach it took in the case giving rise to the LGI/Telenet decision has already been rejected in paragraphs 141 to 144 above.

392 As regards the applicant's assertion that, in the absence of relevant precedents, the longstanding practice of the Courts of the European Union and of the Commission has been

to refrain from imposing any fine or to impose only a symbolic fine, it must be stated that there is no established practice in that sense. Admittedly, there are cases in which the Commission did not impose any fine or imposed a symbolic fine in the absence of precedents. However, in other cases, the Commission has imposed large fines even in situations in which there were no precedents in relation to conduct with the same features.

393 It is apparent from the case-law that the fact that conduct with the same features has not been examined in past decisions does not exonerate an undertaking (judgments of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin* v *Commission*, 322/81, EU:C:1983:313, paragraph 107, and of 1 July 2010, *AstraZeneca* v *Commission*, T-321/05, EU:T:2010:266, paragraph 901). In the cases giving rise to those judgments, the Commission imposed fines in an amount that was not symbolic.

394 The first part of the fourth plea in law must therefore be rejected.

2. The second part, alleging breach of the general principle of equal treatment

395 In the context of the second part of the fourth plea, the applicant relies, in essence, on three earlier cases and demands the same treatment. The cases in question are (i) the case that gave rise to the Yara/Kemira GrowHow decision; (ii) the judgment of 28 February 2002, *Compagnie générale maritime and Others* v *Commission* (T-86/95, EU:T:2002:50); and (iii) the judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission* (T-191/98 and T-212/98 to T-214/98, EU:T:2003:245).

396 As the applicant explains, the present case and the case that gave rise to the Yara/Kemira GrowHow decision both concern the acquisition of an initial 'build-up' stake from a major shareholder of the target company, which triggered an obligation to launch a public bid. The public bid was launched shortly after completion of the initial acquisition, and the acquirers informed the Commission of the concentration shortly afterwards, and refrained from exercising the voting rights.

397 In the case that gave rise to the Yara/Kemira GrowHow decision, the Commission did not open an investigation and did not impose a fine. According to the applicant, there is no objective difference that would justify the different treatment of Yara and the applicant. The applicant requests the Court to follow the approach taken in its judgment of 28 February 2002, *Compagnie générale maritime and Others* v *Commission* (T-86/95, EU:T:2002:50, paragraph 487), in which it held that a fine was not justified because the Commission had not imposed a fine in a prior decision relating to similar conduct.

398 In that regard, it should be noted that the fact that the Commission has not imposed a fine on the perpetrator of a breach of the competition rules cannot in itself prevent a fine from being imposed on the perpetrator of a similar infringement (judgment of 28 February 2002, *Compagnie générale maritime and Others* v *Commission*, T-86/95, EU:T:2002:50, paragraph 487). In addition, where an undertaking has acted in breach of the competition rules, it cannot escape being penalised altogether on the ground that other undertakings have not been fined, where, as in this case, those undertakings' circumstances are not the subject of proceedings before the Court (see, to that effect, judgment of 11 July 2014, *Sasol and Others* v *Commission*, T-541/08, EU:T:2014:628, paragraph 194).

399 It must also be noted that, in the judgment of 28 February 2002, *Compagnie générale maritime and Others* v *Commission* (T-86/95, EU:T:2002:50), the Court did not merely note that the Commission had not imposed a fine in a prior decision relating to similar conduct in order to justify cancellation of the fine. The Court found, in particular, that 'the legal treatment that should be reserved for this type of agreement, particularly because of its

close links with maritime transport which is the subject of a wholly specific and exceptional set of rules, was not at all straightforward and, in particular, raised complex questions of both an economic and a legal nature' (judgment of 28 February 2002, *Compagnie générale maritime and Others* v *Commission*, T-86/95, EU:T:2002:50, paragraph 484), that 'numerous factors led the applicants to believe that the contested agreement was lawful' (judgment of 28 February 2002, *Compagnie générale maritime and Others* v *Commission*, T-86/95, EU:T:2002:50, paragraph 485) and that, 'in its Decision 94/980, the Commission did not impose a fine on the companies who were party to that agreement, whereas not only did the contested agreement also provide for the fixing of prices for the inland part of intermodal transport, but also contained other serious infringements of the competition rules' (judgment of 28 February 2002, *Compagnie générale maritime and Others* v *Commission*, T-86/95, EU:T:2002:50, paragraph 487). With regard to Commission Decision 94/980/EC of 19 October 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.446 — Trans-Atlantic Agreement) (OJ 1994 L 376, p. 1), the Court noted that the decision 'was adopted very shortly before the contested decision' (judgment of 28 February 2002, *Compagnie générale maritime and Others* v *Commission*, T-86/95, EU:T:2002:50, paragraph 487).

400 It must be pointed out that Decision 94/980 is dated 19 October 1994 and that, in the case giving rise to the judgment of 28 February 2002, *Compagnie générale maritime and Others* v *Commission* (T-86/95, EU:T:2002:50), the statement of objections had been notified by letter of 21 December 1992 and the contested decision was dated 21 December 1994, as is apparent from paragraphs 20 and 22 of that judgment.

401 It follows that the operators concerned in the case giving rise to the judgment of 28 February 2002, *Compagnie générale maritime and Others* v *Commission* (T-86/95, EU:T:2002:50) had not had an opportunity to take into consideration the clarification provided by the Commission in Decision 94/980 in order to prevent an infringement of the competition rules. When they were able to take note of the Commission's decision of 19 October 1994, they were not in a position to change retrospectively the conduct that had resulted in the statement of objections notified by letter of 21 December 1992.

402 However, in the present case, the Yara/Kemira GrowHow decision was more than five years old when the applicant infringed Article 4(1) and Article 7(1) of Regulation No 139/2004, as the Commission rightly pointed out. The applicant could therefore have taken into consideration the Commission's interpretation of Article 7(2) of Regulation No 139/2004 in that decision, albeit *obiter dictum*, and, if necessary, contacted the Commission regarding the interpretation to be given to that provision.

403 The applicant states in that regard that the Commission ignores a critical element of the case giving rise to the judgment of 28 February 2002, *Compagnie générale maritime and Others* v *Commission* (T-86/95, EU:T:2002:50) that renders the time difference irrelevant or, at most, insignificant. The case involved an Article 101 TFEU infringement decision, as compared to a mere *obiter dictum* in the Yara/Kemira GrowHow decision, a merger clearance decision.

404 The applicant's argument in that respect cannot be accepted. The fact that Decision 94/980 was a decision finding an infringement could not be of any assistance to operators in terms of preventing infringements which they had already committed at the date of that decision. However, in the present case, the *obiter dictum* in the Yara/Kemira GrowHow decision was capable of giving an indication as to how Article 7(2) of Regulation No 139/2004 was to be interpreted and thus of helping the applicant to avoid committing the infringements at issue.

405 It should further be observed that the applicant relies, on the one hand, on the alleged practice of the Courts of the European Union and of the Commission of refraining from imposing any fine or imposing only a symbolic fine in the absence of relevant precedents (see paragraph 392 above) and, on the other, on the principle of equal treatment vis-à-vis another undertaking on which no fine had been imposed.

406 If the logic of that reasoning were to be followed, the Commission would never be able to impose fines of more than a symbolic amount. When adopting the first decision in relation to particular conduct, it would be obliged not to impose a fine of more than a symbolic amount, in the absence of relevant precedents. In subsequent cases, it would be required not to impose a fine of more than a symbolic amount by virtue of the principle of equal treatment.

407 It must be held that the principle of equal treatment, in relation to an undertaking on which no fine was imposed in a previous decision for the same type of conduct, can, in principle, properly be relied on only by operators who have not had an opportunity to take into consideration the clarification provided in that previous decision in order to prevent infringements of the competition rules, because that decision was adopted when the infringement had already been committed.

408 Moreover, in the present case, there were not numerous factors that might have led the applicant to believe that its conduct was lawful, contrary to what the Court found in the judgment of 28 February 2002, *Compagnie générale maritime and Others* v *Commission* (T-86/95, EU:T:2002:50, paragraph 485).

409 It follows from the foregoing that it is not appropriate, in the present case, to follow the same approach as that taken in the judgment of 28 February 2002, *Compagnie générale maritime and Others* v *Commission* (T-86/95, EU:T:2002:50), and that the applicant cannot properly rely on that judgment in order to substantiate its argument as to an alleged breach of the principle of equal treatment.

410 As regards the judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission* (T-191/98 and T-212/98 to T-214/98, EU:T:2003:245), it must be noted that, in that judgment, the Court concluded that there was justification for not imposing a fine (paragraph 1633 of the judgment). The applicant asks the Court to make the same finding in the present case.

411 In the judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission* (T-191/98 and T-212/98 to T-214/98, EU:T:2003:245), the Court found that the following factors justified not imposing a fine:

– in the first place, the applicants in the case giving rise to that judgment had on their own initiative revealed the practices regarded by the Commission as constituting an abuse (paragraphs 1603 to 1610 of the judgment);

– in the second place, the decision at issue in the case giving rise to that judgment was the first decision in which the Commission had directly assessed the lawfulness, in the light of the competition rules, of the practices on service contracts adopted by shipping conferences (paragraphs 1611 to 1614 of the judgment);

– in the third place, the legal treatment that should be reserved for the practices at issue was not at all straightforward and raised complex legal issues (paragraphs 1615 and 1616 of the judgment);

– in the fourth place, the abuse resulting from the practices on service contracts did not constitute a classic abuse (paragraphs 1617 to 1621 of the judgment);

– in the fifth place, the applicants in the case giving rise to that judgment had every reason to believe during the administrative procedure that the Commission would not fine them in respect of their practices on service contracts (paragraphs 1622 to 1632 of the judgment).

412 The Court must examine the arguments put forward by the applicant in support of its assertion that the situation underlying the judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission* (T-191/98 and T-212/98 to T-214/98, EU:T:2003:245) is comparable to that underlying the present case.

413 The applicant asserts, in the first place, that, like the applicants in the case giving rise to the judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission* (T-191/98 and T-212/98 to T-214/98, EU:T:2003:245), it raised the alleged infringement on its own initiative, informing the Commission immediately of the concentration.

414 It must be stated in that regard that the circumstances of the present case are not at all comparable to those underlying the judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission* (T-191/98 and T-212/98 to T-214/98, EU:T:2003:245).

415 In the case that gave rise to the judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission* (T-191/98 and T-212/98 to T-214/98, EU:T:2003:245), notification of the agreement at issue had been on a voluntary basis. The Court found, in that regard, that neither of the regulations at issue established a system of compulsory notification for the grant of individual exemption, so that the applicants in that case had notified the Trans-Atlantic Conference Agreement (TACA) — the agreement at issue in that case — voluntarily (judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission*, T-191/98 and T-212/98 to T-214/98, EU:T:2003:245, paragraph 1606).

416 In the present case, the applicant was obliged to notify the concentration at issue, which was a concentration with a Community dimension, and, moreover, it considered itself to be obliged to notify it under Article 7(2)(a) of Regulation No 139/2004, read in conjunction with Article 4 of that regulation.

417 Furthermore, in the present case, notification took place after the concentration was put into effect, whereas in the case that gave rise to the judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission* (T-191/98 and T-212/98 to T-214/98, EU:T:2003:245), the undertakings concerned had notified the agreement at issue before it came into force. As is apparent from paragraphs 34 and 37 of the judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission* (T-191/98 and T-212/98 to T-214/98, EU:T:2003:245), the agreement at issue in that case was notified on 5 July 1994 and came into force on 24 October 1994.

418 The applicant claims, in the second place, that the decision in the present case is the first decision in which the Commission has assessed the scope of Article 7(2) of Regulation No 139/2004 in the way that it has. Just as in the case giving rise to the judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission* (T-191/98 and T-212/98 to T-214/98, EU:T:2003:245), the Contested Decision is therefore, in the applicant's submission, the first decision in which the Commission has directly assessed the lawfulness of the practices in question.

419 It should be noted in that regard that, in the Yara/Kemira GrowHow decision, the Commission had already stated, albeit in an *obiter dictum*, how Article 7(2) of Regulation No 139/2004 was to be interpreted. The situation in the present case is not, therefore, comparable to that underlying the case that gave rise to the judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission* (T-191/98 and T-212/98 to T-214/98, EU:T:2003:245).

420 The applicant also relies on paragraph 1614 of the judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission* (T-191/98 and T-212/98 to T-214/98, EU:T:2003:245). In that paragraph, the Court held:

'whilst it is true … that in the statement of objections in the TAA case it informed the TAA parties that it intended to impose fines for abuse of a dominant position in relation to service contracts, in the final decision the Commission did not find that there had been an infringement of Article 86 of the Treaty on that point. In those circumstances, given the provisional nature of the statement of objections, the applicants were entitled to believe that the Commission had withdrawn its complaints concerning the application of Article 86 of the Treaty to the rules on service contracts.'

421 The applicant submits that, by analogy, in the absence of any action by the Commission with regard to Yara, the applicant was entitled to believe that the Commission had withdrawn its complaints concerning the application of the exemption provided for in Article 7(2) of Regulation No 139/2004.

422 However, the situations are not comparable. A statement of objections is merely a preparatory document which, moreover, is not published. In the TAA case, mentioned in paragraph 1614 of the judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission* (T-191/98 and T-212/98 to T-214/98, EU:T:2003:245), the Commission had, moreover, adopted a decision, but it had not found that there was an infringement consisting in an abuse of a dominant position in relation to service contracts in that decision. It is in those circumstances that the Court held that the applicants in that case were entitled to believe that the Commission had withdrawn some of its complaints.

423 By contrast, the *obiter dictum* in the Yara/Kemira GrowHow decision was capable of giving the undertakings an indication of the Commission's interpretation of Article 7(2) of Regulation No 139/2004. The fact that it did not initiate a proceeding against Yara does not mean that operators may conclude that the Commission has changed its interpretation. The Commission has a discretion as to whether or not it is appropriate to pursue an infringement of the competition rules and it is entitled to set its own priorities. In no way can it be concluded that the Commission considers conduct to be lawful because it has decided not to open an investigation in that regard.

424 Next, the applicant relies on paragraph 1615 of the judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission* (T-191/98 and T-212/98 to T-214/98, EU:T:2003:245). In that paragraph, the Court stated that 'it cannot seriously be denied that the legal treatment that should be reserved for the practices of shipping conferences on service contracts, particularly because of their close links with agreements which are the subject of block exemption pursuant to a wholly specific and exceptional set of rules under competition law, was not at all straightforward and, in particular, raised complex legal issues'. The applicant submits that the interpretation in the Contested Decision of the exemption provided for in Article 7(2) of Regulation No 139/2004 was, similarly, far from straightforward.

425 It must however be noted that, in paragraph 1615 of the judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission* (T-191/98 and T-212/98 to T-214/98, EU:T:2003:245), the Court relied in particular on the close links between the practices at issue and 'agreements which are the subject of block exemption pursuant to a wholly specific and exceptional set of rules under competition law'. These were therefore very particular circumstances, which is not the case in this instance.

426 Furthermore, the applicant notes that the Court found, in paragraph 1617 of the judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission* (T-191/98 and T-212/98 to T-214/98, EU:T:2003:245), that 'the abuse resulting from the practices on service contracts [did] not constitute a classic abuse within the meaning of Article 86 of the Treaty'. In its view, the present case constitutes, at most, a case of an erroneous interpretation of an exemption rather than a clear-cut classic infringement of the standstill obligation.

427 In that regard, suffice it to note that the obligation to notify the concentration at issue and to await its clearance before putting it into effect follows clearly from the wording of Article 4 (1) and Article 7(1) of Regulation No 139/2004. The fact that the applicant may have misinterpreted the exception provided for in Article 7(2) of Regulation No 139/2004 cannot absolve it of responsibility.

428 Lastly, the applicant notes that the Court stated, in paragraphs 1626 and 1627 of the judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission* (T-191/98 and T-212/98 to T-214/98, EU:T:2003:245), that, 'notwithstanding the continuous exchange of correspondence with the TACA parties during the administrative procedure in the present case, the Commission did not inform them prior to issuing the statement of objections that it intended to treat the practices in question not only as restrictions of competition within the meaning of Article 85 of the Treaty, but also as an abuse of a dominant position under Article 86 of the Treaty', and that 'it [had to] be remembered ... that all the fines imposed by the contested decision [had been] in respect of the period between the notification of the TACA and the issue of the statement of objections'.

429 The applicant asserts that, by analogy, notwithstanding the continuous exchange of correspondence between the applicant and the Commission on the subject of the scope of the exemption provided for in Article 7(2) of Regulation No 139/2004, the Commission did not inform the applicant that it intended to treat the transaction as a breach of the standstill obligation until after the Clearance Decision had been issued. In addition, according to the applicant 'all the fines imposed by the [Decision] were in respect of the period between the notification of the [Transaction] and [its clearance]'.

430 In that regard, it should be pointed out that the situation in the case giving rise to the judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission* (T-191/98 and T-212/98 to T-214/98, EU:T:2003:245) is not at all comparable to that at issue in the present case.

431 First of all, it must be noted that the applicant's assertion that, by analogy with the case giving rise to the judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission* (T-191/98 and T-212/98 to T-214/98, EU:T:2003:245), in the present case 'all the fines imposed by the [Decision] were in respect of the period between the notification of the [Transaction] and [its clearance]' is wholly unfounded.

432 In the Contested Decision, the Commission found an infringement of Article 4(1) of Regulation No 139/2004, which had been committed on 18 December 2012, and an

infringement of Article 7(1) of Regulation No 139/2004, which had been committed in the period between 18 December 2012 and 30 September 2013.

433 The applicant's first contact with the Commission — the applicant's request for the allocation of a case team in respect of the acquisition of sole control over Morpol — was on 21 December 2012.

434 When the applicant first made contact with the Commission, the infringement of Article 4 (1) of Regulation No 139/2004 had already ended therefore, and the infringement of Article 7(1) of Regulation No 139/2004 had commenced. That was also the case, a fortiori, on the date on which formal notification was given, 9 August 2013.

435 Since the applicant contacted the Commission only after having committed the infringements, it certainly cannot claim the same treatment as that afforded to the applicants in the judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission* (T-191/98 and T-212/98 to T-214/98, EU:T:2003:245), who had notified the TACA, on a voluntary basis, before it came into force (see paragraphs 415 and 417 above).

436 Furthermore, it is apparent from paragraph 1620 of the judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission* (T-191/98 and T-212/98 to T-214/98, EU:T:2003:245) that, in the case giving rise to that judgment, 'it was only in the statement of objections, after three years of examining the rules in question, that the Commission [had] informed the TACA parties for the first time that it intended to apply Article 86 of the Treaty to the practices even though it [was] apparent from the exchange of correspondence during the administrative procedure that it had already examined them in detail at the end of 1994 and at the beginning of 1995', and that, 'at that stage, ... the Commission [had] at no time alluded to a possible application of Article 86 of the Treaty'.

437 In the present case, it will be recalled that the applicant's first contact with the Commission — its request for the allocation of a case team in respect of the acquisition of sole control over Morpol — was on 21 December 2012. As is evident from paragraph 21 of the Contested Decision, in the absence of any contact by the applicant after the submission of the request for allocation of a case team, the Commission requested a conference call, which took place on 25 January 2013. During the conference call, the Commission requested information on the deal structure and clarification as to whether the December 2012 Acquisition might have already conferred control over Morpol on the applicant.

438 The fact that the Commission showed interest, from the very beginning, in a possible infringement of the standstill obligation is confirmed by an email which legal counsel of law firm F. wrote to the applicant on 27 January 2013. In that email, the lawyer wrote that, 'on request of the Case Team, we briefly explained the structure of the transaction', and that, 'thereby, the Commission showed particular interest in the timing of the transaction as far as the consummation [was] concerned'.

439 In addition, on 12 February 2013, the Commission sent the applicant a request for information relating to the possible acquisition of de facto control over Morpol as a result of the December 2012 Acquisition. In that request for information, the Commission posed, inter alia, the following question:

'Please explain your proposed timing for notification in light of Articles 4(1) and Article 7 (1) of [Regulation No 139/2004]. In particular, please explain why you consider that the suspension obligation of Article 7(1) of [that] regulation does not apply to the acquisition by Marine Harvest of the 48.5% shareholding in Morpol from Friendmall and Bazmonta'.

440 The Commission therefore expressed concerns regarding a possible breach of the standstill obligation shortly after it was first contacted by the applicant. That situation is not at all comparable to the position in the case that gave rise to the judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission* (T-191/98 and T-212/98 to T-214/98, EU:T:2003:245), in which it was only 'after three years of examining the rules in question, that the Commission [had] informed the TACA parties for the first time that it intended to apply Article 86 of the Treaty to the practices' (see paragraph 436 above).

441 It follows from the foregoing that the analogies which the applicant seeks to draw between the present case and that giving rise to the judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission* (T-191/98 and T-212/98 to T-214/98, EU:T:2003:245) are not persuasive.

442 The second part of the fourth plea must therefore also be rejected, as, consequently, must the fourth plea in its entirety.

E. Fifth plea in law, alleging a manifest error of law and fact and a failure to state reasons in relation to setting the levels of the fines

443 The fifth plea consists of five parts, alleging, first, a failure to state reasons in relation to setting the amount of the fine; second, an erroneous assessment of the gravity of the alleged infringements; third, an erroneous assessment of the duration of the alleged infringement; fourth, that the fine is disproportionate; and, fifth, that the Contested Decision incorrectly fails to recognise the existence of mitigating circumstances.

1. The first part, alleging a failure to state reasons in relation to setting the amount of the fine

444 The applicant submits that the statement of reasons in the Contested Decision concerning the amount of the fine is limited to two concise paragraphs (paragraphs 206 and 207 of the Contested Decision) which contain only general considerations. In its view, the fine imposed is thus vitiated by a failure to state adequate reasons and must be annulled.

445 The Commission disputes the applicant's arguments.

446 It is settled case-law that the statement of reasons required by the second paragraph of Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measures in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the court having jurisdiction to exercise its power of review (see judgment of 15 April 1997, *Irish Farmers Association and Others*, C-22/94, EU:C:1997:187, paragraph 39 and the case-law cited). It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of the second paragraph of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 6 March 2003, *Interporc* v *Commission*, C-41/00 P, EU:T:2003:125, paragraph 55 and the case-law cited).

447 As regards fines imposed under Article 14 of Regulation No 139/2004, it should be noted that, according to paragraph 3 of that article, 'in fixing the amount of the fine, regard shall be had to the nature, gravity and duration of the infringement'.

448 In addition, according to Article 14(2) of Regulation No 139/2004, the Commission may impose fines not exceeding 10% of the aggregate turnover of the undertaking concerned

within the meaning of Article 5 of that regulation for breach of the notification obligation laid down in Article 4 of Regulation No 139/2004 and for implementation of a concentration in breach of Article 7 of that regulation.

449 Furthermore, it must be noted that the Commission has not adopted guidelines setting out the method of calculation that it must follow when setting the amount of a fine under Article 14 of Regulation No 139/2004, which, moreover, the applicant acknowledges.

450 In the absence of such guidelines, the framework of the Commission's analysis must be that set out in Article 14(3) of Regulation No 139/2004 (see, by analogy, judgment of 12 December 2012, *Electrabel* v *Commission*, T-332/09, EU:T:2012:672, paragraph 228). However, it is required to reveal clearly and unequivocally in the contested decision the elements which it took into account in setting the amount of the fine (judgment of 12 December 2012, *Electrabel* v *Commission*, T-332/09, EU:T:2012:672, paragraph 228).

451 In the present case, there are only two paragraphs under the heading '5. Amount of the fines' in the Contested Decision: paragraphs 206 and 207. In those paragraphs, the Commission confines itself, in essence, to declaring that, in the case of an undertaking of the size of the applicant, the amount of the penalty must be significant in order to have a deterrent effect, that that is even more the case when the transaction which was implemented before clearance raised serious doubts as to its compatibility with the internal market, and that, 'in order to impose a penalty for the infringement and prevent it from recurring ... and given the specific circumstances of the case at hand', it is appropriate to impose fines under Article 14(2) of Regulation No 139/2004 of EUR 10 000 000 for the infringement of Article 4(1) of Regulation No 139/2004, and of EUR 10 000 000 for the infringement of Article 7(1) of that regulation.

452 However, as the Commission contends, it is clear from the reference to the 'specific circumstances of the case at hand' in paragraph 207 of the Contested Decision that account must also be taken of the reasoning set out under the heading '4. Decision to impose fines' in that decision, namely paragraphs 124 to 205.

453 In those paragraphs, the Commission examined the factors set out in Article 14(3) of Regulation No 139/2004, namely the nature, the gravity and the duration of the infringement (see, in that regard, the summary in paragraphs 31 to 33 above). In that context, it revealed clearly and unequivocally the elements which it took into account in setting the amount of the fine, thus enabling the applicant to defend itself and the Court to exercise its power of review. Indeed, in the second and third parts of the fifth plea, the applicant challenges in detail the Commission's findings in relation to the gravity and duration of the infringement, which confirms that the examination of those factors in the Contested Decision is sufficiently precise to enable the applicant to defend itself.

454 The applicant submits that the Commission made no reference either to the starting amount of the fine or to the approach used to determine it or the weight attributed to the factors affecting the fine.

455 In that regard, it must be noted that, where the Commission has not adopted any guidelines setting out the method of calculation which it is required to follow when setting fines under a particular provision and the Commission's reasoning is disclosed in a clear and unequivocal fashion in the contested decision, the Commission is not required to express in figures, in absolute terms or as a percentage, the basic amount of the fine and any aggravating or mitigating circumstances (judgments of 15 December 2010, *E.ON Energie* v *Commission*, T-141/08, EU:T:2010:516, paragraph 284, and of 26 November 2014,

Energetický a průmyslový and EP Investment Advisors v *Commission*, T-272/12, EU:T:2014:995, paragraph 101).

456 The applicant's argument that the Commission should have specified the basic amount of the fine and the weight attributed to the various factors must therefore be rejected.

457 That finding is not called in question by the case-law cited by the applicant.

458 With regard to the judgments of 8 December 2011, *Chalkor* v *Commission* (C-386/10 P, EU:C:2011:815), and of 10 July 2014, *Telefónica and Telefónica de España* v *Commission* (C-295/12 P, EU:C:2014:2062), it must be pointed out that these are judgments that concern infringements of Articles 101 or 102 TFEU and that, in the cases giving rise to those judgments, guidelines on the calculation of fines did apply.

459 Admittedly the Court stated, in paragraph 142 of the judgment of 6 April 1995, *Trefilunion* v *Commission* (T-148/89, EU:T:1995:68), that it was 'desirable for undertakings — in order to be able to define their position in full knowledge of the facts — to be able to determine in detail, in accordance with any system which the Commission might consider appropriate, the method of calculation of the fine imposed upon them, without being obliged, in order to do so, to bring court proceedings against the Commission decision'.

460 It must be noted however that, in the case that gave rise to that judgment, the applicant had argued that the Commission had not stated whether it had taken as a basis for calculation of the fine the overall turnover of the undertaking or only the turnover for France or for the Benelux countries. In that case, it was only during the proceedings before the Court that the Commission stated that it had taken as the basis for calculation of the fine the turnover in welded steel mesh achieved by the undertakings on the relevant geographical market (see, to that effect, judgment of 6 April 1995, *Trefilunion* v *Commission*, T-148/89, EU:T:1995:68, paragraphs 135, 136 and 142).

461 In that case, the Commission had therefore made a calculation on the basis of turnover in a specific market, but had not specified it in the contested decision. The quotation set out in paragraph 459 above must be read in that context. Furthermore, in the judgment of 6 April 1995, *Trefilunion* v *Commission* (T-148/89, EU:T:1995:68, paragraphs 140 to 144), the Court rejected the plea alleging infringement of the obligation to state reasons.

462 The applicant further submits, in paragraph 104 of the application, that 'the [Contested] Decision likewise fails to explain how [the applicant's] turnover and the profit, if any, that [the applicant] could derive from the alleged infringement of Articles 4(1) and 7(1) of [Regulation No 139/2004] affected the fine level'. It goes on to assert, in paragraph 104 of the application, that 'a fine must be specific to the offender and the offence, and must be determined by taking account of, among other, the undertaking's turnover or share capital and the profit gained from the alleged infringement'. According to the applicant, it derived no profit from the alleged infringement.

463 In reply to a question that was put at the hearing as to whether paragraph 104 of the application concerned the statement of reasons or a substantive error in the Contested Decision, the applicant confirmed that that paragraph was referring to the statement of reasons for the Contested Decision, and this was recorded in the minutes of the hearing.

464 As regards the applicant's argument that the Contested Decision does not explain how the applicant's turnover affected the level of the fine, it must be noted that the Commission stated the applicant's worldwide turnover in footnote 5 of the Contested Decision.

465 It must also be noted that, in examining the relevant factors in setting the fine, the Commission repeatedly referred to the size of the applicant. Thus, it stated in paragraph 144 of the Contested Decision, in the context of its assessment of the gravity of the infringement, that the applicant was 'a large European company'. It also stated in paragraph 150 of the Contested Decision, again in the context of its assessment of the gravity of the infringement, that 'in [the] possible market [for Scottish salmon], the transaction would have combined two of the largest farmers and primary processors in the EEA'. The latter statement was repeated in paragraph 172 of the Contested Decision, in the context of the assessment of the duration of the infringement. Lastly, the Commission stated, in paragraph 206 of the Contested Decision, that it took the size of the applicant into account in order to set the amount of the fine.

466 It is therefore clear from the statement of reasons for the Contested Decision that the Commission took the size of the applicant into account when setting the amount of the fine.

467 As regards the applicant's argument that the Contested Decision does not explain how the profit, if any, that the applicant could derive from the alleged infringement of Article 4(1) and Article 7(1) of Regulation No 139/2004 affected the level of the fine, it must be noted that the Commission did not examine, in the Contested Decision, the possible existence of any profit which the applicant was able to derive from the infringement. It is clear from this that the Commission did not take into account the possible profit or lack of profit which the applicant was able to derive from the infringement in determining the amount of the fine. There is, therefore, no failure to state reasons in that respect.

468 Furthermore, even if the argument put forward in paragraph 104 of the application had to be interpreted, contrary to the statement made by the applicant at the hearing, as meaning that the applicant is also relying on a substantive error, in that the Commission failed to take into consideration the lack of any profit from the infringement, that argument would have to be rejected as unfounded.

469 It is apparent from the case-law that no binding or exhaustive list of the criteria which must be applied when assessing the gravity of the infringement has been drawn up (see, as regards infringements of Article 101 TFEU, judgment of 17 July 1997, *Ferriere Nord* v *Commission*, C-219/95 P, EU:C:1997:375, paragraph 33, and, as regards infringements of Article 102 TFEU, judgment of 19 April 2012, *Tomra Systems and Others* v *Commission*, C-549/10 P, EU:C:2012:221, paragraph 107).

470 In particular, there is no obligation for the Commission to examine whether an applicant has derived a profit from an infringement of Article 4(1) and Article 7(1) of Regulation No 139/2004. In that context, it should be noted that that is not a constituent element of an infringement of Article 4(1) or Article 7(1) of Regulation No 139/2004, and it is not always possible to determine whether an applicant has or has not derived any profit from implementing a concentration prior to its notification and clearance, let alone quantify that profit.

471 The applicant cites a number of judgments to support its assertion that the fine must be determined by taking into account, among other, the profit gained from the alleged infringement. It should be noted that the case-law cited by the applicant in that context concerns cases relating to infringements of Article 101 TFEU (judgments of 7 June 1983, *Musique Diffusion française and Others* v *Commission*, 100/80 to 103/80, EU:C:1983:158, paragraph 129; of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 242; of 3 September 2009, *Prym and Prym Consumer* v *Commission*, C-534/07 P,

EU:C:2009:505, paragraph 96; and of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 56) or Article 102 TFEU (Opinion of Advocate General Wathelet in *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2013:619, point 117).

472 Only the Opinion of Advocate General Bot in *E.ON Energie* v *Commission* (C-89/11 P, EU:C:2012:375), which the applicant cited in that context, concerned a different type of infringement, that of breaking a seal. It must be noted that the Court of Justice did not follow the Opinion of Advocate General Bot and dismissed the appeal in the judgment of 22 November 2012, *E.ON Energie* v *Commission* (C-89/11 P, EU:C:2012:738), contrary to the Advocate General's recommendation. Furthermore, it is not apparent from the Opinion of Advocate General Bot in that case that he considered the Commission to be obliged to examine the profit derived from the infringement in every case. He merely stated, in point 114 of his Opinion, that it was necessary to take into account all the elements of the case, 'such as', among other, the profit which the undertaking concerned derived from the infringement. He thus confined himself to listing examples of criteria that may be taken into consideration, while recalling, in point 113 of his Opinion, the case-law which states that no binding or exhaustive list of the criteria which must be applied has been drawn up.

473 It should, moreover, be pointed out that it is apparent from the case-law that, even in the context of an infringement of Article 101 TFEU, the fact that an undertaking did not benefit from an infringement cannot preclude the imposition of a fine since otherwise it would cease to have a deterrent effect (see judgment of 8 July 2008, *BPB* v *Commission*, T-53/03, EU:T:2008:254, paragraph 441 and the case-law cited). The Commission is not required, in fixing the amount of fines, to take into consideration any lack of benefit from the infringement (see judgment of 29 November 2005, *SNCZ* v *Commission*, T-52/02, EU:T:2005:429, paragraph 90 and the case-law cited). The Commission is not obliged to establish in every case, for the purpose of determining the amount of the fine, the financial advantage linked to the infringement found to have been committed. The absence of such an advantage cannot be regarded as an attenuating circumstance (see judgment of 8 July 2008, *BPB* v *Commission*, T-53/03, EU:T:2008:254, paragraph 442 and the case-law cited).

474 Likewise, the Commission is not required to take into account, in fixing the amount of a fine, any lack of profit from the implementation of a concentration prior to its notification and clearance.

475 Assessment of the gains from the infringement may be relevant if the Commission bases itself precisely on such gains in order to assess the gravity of the infringement and/or to calculate the fine (judgment of 15 March 2000, *Cimenteries CBR and Others* v *Commission*, T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, EU:T:2000:77, paragraph 4882). However, that is not the position in the present case.

476 It should also be noted that, in order to substantiate the fact that it did not derive any benefit from the alleged infringement, the applicant relies, in paragraph 71 of the reply, in particular on the fact that it refrained from exercising its voting rights in Morpol pending clearance of the concentration. That element was taken into account by the Commission as a mitigating circumstance (paragraphs 196 and 198 of the Contested Decision).

477 It follows from the foregoing that the Commission neither infringed its obligation to state reasons nor made a substantive error by refraining from determining and taking into account the possible profit or lack of profit from the infringement.

2. The second part, alleging an erroneous assessment of the gravity of the alleged infringements

478 The applicant states that none of the factors taken into account in the Contested Decision for the purposes of assessing gravity, namely negligence, the serious doubts as to the compatibility of the transaction with the internal market and the existence of precedents concerning the applicant and other companies, is relevant.

479 The Commission disputes the applicant's arguments.

480 It must be noted, first of all, that the applicant does not take issue with the considerations in paragraphs 131 to 136 of the Contested Decision concerning the nature of the infringement. In those paragraphs, the Commission considered that any infringement of Article 4(1) and Article 7(1) of Regulation No 139/2004 was, by its nature, a serious infringement. That assessment, which must be endorsed, was based in particular on paragraph 235 of the judgment of 12 December 2012, *Electrabel* v *Commission* (T-332/09, EU:T:2012:672). In that paragraph, the Court had held that the Commission had correctly stated that, 'by making concentrations with a Community dimension conditional upon notification and prior authorisation, the Community legislature wanted to ensure that such concentrations were subject to effective control by the Commission, allowing the Commission where appropriate to prevent such concentrations from being carried out before it takes a final decision, thereby avoiding irreparable and permanent damage to competition'. The Court had also stated that 'the Commission was therefore able, without making an error, to characterise the infringement as serious, in view of its nature'.

481 The applicant does, however, dispute the relevance of the factors which the Commission took into account in the specific assessment of the gravity of the infringements at issue in the present case.

482 It must be borne in mind, as a preliminary point, that the gravity of an infringement must be assessed in the light of numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up (judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 241).

(a) The account taken of the negligence of the applicant

483 As regards the applicant's argument that its conduct was not negligent, suffice it to note that that argument was rejected in the course of the examination of the second plea in law.

484 Contrary to the applicant's assertion, there was no excusable error on its part. The concept of excusable error, which arises directly out of a concern that the principles of legal certainty and the protection of legitimate expectations should be upheld, can, according to settled case-law, concern only exceptional circumstances in which, in particular, the conduct of the institution concerned has been, either alone or to a decisive extent, such as to give rise to a pardonable confusion in the mind of a party acting in good faith and exercising all the diligence required of a normally experienced person (see judgment of 15 September 2011, *CMB and Christof* v *Commission*, T-407/07, not published, EU:T:2011:477, paragraph 99 and the case-law cited). In the present case, the applicant did not exercise all the diligence required of a normally experienced person, which rules out the existence of an excusable error on its part.

(b) The account taken of the existence of serious doubts as to the compatibility of the transaction with the internal market

485 As regards the account taken by the Commission of the existence of serious doubts as to the compatibility of the transaction with the internal market, the Court notes the following.

486 In paragraph 150 of the Contested Decision, the Commission observed that the applicant's acquisition of Morpol had been cleared following the submission by the applicant of wide-ranging remedies to remove the serious doubts raised by the Commission as regards the possible market for Scottish salmon. It also stated that, in the possible market for Scottish salmon, the concentration would have combined two of the largest farmers and primary processors in the European Economic Area (EEA).

487 The Commission considered that the implemented merger could have had an adverse impact on competition in the possible market for Scottish salmon for the whole duration of the infringement. According to the Commission, although the applicant did not exercise its voting rights in Morpol, it was at least possible that the competitive interaction between the applicant and Morpol had been affected as a result of the December 2012 Acquisition.

488 It must be pointed out that the applicant does not put forward any argument that might call in question the Commission's assessment that the concentration at issue gave rise to serious doubts as to its compatibility with the internal market. It does, however, take issue with the account that was taken of that factor as an element that rendered the infringements more serious. In its submission, the statement in paragraph 157 of the Contested Decision that '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' distorts the General Court's reasoning in its judgment of 12 December 2012, *Electrabel* v *Commission* (T-332/09, EU:T:2012:672, paragraph 247), according to which 'the presence of damage to competition would render the infringement even more serious'.

489 As to how the judgment of 12 December 2012, *Electrabel* v *Commission* (T-332/09, EU:T:2012:672) is to be interpreted, the following should be noted.

490 The case giving rise to that judgment concerned a concentration which the Commission had found did not give rise to competition concerns. The Commission stated, in paragraph 194 of Decision C(2009) 4416 final of 10 June 2009 (Case COMP/M.4994 — Electrabel/Compagnie nationale du Rhône) ('the Electrabel decision'), that 'the presence of damage to competition would indeed render the infringement more serious' and that 'the absence of any such damage in the present case [was] an important factor to be taken into account in determining the amount of the fine', but that, '[nevertheless], the fact that the transaction [did] not raise competition concerns [did] not take away from the seriousness of the infringement'. That statement must be read in the light of the fact that the Commission had concluded, in paragraph 191 of the Electrabel decision, that any infringement of Article 7(1) of Regulation No 4064/89 was by nature a serious infringement.

491 The Commission therefore found that the infringement of Article 7(1) of Regulation No 4064/89 remained, by its very nature, a serious infringement, even though the concentration had not raised competition concerns. It is not possible to conclude from this *a contrario*, as the applicant endeavours to do, that the existence of competition concerns cannot add to the seriousness of the alleged infringement. The Commission did not find that the existence or non-existence of competition concerns was irrelevant to the assessment of the gravity of the infringement, only that the infringement was by nature a serious infringement, even in the absence of any competition concerns raised by the concentration.

492 In the judgment of 12 December 2012, *Electrabel* v *Commission* (T-332/09, EU:T:2012:672), the Court endorsed the Commission's approach. It stated, in particular, in paragraph 246 of the judgment, that 'the Commission [was] correct to maintain that the *ex post* analysis of the lack of 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'. It also held as follows, in paragraph 247 of the judgment:

'That, however, does not prevent the absence of effects on the market being taken into account as a relevant factor in determining the amount of the fine, as the Commission acknowledges at recital 194 to the contested decision. The Commission is also correct to claim at the same recital that the presence of damage to competition would render the infringement even more serious.'

493 It must be pointed out that the statement in paragraph 246 of the judgment of 12 December 2012, *Electrabel* v *Commission* (T-332/09, EU:T:2012:672), that 'the *ex post* analysis of the lack of 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', cannot be interpreted as meaning that the existence or non-existence of damage to competition plays no role in the assessment of the gravity of the infringement. That is apparent from paragraph 247 of that judgment, in which the Court found that 'the presence of damage to competition would render the infringement even more serious'. The statement in paragraph 246 of that judgment must be read in the light of the fact that the Court was responding to Electrabel's argument that the infringement could not be serious as it had not caused any damage to competition.

494 In the case giving rise to the Electrabel decision, the Commission and the Court made findings in respect of two possible situations. First, they found that the absence of any damaging effect on competition — as is the case where the concentration put into effect prematurely raised no competition concerns — did not in any way alter the fact that the infringement was (by nature) serious. Second, they stated, by way of illustration, that the presence of damaging effects would have made the infringement even more serious.

495 There is, however, a third scenario, on which the Commission and the Court did not comment in the case giving rise to the Electrabel decision. That is the 'intermediate situation', in which the concentration, implemented prematurely, raised serious doubts as to its compatibility with the internal market, but in which it cannot be determined whether its implementation in the form initially envisaged and not cleared by the Commission has had damaging effects on competition or not.

496 The question therefore arises whether, in that third scenario, the Commission may find the fact that the concentration raised serious doubts as to its compatibility with the internal market to be a factor that makes the infringement more serious.

497 That question must be answered in the affirmative. It would be inappropriate to treat the early implementation of concentrations which raise serious doubts as to their compatibility with the internal market, and the early implementation of concentrations which do not raise any competition concerns, in the same way.

498 It must be noted that the aim of Article 4(1) and of Article 7(1) of Regulation No 139/2004 is to ensure the effectiveness of the system of *ex ante* control of the effects of concentrations with a Community dimension (see, to that effect and by analogy, judgment of 12 December 2012, *Electrabel* v *Commission*, T-332/09, EU:T:2012:672, paragraph 246). It should also be noted that the objective of the EU rules on the control of concentrations is the prevention of irreparable and permanent damage to competition (judgment of 12 December 2012,

Electrabel v *Commission*, T-332/09, EU:T:2012:672, paragraph 245). The system for the control of concentrations is intended to enable the Commission to exercise 'effective control of all concentrations in terms of their effect on the structure of competition' (recital 6 of Regulation No 139/2004).

499 In the case of concentrations which raise serious doubts as to their compatibility with the internal market, the possible competition risks associated with early implementation are not the same as in the case of concentrations which do not raise competition concerns.

500 The fact that a concentration raises serious doubts as to its compatibility with the internal market therefore makes the early implementation of that concentration more serious than the early implementation of a concentration which does not raise competition concerns, unless, notwithstanding the fact that it raises such serious doubts, the possibility that its implementation in the form initially envisaged and not cleared by the Commission may have had damaging effects on competition can be ruled out in a particular case.

501 The Commission was therefore right in finding, in paragraph 157 of the Contested Decision, that 'the mere fact that the Transaction gave rise to serious doubts as to the compatibility with the internal market [was] in itself a factor which [made] the infringement more serious', having expressly found, in paragraph 151 of the Contested Decision, that the implemented merger could have impacted adversely upon competition in the possible market for Scottish salmon for the whole duration of the infringement and that it was at least possible that the competitive interaction between the applicant and Morpol had been affected as a result of the December 2012 Acquisition.

502 It is not possible to conclude *a contrario* from the finding in the judgment of 12 December 2012, *Electrabel* v *Commission* (T-332/09, EU:T:2012:672, paragraph 247), according to which 'the presence of damage to competition would render the infringement even more serious', that it is only where actual damaging effects can be demonstrated that the infringement may be rendered more serious. It cannot be inferred from the fact that the Court stated, by way of illustration, that the presence of damaging effects would have rendered the infringement more serious that that is the only circumstance that would render the infringement more serious. In the case giving rise to the Electrabel decision, the Commission and the Court simply did not make any finding in respect of the 'intermediate situation' described in paragraph 495 above.

503 The applicant submits that, in paragraphs 156 and 157 of the Contested Decision, the Commission paradoxically explains that 'the presence of [damage to competition] is likely to render the infringement even more serious', even though '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'.

504 It should be noted in that regard that the Commission was repeating the content of the statements made by the Court in the judgment of 12 December 2012, *Electrabel* v *Commission* (T-332/09, EU:T:2012:672, paragraphs 246 and 247), as cited in paragraph 492 above. It is sufficient to recall the observations on how those paragraphs of the judgment should be interpreted (paragraph 493 above).

505 The Court must examine whether the Commission was right in finding, in paragraph 151 of the Contested Decision, that the implemented merger could have impacted adversely upon competition in the possible market for Scottish salmon for the whole duration of the infringement and that 'it [was] at least possible that the competitive interaction between Marine Harvest and Morpol [had] been affected as a result of the December 2012 Acquisition'.

506 In that regard, first, the Commission stated in paragraph 151 of the Contested Decision that the former CEO of Morpol, Mr M., had resigned with effect from 1 March 2013 as a result of a provision included in the SPA which had been signed with the applicant. According to the Commission, the applicant's acquisition of a 48.5% stake in Morpol appeared therefore to have been 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.

507 The applicant submits in that regard that the December 2012 Acquisition was not a decisive factor in Mr M.'s decision to step down. On the contrary, according to the applicant, Morpol's corporate governance structure, including Mr M.'s resignation, had been a topic of intense discussion within Morpol's board of directors for over a year.

508 In the present case, it is not possible to determine with certainty whether Mr M.'s decision to step down was or was not influenced by the December 2012 Acquisition.

509 Admittedly, the applicant demonstrates that Mr M.'s possible resignation was a topic of discussion even before the December 2012 Acquisition, by producing in particular the minutes of Morpol's board meetings of 12 and 15 September 2011. The applicant also stated that Morpol had experienced considerable corporate governance issues, that Morpol's largest creditor bank had wanted to reduce its exposure to Morpol's debt obligations and that these events had led Morpol's share price to drop, from approximately 21 Norwegian kroner (NOK) at the time of its listing on the Oslo Stock Exchange in 2010 to less than NOK 8 in November 2012. The Commission does not dispute those facts.

510 However, that does not preclude the possibility that the closing of the December 2012 Acquisition, and notably the clause to that effect included in the SPA, influenced Mr M.'s decision to resign. According to clause 12.1.1. of the SPA, Mr M. had undertaken to resign as CEO of Morpol no later than 1 March 2013. It appears quite likely, moreover, that the decision to resign specifically with effect from 1 March 2013 was influenced by the implementation of the SPA. As the Commission correctly points out, if the applicant had suspended implementation of the SPA pending clearance, Mr M. would not have been bound to comply with clause 12.1.1. of the SPA until completion of the transaction.

511 Second, the Commission stated in paragraph 151 of the Contested Decision that the applicant had 'internalised a large share of Morpol's profits through the December 2012 Acquisition'. It found that, therefore, 'the likely financial effects of the December 2012 Acquisition which [had] eliminated [the applicant's] incentives to maintain the pre-acquisition competitive constraint on Morpol [were] considered sufficient to have given rise to potential competition harm'.

512 The applicant submits that the Commission's assertion that the applicant's internalisation of a large share of Morpol's profits eliminated the factors which gave the applicant an incentive to maintain the competitive constraint is unsubstantiated and, in any event, is not infringement-specific. In the applicant's view, this also holds true for any 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 its closing.

513 It must be pointed out that the situations are not the same. In the present case, the applicant internalised a large share of Morpol's profits prior to clearance of the concentration. The incentives to maintain the competitive constraint exercised on Morpol were therefore likely to be weaker than in the case of a company which only has the prospect of retroactively recovering the profits resulting from activities conducted after the agreement has been signed, once clearance of the concentration has been obtained.

514 The two aspects considered in paragraphs 506 to 513 above were in themselves sufficient to justify the finding, in paragraph 151 of the Contested Decision, of a possible adverse impact on competition in the possible market for Scottish salmon for the whole duration of the infringement.

515 It is not necessary, therefore, to examine the relevance of the third aspect on which the Commission relied, in paragraph 151 of the Contested Decision, namely that it could not be excluded, according to the Commission, that the applicant, in its capacity as the largest shareholder of Morpol, had acquired privileged access to market information of Morpolin the period between the closing of the December 2012 Acquisition and adoption of the Clearance Decision.

516 It must be held, therefore, that the measures taken by the applicant, namely the non-exercise of voting rights and the separation of the entities pending clearance of the concentration, were not capable of removing the risk of damage to competition caused by the implementation of the concentration at issue in the form initially envisaged and not cleared by the Commission, even if those measures may have reduced the possible anticompetitive effect.

517 It follows from the foregoing that the situation in the present case falls within the ‘intermediate situation’, as defined in paragraph 495 above, that is a situation in which the concentration, implemented prematurely, raised serious doubts as to its compatibility with the internal market, but in respect of which it cannot be determined whether its implementation in the form initially envisaged and not cleared by the Commission did or did not have damaging effects on competition.

518 The applicant’s argument, put forward at the hearing, that the Commission relied on the matters referred to in paragraphs 506, 511 and 515 above only at the stage of the defence, has no basis in fact. Those matters are set out in paragraph 138 of the Statement of Objections, as well as in paragraph 151 of the Contested Decision.

519 The applicant also states that where the Commission relies on the alleged market impact of an alleged infringement in order to establish its gravity, the Commission must prove its assertions to the requisite legal standard, namely by providing specific and credible evidence indicating the impact with reasonable probability. In support of that claim, the applicant cites the judgments of 27 September 2006, *Roquette Frères* v *Commission* (T-322/01, EU:T:2006:267, paragraph 75); of 27 September 2006, *Jungbunzlauer* v *Commission* (T-43/02, EU:T:2006:270); of 27 September 2006, *Archer Daniels Midland* v *Commission* (T-59/02, EU:T:2006:272, paragraph 161); and of 6 May 2009, *KME Germany and Others* v *Commission* (T-127/04, EU:T:2009:142, paragraph 68).

520 It must be pointed out that the case-law cited by the applicant concerns cartels. For example, the Court noted, in paragraph 68 of the judgment of 6 May 2009, *KME Germany and Others* v *Commission* (T-127/04, EU:T:2009:142), that ‘the [General Court] has held on numerous occasions that actual impact of a cartel on the market must be regarded as sufficiently demonstrated if the Commission is able to provide specific and credible evidence indicating with reasonable probability that the cartel had an impact on the market’.

521 It should also be noted that, according to the terms of the first paragraph of Section 1A of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3), which were applicable in the judgments of the General Court on which the applicant relied and which are cited in paragraph 519 above, in order to calculate the fine on the basis of the gravity of the

infringement, the Commission was required to take account in particular of the ‘actual impact [of the infringement] on the market, where this [could] be measured’.

522 The case-law cited by the applicant cannot, therefore, call in question the considerations set out in paragraphs 495 to 501 above. It should be borne in mind in particular that the objective of the EU rules on the control of concentrations is the prevention of irreparable and permanent damage to competition (see paragraph 498 above).

523 It must be stated that, in the case of infringements of Article 4(1) and Article 7(1) of Regulation No 139/2004, the mere fact that damaging effects on competition are possible, because the concentration implemented in the form initially envisaged and not cleared by the Commission raised serious doubts as to its compatibility with the internal market, may be taken into account in assessing the gravity of the infringement, even if the Commission does not demonstrate a ‘reasonable probability’ that such effects exist.

524 Admittedly, where the existence of damaging effects on competition resulting from the implementation of a concentration in the form initially envisaged and not cleared by the Commission can be demonstrated, that is liable to render the infringement even more serious than an infringement falling within the scope of the ‘intermediate situation’. That does not prevent the mere fact that damaging effects on competition cannot be ruled out from rendering the infringement more serious than the early implementation of a concentration which does not raise any competition concerns.

525 Lastly, the applicant states that it never derived or even expected to derive any benefit from what the Commission views as a violation of the merger control rules, as it complied with the requirements of Article 7(2) of Regulation No 139/2004 by refraining from exercising its voting rights in Morpol.

526 It will be recalled that the fact that an undertaking has not benefited from an infringement cannot preclude the imposition of a fine, since otherwise the fine would cease to have a deterrent effect (see paragraph 473 above).

527 It should also be recalled that the fact that the applicant did not exercise its voting rights in Morpol pending clearance of the concentration was taken into account by the Commission as a mitigating circumstance (see paragraph 476 above).

528 It follows from the foregoing that the Commission was right in taking into account, in the present case, the fact that the concentration raised serious doubts as to its compatibility with the internal market as a factor which made the infringement more serious.

(c) The account taken of precedents concerning the applicant and other companies

529 The Commission noted, in paragraph 159 of the Contested Decision, that the applicant (at that time, Pan Fish) had already been fined in 2007 by the French competition authorities for infringement of the standstill obligation with respect to its acquisition of Fjord Seafood. It also stated that ‘this [meant] that this [was] not the first time that [the applicant] [had infringed] the standstill obligation in the context of merger control proceedings’.

530 The Commission considered, in paragraph 163 of the Contested Decision, that ‘the previous sanction should have induced [the applicant] to apply particular care in the assessment of its obligations as regards merger control at the time of the December 2012 Acquisition’, and that, ‘as such, the existence of an infringement of the standstill obligations at national level [made] the infringement more serious’.

531 The Commission also noted, in paragraph 160 of the Contested Decision, that Regulation No 139/2004 had already been in force for more than 10 years and that similar provisions as regards the standstill obligation had existed in Regulation No 4064/89, which had been in force for more than 13 years. In addition, it stated that it had already proceeded against other companies and had imposed fines on them for breach of Article 7(1) of Regulation No 4064/89, and that it had also adopted a number of other decisions on the basis of Article 14 of Regulation No 4064/89. According to the Commission, the applicant 'should [thus] have been fully aware of the legal framework and the application of these rules by the Commission'.

(1) The account taken of the case giving rise to the Pan Fish/Fjord Seafood decision

532 The applicant submits that punishing it more severely for allegedly being a repeat offender, because it had been penalised in France in the Pan Fish/Fjord Seafood decision, is not consistent with the case-law according to which recidivism implies that a person has committed fresh infringements after being penalised for similar infringements.

533 However, as the Commission argues, it did not consider the existence of the applicant's previous procedural infringements to be an aggravating circumstance. It explicitly found, in paragraph 201 of the Contested Decision, that there were no aggravating circumstances in this case.

534 It must also be pointed out that the Commission did not use the terms 'recidivism' or 'repeat offender' in the Contested Decision. Admittedly it is to the substance of the Contested Decision rather than the terminology that reference must be made in order to examine whether the Commission decided that the applicant was a repeat offender.

535 In that regard, it must be noted that taking repeated infringement into account 'is intended to provide undertakings which have shown a propensity to breach the competition rules with an incentive to change their conduct' (judgment of 12 December 2007, *BASF and UCB* v *Commission*, T-101/05 and T-111/05, EU:T:2007:380, paragraph 67). In the present case, the Commission did not, even implicitly, find in the Contested Decision that a more severe penalty had to be imposed on the ground that the penalty imposed in the Pan Fish/Fjord Seafood decision had not been sufficient to deter the applicant from committing further infringements. In the paragraphs concerning the necessary deterrent effect of the fine — paragraphs 157, 172 and 206 of the Contested Decision — the Commission referred only to the size of the applicant, to the fact that the transaction at issue had raised serious doubts as to its compatibility with the internal market and to the fact that competitive harm could not be excluded. Contrary to the view taken by the applicant, the Commission did not, therefore, take into account any allegedly repeated infringement by the applicant. The applicant's arguments are therefore based on a false premiss.

536 As is evident from paragraph 163 of the Contested Decision, the Commission considered that 'the previous sanction should have induced [the applicant] 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 Commission found that the existence of an infringement of the standstill obligations at national level made the infringement more serious.

537 It will be recalled in that regard that it was found in paragraph 258 above that the Commission was entitled to take into account the fact that the applicant had already been fined at national level for the early implementation of a concentration, and that particular diligence must be expected of a large European company which has already been fined, albeit at national level, for the early implementation of a concentration.

538 That is a factor which may be taken into account when assessing, on the one hand, whether there has been any negligence on the part of the applicant and, on the other, the degree of such negligence.

539 In paragraphs 159 and 163 of the Contested Decision, the Commission took into account the existence of the precedent in the case giving rise to the Pan Fish/Fjord Seafood decision as being a factor which increased the degree of negligence on the part of the applicant and, as such, '[made] the infringement more serious'. The finding, in paragraph 163 of the Contested Decision, that the previous sanction should have induced the applicant to apply particular care in the assessment of its obligations as regards merger control relates, in essence, to the degree of negligence. At the hearing, the Commission confirmed that, in the Contested Decision, it used the case that gave rise to the Pan Fish/Fjord Seafood decision only as a factor that related to the degree of the applicant's negligence.

540 At the hearing, the applicant agreed that the Commission had taken into account the case giving rise to the Pan Fish/Fjord Seafood decision in the assessment of negligence. However, the applicant claimed that that case was not relevant to the assessment of the existence or degree of negligence, as the facts of that case were completely different from those of the present case, and therefore the applicant had not been able to draw any useful conclusions from it for the present case.

541 It should be borne in mind that it is indeed the case that the Pan Fish/Fjord Seafood decision did not concern the interpretation of Article 7(2) of Regulation No 139/2004 (see paragraph 258 above). However, the fact that the applicant had already been fined, albeit at national level, for the early implementation of a concentration implies that particular diligence had to be expected of the applicant (see paragraph 258 above). On that basis, the existence of that precedent increased the degree of the applicant's negligence, which constituted a factor that rendered the infringement more serious.

542 The Commission did not, therefore, err in taking into consideration the case giving rise to the Pan Fish/Fjord Seafood decision when assessing the gravity of the infringement.

(2) The account taken of cases concerning other companies

543 The applicant submits that the statement in paragraph 160 of the Contested Decision, that 'the Commission had already proceeded against other companies and imposed fines on them for breach of Article 7(1) of [Regulation No 4064/89]', disregards the key issue that none of those cases concerned the scope of Article 7(2) of Regulation No 139/2004 or of Article 7(3) of Regulation No 4064/89.

544 It must be noted in that regard that, in paragraph 160 of the Contested Decision, the Commission stated that Regulation No 139/2004 had already been in force for more than 10 years and that similar provisions as regards the standstill obligation existed in Regulation No 4064/89, which had been in force for more than 13 years. It also observed that it had already proceeded against other companies and imposed fines on them for breach of Article 7(1) of Regulation No 4064/89, and that it had also adopted a number of other decisions on the basis of Article 14 of Regulation No 4064/89.

545 In so doing, the Commission, in essence, provided justification for the fact that it had no further reason to be 'lenient' in setting fines pursuant to Article 14 of Regulation No 139/2004.

546 It should be pointed out that the Commission may indeed choose to impose a small fine when applying for the first time(s) a provision under which it is entitled to impose a fine.

However, the Commission is lawfully entitled to consider that it no longer has any reason to do so if it has already repeatedly imposed fines under that provision.

547 The applicant's argument that the precedents did not concern Article 7(2) of Regulation No 139/2004 or Article 7(3) of Regulation No 4064/89 is, in that context, irrelevant. The existence of precedents, in which fines had been imposed on the basis of Article 14 of Regulation No 4064/89, served as a warning to the applicant that it ran the risk of being heavily fined if it infringed Article 4(1) and Article 7(1) of Regulation No 139/2004. The fact, in particular, that the Commission had already imposed a severe sanction, a fine of EUR 20 million, in the Electrabel decision, was liable to indicate to the applicant that it ran the risk of severe sanctions being imposed in the event of the early implementation of the concentration at issue.

548 As regards the applicant's argument that the Commission did not open an investigation or impose a fine in the case giving rise to the Yara/Kemira GrowHow decision, suffice it to note that the Commission did not rely on that case in paragraph 160 and footnotes 64 and 65 of the Contested Decision.

549 Lastly, the applicant submits that the finding, in paragraph 163 of the Contested Decision, that the existence of previous procedural infringement cases concerning the applicant as well as other companies makes the applicant's infringement more serious is manifestly vitiated by errors of law and fact.

550 However, in paragraph 163 of the Contested Decision, the Commission stated that 'the previous sanction', namely the sanction imposed in the Pan Fish/Fjord Seafood decision, should have induced the applicant to apply particular care in the assessment of its obligations and that, 'as such, the existence of an infringement of the standstill obligations at national level [made] the infringement more serious'. The Commission therefore merely found, in paragraph 163 of the Contested Decision, that the existence of a previous infringement committed by the applicant in the case giving rise to the Pan Fish/Fjord Seafood decision made the infringement more serious. It did not, however, find that the existence of previous procedural infringement cases concerning other companies made the applicant's infringement more serious.

551 It follows from the foregoing that the second part of the fifth plea must be rejected.

3. The third part, alleging an erroneous assessment of the duration of the alleged infringement

552 The applicant asserts that, in order to justify its refusal to exclude the pre-notification period from the duration of the infringement, the Commission erroneously asserted, in paragraph 173 of the Contested Decision, that the applicant had not been sufficiently forthcoming in the course of the pre-notification phase. According to the applicant, the Commission failed in the Contested Decision to observe the principle of equal treatment in its assessment of the duration of the infringement, by not adopting the same approach as that followed in its Electrabel decision, wherein it excluded the period of pre-notification and examination of the concentration from the duration of the infringement.

553 The Commission disputes the applicant's arguments.

554 First of all, it will be recalled that, in paragraphs 128 and 165 of the Contested Decision, the Commission noted that an infringement of Article 4(1) of Regulation No 139/2004 was an instantaneous infringement, and that that infringement had been committed in the present case on 18 December 2012, the date of closing of the December 2012 Acquisition.

555 The Commission also noted, in paragraphs 128 and 166 of the Contested Decision, that an infringement of Article 7(1) of Regulation No 139/2004 was a continuous infringement which remained ongoing for as long as the transaction was not declared compatible with the internal market by the Commission in accordance with Regulation No 139/2004. According to the Commission, in the present case, the infringement of Article 7(1) of Regulation No 139/2004 commenced on 18 December 2012 and came to an end on the date of the Clearance Decision, that is 30 September 2013.

556 The Commission therefore found that the infringement of Article 7(1) of Regulation No 139/2004 lasted for 9 months and 12 days. It found that that period could be considered particularly long, especially as regards a merger with potential anticompetitive effects.

557 Lastly, 'in the exercise of its discretion' the Commission considered 'it justified to take into account for the purposes of calculating the duration of the infringement of Article 7(1) [of Regulation No 139/2004] the pre-notification period, as well as the extended Phase I investigation'. In the first place, the Commission noted in that regard that the proposed transaction had raised serious doubts in the possible market for Scottish salmon and that it could not be excluded that competitive harm had materialised. In those circumstances, according to the Commission, a fine had to achieve the maximum deterrence possible. In the second place, the Commission stated that the applicant had not been sufficiently forthcoming in the course of the pre-notification phase to justify the exclusion of that period from the overall duration of the infringement, for the reasons explained in more detail in paragraphs 174 to 194 of the Contested Decision.

558 The applicant does not dispute the fact that the infringement of Article 4(1) of Regulation No 139/2004 was an instantaneous infringement. The third part of the fifth plea in law concerns only the Commission's assessment of the duration of the infringement of Article 7 (1) of Regulation No 139/2004.

559 As regards the duration of the infringement of Article 7(1) of Regulation No 139/2004, it should be recalled that the Court held, in paragraph 212 of the judgment of 12 December 2012, *Electrabel* v *Commission* (T-332/09, EU:T:2012:672), that 'the ability to exercise decisive influence over the activity of the controlled undertaking necessarily exist[ed] in the period beginning on the date of acquisition of control and lasting until the end of control' and that 'the entity which [had] acquired control of the undertaking continue[d] to exercise such control in breach of the obligation to suspend the concentration arising under Article 7 (1) of Regulation No 4064/89 until the time when it [put] an end to the infringement by obtaining the Commission's authorisation or by giving up control'. The Court also made clear, in paragraph 212 of that judgment, that 'the infringement last[ed] for so long as the control acquired in breach of Article 7(1) remain[ed] and the concentration [had] not been authorised by the Commission' and that 'the Commission [had] therefore [been] correct to characterise the infringement as having been continuous until the date of authorisation of the concentration or, as the case may be, until such earlier date that might be taken into account in the light of the circumstances of the case'.

560 Those considerations, which concerned Article 7(1) of Regulation No 4064/89, apply by analogy to Article 7(1) of Regulation No 139/2004.

561 Applying those principles, the starting point for the infringement of Article 7(1) of Regulation No 139/2004 was 18 December 2012, the date of implementation of the concentration at issue, as the Commission correctly found. The applicant does not, moreover, dispute the starting point used by the Commission in respect of the infringement of Article 7(1) of Regulation No 139/2004.

562 As regards the date on which the infringement came to an end, it is apparent from the considerations in paragraph 559 above that an infringement of Article 7(1) of Regulation No 139/2004 comes to an end when the Commission authorises the concentration or when the undertaking concerned gives up control. An infringement of Article 7(1) of Regulation No 139/2004 also ends when any derogation from the suspension obligation is granted by the Commission under Article 7(3) of Regulation No 139/2004.

563 In the present case, the Commission therefore correctly found that the infringement had come to an end on the date on which the concentration had been authorised by the Commission, that is on 30 September 2013. No derogation from the suspension obligation was granted by the Commission or requested by the applicant, and the applicant did not at any time give up control of Morpol. The infringement of Article 7(1) of Regulation No 139/2004 therefore lasted from 18 December 2012 until 30 September 2013, that is a period of 9 months and 12 days, as the Commission found.

564 In paragraphs 172 to 195 of the Contested Decision, the Commission gave detailed reasons for its decision not to exclude either the pre-notification period or the extended Phase I investigation period for the purposes of determining the duration of the infringement of Article 7(1) of Regulation No 139/2004.

565 According to the applicant, the Commission should have excluded the pre-notification period from the duration of the infringement, and the applicant takes issue with a number of the considerations set out in paragraphs 172 to 195 of the Contested Decision.

566 It must be noted in that regard that where the Commission finds an infringement lasting 9 months and 12 days, it is entirely normal for it to take that period into account for the purposes of setting the fine. Admittedly, the Commission may decide, in its discretion, not to take part of the period of an infringement into account, just as it has the right to decide not to pursue an infringement. However, the Commission is not, in principle, obliged not to take into consideration part of the period of an infringement.

567 When questioned at the hearing as to why there was, in the applicant's view, an obligation to exclude the pre-notification period from the duration of the infringement, the applicant explained that that argument was based solely on the principle of equal treatment and that it was claiming the same treatment as that afforded to Electrabel in the Electrabel decision.

568 It should be noted in that regard that, in paragraph 215 of the Electrabel decision, the Commission decided, 'exercising its discretion and without prejudice to its general position of principle', not to take account of the period of pre-notification and examination of the concentration and to make a finding of infringement only up to the date on which Electrabel had informed the Commission of the concentration.

569 Nevertheless, the Commission also found, in paragraph 211 of the Electrabel decision, that a breach of Article 7 of Regulation No 4064/89 could end only when the Commission authorised the concentration or, as the case may be, granted an exemption.

570 It must be noted that the mere fact that the Commission decided, in a particular case, not to take account of part of the period of an infringement, and did so explicitly 'exercising its discretion and without prejudice to its general position of principle', does not change the legal framework applicable.

571 The reference in paragraph 212 of the judgment of 12 December 2012, *Electrabel* v *Commission* (T-332/09, EU:T:2012:672) to 'such earlier date [than the date of authorisation of the concentration] that might be taken into account in the light of the circumstances of the

case' must be interpreted as a reference to the Commission's power, in the exercise of its discretion, not to take a certain period of the infringement into account in determining its duration. It does not follow from this that the Commission is under an obligation to accept as the date on which the infringement came to an end a date prior to the date on which the concentration was authorised by the Commission.

572 In order to justify its decision not to exclude either the pre-notification phase or the examination phase of the concentration from the duration of the infringement of Article 7(1) of Regulation No 139/2004, the Commission stated, in paragraph 172 of the Contested Decision, that the proposed transaction had raised serious doubts as to its compatibility with the internal market and that it could not be excluded that competitive harm had materialised at least to some extent after implementation and before clearance of the proposed transaction.

573 That consideration is in itself sufficient to justify the fact that the Commission did not adopt the same approach as that taken in the Electrabel decision, wherein the period covering pre-notification and examination of the concentration was excluded from the duration of the infringement.

574 In that context, it must be noted that, in the case giving rise to the Electrabel decision, the Commission found that the concentration had not raised any competition concerns. That implies that the early implementation of that concentration had not had a damaging effect on competition.

575 However, in the present case, the presence of damaging effects on competition as a result of the early implementation of the concentration cannot be ruled out (see paragraphs 505 to 517 above). In those circumstances, it would be inappropriate for the Commission to exclude the period covering pre-notification and examination of the concentration from the duration of the infringement. The risk of damaging effects on competition increases, in such cases, with the duration of the infringement. The applicant's situation and that of Electrabel in the case giving rise to the Electrabel decision are not comparable, therefore, and so the applicant cannot properly rely on the principle of equal treatment.

576 Accordingly, it is not necessary to examine the applicant's arguments challenging the Commission's assessment, in the Contested Decision, that the applicant was reluctant to provide the Commission with all relevant market data. Even if the applicant had demonstrated a cooperative attitude during the procedure to notify the concentration, as it maintains, that would not justify the same approach being taken as that followed in the Electrabel decision and the period encompassing pre-notification and examination of the concentration being excluded from the duration of the infringement of Article 7(1) of Regulation No 139/2004.

577 It follows from the foregoing that the Commission was correct in its assessment of the duration of the infringement of Article 7(1) of Regulation No 139/2004 and correctly excluded neither the pre-notification period nor the period of examination of the concentration from the duration of the infringement.

578 The third part of the fifth plea must therefore be rejected.

4. The fourth part, alleging that the fine is disproportionate

579 The fourth part of the fifth plea consists of three complaints, alleging (i) that the fine exceeds what is necessary to achieve the objective pursued; (ii) that the fine is

disproportionate to the duration and gravity of the alleged infringements; and (iii) that the fine is excessive and must be reduced.

580 It should be noted, first of all, that the principle of proportionality requires that measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. It follows that fines must not be disproportionate to the aims pursued, that is to say, to compliance with the competition rules, and that the amount of the fine imposed on an undertaking for an infringement of competition law must be proportionate to the infringement, viewed as a whole, account being taken, in particular, of the gravity of the infringement (see judgment of 12 December 2012, *Electrabel* v *Commission*, T-332/09, EU:T:2012:672, paragraph 279 and the case-law cited).

581 In addition, it must be borne in mind that, under Article 16 of Regulation No 139/2004, the Court of Justice of the European Union is to have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed. That jurisdiction empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed (see judgment of 8 December 2011, *KME Germany and Others* v *Commission*, C-272/09 P, EU:C:2011:810, paragraph 103 and the case-law cited; see also, to that effect, judgment of 5 October 2011, *Romana Tabacchi* v *Commission*, T-11/06, EU:T:2011:560, paragraph 265).

(a) The first complaint, alleging that the fine exceeds what is necessary to achieve the objective pursued

582 The applicant notes that the Commission concluded, in paragraph 206 of the Contested Decision, that a significant fine was necessary to ensure sufficient deterrence. The applicant concedes that, according to the judgment of 12 December 2012, *Electrabel* v *Commission* (T-332/09, EU:T:2012:672, paragraph 282), the Commission 'is entitled to *take into account* the need to ensure that fines have a sufficient deterrent effect'. However, according to the applicant, that does not in itself render a fine 'necessary' to achieve the objective pursued in this case. In its submission, an infringement decision clarifying the scope of Article 7(2) of Regulation No 139/2004 would have been sufficient in this case to ensure legal certainty and would have represented the least onerous measure.

583 It must be borne in mind that a number of the arguments by which the applicant seeks to establish that the Commission erred in imposing more than a symbolic fine have already been rejected in the context of the examination of the fourth plea in law.

584 As regards, specifically, the deterrent effect of the fine, it should be noted that a simple infringement decision clarifying the scope of Article 7(2) of Regulation No 139/2004 would not have had the same deterrent effect as the Contested Decision imposing a fine of EUR 20 million (see, to that effect, judgment of 12 December 2012, *Electrabel* v *Commission*, T-332/09, EU:T:2012:672, paragraph 295). It was therefore necessary to impose a significant fine in order to achieve the objective of ensuring future compliance with the competition rules.

585 The mere fact that the infringements were committed negligently does not mean that it was not necessary to impose fines in an amount that would have a sufficient deterrent effect. It should be noted that the case giving rise to the Electrabel decision also concerned an

infringement that was committed negligently (see, to that effect, judgment of 12 December 2012, *Electrabel* v *Commission*, T-332/09, EU:T:2012:672, paragraph 276).

586 As regards the applicant's argument that the present case concerns a possible infringement due to an excusable misinterpretation of Article 7(2) of Regulation No 139/2004, it is sufficient to recall that the applicant's conduct was negligent and that there was no excusable error on its part (see the examination of the second plea and paragraph 484 above).

587 The applicant has not therefore raised any argument, in the context of the first complaint in the fourth part of the fifth plea, that is capable of calling in question the proportionality of the fine imposed.

(b) The second complaint, alleging that the fine is disproportionate to the duration and gravity of the alleged infringements

588 The applicant submits that, owing to errors of law and fact in the assessment of the gravity and duration of the alleged infringement, the fine is manifestly disproportionate to the actual gravity and duration of the alleged infringement.

589 In that regard, it is sufficient to recall that the applicant's arguments in relation to the errors allegedly made by the Commission in its assessment of the gravity and duration of the infringements were rejected in the Court's examination of the second and third parts of the fifth plea.

590 The second complaint in the fourth part of the fifth plea must therefore be rejected.

(c) The third complaint, alleging that the fine is excessive and must be reduced

591 The applicant states that, in the Contested Decision, the Commission imposed a fine identical to that imposed in the Electrabel decision, even though significant differences exist between the two cases, inter alia, concerning the duration of the alleged infringements and the global turnover of the undertakings. It submits that the duration of the infringement in the case giving rise to the Electrabel decision was over 4.5 times longer than that of the infringement of Article 7(1) of Regulation No 139/2004 in the present case. The applicant also states that the fine imposed in the Electrabel decision accounted for 0.04% of the offender's global revenue, as opposed to 1% in the present case. It further submits that the fine imposed in the Electrabel decision accounted for only 0.42% of the maximum permissible fine, as opposed to 10% in the present case. Moreover, the fine imposed on Electrabel accounted for approximately 1/13 of the value of the transaction, while it was approximately 1/6 of the value of the transaction in the present case.

592 In that regard, it should be borne in mind that, as the applicant acknowledges, the Commission's previous practice in taking decisions does not serve as a legal framework for the fines imposed in competition matters (see judgment of 12 December 2012, *Electrabel* v *Commission*, T-332/09, EU:T:2012:672, paragraph 259 and the case-law cited).

593 The applicant submits in that regard that it is not requesting the Court to apply the same mathematical formula as in the Electrabel decision, which would result in a reduction of the fine imposed on the applicant by a coefficient of 25. It does, however, submit that the Court should take account of the striking difference in the treatment of Electrabel and the applicant, in the exercise of its unlimited jurisdiction, and giving due account to the circumstances of the present case.

594 It must be stated that the fine in the present case is indeed much larger in relation to the applicant's turnover than that imposed in the Electrabel decision, although the two fines are identical in absolute terms (EUR 20 million in both cases). It should, however, be borne in mind that previous decisions by the Commission imposing fines can be relevant from the point of view of observance of the principle of equal treatment only where it is demonstrated that the facts of the cases in those other decisions are comparable to those of the present case (see judgment of 29 June 2012, *E.ON Ruhrgas and E.ON* v *Commission*, T-360/09, EU:T:2012:332, paragraph 262 and the case-law cited).

595 In the present case, first, it is necessary to take into account the fact that, in the Electrabel decision, the Commission had imposed a fine for infringement of Article 7(1) of Regulation No 4064/89 only. In the present case, the Commission was fully entitled to impose two fines for the infringements of Article 4(1) and Article 7(1) of Regulation No 139/2004.

596 Second, it is necessary to take into account the fact that, in the present case, the proposed transaction raised serious doubts as to its compatibility with the internal market and that the early implementation of the concentration could have had adverse effects on competition, contrary to the position in the case giving rise to the Electrabel decision. That fact alone justifies the imposition of a much larger fine than that imposed in the Electrabel decision.

597 The applicant argues that the Commission had emphasised in the Electrabel decision that the fact that the transaction had not raised competition concerns did not take away from the seriousness of the infringement and that the presence of damage to competition would indeed have rendered the infringement more serious. According to the applicant, neither the case giving rise to the Electrabel decision nor the present case involved any actual damage to competition.

598 In that regard, suffice it to note, first, that the fact that a concentration raises serious doubts as to its compatibility with the internal market makes the early implementation of that concentration more serious than the early implementation of a concentration which does not raise competition concerns, unless the possibility that its implementation in the form initially envisaged and not cleared by the Commission may have had damaging effects on competition can be ruled out in a particular case (see paragraph 500 above), and, second, that, in the present case, an adverse impact on competition of the early implementation of the concentration cannot be ruled out (see paragraph 514 above).

599 The applicant further submits that the context of the present case — first, reliance upon the exemption provided for in Article 7(2) of Regulation No 139/2004; second, concomitant observance of the conditions in Article 7(2) of Regulation No 139/2004; and, third, full cooperation with the Commission in designing an appropriate remedy package — renders any potential factual difference with the case giving rise to the Electrabel decision insignificant.

600 As regards the first element, it must be borne in mind that the present case concerns an infringement committed negligently, like the infringement at issue in the case giving rise to the Electrabel decision. The fact that the applicant's error may have concerned the scope of the exception provided for in Article 7(2) of Regulation No 139/2004 does not render the infringement less serious.

601 As regards the second element, it must be noted that the Commission took into account as mitigating circumstances the fact that the applicant had not exercised its voting rights in Morpol and the fact that it had kept Morpol as an entity separate from the applicant during the merger review process (paragraphs 196 and 198 of the Contested Decision). It must, however, be borne in mind that those measures do not preclude the possibility that the early

implementation of the concentration may have had adverse effects on competition (see paragraph 516 above).

602 As regards the third element, the Commission correctly points out that it was in the applicant's own commercial interest to offer a remedy package. Had the applicant not offered such remedies, the Commission would have opened Phase II proceedings, which would have prolonged the infringement and could ultimately have led to the prohibition of the concentration. The fact that the applicant offered an appropriate remedy package does not, therefore, render the infringement less serious.

603 It must also be noted, as regards the comparison between the present case and the case giving rise to the Electrabel decision, that the fact that in the past the Commission has applied fines of a particular level for certain types of infringements does not mean that it is precluded from raising that level within the limits indicated in the relevant legislation if that is necessary to ensure the implementation of EU competition policy. Indeed, the proper application of the EU competition rules requires that the Commission be able at any time to adjust the level of fines to the needs of that policy (see judgment of 12 December 2012, *Electrabel* v *Commission*, T-332/09, EU:T:2012:672, paragraph 286 and the case-law cited).

604 The applicant submits that the present case does not concern a clear-cut breach of the standstill obligation and that, at most, it concerns an erroneous interpretation of Article 7(2) of Regulation No 139/2004 due to an excusable error. Therefore, according to the applicant, the level of the fine in this case cannot be justified by any competition policy arguments.

605 As regards the applicant's argument in that respect, it is sufficient to recall that the applicant's conduct was negligent and that there was no excusable error on its part (see the examination of the second plea and paragraph 484 above).

606 It must also be noted that the total amount of the two fines imposed in the present case is equivalent to approximately 1% of the applicant's turnover. The Commission indicates in that regard that that amount corresponds to 10% of the maximum amount permitted.

607 The Commission correctly points out in the defence that the decision to set the amount of the fine at the low end of the permitted range reflects the balance that the Commission sought to strike between, on the one hand, the seriousness of the infringements committed, the potential harm to competition that the transaction could have caused, the size and complexity of the applicant's structure and the need to ensure sufficient deterrence, and, on the other hand, certain mitigating factors such as the applicant having acted negligently rather than intentionally, the fact that it sought legal advice, the fact that it did not exercise its voting rights under its shares and the fact that the two businesses were kept separate pending clearance of the transaction.

608 In the light of the matters mentioned in paragraph 607 above, the amount of the fines cannot be considered disproportionate. The amount of the fines, even aggregated, is at the low end of the permitted range, which reflects a fair balance between the factors to be taken into account and which is proportionate in the light of the circumstances of the case. For those reasons, it must be held that the amount of the fines imposed is appropriate having regard to the circumstances of the case.

609 None of the arguments or evidence put forward by the applicant is such as to enable the Court, in the exercise of its unlimited jurisdiction, to find that the fines imposed are inappropriate.

610 As regards the applicant's arguments that the Courts of the European Union have significantly reduced fines imposed by the Commission in circumstances similar to the present case, it must be held that, as the Commission points out, the facts of those cases were not comparable to those of the present case.

611 In the first place, as regards the judgment of 28 March 1984, *Officine Bertoli* v *Commission* (8/83, EU:C:1984:129), it must be noted that the Court reduced by 75% the fine imposed on the applicant for an infringement of Article 60 ECSC. It stated, in paragraph 29 of that judgment, as follows:

'[C]ertain circumstances peculiar to this case justify a reduction on equitable grounds. In the last 30 years, in spite of numerous checks carried out by the Commission, no penalty has ever been imposed on the applicant for infringing the rules on prices, levies or quotas. An additional factor is the uncertain nature of the notices issued by the Commission which, whilst warning the undertakings concerned that the system of checks to monitor compliance with the prices and conditions of sale imposed by Article 60 of the ECSC Treaty would be tightened and extended, did not draw their attention to the Commission's intention of penalising more severely, as it was empowered to do, any infringements established.'

612 The applicant states in that regard that, 'similarly, the exemption to the standstill obligation was introduced some 25 years ago before the Decision', and that 'no penalty was ever imposed for an erroneous application of the exemption'.

613 It must be pointed out that the Commission did not impose a fine for an erroneous application of the exception laid down in Article 7(2) of Regulation No 139/2004, but for the infringement of Article 4(1) and Article 7(1) of Regulation No 139/2004. This is not the first case in which the Commission has imposed fines for implementation of a concentration prior to its notification and clearance.

614 Furthermore, the considerations set out in paragraph 29 of the judgment of 28 March 1984, *Officine Bertoli* v *Commission* (8/83, EU:C:1984:129) concerned the situation of a single undertaking on which no fine had been imposed, despite numerous checks. Those considerations cannot be transposed to the situation of all undertakings, where no fine has been imposed on any undertaking.

615 In addition, as regards compliance with the competition rules, there is no system of regular checks, unlike the situation in the judgment of 28 March 1984, *Officine Bertoli* v *Commission* (8/83, EU:C:1984:129).

616 In the second place, as regards the judgment of 19 October 1983, *Lucchini Siderurgica* v *Commission* (179/82, EU:C:1983:280), the applicant states that the Court reduced by 50% the fine which had been imposed for exceeding a steel production quota.

617 The Court found that 'exceptional circumstances' justified a departure from the normal rate imposed by the Commission. The Court noted that, in the quarter in question, the applicant in that case had encountered exceptional difficulties in observing the quota allocated and that it had made a reduction in its subsequent production. The Court went on to find that the applicant in that case had offered in advance, by telex, to offset the excess by reducing its subsequent production, and that the Commission had not replied to that telex, in breach of the rules of good administration, leaving the applicant in doubt as to whether the Commission was accepting the applicant's offer (judgment of 19 October 1983, *Lucchini Siderurgica* v *Commission*, 179/82, EU:C:1983:280, paragraphs 25 to 27).

618 The applicant in the present case claims that it too minimised any negative consequences from its infringement by refraining from exercising its voting rights and keeping Morpol ring-fenced pending clearance by the Commission. In addition, according to the applicant, the Commission left the applicant in doubt as to whether the exemption provided for in Article 7(2) of Regulation No 139/2004 applied until after it concluded the merger review process.

619 However, in the present case, unlike the position in the case resulting in the judgment of 19 October 1983, *Lucchini Siderurgica* v *Commission* (179/82, EU:C:1983:280), there is no normal rate for the imposition of a fine for infringement of Article 4(1) and Article 7(1) of Regulation No 139/2004. As is apparent from paragraph 25 of the judgment of 19 October 1983, *Lucchini Siderurgica* v *Commission* (179/82, EU:C:1983:280), the fine had to be fixed, according to a general decision, at an amount of ECU 75 per tonne of excess production, save in exceptional cases justifying a departure from that normal rate.

620 In the present case, the fact that the applicant reduced the risk of adverse effects on competition by refraining from exercising its voting rights and by keeping Morpol ring-fenced during the period for examination of the concentration was duly taken into account by the Commission, in paragraphs 196 and 198 of the Contested Decision, as a mitigating circumstance. It is not necessary, therefore, to take that circumstance into account a second time, by reducing the amount of the fines imposed by the Commission.

621 As regards the applicant's argument that the Commission left the applicant in doubt as to whether the exemption provided for in Article 7(2) of Regulation No 139/2004 applied, it is sufficient to point out that, since the applicant did not contact the Commission for clarification regarding the applicability of Article 7(2) of Regulation No 139/2004 in the present case, it cannot criticise the Commission for having left it in a state of uncertainty on that point. Unlike in the case that gave rise to the judgment of 19 October 1983, *Lucchini Siderurgica* v *Commission* (179/82, EU:C:1983:280), no contact was made by the applicant in the present case to which the Commission might have failed to respond.

622 In the third place, the applicant relies on the judgment of 16 May 1984, *Eisen und Metall* v *Commission* (9/83, EU:C:1984:177), in which the Court of Justice reduced by 50% the amount of the fine imposed by the Commission on the applicant in that case, a steel dealer, for undercutting its own published list prices and for having thus applied dissimilar conditions to comparable transactions (see paragraphs 27 and 41 to 46 of the judgment).

623 In that judgment, the Court held that, where an infringement has been committed by a steel dealer, the more limited influence which the latter may exercise on the state of the market constitutes a factor mitigating the gravity of the infringement, and that, in those circumstances, the imposition of a very high fine can be justified only by the existence of circumstances demonstrating that an infringement committed by a steel dealer is particularly serious (judgment of 16 May 1984, *Eisen und Metall* v *Commission*, 9/83, EU:C:1984:177, paragraphs 43 and 44). It was in those circumstances that the Court held, in paragraph 45 of the judgment, that a fine equal to 110% of the price reductions was not justified, the Commission's only justification for the amount of the fine having been the fact that the amount of the fine had to be sufficiently high to deter the undertaking from undercutting its list prices again.

624 The judgment of 16 May 1984, *Eisen und Metall* v *Commission* (9/83, EU:C:1984:177) merely shows therefore that a reference to the need for a sufficient deterrent effect is not sufficient to demonstrate that an infringement committed by a trader is particularly serious.

625 In the present case, the Commission was not obliged to demonstrate that the infringement was particularly serious in order to justify imposing a large fine. It cannot be claimed that the applicant was able to exert only limited influence on the market.

626 In so far as the applicant relies on having made an excusable error in its interpretation of Article 7(2) of Regulation No 139/2004, suffice it to note that that argument has already been rejected in paragraph 484 above.

627 In the fourth place, the applicant relies on the judgment of 14 July 1994, *Parker Pen* v *Commission* (T-77/92, EU:T:1994:85). In paragraph 94 of that judgment, the Court stated that 'the Commission [had] not [taken] into account the fact that the turnover accounted for by the products to which the infringement [related] was relatively low in comparison with the turnover resulting from Parker's total sales', and that 'an appropriate fine [could not] be fixed merely by a simple calculation based on the total turnover'. The Court therefore reduced the fine by approximately 43%, lowering it from ECU 700 000 to ECU 400 000 (paragraph 95 of the judgment).

628 The applicant submits that, similarly, Morpol's 2012 sales in farmed Scottish salmon, the area where the Commission identified competition concerns, were relatively low (5%) in comparison with the applicant's total sales.

629 It must be noted that the judgment of 14 July 1994, *Parker Pen* v *Commission* (T-77/92, EU:T:1994:85) concerned an infringement of Article [101 TFEU]. As regards the infringements of Article 4(1) and Article 7(1) of Regulation No 139/2004, it is inappropriate to calculate the amount of the fine on the basis of the value of sales in the sector affected by possible competition concerns. The implementation of a concentration prior to notification and clearance does not concern only the market sector in respect of which the Commission may have identified competition concerns. Otherwise the fine would, in principle, have to be set at EUR 0 in the case of a concentration raising no competition concerns.

630 Furthermore, in the present case, the Commission did not make a 'simple calculation based on the total turnover', but took into account a large number of factors when assessing the nature, gravity and duration of the infringement.

631 The fourth part of the fifth plea must therefore be rejected.

5. The fifth part, alleging that the Contested Decision incorrectly fails to recognise mitigating circumstances

632 The applicant claims that the Commission should have recognised as mitigating circumstances the following factors:

– the applicant's cooperation during the merger control procedure;

– the absence of relevant precedents;

– the existence of an excusable error which gave rise to the alleged infringements.

633 The Commission disputes the applicant's arguments.

634 In the first place, as regards the applicant's alleged cooperation during the merger control procedure, even if that were established, it should be noted that that is not a mitigating circumstance in the context of proceedings relating to infringements of Article 4(1) and Article 7(1) of Regulation No 139/2004.

635 It is true that, in proceedings relating to infringements of Articles 101 or 102 TFEU, the cooperation of an applicant during the administrative procedure may, where relevant, be taken into account as a mitigating circumstance. In such cases, in which the Commission is seeking to establish infringements, it is by no means obvious that the undertakings being investigated will be cooperative and actively assist the Commission in establishing the infringement.

636 However, in the present case, the applicant is not relying on any alleged cooperation during the administrative procedure to establish the infringements of Article 4(1) and Article 7(1) of Regulation No 139/2004.

637 It merely claims to have cooperated during the merger control procedure. In that regard, it should be pointed out that it is entirely logical that an undertaking seeking clearance for a concentration would cooperate with the Commission in order to accelerate the procedure, which is in its own interest (see, with regard to the applicant's offer of a remedy package, paragraph 602 above).

638 The Commission cannot therefore be criticised for failing to take such cooperation into account as a mitigating circumstance.

639 In the second place, the applicant claims that the Commission should have allowed it to benefit from the mitigating circumstance resulting from the absence of relevant precedents establishing an infringement of the standstill obligation in relation to Article 7(2) of Regulation No 139/2004. The applicant states in that regard that, in its decision of 18 February 1998 (Case No IV/M.920 — Samsung/AST) ('the Samsung/AST decision') and in its decision of 10 February 1999 (Case No IV/M.969 — A.P. Møller) ('the A.P. Møller decision'), the Commission recognised as a mitigating factor the fact that the relevant conduct took place at a time when the Commission had not yet taken any infringement decision regarding the conduct in question.

640 In that regard, it must be noted that there is no obligation for the Commission to take into consideration as a mitigating circumstance the fact that conduct with exactly the same characteristics as that at issue has not yet given rise to the imposition of a fine. In addition, first, it should be borne in mind that, in the Yara/Kemira GrowHow decision, the Commission had already stated how Article 7(2) of Regulation No 139/2004 was to be interpreted, albeit in an *obiter dictum* (see paragraph 419 above). Second, the Commission has, in a number of cases, imposed fines under Article 14 of Regulation No 4064/89, even though those cases did not concern the interpretation of the exception provided for in Article 7(2) of Regulation No 139/2004.

641 In the case of the Samsung/AST decision, it should be noted that the Commission stated, in recital 28(5) thereof, that that decision was 'the first one [it had] taken ... under Article 14 of [Regulation No 4064/89]'. In recital 21 of the A.P. Møller decision, the Commission stated that 'the infringements [had taken] place at the same time as the one which was the object of the Samsung decision, at a moment in which the Commission had not yet taken any decision under Article 14 of [Regulation No 4064/89]', that 'this circumstance [had been] considered as a mitigating factor in the Samsung decision' and that 'the same reasoning [applied] in the present case.'

642 In those decisions, the Commission did not therefore merely declare that it had not yet imposed a fine for conduct that had exactly the same characteristics but stated that no decision under Article 14 of Regulation No 4064/89 had been taken. The situation in the present case is thus not comparable to those underlying the Samsung/AST and A.P. Møller decisions.

643 In the third place, the applicant submits that, even assuming that the Contested Decision could rightfully characterise the applicant's alleged infringements of Article 4(1) and Article 7(1) of Regulation No 139/2004 as negligent, the decision failed to allow the applicant to benefit from the mitigating circumstance arising from the fact that the alleged infringement resulted from an excusable error and was not intended to circumvent the Commission's control.

644 Suffice it to note in that regard that the existence of an excusable error presupposes that the person concerned has exercised all the diligence required of a normally experienced person (see paragraph 484 above). The finding that the applicant was negligent thus necessarily precludes the existence of an excusable error on its part.

645 The fifth part of the fifth plea must therefore also be rejected, as must the fifth plea in its entirety.

646 In the light of all of the foregoing, the action must be dismissed in its entirety.

Costs

647 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Fifth Chamber),

hereby:

1. Dismisses the action;

2. Orders Marine Harvest ASA to pay the costs.

Dittrich Schwarcz Tomljenović

Delivered in open court in Luxembourg on 26 October 2017.

E. Coulon A. Dittrich

Registrar President

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Costs

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* Language of the case: English.