Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

4 March 2020*

(Appeal — Competition — Control of concentrations between undertakings — Regulation (EC) No 139/2004 — Article 4(1) — Prior notification obligation for concentrations — Article 7(1) — Standstill obligation — Article 7(2) — Exemption — Concept of a 'single concentration' — Article 14(2) — Decision imposing fines for the implementation of a concentration before it has been notified and authorised — Principle *ne bis in idem* — Set-off principle — Concurrent offences)

In Case C-10/18 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 5 January 2018,

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

appellant,

the other parties to the proceedings being:

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

defendant at first instance,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, S. Rodin, D. Šváby, K. Jürimäe (Rapporteur) and N. Piçarra, Judges,

Advocate General: E. Tanchev,

Registrar: M. Longar, Administrator,

having regard to the written procedure and further to the hearing on 22 May 2019,

after hearing the Opinion of the Advocate General at the sitting on 26 September 2019,

gives the following

* Language of the case: English.

Judgment

1 By its appeal, Mowi ASA, formerly Marine Harvest ASA, seeks to have set aside the judgment of the General Court of the European Union of 26 October 2017 in *Marine Harvest* v *Commission* (T-704/14, 'the judgment under appeal', EU:T:2017:753), by which the General Court dismissed Mowi ASA's action for annulment of European 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 Council Regulation (EC) No 139/2004 (Case M.7184 — Marine Harvest/Morpol (Article 14(2) proc.)) ('the decision at issue'), or, in the alternative, for annulment or reduction of the fines imposed on it.

Legal context

2 Recitals 5, 6, 8, 20 and 34 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ('the EC Merger Regulation') (OJ 2004 L 24, p. 1), state that

'(5) … it should be ensured that the process of reorganisation does not result in lasting damage to competition; Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it.

(6) A specific legal instrument is therefore necessary to permit effective control of all concentrations in terms of their effect on the structure of competition in the [European Union] and to be the only instrument applicable to such concentrations. …

…

(8) The provisions to be adopted in this Regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State. Such concentrations should, as a general rule, be reviewed exclusively at [Union] level, in application of a "one-stop shop" system and in compliance with the principle of subsidiarity.

…

(20) It is expedient to define the concept of concentration in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market. It is therefore appropriate to include, within the scope of this Regulation, all joint ventures performing on a lasting basis all the functions of an autonomous economic entity. 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.

…

(34) To ensure effective control, undertakings should be obliged to give prior notification of concentrations with a Community dimension following the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest. … The implementation of concentrations should be suspended until a final decision of the Commission has been taken. However, it should be possible to derogate from this suspension at the request of the undertakings concerned, where appropriate. …'

3 Article 1(1) of that regulation, headed ‘Scope’, provides:

‘Without prejudice to Article 4(5) and Article 22, this Regulation shall apply to all concentrations with a Community dimension as defined in this Article.’

4 Article 3 of the regulation, headed ‘Definition of concentration’, provides, in paragraphs 1 and 2:

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

(a) the merger of two or more previously independent undertakings or parts of undertakings, or

(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.

2. 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, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.’

5 Article 4 of that regulation, entitled ‘Prior notification of concentrations and pre-notification referral at the request of the notifying parties’, provides in paragraph 1 thereof:

‘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.

Notification may also be made where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension.

For the purposes of this Regulation, the term “notified concentration” shall also cover intended concentrations notified pursuant to the second subparagraph. For the purposes of paragraphs 4 and 5 of this Article, the term “concentration” includes intended concentrations within the meaning of the second subparagraph.’

6 Article 7 of Regulation No 139/2004, entitled ‘Suspension of concentrations’, provides in paragraphs 1 and 2:

‘1. A concentration with a Community dimension as defined in Article 1, or which is to be examined by the Commission pursuant to Article 4(5), shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6).

2. 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.'

7 Article 14(2) to (4) of that regulation provides:

'2. 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;

(c) implement a concentration declared incompatible with the common market by decision pursuant to Article 8(3) or do not comply with any measure ordered by decision pursuant to Article 8(4) or (5);

(d) fail to comply with a condition or an obligation imposed by decision pursuant to Article 6(1)(b), Article 7(3) or Article 8(2), second subparagraph.

3. In fixing the amount of the fine, regard shall be had to the nature, gravity and duration of the infringement.

4. Decisions taken pursuant to paragraphs 1, 2 and 3 shall not be of a criminal law nature.'

Background to the dispute and the decision at issue

8 The background to the case was summarised in paragraphs 1 to 37 of the judgment under appeal, as follows:

'1 The [appellant] 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 [appellant] 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 [appellant]

2 On 14 December 2012, the [appellant] 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 [appellant], 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 [appellant] acquired an interest in Morpol amounting to approximately 48.5% of Morpol's share capital. The closing of this acquisition ("the December 2012 Acquisition") took place on 18 December 2012.

6 On 17 December 2012, the [appellant] 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 [appellant] 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 [appellant] owned a total of 87.1% of the shares in Morpol. Thus, through the public offer, the [appellant] acquired shares representing approximately 38.6% of Morpol, in addition to the shares representing 48.5% of Morpol which the [appellant] 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 stage

10 On 21 December 2012, the [appellant] sent a request to the [Commission] for the allocation of a case team regarding the acquisition of sole control over Morpol. In that request, the [appellant] 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 [appellant], 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 [appellant].

12 On 12 February 2013, the Commission sent a request for information to the [appellant] 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 [appellant] 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 [appellant] 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 [appellant] a request for additional information concerning the First Draft Form CO. On 16 April 2013, the [appellant] 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 [appellant] 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 [concentration] was formally notified to the Commission.

16 At a state of play meeting on 3 September 2013, the Commission informed the [appellant] 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 appellant proposed commitments under Article 6(2) of [Regulation No 139/2004] 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 [appellant] 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 [appellant] 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. [Decision at issue] and procedure leading to its adoption

20 In a letter dated 30 January 2014, the Commission informed the [appellant] 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 [appellant] 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 [appellant] 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 [appellant] submitted its response to the Statement of Objections. On 6 May 2014, the [appellant] 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 [the decision at issue].

24 The first three articles in the operative part of the [decision at issue] 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 appellant] has infringed Article 4(1) and Article 7(1) of [Regulation No 139/2004].

Article 2

A fine of EUR 10 000 000 is hereby imposed on [the appellant] for the infringement of Article 4(1) of Regulation [No 139/2004] referred to in Article 1.

Article 3

A fine of EUR 10 000 000 is hereby imposed on [the appellant] for the infringement of Article 7(1) of Regulation [No 139/2004] referred to in Article 1."

25 In the [decision at issue], the Commission, first of all, considered that the [appellant] had acquired de facto sole control of Morpol after the closing of the December 2012 Acquisition because the [appellant] 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 [appellant] 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 [appellant]'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 [appellant] 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 [appellant] 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 [appellant] 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 [appellant] had not exercised its voting rights in Morpol and had kept Morpol as an entity separate from the [appellant] during the merger review process.

35 It also regarded as a mitigating circumstance the fact that the [appellant] 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 [appellant], 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.'

The procedure before the General Court and the judgment under appeal

9 By application lodged at the Registry of the General Court on 3 October 2014, the appellant brought an action for annulment of the decision at issue and, in the alternative, annulment or reduction of the fines imposed by the Commission.

10 In support of its application, it raised five pleas in law, only the first and third of which are of any relevance to the present appeal. The first plea alleged a 'manifest error of law and fact' in that the decision at issue rejected the applicability of Article 7(2) of Regulation No 139/2004. The third plea alleged breach of the general principle *ne bis in idem*.

11 By the judgment under appeal, the General Court dismissed the action in its entirety.

Forms of order sought by the parties to the appeal

12 By its appeal, the appellant claims that the Court should:

– set aside in whole or in part the judgment under appeal, in so far as it dismisses the action brought against the decision at issue;

– annul the decision at issue or, in the alternative, annul the fines imposed on the appellant or, in the further alternative, substantially reduce the amount of those fines;

– order the Commission to pay the legal and other costs incurred by the appellant in connection with the proceedings before the Court of Justice and the General Court;

– refer, if necessary, the case back to the General Court for reconsideration in accordance with the Court's judgment; and

– take any other measures that the Court considers appropriate.

13 The Commission contends that the Court should dismiss the appeal and order the appellant to pay the costs.

The appeal

14 The appellant relies on two grounds in support of its appeal. The first ground alleges an error of law in that the General Court failed to apply Article 7(2) of Regulation No 139/2004. The second ground alleges an error of law in that the General Court infringed the principle *ne bis in idem*, the set-off principle, and the principle governing concurrent offences.

15 At the hearing before the Court, the appellant raised a new ground of appeal, alleging that Article 14(2)(a) of Regulation No 139/2004 is illegal.

The first ground of appeal

– Arguments of the parties

16 The first ground of appeal is divided into two parts.

17 By the first part of that ground, the appellant submits that the General Court erred in law, in paragraphs 70, 150 and 151, as well as 230 of the judgment under appeal, by misinterpreting the notion of 'single concentration' within the meaning of recital 20 of Regulation No 139/2004.

18 By finding, in paragraphs 70 and 230 of the judgment under appeal, that it was not necessary to examine the appellant's arguments that there was a conditionality between the December 2012 Acquisition and the public offer at issue, the General Court failed to have regard to the relevant test

for determining whether several transactions can be treated as a single concentration, which lies in the fact that those transactions are linked by a condition and not in the time at which the concentration by which control is acquired takes place.

19 In this respect, in the first place, the appellant submits that the General Court erred in law, in particular in paragraphs 150 and 151 of the judgment under appeal, by finding that recital 20 of Regulation No 139/2004 is not the appropriate basis for interpreting the notion of a 'single concentration'. According to the appellant, this recital clearly reflects the legislature's intention to treat as a 'single concentration' all transactions that are 'closely connected in that they are linked by condition'.

20 The General Court's finding, in paragraph 150 of the judgment under appeal, that recital 20 is only a 'single, very short,' sentence and that it does not constitute a legally binding legal rule does not enable the General Court to call into question the appellant's interpretation of the notion of a 'single concentration'. The appellant submits that the General Court failed to take into account the fact that the same recital has been reflected in a legally binding rule, namely Article 7(2) of Regulation No 139/2004, which refers to public bids and to a series of transactions in securities. Furthermore, the General Court rejected that interpretation, relying, in paragraphs 106 to 109 of the judgment under appeal, on the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2008 C 95, p. 1), which, the appellant claims, constitutes non-binding soft law guidance according to the case-law of the Court of Justice. Moreover, the General Court misread that recital 20, in paragraph 151 of the judgment under appeal, in stating that, if the same interpretation were to be adopted, any transactions 'which are linked by condition' would be treated as a single concentration, even if they did not give rise to an acquisition of control.

21 In the second place, the appellant submits that the December 2012 Acquisition and the public offer at issue were linked by condition and therefore constituted a single concentration.

22 On the one hand, it submits that, in the present case, the condition linking that public offer and the December 2012 Acquisition is mandated by the Norwegian Law on securities trading, which represents the highest possible level of conditionality. In particular, that condition derives from Norwegian law implementing 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). However, the General Court did not call that circumstance into question.

23 On the other hand, the existence of a conditional link between the public bid and the December 2012 Acquisition is also confirmed by the Consolidated Jurisdictional Notice referred to in paragraph 20 of this judgment, pursuant to which two or more transactions may be linked *de jure* or de facto. In this case, the appellant states that the December 2012 Acquisition and the public offer at issue are linked *de jure* by a mutual conditionality, since that public offer was made compulsory by the completion of the December 2012 Acquisition and was conditional on that acquisition. Similarly, those two transactions were linked de facto, since in accordance with paragraph 43 of that notice, in economic terms, 'each of the transactions necessarily depends on the conclusion of the [other]'. Those two transactions were considered and agreed upon simultaneously and were executed with a view to achieving the same economic objective, namely acquiring all of the outstanding shares of Morpol.

24 By the second part of the first ground of appeal, the appellant submits that the General Court misinterpreted the rationale of the exemption referred to in Article 7(2) of Regulation No 139/2004.

25 In the first place, the appellant submits that the formalistic approach adopted by the General Court is ill-suited for the purposes of interpreting the purpose of that exemption, which requires an analysis of the policy objective of the exemption. Thus, the General Court adopted a strict approach by rejecting, in paragraphs 174 to 189 of the judgment under appeal, the relevance of the Green Paper on the

Review of Council Regulation (EEC) No 4064/89 (COM(2001) 745 final; 'the Green Paper'), which called for the scope of that exemption to be extended to facilitate acquisitions. Furthermore, paragraph 189 of the judgment under appeal is based on a formalistic distinction between transaction structures and incorrectly rejects the application of Article 7(2) of Regulation No 139/2004 to a transaction structure where control may have been acquired before the launch of a public bid.

26 In the second place, according to the appellant, the policy objective of the exemption under Article 7(2) of Regulation No 139/2004 is to facilitate public bids and creeping takeovers through compliance with rigorous conditions aimed at avoiding changes to the market structure before the Commission adopts a decision on the notified concentration. Thus, the buyer nominally acquires shares in the target company, but cannot effectively use them before the Commission has cleared that merger, which does not prevent the Commission from exercising its merger control powers.

27 Refusal to apply the exemption under Article 7(2) of Regulation No 139/2004 to a particular transaction structure where control may be acquired at a point prior to the launch of a public bid is not justified. In paragraph 134 of the Green Paper, the Commission recognised that the acquisition of a publicly traded company should benefit from the derogation under Article 7(2) of Regulation No 139/2004 on the ground 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'. Although that statement concerned creeping takeovers, it is equally applicable to public bids.

28 Thus, by finding that that provision was not applicable to a transaction structure in which control may be acquired before the launch of a public bid, the General Court made a formalistic differentiation between transaction structures, raising uncertainty about which transactions fall within that exemption, and has exposed acquirers to significant practical and financial risks.

29 In the third place, the appellant refers to the Commission's decision of 20 January 2005 (Case COMP/M.3709 — Orkla/Elkem), which relates to a similar situation to that at issue in the present case, in which the Commission accepted, inter alia, that the acquirer of a stake that triggers a mandatory public bid faces serious financial risks pending merger approval of that acquisition by the Commission.

30 In the fourth place, the appellant submits that an interpretation of Article 7(2) of Regulation No 139/2004 to the effect that it applies to all public bids facilitates merger control goals by allowing the Commission to take account of the ultimate rate of the shareholding acquired and of various effects of the transaction in question.

31 In the fifth place, the appellant submits that, in this case, it complied with Article 7(2) of Regulation No 139/2004 by notifying the concentration without delay, namely three days after the closing of the December 2012 Acquisition, and by refraining from exercising the voting rights attached to the shares acquired, which the General Court did not call into question.

32 The Commission contests the appellant's arguments and contends that the first ground of appeal is unfounded.

– Findings of the Court

33 By its first ground of appeal, the two parts of which it is appropriate to examine together, the appellant challenges, in essence, the General Court's interpretation of Article 7(2) of Regulation No 139/2004, which led the General Court to reject its first plea for annulment.

34 In that regard, it should be recalled that, according to paragraph 2 of Article 7 of Regulation No 139/2004, provided that the conditions laid down in that provision are satisfied, paragraph 1 of that article is not to prevent the implementation of a public bid or of a series of transactions in securities, by which control within the meaning of Article 3 of that regulation is acquired from various sellers.

35 It should be noted that the General Court examined, in paragraphs 68 to 83 of the judgment under appeal, the applicability of Article 7(2) of Regulation No 139/2004 to the situation at issue in the present case in the light of the December 2012 Acquisition alone.

36 It noted, on the one hand, in paragraphs 69 and 70 of the judgment under appeal, that the breach of Article 7(1) and Article 4(1) of Regulation No 139/2004 established by the Commission stemmed from the December 2012 Acquisition alone, namely the transaction by which the appellant acquired control of Morpol. In so far as that transaction occurred before the public offer at issue, the General Court concluded from this that Article 7(2) of Regulation No 139/2004 is irrelevant inasmuch as that provision relates to public bids.

37 On the other hand, the General Court also ruled out the applicability of Article 7(2) of Regulation No 139/2004, inasmuch as that provision concerns the implementation of transactions whereby control, within the meaning of Article 3 of that regulation, is acquired from various sellers by means of a series of transactions in securities. As is apparent from a combined reading of paragraphs 75 and 79 to 81 of the judgment under appeal, the General Court held that the appellant acquired control of Morpol from one seller by means of a single transaction in securities, that is the December 2012 Acquisition. As regards the public offer at issue, according to the General Court, that offer occurred at time when the appellant already had sole de facto control over Morpol on account of the December 2012 Acquisition.

38 However, before the General Court, the appellant submitted, in essence, that, because of the links between the December 2012 Acquisition and the public offer at issue, they were steps in a single concentration, with the result that, pursuant to paragraph 2 of Article 7 of Regulation No 139/2004, paragraph 1 of that article did not apply to that concentration.

39 In paragraphs 85 to 229 of the judgment under appeal, the General Court examined the arguments put forward by the appellant in support of that argument and rejected them. The General Court found, in that context, that 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 private transaction, even where it is followed by a mandatory public offer.

40 In the context of the first ground of appeal, the appellant submits, in essence, that such an interpretation of Article 7(2) of Regulation No 139/2004 is erroneous, in so far as that provision, read in the light of recital 20 of that regulation, should be interpreted broadly, so that that provision was applicable to the December 2012 Acquisition and the public offer at issue, in that those two transactions were steps in a single concentration.

41 In the first place, the appellant submits that, in its interpretation of Article 7(2) of Regulation No 139/2004, the General Court failed to apply the concept of ‘single concentration’, as set out in recital 20 of that regulation, which, in its view, is the appropriate legal basis for that interpretation.

42 In that regard, as the General Court rightly pointed out in paragraph 91 of the judgment under appeal, it must be noted that the concept of ‘single concentration’ appears only in recital 20 of Regulation No 139/2004, and not in the articles of that regulation.

43 In paragraph 150 of the judgment under appeal, the General Court found that that recital does not, however, contain an exhaustive definition of the circumstances in which two transactions constitute a single concentration. It relied in this respect on the specific nature of that recital, which, although it may cast light on the interpretation to be given to a legal rule, cannot, since it has no binding legal force of its own, constitute such a rule.

44 Although, as the appellant acknowledges by its arguments, recital 20 of Regulation No 139/2004 may serve as a basis for interpreting the provisions of that regulation, it cannot reasonably infer from the wording of that recital alone an interpretation of the concept of 'single concentration' which is not consistent with those provisions. To that effect, the Court has moreover had occasion to state, on several occasions, that the preamble to an EU act has no binding legal force and cannot be validly relied on either as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording (see, to that effect, judgments of 10 January 2006, *IATA and ELFAA*, C-344/04, EU:C:2006:10, paragraph 76, and of 2 April 2009, *Tyson Parketthandel*, C-134/08, EU:C:2009:229, paragraph 16).

45 Accordingly, the appellant cannot rely on a broad interpretation of the wording of recital 20 of Regulation No 139/2004 in order to extend the scope of Article 7(2) of Regulation No 139/2004.

46 In that regard, as the General Court noted in paragraph 71 of the judgment under appeal, Article 7(2) of Regulation No 139/2004 permits, in certain circumstances, the implementation of a public bid before it has been notified to the Commission and before it has been authorised by the Commission, even if that transaction constitutes a concentration with a Community dimension for the purpose of Article 3 of that regulation.

47 Article 7(1) of that regulation, which prohibits the implementation of a concentration, limits that prohibition only to concentrations as defined in Article 3 of that regulation (judgment of 31 May 2018, *Ernst & Young*, C-633/16, EU:C:2018:371, paragraph 43).

48 Since Article 7(2) of that regulation constitutes an exception to that prohibition, account must be taken, in order to define the scope of that provision, of the definition of the concept of concentration set out in Article 3 (see, to that effect, judgment of 31 May 2018, *Ernst & Young*, C-633/16, EU:C:2018:371, paragraph 44).

49 Under Article 3 of Regulation No 139/2004, a concentration is deemed to arise where a change of control on a lasting basis results from the merger of two or more previously independent undertakings or parts of undertakings, or the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings of direct or indirect control of the whole or parts of one or more other undertakings, that control being constituted by the possibility, conferred by rights, contracts or any other means, of exercising decisive influence on an undertaking (judgment of 31 May 2018, *Ernst & Young*, C-633/16, EU:C:2018:371, paragraph 45).

50 It follows that a concentration arises as soon as the merging parties implement operations contributing to a lasting change in the control of the target undertaking (judgment of 31 May 2018, *Ernst & Young*, C-633/16, EU:C:2018:371, paragraph 46).

51 Although recital 20 of Regulation No 139/2004 admittedly states that it is 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, only transactions which are necessary to achieve a change of control are capable of falling within the scope of Article 7 of Regulation No 139/2004 (see, to that effect, judgment of 31 May 2018, *Ernst & Young*, C-633/16, EU:C:2018:371, paragraphs 48 et 49).

52 In those circumstances, it must be held that the General Court did not err in law in finding, in paragraph 70 of the judgment under appeal, that Article 7(2) of Regulation No 139/2004 is irrelevant in a situation in which control is conferred in the context of an initial private transaction even if that transaction is followed by a public bid, since the latter is not necessary to achieve a change of control of an undertaking concerned by the concentration at issue.

53 It follows that the General Court was also correct to reject the appellant's arguments based on the existence, in the present case, of a single concentration, since, as it noted, in essence, in paragraph 151 of the judgment under appeal, those arguments would lead to the inclusion within the concept of 'single concentration' and, consequently, within the scope of Article 7 of Regulation No 139/2004, of transactions which, although ancillary to the concentration, have no direct functional link with its implementation.

54 Therefore, the appellant cannot maintain that a transaction which is not necessary to achieve a change of control of an undertaking, such as a public bid launched after the acquisition of control of the target undertaking, falls within the concept of 'concentration' referred to in Articles 3 and 7 of Regulation No 139/2004.

55 Consequently, the appellant's arguments, alleging misinterpretation of the concept of 'single concentration', must be rejected.

56 In the second place, the appellant submits that the General Court's interpretation of Article 7(2) of Regulation No 139/2004 is contrary to the objective pursued by that provision. In that regard, it submits that the purpose of that provision is to facilitate public bids and creeping takeovers, so that Article 7(2) of Regulation No 139/2004 applies to transaction structures in which control may have been acquired prior to the launch of a public bid.

57 It should be noted that the appellant acknowledges that its broad interpretation of the concept of 'single concentration' would result in Article 7(2) of Regulation No 139/2004 being given a broader scope than that stemming from the wording of that provision.

58 In paragraphs 200 and 201 of the judgment under appeal, the General Court rightly noted, and as the appellant accepts, that Article 7(2) of Regulation No 139/2004 lays down an exception to Article 7(1) of that regulation, which must be interpreted narrowly.

59 However, as was observed in paragraph 57 of this judgment and as the General Court noted in paragraphs 202 to 204 of the judgment under appeal, the interpretation put forward by the appellant would amount to extending the scope of the exception provided for in Article 7(2) of Regulation No 139/2004.

60 In those circumstances, the appellant's arguments, based on the fact that such an interpretation is justified by the objectives of Union law in the field in question, as those objectives are set out in Directive 2004/25 or in the Green Paper, must be rejected.

61 Similarly, the appellant's argument that the interpretation of Article 7(2) of Regulation No 139/2004 facilitates the substantive assessment of the concentration cannot succeed. Such an argument, which relates to the examination of the compatibility of the concentration with the internal market, is irrelevant to the preliminary question of whether that concentration was capable of being exempted from notification to the Commission, in accordance with Article 7(2) of Regulation No 139/2004.

62 Accordingly, the appellant's arguments, alleging failure to have regard to the objective referred to in Article 7(2) of Regulation No 139/2004, must be rejected as unfounded.

63 In the third place, it follows from paragraphs 52 and 55 of this judgment that the appellant's arguments, based on the fact that (i) there was a conditional link between the December 2012 Acquisition and the public offer at issue and (ii) the appellant complied with the conditions laid down in Article 7(2) of that regulation, must be rejected.

64 Indeed, as the General Court correctly observed in paragraphs 229 and 230 of the judgment under appeal, since the concept of a 'single concentration' is not intended to apply in a situation in which sole de facto control is acquired from one seller by means of a single transaction, the question whether or not there is any conditionality *de jure* or de facto between the December 2012 Acquisition and the public offer at issue is irrelevant. The same conclusion must be drawn a fortiori as regards the question whether the appellant has complied with the conditions laid down in Article 7(2) of Regulation No 139/2004.

65 In the light of all the foregoing, the first ground of appeal must be rejected in its entirety.

The second ground of appeal

66 By its second ground of appeal, the appellant submits that, by holding, in particular in paragraphs 306, 319, 339 to 344 and 362 of the judgment under appeal, that the Commission was entitled to impose separate fines on the appellant, one for breach of Article 4(1) of Regulation No 139/2004 and the other for breach of the standstill obligation laid down in Article 7(1) of that regulation, the General Court failed to apply the principle *ne bis in idem*, the set-off principle and the principle governing concurrent offences.

67 The second ground of appeal is divided into two parts.

The first part

– Arguments of the parties

68 By the first part of the second ground of appeal, the appellant claims that the General Court erred in law by failing to apply, in the present case, the principle *ne bis in idem* or, in the alternative, the set-off principle.

69 That error of law is to be found, in particular, in paragraph 344 of the judgment under appeal, in which the General Court held that the two separate fines imposed on the appellant for the same conduct do not infringe the principle *ne bis in idem*. That principle, as it emerges from the case-law of the Court of Justice, encompasses both a prohibition on double proceedings and a prohibition on double penalties, so that no one should be punished twice for the same offence.

70 In the first place, by adopting as a relevant criterion, in paragraph 319 of the judgment under appeal, the fact that the two fines imposed on the appellant 'were imposed by the same authority in a single decision', the General Court adopted a formalistic and artificial interpretation of the principle *ne bis in idem*, whereas the principle covers any double punishment, irrespective of whether it is imposed in the same or separate proceedings.

71 That principle prohibits the imposition of more than one penalty for the same unlawful conduct, provided that the three conditions of identity of the facts, unity of the offender and unity of the legal interest protected are met, which is the case here. As regards the criterion of the identity of the facts and the unity of the offender, the General Court acknowledged, in paragraph 305 of the judgment under appeal, that the two separate fines were imposed on the basis of one single act by the appellant, namely the December 2012 Acquisition. As regards the unity of the legal interest protected,

Article 4(1) and Article 7(1) of Regulation No 139/2004 are both designed to protect the same legal interest, namely, to ensure that no permanent and irreparable damage to effective competition is caused as a result of the early implementation of concentrations.

72 In the second place, paragraph 344 of the judgment under appeal is not consistent with the case-law of the Court of Justice and the General Court, from which it is apparent that the principle *ne bis in idem* applies in the context of a single decision or proceeding. The appellant refers, in that regard, to the judgments 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), and of 21 July 2011, *Beneo-Orafti* (C-150/10, EU:C:2011:507), and to the judgment of the General Court of 5 October 2011, *Transcatab* v *Commission* (T-39/06, EU:T:2011:562). Furthermore, the references made by the General Court, in paragraphs 333 to 338 of the judgment under appeal, to the case-law of the European Court of Human Rights are irrelevant, since Union law provides for more extensive protection against double punishment, as is apparent from the case-law of the Court of Justice and the General Court.

73 In the alternative, the appellant submits that the General Court erred in failing to apply the set-off principle (*Anrechnungsprinzip*), which requires the first penalty imposed to be taken into account when determining the second penalty and is applicable to any situation in which the principle *ne bis in idem* is not fully applicable. According to the appellant, neither the Commission, in paragraphs 206 and 207 of the decision at issue, nor the General Court, in paragraphs 339 to 344 of the judgment under appeal, took into account the first fine when imposing the second fine.

74 The Commission contends, first, that the appellant's arguments are unfounded in so far as they concern the alleged infringement by the General Court of the principle *ne bis in idem*. Second, as regards the alleged failure to have regard to the set-off principle, the Commission contends that, since the appellant has not correctly developed its arguments or identified the specific failure alleged against the General Court in that regard, those arguments should be rejected as inadmissible.

– *Findings of the Court*

75 By the first part of its second ground of appeal, the appellant submits, in essence, that the General Court erred in law in holding, in paragraph 344 of the judgment under appeal, that 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.

76 As regards, in the first place, the principle *ne bis in idem*, the Court has held that that principle must be observed in proceedings for the imposition of fines under competition law. That principle 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. That principle thus aims to prevent an undertaking from 'being found liable or proceedings being brought against it afresh', which assumes that that undertaking was found liable or declared not liable by an earlier decision that can no longer be challenged (see, to that effect, judgment of 3 April 2019, *Powszechny Zakład Ubezpieczeń na Życie*, C-617/17, EU:C:2019:283, paragraphs 28 and 29 and the case-law cited).

77 That interpretation of the principle *ne bis in idem* is supported by the wording of Article 50 of the Charter of Fundamental Rights of the European Union and the rationale of that principle, that article thus specifically targeting the repetition of proceedings concerning the same material act which have been concluded by a final decision (see, to that effect, judgment of 3 April 2019, *Powszechny Zakład Ubezpieczeń na Życie*, C-617/17, EU:C:2019:283, paragraphs 30 and 32).

78 It follows that, contrary to the appellant's submission, the General Court was right to hold, in paragraph 319 of the judgment under appeal, that the principle *ne bis in idem* does not apply in the present case, on the ground that the penalties for breach of Article 4(1) and Article 7(1) of Regulation No 139/2004 were imposed by the same authority in a single decision, namely the decision at issue.

79 As the Advocate General observed in point 106 of his Opinion, that conclusion is not called into question by the appellant's argument, put forward at the hearing, that the situation which gave rise to the judgment of 3 April 2019, *Powszechny Zakład Ubezpieczeń na Życie* (C-617/17, EU:C:2019:283), is different from that at issue in the present case, since that precedent concerned the imposition, in a single decision, of a fine for infringement of national competition law and a fine for infringement of the rules of EU law on competition.

80 The protection which the principle *ne bis in idem* aims to afford against the repetition of prosecution leading to a criminal sentence bears no relation to the situation in which Article 14(2)(a) and (b) of Regulation No 139/2004 are applied in a single decision for the purposes of penalising an infringement of Article 4(1) and Article 7(1) of that regulation (see, by analogy, judgment of 3 April 2019, *Powszechny Zakład Ubezpieczeń na Życie*, C-617/17, EU:C:2019:283, paragraph 34).

81 Furthermore, the appellant's arguments based on the case-law of the Court of Justice and the General Court, referred to in paragraph 72 of this judgment, must be rejected.

82 In that regard, it is sufficient to note that, in paragraphs 322 to 328 of the judgment under appeal, the General Court analysed that case-law and concluded, correctly, that neither the Court of Justice nor the General Court had ruled on whether the principle *ne bis in idem* applies where several penalties are imposed in a single decision. Therefore, as the Advocate General observed in points 110 and 111 of his Opinion, that case-law is not capable of showing that the General Court made any error of law in interpreting the principle *ne bis in idem*.

83 As regards, in the second place, the appellant's argument, put forward in the alternative, that the General Court erred in failing to apply the set-off principle, it must be held that, although it is indeed apparent from the appeal that, by that argument, the appellant seeks to challenge paragraphs 339 to 344 of the judgment under appeal, it does not, however, put forward any specific evidence capable of showing that the General Court erred in law in holding, in particular in those paragraphs, that the set-off principle, on the assumption that it is a principle which can be invoked in the present case, is not applicable to a situation in which several penalties are imposed in a single decision, even if those penalties are imposed for the same actions.

84 Therefore, in so far as that premiss is not disputed by the appellant, it must be held that the arguments aimed at showing that that principle required the General Court to find that the Commission should have taken into account the first penalty imposed on the appellant when determining the second are ineffective.

85 In addition, it should be noted that, when questioned by the Court on that point at the hearing, the appellant stated that, by referring in particular to the set-off principle, it sought to base its argument on the disproportionate nature of those penalties. That argument is, however, inadmissible in so far as the appellant did not raise any objection in respect of paragraphs 579 to 631 of the judgment under appeal, in which the General Court specifically assessed the amount of the fine imposed on the appellant in the light of the principle of proportionality.

86 In the light of all the foregoing considerations, the first part of the second ground of appeal must be rejected in its entirety.

The second part

– *Arguments of the parties*

87 By the second part of its second ground of appeal, the appellant submits that the General Court erred in law in holding, in paragraph 362 of the judgment under appeal, that the alleged breach of the notification obligation in Article 4(1) of Regulation No 139/2004 is not the more specific offence and does not therefore subsume the more general offence in Article 7(1) of that regulation. In so doing, it infringed the principle governing concurrent offences.

88 In the first place, the appellant submits that this principle is recognised in international law and in the legal order of the Member States. It follows that, where one act appears to be caught by two statutory provisions, the primarily applicable provision excludes all other provisions based on the principles of subsidiarity, consumption or specialty. Some Member States also prohibit the imposition of double penalties where these are intended to punish a more serious offence and a lesser offence, which is included in the more serious offence. Furthermore, the appellant observes that the settled case-law of the international courts prohibits the imposition of a double penalty on a person where the infringement of one provision entails the infringement of another provision.

89 In the second place, the appellant submits that the General Court erred in law, in paragraphs 302, 352 and 361 of the judgment under appeal, by making a 'technocratic' distinction between the elements which define the notification obligation and those which define the standstill obligation. The General Court held that infringement of the first of those obligations is an instantaneous infringement, while infringement of the second is a continuous infringement. That distinction is irrelevant for the purposes of assessing the concurrent nature of the two infringements at issue, since they relate to the same conduct, namely the implementation of a concentration, but at different points in time, namely before notification and before clearance, respectively. In any event, that distinction does not justify cumulative penalties being imposed for the same conduct.

90 In the third place, in its appeal, the appellant argued that the alleged infringement of Article 4(1) of Regulation No 139/2004 is the more specific offence and subsumes the alleged infringement of Article 7(1) of that regulation.

91 The appellant submits that the Commission's ability to impose fines must be consistent with the distinct scenarios covered by the provisions of Regulation No 139/2004. Thus, Article 7(1) of that regulation and the Commission's power to fine the infringement under that article, under Article 14(2)(b) of that regulation, addresses a situation where a concentration has been notified, but implemented before it has been cleared. In the absence of notification, implementing a concentration prior to notification, and hence necessarily before it has been cleared, is the more specific and appropriate offence, entailing the imposition of a fine under Article 14(2)(a) of that regulation.

92 At the hearing before the Court, the appellant nevertheless stated that it considered, conversely, that Article 7(1) of Regulation No 139/2004, in so far as it refers both to the notification obligation and to the standstill obligation, subsumes Article 4(1) of that regulation.

93 According to the appellant, an infringement of the notification obligation may be established only if the standstill obligation has been infringed. In that regard, in paragraph 306 of the judgment under appeal, the General Court concluded 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'. In addition, the appellant relies, by analogy, on the judgment of 24 March 2011, *IBP and International Building Products France* v *Commission* (T-384/06, EU:T:2011:113, paragraph 109), in which the General Court

stated, as regards the imposition of a fine for obstruction or for the supply of false or misleading information in response to a request for information, that 'if conduct is classified under one of those heads, it cannot at the same time be classified under the other'.

94 Thus, contrary to what the General Court held in paragraphs 356 and 357 of the judgment under appeal, there is no risk of the 'absurd' outcome described in that paragraph 356, in the event that, as the appellant submits, the infringement of the notification obligation in Article 4(1) of Regulation No 139/2004 is covered by the more general offence in Article 7(1) of that regulation.

95 In the appellant's view, the General Court's interpretation of the provisions at issue is consistent with Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1), which required the concentration to be notified within a prescribed period, and which has been replaced by Regulation No 139/2004. However, that interpretation makes no sense in the context of Regulation No 139/2004, which imposes a mere obligation to notify the transaction before it is implemented, so that it is no longer justified to impose cumulative penalties for the infringement of Article 4(1) and Article 7(1) of Regulation No 139/2004.

96 The Commission disputes the appellant's arguments and contends that the second part of the second ground of appeal is unfounded.

– *Findings of the Court*

97 By this second part, the appellant submits, in essence, that the General Court infringed the principle governing concurrent offences by holding, in particular in paragraph 362 of the judgment under appeal, that the Commission correctly penalised the appellant both for infringement of Article 4(1) and of Article 7(1) of Regulation No 139/2004.

98 It should be observed that, as is apparent from paragraphs 348 and 349 of the judgment under appeal, while noting that, in EU competition law, there are no specific rules concerning concurrent offences, the General Court nevertheless examined the appellant's arguments in relation to principles of international law and the legal orders of the Member States. It thus examined whether Regulation No 139/2004 contained, as the appellant claims, a 'primarily applicable provision', excluding the application of the other provisions of that regulation.

99 In that regard, first, in paragraph 350 of the judgment under appeal, the General Court upheld the Commission's finding that the EU legislature has not defined one offence as being more serious than the other, infringements of Article 4(1) and Article 7(1) of Regulation No 139/2004 being subject to the same cap under Article 14(2)(a) and (b) of that regulation.

100 In making such a finding, the General Court did not err in law.

101 In paragraphs 294 and 295 of the judgment under appeal, the General Court rightly observed, in its preliminary observations on the relationship between Article 4(1) and Article 7(1) of Regulation No 139/2004, that, although there is a link between those provisions, in that an infringement of Article 4(1) of that regulation automatically results in an infringement of Article 7(1) of that regulation, the converse is not true.

102 Thus, in a situation where an undertaking notifies a concentration prior to implementing it pursuant to Article 4(1) of Regulation No 139/2004, it remains possible for that undertaking to infringe Article 7(1) of that regulation if it implements that concentration before the Commission declares it compatible with the internal market.

103 It follows that Article 4(1) and Article 7(1) of Regulation No 139/2004 pursue autonomous objectives in the context of the 'one-stop shop' system referred to in recital 8 of that regulation.

104 As the General Court rightly noted in paragraph 302 of the judgment under appeal, on the one hand, Article 4(1) of that regulation lays down an obligation to act, consisting in the obligation to notify the concentration prior to its implementation and, on the other hand, Article 7(1) of that regulation lays down an obligation not to act, namely not to implement that concentration before its notification or authorisation.

105 Article 14(2)(a) and (b) of that regulation provides for separate fines for breach of each of those obligations.

106 Therefore, although, as the appellant submits, in the context of Regulation No 139/2004, it is indeed not possible to envisage an infringement of Article 4(1) of Regulation No 139/2004 independently of an infringement of Article 7(1) of that regulation, the fact remains that, as the General Court correctly held in paragraphs 296 and 297 of the judgment under appeal, that regulation provides for the possibility, in accordance with Article 14(2)(a) and (b) thereof, of imposing separate fines, in respect of each of those infringements, in a situation where those infringements are committed concomitantly, through the implementation of a concentration before it has been notified to the Commission.

107 The appellant's interpretation that, in such a situation, the Commission may penalise only the infringement of Article 7(1) of Regulation No 139/2004, in so far as that provision subsumes Article 4(1) of that regulation, cannot succeed.

108 Such an interpretation runs counter to the objective of Regulation No 139/2004, which, as is apparent from recital 34 of that regulation, is to ensure effective control of concentrations with a Community dimension by obliging undertakings to give prior notification of concentrations and by providing for the implementation of such concentrations to be suspended until a final decision has been taken (see, to that effect, judgment of 31 May 2018, *Ernst & Young*, C-633/16, EU:C:2018:371, paragraph 42).

109 By depriving the Commission of the possibility of establishing a distinction, by means of the fines which it imposes, between the situations envisaged in paragraphs 102 and 106 of this judgment, namely (i) that in which the undertaking complies with the notification obligation but infringes the standstill obligation and (ii) that in which that undertaking infringes both those obligations, that interpretation would not enable that objective to be attained, in so far as infringement of the notification obligation could never be the subject of a specific penalty.

110 Furthermore, that interpretation would amount to rendering Article 14(2)(a) of Regulation No 139/2004 redundant, since, as the appellant itself acknowledges, there is no situation, other than that envisaged by the General Court in the judgment under appeal, in which that provision could apply. In so far as the appellant's interpretation would amount, in that regard, to calling into question the validity of that provision, it should be pointed out that, as the General Court noted in paragraph 306 of the judgment under appeal, and as the appellant does not dispute, the latter did not raise before the General Court an objection of illegality in respect of Article 14(2)(a) of that regulation.

111 The General Court was therefore justified in holding that the Commission was entitled to impose two separate fines under Article 4(1) and Article 7(1) of that regulation respectively.

112 Second, in paragraphs 351 to 358 of the judgment under appeal, the General Court examined and rejected the appellant's argument that the infringement of Article 4(1) of Regulation No 139/2004 is the more specific infringement, which subsumes the infringement of Article 7(1) of that regulation.

113 To that end, the General Court relied essentially on the finding, in paragraph 352 of the judgment under appeal, 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 which is triggered when the infringement of Article 4(1) of that regulation is committed.

114 In paragraphs 353 to 356 of the judgment under appeal, the General Court inferred from this that, in view of the different limitation periods which apply for the prosecution of those two types of infringement, the appellant's interpretation would result in an undertaking which infringes both the notification obligation and the standstill obligation being put at an advantage over an undertaking which infringes only the standstill obligation.

115 It follows that, contrary to the appellant's claims, the distinction correctly established by the General Court between the infringement of Article 4(1) of Regulation No 139/2004, which is an instantaneous infringement, and the infringement of Article 7(1) of that regulation, which is a continuous infringement, is relevant to the assessment of whether one of those two infringements must be classified as 'more specific' and, consequently, whether one is capable of subsuming the other.

116 Furthermore, in the light of the considerations set out in paragraphs 100 to 111 of this judgment, the appellant's argument that that distinction does not allow the Commission to impose cumulative penalties is, in any event, unfounded.

117 Third, the appellant's argument that the General Court infringed the principle of concurrent offences, as laid down in international law and the legal order of the Member States, cannot be upheld either.

118 On the assumption that that principle is relevant in the present case, as the General Court rightly held in paragraphs 372 and 373 of the judgment under appeal, in the absence, in Regulation No 139/2004, of a provision which is 'primarily applicable', as is apparent from paragraphs 100 to 111 of this judgment, that argument cannot succeed.

119 In the light of all the foregoing considerations, the second part of the second ground of appeal must be rejected as unfounded.

120 Since neither of the parts raised by the appellant in support of the second ground of appeal has been upheld, that ground of appeal must be rejected in its entirety.

The new plea raised at the hearing

Arguments of the parties

121 By a new plea raised at the hearing, the appellant relied on Article 277 TFEU in order to plead the illegality of Article 14(2)(a) of Regulation No 139/2004.

122 It submits, in that regard, that Article 14(2)(b) of Regulation No 139/2004 is the legal basis for penalising infringement of both Article 4(1) and of Article 7(1) of that regulation, so that there is no reason to apply Article 14(2)(a) of that regulation.

123 The Commission contends that that new plea is inadmissible.

Findings of the Court

124 By its new ground of appeal, raised at the hearing, the appellant pleads the illegality of Article 14(2)(a) of Regulation No 139/2004.

125 In that regard, as was already observed in paragraph 110 of this judgment, it is apparent from paragraph 306 of the judgment under appeal that, before the General Court, the appellant did not raise an objection of illegality in respect of that provision.

126 According to the Court's case-law, to allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the General Court would be to authorise it to bring before the Court of Justice, the appellate jurisdiction of which is limited, a case of wider ambit than that which came before the General Court. In an appeal, the jurisdiction of the Court of Justice is thus confined to a review of the findings of law on the pleas argued before the General Court (judgments of 19 April 2012, *Tomra Systems and Others* v *Commission*, C-549/10 P, EU:C:2012:221, paragraph 99, and of 3 July 2014, *Electrabel* v *Commission*, C-84/13 P, not published, EU:C:2014:2040, paragraph 35 and the case-law cited).

127 Consequently, the new ground of appeal submitted by the appellant must be rejected as inadmissible.

128 Since none of the grounds relied on by the appellant in support of its appeal has been upheld, that appeal must be dismissed in its entirety.

Costs

129 In accordance with Article 184(2) of the Rules of Procedure of the Court, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those rules, which applies to appeal proceedings by virtue of Article 184(1) thereof, 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 Commission has applied for costs and the appellant has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. Dismisses the appeal;

2. Orders Mowi ASA to pay the costs.

Vilaras Rodin Šváby

Jürimäe Piçarra

Delivered in open court in Luxembourg on 4 March 2020.

A. Calot Escobar
Registrar

M. Vilaras
President of the Fourth Chamber