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ABSTRACT

This article intends to illustrate the multiple issues raised by Article 7 of Regulation No. 139/2004, and in particular the scope of the standstill obligation resulting from Article 7(1) and the derogation provided by Article 7(2). In the context of the increasingly stringent approach by antitrust authorities with respect to "gun jumping," it aims at setting out the applicable analytical framework by reviewing a number of recent decisions issued by the European Commission and the Court of Justice, namely, Veolia/Suez, Marine Harvest, Canon/Toshiba, Ernst & Young, Altice or, less recently, Ryanair/Aer Lingus. By putting these decisions into perspective, it identifies the categories of behaviours that are likely to be covered by the standstill obligation, whether they consist of successive transactions aimed at transferring the ownership of the shares of the target or of other contractual arrangements that may entail a transfer of control. Conversely, it reviews the types of decisions that, although taken in light of an anticipated merger, escape the prohibition laid out by Article 7(1).

Cet article vise à illustrer les multiples enjeux soulevés par l'article 7 du Règlement n°139/2004, et en particulier la portée de l'obligation de suspension résultant de l'article 7(1) et de la dérogation prévue par l'article 7(2). Dans le contexte d'une approche de plus en plus stricte des autorités de concurrence en matière de «gun jumping», il se propose de définir le cadre analytique applicable par l'étude d'un certain nombre de décisions récentes rendues par la Commission européenne et la Cour de Justice, à savoir Veolia/Suez, Marine Harvest, Canon/Toshiba, Ernst & Young, Altice ou, plus anciennement, Ryanair/Aer Lingus. En mettant ces décisions en perspective, il identifie les catégories de comportements susceptibles de relever de l'obligation de suspension, qu'il s'agisse d'opérations successives visant à transférer la propriété des titres de la cible ou d'autres arrangements contractuels susceptibles d'entraîner un transfert de contrôle. Il s'attache également à recenser les types de décisions qui, bien que prises en considération de l'opération de concentration à intervenir, échappent à l'interdiction prévue par l'article 7(1).

1. This article discusses the types of behaviours that may lead to a breach of the standstill obligation laid down in Regulation No. 139/2004[1] ("EUMR") and offers practical guidance to avoid "jumping the gun" for companies engaging in M&A processes in the European Union. The mandatory and suspensory European merger control regime imposes a strict prohibition on any early implementation of a concentration. The enforcement of this standstill obligation has emerged as a priority area of action for the European Commission ("Commission"). The potential implications for businesses are high, given the substantial fines companies face if they "jump the gun", even by mere negligence. It is, however, fair to say that the legal landscape has become somewhat clearer as a number of recent decisions and judgements have addressed the scope of the standstill obligation (I.) and of the derogation that applies to transactions in securities (II.). We will review each of those two issues in turn.

I. The scope of the standstill obligation–Article 7(1) EUMR

2. Article 7(1) EUMR prevents a concentration with a Community dimension to be implemented before it has been cleared by the Commission or before the deadline allocated to the Commission for its review has been reached. Although straightforward at first reading, this provision raises complex issues that have been addressed in various decisions and judgements, which have gradually shed light on its precise scope.

3. The most prominent decision discussing the scope of the standstill obligation is the judgement of the European Court of Justice ("ECJ") in the *EY* case[2] that was issued following a request by the Danish Maritime and Commercial Court.

1 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

2 ECJ, 31 May 2018, *Ernst & Young P/S v. Konkurrencerådet*, case C-633/16.

4. The facts and background of the case were as follows. On the same day a merger agreement was signed between certain EY companies and KPMG DK, in November 2013, KPMG DK terminated its cooperation agreement with KPMG International on the basis of which it was part of KPMG's network. The merger was later approved by the Danish Competition and Consumer Authority, which, however, issued a sanction decision with respect to the termination of the cooperation agreement, on the grounds that it breached the national suspensory provisions, being an irreversible merger-specific decision. Following an appeal, the Danish Maritime and Commercial Court asked the ECJ to clarify whether the standstill obligation was to be interpreted as covering this kind of situation where, strictly speaking, no transfer of control occurred prior to the clearance decision.

5. The ECJ first noted that the "*wording of Article 7 does not, in itself, clarify the scope of the prohibition which it lays down.*"[3] It went on to state that the scope of Article 7(1) EUMR should thus be defined by reference to the definition of a concentration, as laid out by Article 3 EUMR, which necessarily implies a change of control on a lasting basis (i.e., the possibility of exercising decisive influence). Such an approach is to be welcomed as it avoids conflicting interpretations of the same notion.

6. The ECJ then emphasized that the suspension obligation also covers situations of "partial implementation" and concluded that "*a concentration is implemented only by a transaction which, in whole or in part, in fact or in law, contributes to the change in control of the target undertaking*",[4] irrespective of any market effects. The Commission had for its part argued in favour of a much broader approach, considering, *inter alia*, that gun jumping would arise by reason of any measures pre-empting the effects of the merger or significantly affecting the prevailing competitive conditions.[5]

7. As a result, to the extent the termination of the agreement with KPMG International, although preparatory or ancillary to the concentration between KPMG DK and EY companies, did not contribute, as such, to the change of control, it was found to fall outside Article 7(1) EUMR. Said differently, according to Advocate General Wahl, measures that "*precede and are severable from the measures actually leading to the acquisition of the possibility of exercising decisive influence on a target undertaking*"[6] do not amount to gun jumping.

8. According to the ECJ, the basis for this approach is that certain types of behaviours, although adopted in the context of a concentration, with the contemplated deal in mind, are not "necessary" to the change of control as they do not present "*a direct functional link with its implementation*"[7] and are thus not expected to jeopardize the efficiency of merger control.

9. Against the ECJ's standard, it is arguably possible to distinguish those acts and decisions which squarely fall within the scope of the standstill obligation (1.) from those which escape the prohibition laid out by Article 7(1) EUMR (2.).

1. Agreements that contribute to the change of control over the target undertaking

10. As apparent from the case law, issues regarding the scope of the standstill obligation arose in relation to two main types of transactions: the acquisition of publicly traded securities on the stock market (1.1) and the implementation of certain contractual mechanisms in the context of private transactions (1.2).

1.1 The acquisition of publicly traded securities on the stock market

11. Over the last ten years, the Commission addressed at least three times the application of Article 7(1) EUMR to series of transactions involving, at some point, a public offering through the stock market. The Commission made clear that such transactions are subject to the standstill obligation to the extent they form part of a "single concentration" or entail an acquisition of control.

12. In the first case, the controversial *Ryanair/Aer Lingus* decision,[8] the Commission dealt with a request of Aer Lingus, arguing, in essence, that the acquisition of a minority shareholding in its capital by its competitor, Ryanair, amounted to the "partial implementation" of a concentration that was ultimately declared incompatible with the common market by the Commission. Ryanair acquired some of Aer Lingus' shares directly on the stock market, with a view to carrying out a public bid for the remaining shares, that had already been announced and notified to the Commission, which subsequently prohibited the takeover. Given that the shareholding initially acquired by Ryanair did not grant *de jure* or *de facto* control over Aer Lingus, and that no control would arise in the future, the Commission rejected the request, on the grounds that no concentration had occurred, and, therefore, no "partial implementation" either.

3 *Ibid.*, para. 39.

4 *Ibid.*, para. 62.

5 As previously mentioned, this was also the view of the Danish Competition and Consumer Authority, which set the three following criteria as relevant to qualify a breach to the standstill obligation: (i) a merger-specific decision; (ii) irreversible; and (iii) potentially creating market effects. On this latter point, one can note that the decision did produce market effects, as a number of clients chose to switch to another auditing firm following the announcement of the termination of the cooperation agreement.

6 Opinion AG Wahl, 18 January 2018, *Ernst & Young P/S v. Konkurrencerådet*, case C-633/16, para. 78.

7 Case C-633/16, para. 49.

8 EC, decision of 11 October 2007, *Ryanair/Aer Lingus*, case COMP/M.4439.

13. The General Court ("GCEU") upheld the Commission decision[9] but the interesting issue was whether the two steps described above qualified as a "single concentration". The Commission responded in the affirmative given the very short period between the various acquisitions and the economic objective announced by Ryanair—namely, gaining control over Aer Lingus. The GCEU agreed and observed, accordingly, that "*the acquisition of a shareholding which does not, as such, confer control for the purposes of Article 3 of the merger regulation may fall within the scope of Article 7*."[10]

14. This statement, although it was made eight years before the *EY* ruling, is arguably fully consistent with the ECJ's recent finding. To the extent interrelated transactions contribute to the final acquisition of control and present a direct functional link with the implementation of the concentration, it is quite logical that they should be subject to the standstill obligation.

15. This approach was confirmed more recently, in a series of "post-*EY*" cases, including *Marine Harvest*[11] and *Veolia/Suez*.[12]

16. In the *Marine Harvest* case, the ECJ gave additional guidance on the meaning of the notion of "necessity" as laid out in its *EY* ruling. In this case, Marine Harvest had acquired *de facto* control of a competitor, through a SPA whereby it acquired 48.5% of the capital, notified the deal and then announced its intention to buy the outstanding shares by way of a public offer. Because control over the target had already been acquired by means of the private transaction, the Commission had found that Marine Harvest infringed Article 7(1) EUMR.[13] The ECJ concurred and rejected Marine Harvest's argument that the SPA was only the first step of a "single concentration", which could benefit from Article 7(2) EUMR derogation on the grounds that the public bid was—obviously—"*not necessary to achieve a change of control*",[14] extensively quoting the *EY* ruling. Conversely, the GCEU, in the context of the same case, had already confirmed, in 2017, 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*"[15] and therefore fall within the scope of Article 7 EUMR.

17. In the context of the Veolia planned takeover of Suez, the Commission recently adopted a similar approach, finding that the acquisition of 29.9% of Suez's capital, by means of a private transaction to be followed by a public bid, constituted a "single concentration", within the scope of Article 7 EUMR. This conclusion was based on the fact that the initial step would not have been carried out absent the intention to launch the public bid and was implemented with the ultimate objective of acquiring control of Suez. The Commission thus found that the two steps were *de facto* interrelated. This is, again, entirely consistent with the *EY* standard.

1.2 The setting up of contractual schemes in the context of private transactions

18. The implementation of pre-merger agreements and transaction structures intended to facilitate the ultimate transfer of control may also qualify as gun jumping under the *EY* doctrine.

19. In particular, warehousing schemes have often been scrutinized and ultimately sanctioned as infringements of the standstill obligation.[16] The most recent example is the one involving Canon in relation to its acquisition of Toshiba Medical Systems Corporation.[17] Canon set up a two-step transaction structure that implied the creation of a special purpose vehicle ("SPV"), supposed to retain ownership of 95% of the shares until Canon could exercise its option to fully acquire the target. This aimed to secure the full consideration for the transaction and to address Toshiba's financial difficulties, without formally acquiring control to avoid triggering a merger filing obligation.

20. The Commission cleared the deal, which had been notified between the two steps, but started proceedings regarding a potential early implementation of the concentration. The *EY* ruling was issued in the course of the procedure and the Commission heavily relied on the ECJ's finding, to conclude that the warehousing scheme was a breach of the standstill obligation. Even if the transitory ownership of securities by the SPV fell short of control, the Commission considered that it amounted to a "partial implementation", to the extent the interim transaction "contributed to" such change of control of the target.

21. The Commission first qualified both steps as a "single concentration", given the conditionality between them, as the first one would never have been implemented if not for the second.

22. The Commission then rejected Canon's argument that the first step was not "necessary" to carry out the concentration, as there were other ways to acquire control over the target. In this respect, the Commission stated that any transaction "*needs to be assessed taking into account*

9 GCEU, 6 July 2010, *Aer Lingus Group plc v. European Commission*, case T-411/07.

10 *Ibid.*, para. 83.

11 ECJ, 4 March 2020, *Mowi ASA* (formerly Marine Harvest) *v. European Commission*, case C-10/18 P.

12 EC, decision of 17 December 2020, *Veolia/Suez*, case M.9969.

13 As well as Article 4(1) EUMR.

14 Case C-10/18 P, para. 52. The Commission, in its sanction decision, considered that "*Marine Harvest's references to* [the 'single concentration' concept] *appear to be misplaced*" (decision of 23 July 2014, *Marine Harvest/Morpol*, case COMP/M.7184, para. 113).

15 GCEU, 26 October 2017, *Marine Harvest ASA v. European Commission*, case T-704/14, para. 191. It was intended to clarify the meaning of the *Ryanair/Aer Lingus* ruling, which was unclear as to whether the "single concentration" concept was at stake.

16 *See* for instance para. 35 of the Consolidated Jurisdictional Notice, where the interim transaction is deemed to be the first step of a "single concentration".

17 EC, decision of 27 June 2019, *Canon/Toshiba Medical Systems Corporation*, case M.8179.

the actual structure chosen by the parties to the transaction (which would normally reflect [their] *interests* (. . .)*)*"[18] so that the mere existence of another hypothetical structure is deemed irrelevant as to the *EY* necessity criteria. Such an approach, while quite extensive, shall not come as a surprise: the whole structure was designed to satisfy Toshiba's requirements to dispose of its subsidiary while not filing the deal to the Commission, to avoid the standstill period.

23. Another crucial element was that Canon paid the whole consideration upfront and not only a premium. In fact, the Commission found Canon did not simply obtain an option to acquire control but the right to determine who would be the ultimate owner of the target. The Commission concluded that the Interim Transaction gave Canon influence "*over the future of* [the target]."[19]

24. Also, contrary to the circumstances of the *EY* case, the transaction did not involve a third party but only concerned the merging parties. Although it can be argued that the target remained an independent company until the final acquisition, the interim transaction appeared to be the initial step of a global plan so that the overall structure arguably demonstrated a direct functional link between the two sequential stages.[20]

25. Gun jumping may also arise by reason of arrangements giving the buyer some level of influence over the operation of the target. Although the acquiring party may ensure, through contractual mechanisms, that the value of the assets to be acquired is not negatively affected until closing occurs, or indeed prepare for the future integration of the two companies, clauses that interfere with the commercial conduct of the target would typically raise concerns.

26. In this regard, the landmark decision, issued prior to *EY*, is the *Altice* one.[21] In the context of the purchase of PT Portugal, Altice and the seller notably included in their SPA provisions governing the way the target was supposed to conduct its operations between the signing and closing. More specifically, those provisions gave Altice a veto right on the appointment of the target's senior management and on the target's pricing policies as well as the ability to induce the target to enter into, terminate or modify contracts. In addition, two types of conducts were considered problematic by the Commission, namely, those by which Altice exercised a material influence over the target's business and commercial strategy (selection of suppliers, ad campaigns, distribution agreements, etc.) and competitively sensitive information was exchanged outside confidentiality agreements and clean team arrangements.

27. The Commission, while acknowledging that covenants aimed at protecting the value of the target between the signing and closing are "*common and appropriate*",[22] concluded that Altice was given the possibility to exercise a decisive influence over the target prior to the clearance decision, and even, under some circumstances, before the notification, in breach of the standstill obligation. The decision appears consistent with the *EY* standard to the extent the clauses and behaviours at issue not only contributed to the transfer of control but effectively amounted to an early implementation of the concentration.

2. The *EY* ruling new safe area: Agreements that do not contribute to the change of control over the target undertaking

28. The *EY* ruling, by limiting gun-jumping offences to acts contributing to the change of control over the target, also implies that many decisions, although carried out in anticipation of a proposed merger, nevertheless fall outside the scope of Article 7(1) EUMR.

29. In this respect, the ECJ's reasoning in *EY* is informative. The termination of the agreement with KPMG was found to fall outside the scope of Article 7(1) EUMR because (i) the KPMG DK companies were independent "*both before and after the termination*",[23] (ii) the transaction only concerned one of the merging parties and a third party, and (iii) it did not give any level of influence over the target. The fact that the termination of the agreement was obviously decided in anticipation of the future transaction—with the target not being in a position to remain integrated into a group network that was to become a competitor post-merger—was deemed irrelevant.

30. This does not necessarily mean, however, that decisions taken in consideration of a future merger but which fall short of contributing to the acquisition of control may not have negative consequences from the parties' point of view.

31. Take the example of a company that would anticipate the implementation of a proposed merger by discontinuing a product line or by shutting down certain stores on the basis that they would be redundant with the activities of the target. Such decisions would surely fall outside the scope of the standstill obligation under *EY* as they do not contribute to the acquisition of control or otherwise present a functional link with the transaction.

18 *Ibid.*, para. 147.

19 *Ibid.*, para. 135.

20 The decision was appealed (case T-609/19). The first plea of law alleges that the Commission relied on an "*unprecedented and unsupported concept of 'partial implementation of a single concentration'*."

21 EC, decision of 24 April 2018, *Altice/PT Portugal*, case M.7993. This decision is subject to a pending appeal procedure (case T-425/18).

22 *Ibid.*, para. 70.

23 Case C-633/16, para. 61.

32. However, to the extent those decisions would have been taken in consideration of the merger, a regulator could take the view that, under the relevant counterfactual (that is, absent the transaction), the overlaps that existed between the parties result in competition concerns. In such a scenario, the irreversible decision to terminate certain activities may limit the parties' flexibility in terms of offering adequate remedies to address the regulator's concerns. More specifically, to the extent the acquirer would have discontinued some of its activities, the only option left may be to divest the target's business, leaving the combined entity with nothing.

33. Thus, the "safe zone" created by *EY* should be used with caution, especially in the context of transactions that may ultimately give rise to competition concerns.

34. However, between these two "extreme" situations, there are many conducts that may or may not meet the *EY* test, depending on factual circumstances. In view of the few relevant cases, all of which being somewhat unique, merging parties are advised to consider very carefully any merger-related decision or agreement, also bearing in mind that the rules on anticompetitive agreements apply in any case.

II. The scope of the standstill obligation derogation– Article 7(2) EUMR

35. While Article 7(1) EUMR requires parties waiting for the Commission's clearance to avoid premature implementation, Article 7(2) EUMR provides an exception for certain transactions, for which the closing cannot reasonably be subject to the suspension obligation. Article 7(2) EUMR thus reads that Article 7(1) EUMR does not prevent "*a public bid or* (. . .) *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*" to be implemented, provided that the acquirer does not exercise any of the voting rights over the target[24] and promptly reports the acquisition to the Commission.

36. This is intended to provide legal certainty to two types of takeover strategies so that they remain possible and attractive as they carry efficiencies: public offers, on the one hand, and so-called "creeping bids" or "ramping acquisitions", by which the acquirer gradually buys the target's shares and acquire control, on the other. Still, the recent *Veolia/Suez* decision[25] significantly widened the concept of "*series of transactions in securities*" as defined so far. It is now clear that it does not only cover creeping bids on the stock market but also series of private transactions carried out with several sellers.

37. As previously mentioned, in the context of public bids, the *Ryanair/Aer Lingus* case confirmed that when a non-controlling shareholding is acquired and is followed by a tender offer on the market, those two steps are deemed to be part of a "single concentration" subject to Article 7(1) EUMR. Before the Commission, Aer Lingus applied for interim measures to prevent Ryanair from further exercising the voting rights acquired in connection with the minority shareholding of 25.17% in its capital. This request was rejected. However, Ryanair committed to refraining from exercising the voting rights. In its judgement, the GCEU mentioned that "[a]*s the Commission submits in its pleadings,* [Article 7(2) EUMR] *that derogation effectively transfers the risk of having the operation prohibited to the acquirer. If, after the examination procedure, the Commission considers that the notified operation must be prohibited, the securities acquired to implement the concentration have to be disposed of, as is illustrated in* Tetra Laval *and* Schneider."[26] The GCEU carried on stating that "[w]*hen the Commission requested Ryanair not to exercise its voting rights* (. . .) *it merely asked Ryanair to avoid putting itself in a situation in which it would be implementing a concentration*",[27] thereby clearly asserting that Article 7(2) EUMR applies in the context of the acquisition of a non-controlling minority shareholding followed by a public bid. In the end, as the concentration was later declared incompatible, there was no more reason for Ryanair to restrain from exercising the voting rights, Article 7 EUMR not being applicable.

38. The *Marine Harvest* case also contributed to clarifying the scope of Article 7(2) EUMR. As a reminder, Marine Harvest had acquired *de facto* control over a competitor, through the conclusion of a SPA with one seller, with the intention of buying the outstanding shares by way of a public offer. Marine Harvest sought to rely, in the course of the Commission's proceedings for gun jumping, on Article 7(2) EUMR's exemption. It mainly argued that the private transaction did not constitute a separate transaction but "*the triggering event of the Public Offer and, as such, an integral part of the 'creeping and public takeover'*",[28] the two transactions being part of a "single concentration". Marine Harvest thus claimed the benefit of Article 7(2) EUMR for both transactions, arguing that it sent a case team allocation request to the Commission only three days after the private transaction's closing and had not exercised any

24 Or does so only to protect the value of its investment based on a Commission's explicit derogation.

25 Case M.9969.

26 Case T-411/07, para. 82. These two cases differ from the *Ryanair/Aer Lingus* one in the sense that the concentration was fully implemented, under Article 7(2) EUMR's derogation, and then subsequently prohibited, leaving the acquirer with no choice but to divest its (almost) entire shareholding.

27 *Ibid.*, para. 83.

28 Case COMP/M.7184, para. 93.

of the voting rights. The Commission ruled out the applicability of Article 7(2) EUMR, on the grounds that control over the competitor has been acquired from only one seller while the derogation refers to "various sellers". In addition to its wording, the rationale of Article 7(2) EUMR also excluded Marine Harvest's interpretation, as it covers "*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* (. . .) *thereby preserving the liquidity of stock markets, and protecting bidders from unintended and unforeseen breaches of the standstill obligation.*"[29] The Commission noted that, in the present case, it was clear that *de facto* control was acquired by the SPA. This reasoning was upheld by the GCEU[30] and the ECJ,[31] the latter considering that "*the interpretation put forward by the appellant would amount to extending the scope of the exception provided for in Article 7(2)*."[32]

39. The recent *Veolia/Suez* decision[33] is also an important development as regards Article 7(2) EUMR's scope of application. The acquisition of a non-controlling interest of 29.9% of Suez's capital by means of a private transaction, to be followed by a public offer, qualified as a "single concentration". Veolia availed itself the "creeping bids" exemption, which was challenged by Suez, claiming that such a derogation must be construed strictly, and that the first step of the transaction did not correspond to any of the situations where the derogation would apply: it was neither a "*series of transaction in securities* [with] *various sellers*" nor a public bid, which was supposed to be launched only after the Commission's clearance.

40. Having found that the two stages of the transaction formed a "single concentration", the Commission considered that the entire concentration qualified for a derogation under Article 7(2) EUMR. According to the Commission, a different interpretation would mean that only the first step would be subject to the suspensive effect, although being non-controlling, unduly extending the scope of Article 7(1) EUMR. Indeed, when in *Ryanair/Aer Lingus* and *Marine Harvest*, the GCEU found that the acquisition of non-controlling minority shareholdings may fall into Article 7 EUMR's scope, it was only in the event of a "single concentration".[34]

41. Then, the Commission stated that, as the derogation applies to either "*series of transactions in securities*" or public bids, there is, therefore, no reason to exclude from the scope of this provision a situation in which control is acquired from different sellers both through a private transaction involving securities and a subsequent public offer for the outstanding shares. The rationale of Article 7(2) EUMR—namely, legal certainty in the context of transactions concerning listed securities—is also deemed relevant in a "hybrid" scenario such as the one that arose in the case at hand.

42. Beyond these considerations, the main practical impact of this decision is that the Commission clarified the concept of "*series of transactions in securities*" by referring to an unprecedented notion of "series of private transactions in securities (aimed at a creeping bid)."[35] This statement makes clear that Article 7(2) EUMR's derogation may cover, in addition to public bids and ramping acquisitions on the stock market, series of private transactions, even if not followed by a public offer—as distinct from the facts in *Veolia/Suez*.[36] For example, in a situation where a company would acquire control of a publicly listed target by means of three successive private transactions, each transferring 15% or 20% of the target's securities through three SPAs with three different sellers, the acquirer would arguably benefit from the derogation granted by Article 7(2) EUMR.

43. This landmark decision, by which the Commission has broadened the scope of Article 7(2) EUMR's derogation, is therefore likely to open new perspectives in the context of takeovers over listed companies. ■

29 *Ibid.*, para. 102.

30 Case T-704/14.

31 Case C-10/18 P.

32 *Ibid.*, para. 59.

33 Case M.9969.

34 *See* point 16 of the present article.

35 Case M.9969, para. 26.

36 We can note that already in *Marine Harvest*, the GCEU and the ECJ held that the private transaction conferring control was a "transaction in securities", paving the way for the *Veolia/Suez* decision: "[T]*he 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*" (case C-10/18 P, para. 37).

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