

Newsletter, 8 August 2022

Gun Jumping and Warehousing Structures

A recent ruling at EU level sheds a new light on when interim transactions in multi-stage M&A deals may be considered an implementation of a concentration

On 18 May 2022, the General Court upheld the European Commission's ("Commission") EUR 28 million fine¹ on the manufacturer of imaging and optical products Canon Inc. for "gun jumping" in its acquisition of the Japanese medical equipment manufacturer Toshiba Medical Systems Corporation ("TMSC").² The General Court's decision clarifies that a warehousing structure cannot be used to circumvent the standstill obligation under the EU Merger Control Regulation ("EUMR").

Background

Following financial difficulties and to avoid reporting negative results to its shareholders for the financial year ending in March 2016, Toshiba decided to sell its wholly-owned subsidiary TMSC. In its bid, Canon proposed a transaction structure according to which TMSC would be recognized as a capital contribution in Toshiba's accounts by the end of March 2016, but control would only be acquired after the necessary merger control clearances. Canon's offer consisted of a two-step transaction structure, also known as a "warehousing structure" (i.e., the target is acquired and temporarily held by an interim buyer until the respective clearance decisions have been obtained):

1. Interim transaction: On 17 March 2016, (i) Canon acquired TMSC's non-voting share for EUR 40 and 100 voting share options for EUR 5.28 billion (the right to vote not being exercisable until the options had been exercised) and (ii) MS Holding, a vehicle created for the purpose of the transaction, acquired the remaining 20 voting shares for EUR 800. This interim transaction was closed prior to notification of the deal to the Commission.

2. Ultimate transaction: On 19 December 2016, after obtaining all merger control clearances, Canon exercised its 100 share options to acquire

the underlying voting shares and TMSC acquired from Canon the non-voting share and from MS Holding the 20 voting shares.

Commission's fining decision

Following the case team allocation request sent on 11 March 2016, Canon formally notified the Commission on 12 August 2016 of the acquisition of 100% of the shares in and sole control over TMSC (covering both the interim and the ultimate transaction). The transactions did not raise any competition law concerns and was cleared by the Commission.

In parallel to the merger review process, the Commission opened an investigation – following an anonymous complaint – concerning a possible breach of the standstill obligation under Art. 7(1) EUMR and the obligation to notify under Art. 4(1) EUMR. On 27 June 2019, the Commission imposed a fine of EUR 28 million on Canon for breaching these obligations.

The Commission found that the interim and the ultimate transactions constituted together a single concentration and were inherently closely connected. The Commission reasoned that the interim transaction was a necessary step and contributed, at least in part, to achieve a change of control over TMSC, presenting a direct functional link with the implementation of the acquisition of control. As such, it came to the conclusion that, by carrying out the interim transaction, Canon partially implemented the single concentration, i.e., the acquisition of control over TMSC, prior to notification to and clearance by the Commission. In its decision, the Commission acknowledged that Canon did not acquire control over TMSC before clearance.

General Court's decision

On appeal, the General Court dismissed Canon's action and upheld the EUR 28 million fine.

¹ Commission, [M.8179](#) – Canon / Toshiba Medical Systems Corporation, 27 June 2019.

² General Court, [T-609/19](#), Canon v Commission.

Canon alleged that the interim transaction (i.e., the warehousing stage closed before the Commission's clearance) did not constitute an acquisition of control and, thus, could not be considered an early implementation of a concentration, as there is only an early implementation where control over the target is acquired. The General Court disagreed and found that the Commission was right to argue that the concepts of 'concentration' and 'implementation of a concentration' are different. While the 'implementation of a concentration' requires a change of control on a lasting basis, a 'concentration' may take place as soon as the parties implement operations contributing to a lasting change of control, possibly even before control is acquired (e.g., through interim transactions which merely 'contribute' to a later change in control). The General Court clarified that transactions fall within the concept of implementation of a concentration if they can *contribute*, in whole or in part, in fact or in law, to the change of control of the target company.³

The General Court therefore concluded that the Commission's review is only effective if it is carried out not only before the acquisition of control but also prior to the (partial) implementation of a concentration. The prior nature of the control required by the EUMR would be, in the General Court's view, undermined in case parties would be prohibited from implementing a concentration by means of a single transaction but allowed to achieve the same results by successive partial operations. However, transactions which – albeit carried out in the context of the transaction and ancillary or preparatory to the concentration – do not present a direct functional link with its implementation, are not necessary to achieve a change of control and do not fall within the scope of Articles 4(1) and 7(1) EUMR.

In response to the argument that the Commission's review had not been jeopardized as control had only been acquired after clearance, the General Court clarified that Canon had confused the concepts of 'implementation', which relates to the concentration itself and may be long term, and 'acquisition', which relates to control and occurs at a single point in time (i.e., control is either acquired or not, there is no 'partial control').⁴

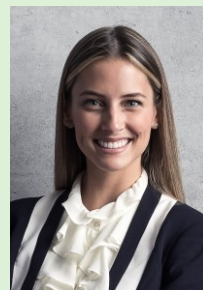
Additionally, the General Court sided with the Commission and found that (i) the interim transaction was undertaken only with a view to the ultimate transaction, (ii) MS Holding was created for the sole purpose of facilitating Canon's acquisition of control and it was not economically

interested in TMSC beyond its role as an interim buyer, for which it was paid a fixed price, and (iii) by paying the full price in the interim transaction, Canon became solely able to determine the identity of the ultimate acquirer and bore the economic risk of the overall transaction (i.e., the share options were not 'genuine').⁵

Comment and outlook

The General Court's decision sheds new light on when interim measures in multi-stage M&A transactions can be considered a partial implementation of a transaction. The decision clarifies that certain interim transactions can qualify as gun jumping and lead to significant fines even if they do not confer control over the target, but merely 'contribute' to a change of control. From a practical perspective, there is no clear cut line and an assessment needs to be made in light of all legal and factual circumstances.

The increased enforcement trend of competition authorities against breaches of the standstill obligation and the obligation to notify and the recent judgments at EU level⁶ endorsing the Commission's fining decisions against gun jumping should not be undermined by companies (and their M&A lawyers) when considering the transaction structure.



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³ Ibid, paras. 65, 73.; Court of Justice, [C-633/16](#) – *Ernst & Young*, 31 May 2018.

⁴ Ibid, paras. 78-79.

⁵ Ibid, paras. 108 ff., 121 ff., 187 ff.

⁶ Court of Justice, [C-10/18 P](#) – *Marine Harvest v Commission*, 4 March 2020; General Court, [T-425/18](#) – *Altice v Commission*, 22 September 2021; See Commeo's newsletters of [27 April 2018](#) and [31 March 2017](#).