

A clear distaste for warehousing structures (Canon/Toshiba)

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Key takeaways

In November, the European Commission ("Commission") published its much-anticipated reasoning in the Canon/Toshiba Medical Systems Corporation ("TMSC") merger infringement case.^[1] Through this decision, which resulted in a remarkable €28 million fine against Canon for purely procedural contraventions, competition practitioners have gained further insight into the Commission's standpoint on the use of warehousing structures in notifiable transactions. The decision however provides little further guidance on the scope of the gun jumping prohibition, a topic on which there is limited practical guidance available in the EU (beyond the reasoning offered in the Commission's Altice decision of April 2018^[2]).

It is clear that the Commission is empowered by the recent decision of the European Court of Justice ("ECJ") in EY/KPMG (2018) to find gun jumping infringements where the measures in question represent a 'direct functional link' with implementation of the concentration, even in a phase I clearance case. The Canon/TMSC case is a fairly obvious example of a breach of the gun jumping prohibition, as further explained below.

On the topic of warehousing, two key points emerge from this decision. Firstly, the Commission has a clear distaste for warehousing via third parties pending receipt of clearance, this is evident from the tone of the decision. Secondly, the key concern with warehousing is the transfer of economic risk to the ultimate purchaser - if the ultimate acquirer already has "skin in the game" prior to receipt of clearances, the Commission considers this problematic.

The warehousing structure applied in Canon/Toshiba

At a high level, the two-step warehousing structure in Canon/Toshiba involved:

- The acquisition by a special purpose vehicle ("SPV") established indirectly by Toshiba and Canon of 95% of TMSC's shares for a nominal amount. In exchange, Canon paid the entire €5.28 billion purchase price to Toshiba up front, in exchange for a 5% share of TMSC and an option to acquire the further shares now held by the SPV. The options acquired by Canon were exercisable upon receipt of merger control clearance or expiry of proceedings in various jurisdictions, including the EU ("Interim Transaction").
- Following satisfaction of the merger control conditions, Canon exercised its option and acquired 100% of the shares of TMSC through the SPV ("Ultimate Transaction").

Prior to receipt of merger clearance from the Commission, infringement proceedings were commenced against Canon under Article 14(2)(a)/(b) of the EU Merger Regulation ("EUMR") for potential breaches of the standstill and notification obligations under Articles 7(1) and 4(1) EUMR. The Commission imposed a fine of EUR 14 million in respect of each of these violations, i.e., EUR 28 million in total.^[3]

Reasoning on the legality of warehousing structure

Applying the test laid down in EY/ KPMG, the Commission reached the following conclusions:

- The Interim Transaction and the Ultimate Transaction were held to be a single concentration. Finding that from the outset the transaction structure had only ever contemplated Canon as the ultimate acquirer and that the sole purpose of the SPV was to facilitate Canon's acquisition of control over TMSC, the Commission concluded that the Interim and Ultimate Transactions formed part of a "single economic project". Critically, Canon was found to have borne the economic risk of the overall operation from the start through its irreversible pre-payment of the whole of the purchase price - not just a premium corresponding to the value of the option to buy TMSC at a later stage.^[4]
- Applying the ECJ's test in EY/KPMG, the Interim Transaction was found to have contributed to a lasting change of control by Canon over TMSC since it was necessary (in view of the actual two-step structure chosen by the parties) and represented a direct functional link with the implementation of the concentration.
- Having established the above, the Commission concluded that by carrying out the Interim Transaction prior to notification and receipt of clearance, that Canon breached both the EUMR's notification and standstill obligations, and had done so negligently.

The Commission's scepticism of warehousing structures, is clear from statements in the decision such as the following:

"As acknowledged by the CJN, warehousing schemes are generally characterised by the fact that the ultimate acquirer "often bears the major part of the economic risks and may also be granted specific rights". This is exactly what happened in the present case [...] [5]

Can't we just blame the lawyers?

Curiously, Canon attempted (unsuccessfully) to attribute responsibility for establishing the two-step transaction structure to its advisors. In particular, Canon argued that it was not actively involved in the established of the SPV, and that its participation in the Toshiba-SPV share transfer was limited to the correction of a typographical error in a draft of the transfer agreement. In addition, Canon claimed that its advisors' selection of the deal structure was driven by the needs of Toshiba, which had been facing financial difficulties.

The Commission dismissed these arguments. Applying the ECJ's decision in *VM Remonts*, the Commission stated that an undertaking can be held liable for anticompetitive conduct on account of the acts of an independent service provider, if that undertaking was aware of the anti-competitive objectives pursued and intended to contribute to them by its own conduct.^[6] Even on the assumption that it was only Canon's counsel that was involved in the creation of the SPV and the two-step transaction structure, Canon was found to have been well aware of the objectives that those actions pursued and intended to contribute to them by its own conduct by way of subscribing to that scheme and paying the full price for TMSC at the time of the Interim Transaction.

Other practice points

Other aspects of the decision worthy of note by practitioners are as follows:

- In setting the amount of the fines, the duration of the standstill obligation infringement was determined to be six months and two days. Canon argued that this lengthy period was, to a large extent, caused by the comprehensive information requests Canon received from the Commission, "which lacked close understanding of the market". Canon also claimed that the infringement duration should take account of the fact that the Commission had, late in the process, required a change from short to Full Form CO. The Commission dismissed these arguments, making clear that it sees it as the responsibility of the parties to submit a correct and complete notification and rejecting any foundation for more lenient treatment.
- The decision does not further provide practical guidance on the limits of the gun jumping prohibition beyond that which was already available to practitioners through the Commission's Altice decision. The boundaries of important concepts, such as integration planning and customer engagement, therefore remain unrefined pending elaboration in future Commission decisions or its issuance of specific gun jumping guidance.
- The heavy fines imposed in this case were clearly intended to demonstrate the Commission's sustained determination to enforce its procedural rules. The notification and standstill obligations are viewed by the Commission as "cornerstones" of the EUMR's *ex ante* merger regime and essential to ensure its effectiveness. This case illustrates that the absence of substantive competition concerns in a transaction will in no way protect against liability for procedural contraventions in the EU.

All views expressed are the author's personal views and not necessarily those of Kirkland & Ellis.

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[1] Case M.8179 - Canon / Toshiba Medical Systems Corporation, Article 14(2) Regulation (EC) 139/2004 decision of 27 June 2019 ("Canon/Toshiba").

[2] Case M.7993 - Altice / PT Portugal, Article 14(2) Regulation (EC) 139/2004 decision of 24 April 2018.

[3] One of the issues under appeal in *Marine Harvest* (Case C-10/18-P) is the Commission's ability to impose two separate fines (for failure to file and for breach of the standstill obligation) in respect of the same conduct. This appeal could therefore have consequences for the fine imposed on Canon, which is also subject to appeal in Case T-609/19.

[4] The decision distinguishes this fact pattern from the legitimate exercise of an option, which according to the principle laid down in *Air France v Commission* (Case T-2/93, judgment of 19 May 1994) gives rise to a change of control only when the option to acquire shares is exercised.

[5] Canon/Toshiba, paragraph 133.

[6] Judgment of 21 July 2016, *SI AVM Remonts and Others v. Konkurences pandome*, Case C-542/14, ECLI:EU:C:2016:578.