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European Commission fines Canon EUR 28 million for Gun Jumping

Marco Hickey (LK Shields Solicitors) · Wednesday, July 31st, 2019

Canon, the Japanese imaging and optical products manufacturer, has been fined €28 million (US$ 31.8 million) for implementing its acquisition of Toshiba Medical Systems Corporation (TMSC), before it was approved by the Commission, which is in breach of EU merger control rules. The fine was announced by the European Commission on 27 June 2019.

Background

On 12 August 2016, Canon notified the Commission of its plan to acquire TMSC from Toshiba. The transaction was unconditionally cleared by the Commission on 19 September 2016.

Canon used a so-called "warehousing" two-step transaction structure involving an interim buyer to purchase the company prior to obtaining the relevant approvals. The above method allowed Toshiba, which was struggling for cash after an accounting scandal, to book proceeds in time for the financial year end in March.

The first step involved an interim buyer (the identity of which is not public) acquiring 95% of the share capital of TMSC for a reported nominal amount of €800 and the remaining 5% being directly acquired by Canon. Canon is reported to have paid €5.28 billion to cover both the acquisition of the remaining 5% of the shares and share options over the interim buyer's stake. This first step was carried out prior to any notification to, or approval by, the Commission. As a second step, following approval of the merger by the Commission, Canon exercised its share options, acquiring 100% of the shares of TMSC.

The Commission addressed a Statement of Objections to Canon detailing its concerns that, through the transaction structure put in place for its acquisition of TMSC, Canon had implemented the acquisition before notifying it to the Commission and obtaining approval under EU merger control rules.

EU Merger Control Rules

The EU Merger Control Regulation requires mergers or acquisition that meet certain turnover thresholds (known in EU merger control terminology as having a Union dimension) for review by the Commission prior to their implementation and do not implement them until notified to and cleared by the Commission ("the standstill obligation"). The notification requirement safeguards the Commission's ability to detect and investigate mergers. The standstill obligation is designed to prevent the implementation of potentially anti-competitive transactions, pending the outcome of the Commission's investigation.

Commission's Decision

On 27 June 2019, the Commission confirmed its preliminary view that Canon breached the EU Merger Control Regulation and fined it €28m.

In this connection, the Commission found that:

- The first and second steps in the transaction structure together formed a single notifiable merger. The first step contributed to the acquisition of final control over TMSC, which occurred with the second step. Within the chosen structure, the first step was necessary for Canon to gain control over TMSC.
- By carrying out the first step, Canon partially implemented its acquisition of TMSC before both the notification and the Commission's approval. As a result, Canon breached the notification requirement and standstill obligation.

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