

The European Commission has fined Canon €28 M for closing the acquisition of Toshiba Medical Systems Corporation prior to notifying and gaining merger clearance (gun-jumping)

On 12 August 2016 Canon notified the European Commission (EC) the acquisition of Toshiba Medical Systems Corporation (TMSC), a subsidiary of Japan's Toshiba. The EC authorized the transaction on 19 September 2016. The acquisition was structured with a view to dodging the associated merger control risk. In summary:

- (i) Toshiba transferred, for an amount of €800, 95% of TMSC's share capital to MS Holding Corp, an investment vehicle independent from Toshiba and Canon. On the other hand, Canon paid €5,028 million in exchange for 5% of TMSC's share capital and for a call option over the remaining 95% held by MS Holding Corp. The exercise of the call option was conditioned on obtaining the mandatory regulatory approvals. This first step was carried out prior to notifying the EC.
- (ii) After gaining the EC's approval, Canon exercised the call option over the remaining 95% of TMSC's share capital.

The EC has considered last June that the first transaction contributed to the acquisition of control over TMSC by Canon. Therefore, the duty to notify and gain authorization before the first transaction was circumvented.

This type of warehousing agreements have led to doubts in the past, also in Spain.¹ For instance, the national Competition Commission fined Verifone for structuring the acquisition of Hypercom's business in Spain through a third party in order to avoid the notification obligation.² As a general rule, the EC has taken the position that an acquisition of a Company by an interim buyer on behalf of the definitive buyer can be considered as a partial execution of the transaction. However, the Court of Justice decided in the *Ernst & Young c. Konkurrenserådet* case³ that the suspension obligation does not cover those preparatory acts which, even if adopted with a view to the merger, are prior and different from the measures conferring decisive influence over the target. The interpretation of *preliminary act* or *partial implementation* may be controversial (as it is not obvious in principle how Canon could exercise decisive influence with only 5% of the share capital of TMSC). The matter will be settled by the General Court taking into account Canon has already announced its intention of appealing the EC's Decision.

This case appears to confirm the restrictive position of competition authorities in relation to the possibility of structuring merger transactions in order to manage regulatory or competition risks. In our experience, this sort of structures are sometimes proposed in early stages of a competitive acquisition where several interested companies concur and one of them holds a weaker position deriving from its market share and associated antitrust risk. But the position of the EC may be considered as being too interventionist if, as a matter of fact, there is no acquisition of decisive influence after the first step transaction. This rather restrictive position may be mitigated by the courts, particularly if private litigants manage to prove that the warehousing structures pose no threat to competition.

1 At a European level, the EC's authorization of the acquisition by Lagardère of the European publishing business of Vivendi Universal was appealed with the argument that through the envisaged structure – using a bank as temporary holder of the assets under the financial temporary holding exemption of the EC Merger Regulation with a view to reselling them is not considered a reportable concentration - Lagardère would have acquired control over the target company prior to gaining the EC's approval and, therefore, the merger was invalid. Advocate General Mazák rejected this argument stating Lagardère had not gained a decisive influence over the assets prior to the approval. However, the Court of Justice it did not have to decide on that point, as it did not consider it affected the validity of the EC's approval (Judgement of the Court of Justice of November 6th 2012, case C-551/10 P), even if the same could amount to gun-jumping.

2 Decision of the CNC of October 24th 2012, Verifone/Hypercom, case SNC/0022/12. Hypercom transferred its assets in Spain to the investment fund Klein Partners prior to the acquisition by Verifone. The mentioned structure for the transfer of assets would be used in those countries where the merger clearance requirement could delay or endanger the transaction. In essence, the warehousing agreement could not be accepted by the CNC because Verifone, after the closing of the merger with Hypercom, would have control over said market share, relegating Klein Partners to a situation of mere passive investor. Since the mentioned transfer of the market share took place, Verifone was obliged to notify Hypercom's acquisition, which it did when prompted by the CNC, offering as commitments new licensing agreements with Klein Partners which would enable the latter to have real and effective control over the market share acquired from Hypercom (Decision of November 10th 2011, VERIFONE/HYPERCOM, case C-0410/11). However, Verifone was fined for gun-jumping. Likewise, after the mentioned commitments, the acquisition of Hypercom by Klein Partners was notified and approved without commitments (Decision of May 3rd 2012, KLEIN PARTNERS/SPIRE PAYMENTS, case C-0436/12).

3 Judgment of the Court of Justice of May 31st 2018, *Ernst & Young contra Konkurrenserådet*, case C-633/16.

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