

Fried Frank Antitrust & Competition Law Alert[®]

Commission Imposes Its First Fine for the Partial Implementation of a Notified Transaction

On 27 June 2019, the European Commission (“Commission”) announced that Canon, a Japan-based imaging and optical products manufacturer, has been fined €28M (US\$33M) for “jumping the gun” in its acquisition of Toshiba’s medical unit (“TMSC”) before securing EU antitrust clearance.

This decision comes one year after the Commission imposed its highest ever gun-jumping fine on Altice on 24 April 2018 in its 2015 acquisition of PT Portugal¹. The Commission issued a statement stressing that companies have to respect competition rules and procedures, and are obliged to notify and wait for approval **before** a merger can go ahead.

The Commission’s Investigation

In 2016, Canon notified the Commission of its plan to acquire TMSC from Toshiba. The Commission subsequently unconditionally cleared the transaction. In 2017, following a third party complaint, the Commission commenced an investigation that has lasted over three years, during which the Commission has assessed whether Canon had in fact acquired any influence or control over TMSC prior to obtaining EU clearance.

According to the Commission’s press release dated 27 June 2019², Canon had breached EU merger rules by using a “warehousing” two-step transaction structure involving an interim buyer to purchase the company prior to obtaining approval:

First step: the interim buyer acquired 95% in the share capital of TMSC for €800 (US\$945) and Canon paid €5.28B (US\$6.23B) for the remaining 5% of the shares and share options over the interim buyer’s stake. This step was carried out **prior to notification to or approval** by the Commission.

Second step: following EC clearance, Canon exercised its pre-merger share options, acquiring 100% of the shares of TMSC.

Together, in the Commission’s view, these steps formed a single notifiable merger as Canon had partially implemented its acquisition before notifying the Commission and obtaining EU approval. The Commission considered that Canon breached both the notification requirement and standstill obligation under the

¹ Commission IP/17/1368 (18 May 2017), http://europa.eu/rapid/press-release_IP-17-1368_en.htm.

² Commission IP/19/3429 (27 June 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_3429.

EUMR³, and took into account the fact that the transaction was cleared unconditionally when calculating the gravity of the infringements.

The Commission justified the €28M fine as proportionate and deterrent due to the seriousness of the infringement to reflect Canon's breach of both (i) the notification requirement and (ii) the standstill obligation.

Canon had previously been fined by two additional competition agencies for using this transaction structure: China's Ministry of Commerce ("MOFCOM, now "SAMR")⁴ and the US Department of Justice ("DoJ")⁵, although for considerably lower amounts (i.e. CNY 300K (€38K; US\$45K) and US\$5M (€4.2M) respectively).

Legal Background: Gun-Jumping

The EU, Chinese and the US regimes, along with many other merger regimes around the world, are "suspensory," i.e. they require that merging companies notify the regulator of anticipated mergers that meet the thresholds (the 'notification requirement'), and that they not implement them until cleared by the regulator (the 'standstill obligation').

From the regulator's perspective, the purpose of this is to prevent any irreparable negative impact of transactions on the market, pending the outcome of the regulatory investigation. In practice, this means that there are limits on what can be done by a purchaser, vis-à-vis the target, between signing a deal and closing a deal.

Practical Implications

Regulators require that parties to a merger remain separate and independent entities until the transaction is closed. Therefore, pre-merger coordination and information exchanges can potentially violate these rules – as the rules prohibit a purchaser from taking control of the target prior to the expiration or termination of the prescribed waiting periods.

In addition, the pre-merger exchange of competitively sensitive information and the coordination of otherwise competitive businesses parties can also potentially violate antitrust laws – should they diminish pre-closing competition between the parties.

Therefore, although it is acceptable to engage in planning for post-merger integration, under no circumstances should integration plans be implemented prior to closing. The parties must remain separate and independent economic actors until the deal is closed.

Procedural Review

The Commission, alongside other antitrust regulators, is taking an increasingly tougher stance on gun-jumping.

³ Article 4(1) and 7(1) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32004R0139>.

⁴ MOFCOM's Decision of Administrative Penalty [2016] No.965.

⁵ Canon Inc., Toshiba Corporation Agree to Pay \$5 Million for Violating Federal Antitrust Laws, 10 June 2019, <https://www.justice.gov/opa/pr/canon-inc-toshiba-corporation-agree-pay-5-million-violating-federal-antitrust-laws>.

- On 24 April 2018, the Commission imposed a record fine of €124.5M (US\$152.3M) on Altice, the Dutch cable and telecommunications company, for implementing its 2015 acquisition of PT Portugal before obtaining merger clearance from the Commission.
- On 20 July 2018, the UK's Competition and Markets Authority ("CMA") announced its first decision to fine a party for gun-jumping. The CMA imposed a penalty of £100,000 (€113,031; US\$133,490) on Electro Rent Corporation for failure to comply with an interim standstill obligation while its completed merger with Microlease was being investigated by the competition regulator.⁶
- On 26 October 2017, the General Court ("GC") dismissed an appeal lodged by Marine Harvest, a Norwegian seafood company, against a €20M (US\$23.6M) fine from the Commission for implementing its acquisition of Morpol before obtaining the required clearance.⁷ In its decision, the GC confirmed that Marine Harvest's minority stake of 48.5% in Morpol would have led to *de facto* control, due to the dispersion of remaining shares and previous low shareholder attendance patterns.

Further Commentary

In lieu of formal guidance, the recent influx of gun-jumping cases is indicative of the Commission's position in protecting serious breaches of the merger control regime. In the European Court of Justice's ("ECJ") 2018 judgment of KPMG's acquisition over EY⁸, the ECJ took a wide view that the standstill obligation must be interpreted according to its purpose, and that parties would only breach gun-jumping rules where the transaction "in whole or in part, in fact or in law, contributes to the change of control of the target undertaking".⁹ The *Canon/Toshiba* case demonstrates the Commission's narrow approach to warehousing structures, and further blurs the line between how (a) gun-jumping (i.e. *Canon/Toshiba*) and (b) the legitimate preparation of mergers (i.e. *KPMG/EY*) are interpreted in EU merger agreements where "warehousing" is concerned.

Ultimately, the deal did not resolve significant competition concerns. Over a three-year span, the Commission's investigation has been quite extensive in its devotion to time and resources, and has imposed a steep fine in comparison to other jurisdictions for sidestepping regulatory requirements. The lowest fine for this infringement has been a warning issued by the Japanese Fair Trade Commission ("FTC"), followed by the DoJ and SAMR, which collectively, amounted to approximately only 15% of the Commission's fine. The extremity of the Commission's fine has led to Canon appealing the issue to the ECJ.

The EU 2008 Consolidated Jurisdictional Notice commented on two mechanisms brought up by the deal. (1) Transactions where an undertaking is "parked" with an interim buyer can amount to a partial implementation of a single concentration if the transaction ultimately leads to a lasting acquisition of

⁶ Case 1285/10/12/18 – Electro Rent Corporation v Competition and Markets Authority.

⁷ Case T-704/14 *Marine Harvest v Commission* ECLI:EU:T:2017:753, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=196102&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1031001>.

⁸ Case C-633/16: Judgment of the Court (Fifth Chamber) of 31 May 2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CA0633>.

⁹ Case C-633/16: Judgment of the Court (Fifth Chamber) of 31 May 2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CA0633>.

FRIED FRANK

New York

One New York Plaza
New York, NY 10004-1980
Tel: +1.212.859.8000
Fax: +1.212.859.4000

Washington, DC

801 17th Street, NW
Washington, DC 20006
Tel: +1.202.639.7000
Fax: +1.202.639.7003

London

41 Lothbury
London, U.K. EC2R 7HF
Tel: +44.20.7972.9600
Fax: +44.20.7972.9602

Frankfurt

Taunusanlage 18
60325 Frankfurt am Main
Tel: +49.69.870.030.00
Fax: +49.69.870.030.555

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