SLAUGHTER AND MAY

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European Commission fines Canon for gun-jumping

On 27 June 2019 the European Commission **announced** that it has fined Canon €28 million for taking steps to implement its acquisition of Toshiba Medical Systems Corporation (TMSC) prior to notification to and approval by the Commission.

The transaction

The transaction took the form of a two-step 'warehousing' structure. As a first step, prior to notification of the transaction to, and approval by, the Commission, an interim buyer acquired a 95 per cent stake in TMSC for a nominal amount of €800, with Canon taking the remaining 5 per cent (along with share options over the stake held by the interim buyer) for €5.28 million.

In the second step, following the Commission's **decision** to approve the transaction in September 2016,[1] Canon exercised its share options to become the sole owner of TMSC.

The Commission's findings

The Commission found that Canon would not have been able to gain control over TMSC if the first step had not taken place. In other words, the first step of the warehousing structure contributed to the acquisition of final control which occurred with the second step. As such, the two steps of the transaction together amounted to a notifiable transaction. The Commission considered that, in carrying out the first step, Canon partially implemented the transaction prior to notification and approval, in breach of EU merger rules.

Canon has said in a **press release** that the decision "violates fundamental principles of law", and has stated its intention to appeal to the General Court. According to Canon, the Commission "*acknowledges that Canon did not acquire control over TMSC before the Commission had cleared the transaction*", but

For further information on any competition related matter, please contact the **Competition Group** or your usual Slaughter and May contact.

[1] The decision to fine Canon has no impact on the Commission's decision to approve the transaction.

relies on "*a novel concept of "preparatory act" or "partial implementation*"" to find that Canon breached EU merger rules.

Recent focus on gun-jumping

This is the latest in a series of recent cases by the Commission focusing on so-called gun-jumping (i.e. breach by a purchaser of the obligation not to implement a transaction until notified to and approved by the Commission (the 'standstill obligation')).

In April 2018 the Commission **fined** Altice €124.5 million for gun-jumping in relation to its acquisition of PT Portugal. The Commission has previously also imposed fines of €20 million on each of Electrabel and Marine Harvest (both in 2017) for failure to notify before completing mergers.

Most recently, in May 2018 the European Court of Justice (CJ) issued a **judgment** in relation to the acquisition of KPMG Denmark by Ernst & Young, which provided clarification on the meaning and scope of the standstill obligation. The CJ held that the standstill obligation should be interpreted narrowly and only cover activities which actually contribute to the change in control under review. Conduct that relates to the merger but is not directly linked to the change of control is not a breach of the standstill obligation even if ancillary or preparatory to the merger.

The E&Y judgment – in particular the question of when conduct should be regarded as contributing to a change in control in breach of the standstill obligation – is likely to be central to the appeal in the Canon case.

Other developments

Merger control

CMA publishes updated guidance on interim measures and derogations in merger investigations

On 28 June 2019 the UK's Competition and Markets Authority (CMA) **published** its updated guidance on the use of interim measures and derogations in merger investigations. The updated guidance does not introduce any new processes, but clarifies when the CMA can impose different kinds of interim measures, the form measures can take, the types of derogations the CMA is likely and unlikely to grant and potential timings and enforcement options in relation to unwinding and breach of interim measures. It also provides more detail on what merging companies should do to ensure that they are compliant and the process for engaging with the CMA when in doubt.

The CMA has recently become increasingly aware of poor compliance with interim measures and has issued fines accordingly. For example, in 2018 the CMA imposed a **fine** of £300,000 on European Metal Recycling and a **fine** of £100,000 on Electro Rent for failing to comply with interim orders. Going forward, this suggests that the CMA will increasingly use its powers to monitor compliance with interim measures and

impose penalties for failing to do so of up to 5 per cent of turnover of enterprises owned or controlled by the person on whom the penalty is imposed.

Antitrust

European Commission opens investigation into Broadcom and sends SO seeking to impose interim measures

On 26 June 2019 the European Commission **announced** it has opened a formal investigation under Article 102 of the Treaty on the Functioning of the European Union into Broadcom, a major supplier of chips for TV set-top boxes, smartphones and Wi-Fi modems. The Commission suspects the US company may be restricting competition through a number of exclusionary practices such as setting exclusive purchasing obligations, granting rebates or other advantages conditioned on exclusivity or minimum purchase requirements, product bundling, pursuing "abusive IP-related strategies" and deliberately degrading interoperability between Broadcom products and other products. The Commission takes the preliminary view that Broadcom's agreements with seven of its major customers may contain exclusivity provisions obliging those customers to purchase systems-on-a-chip, front-end chips and Wi-Fi chipsets exclusively (or almost exclusively) from Broadcom. Broadcom's potential anti-competitive conduct is already being investigated in the US by the Federal Trade Commission.

In parallel with its announcement, the Commission sent Broadcom a Statement of Objections setting out its preliminary conclusions that (i) Broadcom is likely to hold a dominant position in various markets for the supply of systems-on-a-chip for TV set-top boxes and modems, and (ii) there may be exclusivity agreements in place, whose provisions may affect competition and stifle innovation in the markets concerned. The Commission is therefore seeking to impose interim measures in the TV and modem chipset markets while it carries out its investigation. Margrethe Vestager, the European Commissioner for Competition, said such measures may be necessary to prevent "*serious and irreparable harm to the market*" because, in the Commission's opinion, "*Broadcom's conduct may result in the elimination or marginalisation of competitors before the end of proceedings*".

Broadcom now has the opportunity to respond to the Commission's allegations and is not required to halt any behaviour yet. If the Commission does eventually proceed to impose an interim measures order this will be the first time it has done so since the interim measures provision under **Council Regulation No 1/2003 of 16 December 2002** came into force in 2004.

Hong Kong Competition Commission's third renovation cartel case before the Competition Tribunal involves repeat offenders

On 3 July 2019 the Hong Kong Competition Commission (HKCC) **announced** that it had commenced proceedings in the Competition Tribunal against ten parties, including three individuals, for market sharing and price fixing arrangements in the provision of renovation services at a public housing estate. Two of these parties are repeat offenders who were found liable for similar conduct by the Competition

Tribunal earlier this year. The HKCC is also seeking for the first time to disqualify a director who is not alleged to have been personally involved in the anti-competitive conduct.

This is the third case that the HKCC has brought against an alleged cartel between contractors in the renovations sector. All three cases involved very similar conduct. The defendants are alleged to have engaged in market allocation by agreeing that each of the contractors would only solicit or accept business from tenants on certain floors that had been allocated to them and/or would direct other tenants to the relevant allocated contractors. The alleged price fixing arrangement concerned the exchange or coordination of the content and price of standard decoration packages, and the production of leaflets with substantially identical features and prices for each of the contractors.

The HKCC is seeking, among other things, a disqualification order against a director who is not alleged to have been personally involved in the anti-competitive conduct. The company of which this individual is a director was recently held liable by the Tribunal for contravening the First Conduct Rule.[2] As such, the HKCC alleges that this director either had actual knowledge or reasonable grounds to suspect, or should have known that the company was contravening the First Conduct Rule.

Please see our separate **Client Briefing** for further analysis.

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[2] This rule prohibits businesses from entering into or giving effect to an agreement, engaging in a concerted practice, or making or giving effect to a decision of an association, if its object or effect is to harm competition in Hong Kong.