Gun jumping reloaded – lessons from the Canon case

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On 18 May 2022, the General Court (GC) of the European Union upheld a fine of EUR 28 million imposed on Canon for partially implementing its acquisition of Toshiba Medical Systems Corporation (TMSC) before it was cleared under EU merger control rules. The decision sheds new light on when interim measures are considered an implementation of a transaction. The Canon case follows a series of recent 'gun jumping' decisions with significant fines, i.e. cases where competition authorities found that parties to a notifiable transaction implemented the transaction prior to merger control clearance. Several lessons can be drawn from the case for multi-stage M&A transactions. This briefing outlines the key take aways of the case and recent practice more generally.

What is gun jumping?

If a transaction falls under EU merger control rules, the parties are required to notify it to the European Commission prior to its implementation. Until the transaction is cleared by the Commission, the parties must not implement it. Violation of this so-called standstill obligation carries a fine of up to 10% of the annual group turnover of the companies concerned. Fines for gun jumping violations have been imposed also in cases that were cleared during the merger review process. Similar rules exist in Germany and many other jurisdictions with merger control regimes.

Background of the Canon case

Canon's acquisition of TMSC was implemented through a two-step transaction structure known as 'warehousing'. A warehousing arrangement means that the target company is acquired and held by an independent intermediary for an interim period until the ultimate closing date. In the Canon case, the transaction was structured as follows:

- In a first step, a special purpose company established by Canon and Toshiba acquired 95% of the share capital of TMSC for a price of EUR 800. The corporate governance secured that that the intermediary was independent of Canon to some degree, and Canon did not acquire final control over TMSC while it was 'warehoused' with the intermediary.

- Canon subsequently acquired both the remaining 5% in TMSC and call options for the shares held by the special purpose company for a price of approximately EUR 5.28 billion.

Before Canon closed the second part of the transaction by exercising its call options and thereby raising its shareholding in TMSC to 100%, it notified the transition to the European Commission to obtain merger control clearance. Although the merger did not raise antitrust concerns and was eventually cleared unconditionally, the Commission fined Canon EUR 28 million for gun jumping.

The Commission found that Canon had partially implemented the acquisition prior to its clearance by setting up the warehousing arrangement. It considered that both transaction steps constituted a single concentration, since first step was a prerequisite and thus significantly contributed to the eventual change in control over the target company. Consequently, the Commission concluded that Canon had violated the standstill obligation by 'parking' the target company with the intermediary prior to clearance.

The General Court's decision in the Canon case

This view was confirmed by the GC. The court stressed that a gun jumping violation does not require the acquisition of control over the target company. According to the GC, a concentration within the meaning of European merger control occurs as soon as the parties implement operations that contribute to a lasting change in the control of the target company. Such an implementation may occur even before control is acquired, for instance through interim transactions which merely 'contribute' to a later change in control. As the Commission, the GC considered the warehousing structure to be part of a single concentration.

How the GC's decision relates to the ECJ's Ernst & Young judgment

In the proceedings before the GC, Canon invoked the principles laid down by the European Court of Justice's (ECJ) Ernst & Young decision from May 2018. In this case, the ECJ ruled that preparatory steps before clearance violate the standstill obligation only if they 'contribute to a lasting change in control of the target undertaking'. According to the Ernst & Young ruling, purely auxiliary or preparatory measures that have no 'direct functional link with the implementation of the concentration' do not amount to gun jumping. In line with the ECJ's reasoning, the GC noted that 'implementing a concentration' would not require a change of control. Rather, the GC considered that preparatory steps intended to contribute to a later change in control could be considered 'implementing measures' where they are necessary to bring about the acquisition of control over the target.

While some commentators viewed the Ernst & Young judgment as a slight relaxation of the enforcement of gun jumping, the Canon case points in the opposite direction. The decision clarifies that preparatory measures can qualify as gun jumping and lead to significant fines even if they do not confer control over the target.

Increased risk of gun jumping fines in M&A transactions

The Canon decision is just another example of increasingly rigorous enforcement of gun jumping violations by the Commission and antitrust authorities across the globe more generally. At the EU level, significant fines against were imposed, among them an EUR 20 million fine against Electrabel in 2009 and a fine in the same amount against Marine Harvest in 2014, as well as a record EUR 124.5 million fine against Altice in 2018. Other significant fines for procedural merger control violations include a EUR 52 million fine against GE in 2019 and a EUR 110 million fine against Facebook in 2017 for providing incorrect or misleading information. National competition authorities in Europe have also been increasingly aggressive in enforcing gun jumping rules.

Key take aways

The Canon case should remind companies to be mindful of the gun-jumping risks in relation to pre-clearance behaviour when structuring M&A transactions:

- Specific caution is warranted in multi-step transactions or where deals involve 'warehousing' structures, as implementing the first in a series of steps may already trigger a notification requirement and be subject to the stand-still obligation.

- Pre-closing covenants that address the business conduct of the target between signing and closing must be limited to what is strictly necessary to preserve the value of the target. They must not, however, confer control over the target prior to clearance. There is a fine line between permissible value preservation and illegal gun-jumping.

- Be mindful when exchanging information with the target prior to closing (risk of illegal information exchange among competitors). This has implications not only for the due diligence phase, but the strict rules apply also between signing and closing.

- Be aware that the risk of fines for gun jumping violations exists even in cases which are entirely unproblematic from a competition law perspective.

- In complex transactions involving several steps, consider seeking guidance from competition authorities at an early stage to obtain additional legal comfort and reduce the risk of fines before implementing key preparatory steps.

BLOMSTEIN advises on all aspects of merger control and will continue to monitor developments regarding gun jumping. If you have any questions on European and German merger control rules, Max Klasse, Philipp Trube and the entire competition law team will be happy to advise you.