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Canon loses gun-jumping appeal at General Court

The European General Court (GC) has upheld the European Commission's decision to fine Canon €28 million for gun-jumping in the context of its acquisition of Toshiba Medical Systems Corporation (TMSC). The GC concluded that, in order to establish a gun-jumping infringement, it is not necessary to find that there has been an acquisition of control of a target company prior to notification and clearance. Instead, the finding of an infringement is based on whether a transaction contributed, even partially, to the change of control of that undertaking.

BACKGROUND AND COMMISSION DECISION

In 2016 Canon acquired TMSC in a transaction that comprised two steps. As a first step, an interim buyer acquired a 95 per cent stake in TMSC for €800, whilst Canon paid €5.28 billion for the remaining 5 per cent of the shares and share options over the interim buyer's stake. This first step was carried out prior to notification to or approval by the Commission. As a second step, Canon exercised its share options to become the sole owner of TMSC. This second step was implemented following approval of the merger by the Commission. The rationale for this two-step process was that the sale of TMSC would be recognised as a capital contribution in Toshiba's accounts by 31 March 2016, while Canon would not formally acquire control until it had obtained necessary merger clearances.

As outlined in a previous edition of this newsletter, the Commission found that both steps of the transaction constituted a single notifiable concentration. In the Commission's view, the first step contributed to and was necessary for the acquisition of final control over TMSC. In carrying out the first step before notification to and approval by the Commission, Canon had partially implemented its acquisition of TMSC contrary to the notification obligation in Article 4(1) EUMR and the standstill obligation in Article 7(1) EUMR. The Commission imposed a fine of €28 million, a decision which Canon sought to annul in its appeal to the GC in September 2019.

GC'S FINDINGS

On 18 May 2022 the GC upheld the Commission's findings and dismissed Canon's appeal in its entirety.

'CONCENTRATION' VERSUS 'IMPLEMENTATION OF A CONCENTRATION'

Canon argued that there can only be an early implementation of a concentration if control of the target is acquired (whereas TMSC was not controlled by Canon until after notification and approval).

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The GC disagreed, citing the judgment of the European Court of Justice (CJ) in *Ernst & Young* (covered in a previous client briefing) and finding that the Commission was right to distinguish between the concepts of ‘concentration’ and ‘implementation of a concentration’ - ‘implementation of a concentration’ as provided for in Articles 4(1) and 7(1) EUMR is not limited to the situation where the ultimate purchaser acquires control, but also covers any transaction which contributes to such a change of control.

UNITARY NATURE OF THE TRANSACTIONS

The GC rejected Canon’s argument that the first step of the transaction did not constitute a partial implementation of the concentration.

The GC noted that a concentration may be implemented by way of a number of distinct legal transactions and that it is for the Commission to assess whether those transactions have a “*unitary nature*” such that they constitute a single concentration. The Commission must consider the economic purpose pursued by the parties, including whether the undertakings concerned would have been prepared to enter into each step in isolation or whether, on the contrary, each transaction constituted only one element of a more complex operation, without which it would not have been entered into by the parties.

In this context, the GC found that the Commission did not err in classifying the first step of the transaction as a partial implementation of the concentration. In the GC’s view, from the date of the first step of the transaction, Canon had acquired the possibility of exercising a certain degree of influence over TMSC because Canon had sole power to determine the identity of the ultimate purchaser of the target company.

DIRECT FUNCTIONAL LINK WITH THE CHANGE OF CONTROL

Canon had argued (based on the CJ’s judgment in *Ernst & Young*) that the first step in the transaction did not have a “*direct functional link*” with the ultimate change of control, and so did not contribute to the change of control. The GC disagreed, considering that in this case, the first step of the transaction was necessary - without the two-step transaction structure, Toshiba would have been unable to relinquish control of TMSC and irreversibly collect payment before the end of March 2016, and the first step was necessary to achieve the change of control of TMSC.

OUTLOOK

This case further demonstrates the GC’s endorsement of the Commission’s recent approach to gun-jumping, which has been a regulatory focus for the Commission in recent years. As outlined in a previous edition of this newsletter, in September 2021 the GC confirmed the Commission’s largest-ever sanction for gun-jumping, imposed on Altice in the context of its acquisition of PT Portugal.

In an ongoing gun-jumping investigation, the Commission has ordered U.S. life science company Illumina to hold cancer detection test maker GRAIL as a separate company after the transaction closed prior to receiving Commission clearance. This will likely be the next high-profile test of these rules.

OTHER DEVELOPMENTS

ANTITRUST

UK AND EU ADOPT NEW RULES ON VERTICAL AGREEMENTS

On 10 May 2022 the European Commission adopted the new Vertical Agreements Block Exemption Regulation (VBER), accompanied by the revised Guidelines on Vertical Restraints. This comes following a long and thorough review of the previous version of the rules introduced in 2010. The Commission hopes that this revision provides businesses with simpler and clearer rules and guidance, especially where they must assess the compatibility of their supply and distribution agreements with EU competition rules. The Commission also looked to revise the rules to provide greater clarity to businesses given the rapid evolution of the business environment in line with the growth of e-commerce and online sales. The new VBER (which will replace Commission Regulation 330/2010 and its accompanying Guidelines) will come into force on 1 June and is due to expire on 31 May 2034.

The main changes relate to adjusting the safe harbour under which certain agreements are block exempted. The scope of the safe harbour has been narrowed in that certain aspects of dual distribution and certain types of parity obligations will no longer be exempted under the new VBER but must instead be assessed under Article 101 TFEU. The safe harbour has been enlarged as regards: (i) various restrictions of a seller's ability to actively approach individual customers (i.e. active sales); and (ii) various practices relating to online sales, especially the ability to charge the same distributors different wholesale prices for products to be sold online and offline and the ability to impose different criteria for online and offline sales in selective distribution systems. Furthermore, the rules have been updated as regards the assessment of online restrictions, the platform economy and sustainability objectives, among others.

The UK Government Department for Business, Energy & Industrial Strategy also published the final version of the Vertical Agreements Block Exemption Order (VABEO), dated 11 May 2022. The VABEO comes into force on 1 June 2022 for a duration of six years and will replace the retained EU VBER when it expires on 31 May 2022. The new rules were announced in February 2022 and the VABEO is in line with the CMA's recommendations. The main changes relate to a widening of the regime covering both territorial and customer restrictions in that the VABEO includes greater flexibility to combine exclusive and selective distribution and a redressing of the balance of incentives for brick-and-mortar versus online retailers. Also, wide retail parity obligations have been added to the list of hardcore restrictions. For details, see a previous edition of this newsletter.

CJ PROVIDES FURTHER CLARIFICATION ON ARTICLE 102 IN ENEL JUDGMENT

On 12 May 2022 the CJ provided further clarity on the interpretation of Article 102 TFEU in cases relating to exclusionary practices in the context of the liberalisation of the market, in reply to a request for a preliminary ruling from the Italian Council of State.

The questions relate to an appeal case currently before the Council of State by electricity company, Enel. The company had previously been fined €93 million by the Italian Competition Authority (the ACGM) for abuse of a dominant position in breach of Article 102 TFEU. More specifically, under the coordination of their parent company, Enel, SEN (incumbent manager of the protected market) and EE (supplier of electricity on the free market), implemented an exclusion strategy whereby EE reached out to those on SEN's list of customers who had consented to commercial offers from SEN. This would have the effect of bringing these customers across from the protected market to the free market. The ACGM had found that Enel had foreclosed the market for the retail supply of electricity on these facts.

In response to the questions, the CJ first considered the second question, which asked it to clarify whether the purpose of the concept of abuse under Article 102 TFEU was to maximise the well-being of consumers, with the court being responsible for determining whether that well-being has been or could be reduced, or whether the concept of an infringement of competition law has the function of preserving in itself the competitive structure of the market, in order to avoid the creation of economic power groupings that are, in any case, considered harmful for the community. The CJ stated that, in the context of abusive exclusionary practices, the wellbeing of consumers, both intermediate and final, must be regarded as constituting the ultimate objective warranting the intervention of competition law to sanction abuse of a dominant position in the internal market or in a substantial part of that market.

Therefore, a competition authority discharges the burden of proof weighing on it if it demonstrates that a practice of an undertaking in a dominant position could adversely affect the effective competition structure, without it being necessary for that authority to prove that this practice may also cause direct harm to consumers. The dominant undertaking concerned can nevertheless escape the prohibition laid down in Article 102 by demonstrating that the exclusionary effect that could result from the practice in question is counterbalanced, or even outweighed, by positive effects on consumers, particularly in terms of price, choice, quality and innovation.

The CJ also addressed the question of whether Article 102 TFEU must be interpreted in the sense that a practice that it is lawful outside the scope of competition law can be considered "*abusive*" when implemented by a dominant company only on the basis of its potentially anti-competitive effects, or whether it is necessary to find that it is implemented with means departing from competition on the merits.

The CJ first recalled that the abusive nature of those practices anticipates that they have the capacity to produce the exclusionary effects described in this particular context. Secondly, undertakings in a dominant position – regardless of the reasons for which they have such a position - may defend themselves against their competitors. However, they must do so by using means of 'normal' competition, namely, competition on the merits.

The Court further found that "*a practice that could not be adopted by a hypothetical competitor that is as efficient on the market in question because it relies on the use of resources or means inherent to the holding of a dominant position cannot be regarded as competition on the merits*". The Court held that "*when an undertaking loses the legal monopoly it had previously held on a market, it must refrain, during the entire liberalisation phase of the market, from using means available to it on account of its former monopoly and which, on that basis, are not available to its competitors for the purposes of maintaining, other than by its own merits, a dominant position on the recently liberalised market in question*".

THE TAIWAN FAIR TRADE COMMISSION IMPOSES FINES ON 15 AIR CONDITIONER FIRMS FOR WARRANTY COLLUSION

On 10 May 2022 the Taiwan Fair Trade Commission (TFTC) announced (in Chinese) that it has fined 15 local air conditioner (AC) firms a total of TWD 13.9m (approximately £380,000) for warranty collusion.

The TFTC began investigating the case after receiving complaints from the public. It discovered that Hitachi, Panasonic and DAIKIN, the three largest AC firms in Taiwan, extended the warranty periods for their home AC products from three years to seven years in March 2019. Other smaller AC suppliers in Taiwan matched the extensions, which created competition among AC suppliers over warranty conditions. The TFTC also found that on 26 November 2019, the 15 AC suppliers exchanged views on reducing warranty periods at a meeting and eventually entered into a written agreement to reduce the warranty period to three years starting 1 January 2020.

Having found that the duration of the warranty is an important factor in consumers' choice of ACs and that the companies in question had a combined market share of above 90 per cent, the TFTC determined that their conduct could affect competition in the domestic AC market, which constituted a violation of Paragraph 1 of Article 15 of the Fair Trade Act in Taiwan. The TFTC imposed the following pecuniary penalties:

- TWD 2.5m (approximately £67,300) on each of Johnson Controls-Hitachi Air Conditioning Taiwan, Panasonic Taiwan, Ho Tai Development, and Ya-Kuang Electric Appliance;
- TWD 800,000 (approximately £21,500) on each of Heran, SAMPO, and Sanyo Electric;
- TWD 200,000 (approximately £5,400) on each of Gree, Mitsubishi Electric, Action Electronics, NEXGEN Mediatech, MAXE Taiwan, Sharp, and New Widetech Industries; and
- TWD 100,000 (approximately £2,700) on Yu Hwei Technology.

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