



Final Report of the Hearing Officer¹

Case M.8179 – Canon / Toshiba Medical Systems Corporation (Article 14(2) Procedure)

Introduction

1. The draft decision concerns an infringement by Canon Inc. (“Canon”) of Articles 4(1) and 7(1) of the Merger Regulation², in the context of its acquisition of Toshiba Medical Systems Corporation (“TMSC”), previously a subsidiary of Toshiba Corporation (the “Concentration”).
2. The Concentration consisted of a two-step transaction structure. In the first step, by agreement executed on 17 March 2016, Canon acquired one non-voting share and 100 share options attached to TMSC’s ordinary voting shares³ (for approximately EUR 5.28 billion, corresponding to the full price of the acquisition of TMSC) from Toshiba. Pursuant to another agreement concluded on the same day, MS Holding, a special purpose vehicle, which was created specifically for the purposes of the transaction, acquired 20 remaining voting shares from Toshiba (for approximately EUR 800). The two operations are together referred to as the “Interim Transaction”. On 19 December 2016, after having obtained the last of the relevant merger clearances, Canon carried out the second step by exercising the 100 share options to acquire the underlying voting shares in TMSC, whereas TMSC acquired the non-voting share from Canon (for approximately EUR 40) and the 20 remaining voting shares from MS Holding (for approximately EUR 300,000) (together referred as the “Ultimate Transaction”). Thus, Canon became the sole owner of TMSC’s voting shares. The reason for this two-step transaction structure was that Toshiba, due to its financial difficulties, aimed at divesting its ownership in TMSC and realising the capital gain from that transaction by the end of the fiscal year (31 March 2016) in order to avoid a capital deficit appearing in its accounts.
3. On 11 March 2016, Canon sent the Commission a case team allocation request regarding Canon's acquisition of sole control over TMSC within the meaning of Article 3(1)(b) of the Merger Regulation. On 12 August 2016, i.e. after carrying out the Interim Transaction and prior to the Ultimate Transaction, Canon formally notified the

¹ Pursuant to Articles 16 and 17 of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29 (“Decision 2011/695/EU”).

² Council Regulation (EC) No 139/2004 OJ L 24, 29.1.2004, p.1.

³ As long as the share options were not exercised, the voting rights attached to the underlying shares could not be exercised. Furthermore, the share options could not be exercised before all relevant antitrust approvals were obtained.

Concentration to the Commission. On 19 September 2016, the Commission adopted a decision under Article 6(1)(b) of the Merger Regulation, declaring the Concentration compatible with the internal market.⁴

Infringement procedure

4. On 18 March 2016, the Commission was approached by an anonymous complainant, who provided information gathered from public sources, suggesting that Canon may have already acquired control of TMSC.
5. On 11 May 2016, the Commission sent a request for information on the first draft Form CO submitted by Canon on 28 April 2016, including three questions on the transaction structure.
6. On 29 July 2016, the Commission informed Canon that it was carrying out an investigation which might lead to the imposition of fines pursuant to Article 14(2) of the Merger Regulation.
7. On 7 October 2016, the Commission addressed three decisions to each Canon, TMSC and Toshiba (pursuant to Article 11(3) of the Merger Regulation) requesting that they provide information and internal documents. Canon, TMSC and Toshiba responded to these requests. Following a number of further requests from the Commission, Canon, TMSC and Toshiba also submitted additional documents responsive to the 7 October 2016 decisions.
8. On 6 July 2017 the Commission adopted a Statement of Objections under Article 18 of the Merger Regulation which was notified to Canon on 10 July 2017 (“SO”). In the SO, the Commission took the preliminary view that Canon’s acquisition of TMSC via a two-step transaction structure, as summarised in paragraph 2 above, was in breach of the notification requirement of Articles 4(1) of the Merger Regulation and the standstill obligation under 7(1) of the Merger Regulation.
9. Canon received access to the file via a DVD and one hard drive on 7 July 2017.
10. Canon submitted its reply to the SO on 15 March 2018 and requested an oral hearing.
11. On 3 May 2018, Canon presented the arguments developed in its reply to the SO in the course of an oral hearing.
12. On 31 May 2018, the Court of Justice handed down its judgment in case *Ernst & Young P/S v Konkurrencerådet*⁵. The *Ernst & Young* judgment is one of the few judgments of the Court of Justice regarding the scope of the standstill obligation in Article 7(1) of the Merger Regulation.⁶

⁴ Case M.8006 – Canon / Toshiba Medical Systems Corporation, Commission decision of 19 September 2016.

⁵ Judgment in *Ernst & Young P/S v Konkurrencerådet*, C-633/16, EU:C:2018:37 (“*Ernst & Young* judgment”).

⁶ In the *Ernst & Young* judgment, the Court of Justice held that the standstill obligation “*must be interpreted as meaning that a concentration is implemented only by a transaction which, in whole or in part, in fact or in law, contributes to the change in control of the target undertaking*” (*Ernst & Young* judgment, paragraph

13. By letter of 11 June 2018 to the Commission, Canon argued that the Commission should close the current proceedings in light of the principles set out in the *Ernst & Young* judgment. According to Canon, this judgment left no room for the Commission's interpretation of Articles 4(1) and 7(1) of the Merger Regulation as set out in the SO.
14. On 30 November 2018, the Commission adopted a Supplementary Statement of Objections ("SSO"), which complemented and clarified the SO. Canon received access to the file via email on 4 December 2018. In the SSO, the Commission stated its preliminary position that the *Ernst & Young* judgment does not alter the preliminary conclusions reached in the SO, *i.e.* that, by carrying out the Interim Transaction, Canon implemented (at least partially) the Concentration prior to its notification and before it was declared compatible with the internal market by the Commission, in contravention of Articles 4(1) and 7(1) of the Merger Regulation.
15. Canon submitted its response to the SSO on 21 January 2019, in which it requested to be heard orally.
16. On 14 February 2019, Canon presented the arguments developed in its reply to the SSO in the course of a second oral hearing.

Procedural issues

17. No issues concerning access to the file or other rights of defence have been brought to my attention.
18. In its responses to the SO and the SSO and during the oral hearing, Canon claimed that the Commission would violate the principle of legal certainty and the *nulla poena sine lege* principle if it were to impose a fine in this case. Canon argued, in essence, that the case law of the European Courts and the decisional practice of the Commission are not sufficiently clear in indicating that a transaction structure such as that in the present case would infringe the provisions of the Merger Regulation.
19. I have carefully considered this argument. However, the question of whether the case-law on the legality of transaction structures such as the one under consideration here is clear or not is, ultimately, one of substance and not an issue that falls within the Hearing Officer's remit. Regardless of the assessment on substance, in my view, at the time of implementing the transaction, Canon must have been aware of the risk of fines for breaching its obligations under the Merger Regulation by agreeing to buy TMSC through an interim buyer. In particular, the Commission's Consolidated Jurisdictional Notice, which has remained unchanged since its adoption in 2007, gives a clear indication as to how the Commission would approach transaction structures such as the one at issue here.

Conclusion

20. In the draft decision the Commission comes to the conclusion that Canon has, at least negligently, implemented a concentration in breach of Articles 4(1) and 7(1) of the

59). Furthermore, the Court of Justice stated that the acquirer did not "*acquire the possibility of exercising any influence on the [target] by [terminating the agreement with a third party] ... the latter companies [i.e. the acquirer and target] were, in the context of competition law, independent both before and after that termination.*" (*Ernst & Young* judgment, paragraph 61).

Merger Regulation. The draft decision imposes fines on Canon pursuant to Article 14(2) of the Merger Regulation for these two infringements.

21. I have reviewed the draft decision pursuant to Article 16(1) of Decision 2011/695/EU and I conclude that it deals only with objections in respect of which Canon has been afforded the opportunity of making known their views.
22. Overall, I consider that the effective exercise of procedural rights has been respected in this case.

Brussels, 26 June 2019

Joos STRAGIER