



EUROPEAN COMMISSION
DG Competition

***CASE M.8179 – CANON/TOSHIBA
MEDICAL SYSTEMS CORPORATION***

(Only the English text is authentic)

**MERGER PROCEDURE
REGULATION (EC) 139/2004**

Article 14(2) Regulation (EC) 139/2004

Date: 27/06/2019

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Brussels, 27.6.2019
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PUBLIC VERSION

COMMISSION DECISION

of 27.6.2019

imposing fines for failing to notify a concentration in breach of Article 4(1) of Council Regulation (EC) No 139/2004 and for implementing a concentration in breach of Article 7(1) of that Regulation

(Case M.8179 - Canon / Toshiba Medical Systems Corporation, Article 14(2) procedure)

(Only the English version is authentic)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area, and in particular Article 57 thereof,

Having regard to Council Regulation (EC) No 139/2004 of 20.1.2004 on the control of concentrations between undertakings,¹ and in particular Article 14(2)(a) and (b) thereof,

Having given the undertaking concerned, Canon, the opportunity to make known its views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations,²

Having regard to the final report of the Hearing Officer in this case,³

Whereas:

1. FACTUAL BACKGROUND

1.1. The Undertakings Concerned

- (1) Canon Inc. ("Canon") is a multinational company specialising in the manufacture of imaging and optical products, including cameras, camcorders, photocopiers, steppers, and computer printers. Since it acquired Toshiba Medical Systems Corporation ("TMSC"), Canon also specialises in the manufacture of medical equipment, including computed tomography ("CT") systems, diagnostic ultrasound systems, and medical devices magnetic resonance imaging systems.
- (2) Canon is a publicly listed company, headquartered in Tokyo, Japan, and listed on the stock exchanges of Tokyo, Nagoya, Fukuoka, Sapporo, and New York.
- (3) According to the consolidated financial results of Canon, Canon's turnover for the year running from 1 January 2018 to 31 December 2018 was YEN 3 951 937 million

¹ OJ L 24, 29.1.2004, p. 1 (the "Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

² OJ C ..., ...

³ OJ C ..., ...

(EUR 30 307.2 million).⁴ According to Canon, its medical equipment business unit accounts for 11% of its total sales.⁵

- (4) TMSC is a company active in the development, manufacture, sale and provision of technical services for medical equipment, including diagnostic x-ray systems, medical x-ray computed tomography systems, magnetic resonance imaging systems, CT diagnostic ultrasound systems, radiation therapy systems, diagnostic nuclear medicine systems, medical sample testing equipment, and information systems for medical equipment.
- (5) Previously a subsidiary of Toshiba Corporation ("Toshiba"), a publicly listed company, headquartered in Tokyo, Japan, and listed on the stock exchanges of Tokyo and Nagoya, TMSC is now a subsidiary of Canon. On 4 January 2018, TMSC was renamed Canon Medical Systems Corporation ("CMSC").

1.2. The Canon/TMSC transaction

- (6) Canon's acquisition of TMSC (the "Canon/TMSC Transaction" or the "Transaction") was publicly announced on 17 March 2016. On that date, Canon announced that it had concluded a share transfer agreement with Toshiba concerning the acquisition from Toshiba of TMSC.⁶ On the same day, Toshiba⁷ and TMSC⁸ announced that Toshiba had agreed to sell TMSC to Canon and that TMSC was no longer a subsidiary of the Toshiba group.

1.2.1. *The circumstances which led Toshiba to sell TMSC*

- (7) At the beginning of 2016, Toshiba was experiencing substantial financial difficulties. Specifically, in view of its projected results at the time, Toshiba considered that it faced a risk of having to report negative shareholders' equity by the end of the financial year 2015 (ending 31 March 2016). Since no public company of a similar size to Toshiba had ever reported negative shareholders' equity in Japan's recent history, it was difficult to foresee the impact such an event would have on Toshiba's business performance, financial condition, and market value. In Toshiba's view, the company was in danger of suffering a wide array of damaging consequences.⁹
- (8) On 21 December 2015, Toshiba therefore announced that it was taking a number of actions to address its financial difficulties.¹⁰ These included inviting outside majority shareholder(s) into TMSC in exchange for cash. According to Toshiba, executing the definitive agreement for the sale of a majority shareholding in TMSC before the end

⁴ See Canon's results for the fourth quarter and the fiscal year ended 31 December 2018 (<https://global.canon/en/ir/results/2018/rslt2018e.pdf> (last accessed on 3 June 2019)). Amounts converted to EUR based on the average 2018 EUR/JPY conversion rate of the European Central Bank ("ECB") (1 EUR= 130.396 JPY).

⁵ See Canon's annual report for 2018, p. 1.

⁶ See Canon's website, <https://global.canon/en/news/2016/20160317.html> (last accessed on 3 June 2019).

⁷ See Toshiba's website, https://www.toshiba.co.jp/about/ir/en/news/20160317_3.pdf (last accessed on 3 June 2019).

⁸ See TMSC's (now CMSC) website, <https://global.medical.canon/News/PressRelease/Detail/3973-834> (last accessed on 3 June 2019).

⁹ Toshiba's response to the Article 11(3) Decision of 7 October 2016, p. 3 (Doc ID 328-487). See also Toshiba's Press Release "Notice Regarding Dividend of Surplus (Non-dividend)" of 21 December 2015, available at: http://www.toshiba.co.jp/about/ir/en/news/20151221_3.pdf (last accessed on 3 June 2019).

¹⁰ Toshiba's Presentation, "Toshiba Revitalization Action Plan and FY2015 Forecast" of 21 December 2015 available at: <https://www.toshiba.co.jp/about/ir/en/pr/pdf/tpr20151221e.pdf> (last accessed on 3 June 2019).

of its financial year 2015 would allow it to satisfactorily improve its financial accounts.¹¹

- (9) As a result, Toshiba underwent an accelerated bidding process for the sale of TMSC, soliciting the first round of bids by 13 January 2016, a second round by 4 February 2016, and final bid proposals by 4 March 2016.¹²

1.2.2. *The setting up of the transaction structure*

- (10) Initially, on 19 February 2016, Toshiba proposed to the bidders a transaction structure, which was referred to as an “80/20 proposal”. Toshiba proposed this structure to all bidders to “allow for the horizontal comparison of the candidate company proposals”.¹³
- (11) Under Toshiba’s proposal, the buyer would acquire 20% of the shares of TMSC minus one share (“20% minus one”) by the end of March 2016, and simultaneously pre-pay the price for the rest of the shares (“80% plus one”). Toshiba would have continued to own the remaining 80% plus one shares, and therefore control TMSC, until all competent competition authorities had cleared the transfer of the remaining shares. If the required merger control clearances were not obtained by June 2016,¹⁴ under Toshiba’s proposal, the purchaser would retain the 20% minus one TMSC’s shares and terminate the pledge over the 80% plus one. In turn, Toshiba would refund to the purchaser the provisional payment made for the 80% plus one TMSC’s shares, less a reverse break-up fee of YEN 35 000 million (EUR 29.1 million).¹⁵
- (12) In the bidding process, each bidder made proposals, which took Toshiba’s financial situation into consideration.¹⁶ In its offer, Canon proposed a new transaction structure to Toshiba.¹⁷ The rationale of this new transaction structure was to secure Toshiba’s full consideration for TMSC’s sale before March 2016, while not formally acquiring control before obtaining the necessary clearances from the relevant competition authorities.¹⁸
- (13) From Toshiba’s perspective, under Canon’s proposed new transaction structure, TMSC would no longer be one of its subsidiaries based on the United States GAAP

¹¹ Toshiba’s response to the Article 11(3) Decision of 7 October 2016, p. 4-5 (Doc ID 328-487).

¹² Toshiba’s response to the Article 11(3) Decision of 7 October 2016, p. 5 (Doc ID 328-487). See also Toshiba internal document titled “Management Committee – Proposal overview”, 9 March 2016, p. 13 (Doc ID 328-183 – TOSH_EC 00000172-T001 - Ref: 2017/055516).

¹³ See Toshiba internal document titled “Management Committee – Proposal overview”, 9 March 2016, p. 13 (Doc ID 328-183 – TOSH_EC 00000172-T001 - Ref: 2017/055516).

¹⁴ “If the Purchaser is unable to obtain clearances from important competition authorities by June 30”, Canon internal document, p. 1 (Doc ID 145-95 – NASU00032515). See also, Toshiba internal document titled “PJ Lotus (TMSC Sell Off examination) Board of Directors materials”, 25 February 2016, p. 3 (Doc ID 328-191-TOSH_EC 00000237-T001 - Ref: 2017/055516).

¹⁵ Toshiba’s response to the Article 11(3) Decision of 7 October 2016, p. 5 (Doc ID 328-487). See e.g. Canon internal document titled “SPA supplementary explanation” (translation), p.1. Ref: 2016/111955. See also Toshiba internal document titled “PJ Lotus (TMSC Sell Off examination) Board of Directors materials”, 25 February 2016, p. 3 (Doc ID 328-191-TOSH_EC 00000237-T001 - Ref: 2017/055516). Amounts converted to EUR based on the average 2016 EUR/JPY conversion rate of the ECB (1 EUR= 120.197 EUR).

¹⁶ Toshiba’s response to the Article 11(3) Decision of 7 October 2016, p. 6 (Doc ID 328-487).

¹⁷ See Letter from Canon to Toshiba, 4 March 2016, (Doc ID 210-3 – Ref. 2017/011405 and Doc ID 210-20 – Ref. 2017/011405).

¹⁸ See e.g. Canon internal document titled “SPA supplementary explanation” (translation), p. 2 (Doc ID 145-95 – NASU00032515, Ref: 2016/111955), and Toshiba internal document titled “Management Committee – Proposal overview”, 9 March 2016 (Doc ID 328-183 – TOSH_EC 00000172-T001 - Ref: 2017/055516).

(although the group might have needed to provide TMSC financing for the interim period). On 17 March 2016, Toshiba¹⁹ and TMSC²⁰ both publicly announced that TMSC was no longer a subsidiary of the Toshiba group as a result of the Canon/TMSC transaction.

- (14) Toshiba explained that, after examining the feasibility and the effect of each bidder's proposal, it determined that Canon's was the most competitive.²¹ Toshiba noted in particular that although the new transaction structure proposed by Canon was complex and risky from a competition law perspective,²² Canon's bid was the only one where the transfer of the full purchase price was not conditional upon merger control clearances.²³ Therefore, this new transaction structure enabled Toshiba to receive the purchase price in an expedited and irreversible way, thereby securing its financing needs on time.²⁴
- (15) On this basis, Toshiba accepted Canon's offer and the binding transaction documents were signed on 17 March 2016.

1.2.3. *The agreements implementing the transaction structure*

- (16) Pre-transaction, TMSC was a 100% subsidiary of Toshiba. Canon's acquisition of TMSC was implemented through a two-step transaction structure.

1.2.3.1. *Setting up of MS Holding*

- (17) On 8 March 2016, a special-purpose vehicle (MS Holding) was created. [DIRECTOR NAME] (Senior Advisor at [JAPANESE CORPORATION]), [DIRECTOR NAME] (attorney and [FORMER POSITION]) and [DIRECTOR NAME] (CPA, former Executive Board Member of [JAPANESE SERVICES FIRM]) were appointed as controlling directors of MS Holding, each holding a 33.3% stake in MS Holding.²⁵
- (18) The three directors were chosen by Canon, Toshiba and MS Holding's external lawyers, the Japanese law firm TMI Associates ("TMI").²⁶

1.2.3.2. *Conversion of TMSC shares and creation of new classes of shares*

- (19) Following Canon's proposal, TMSC converted its 134 980 060 ordinary shares and created certain (new and additional) classes of shares to be able to implement the transaction structure.²⁷

¹⁹ See https://www.toshiba.co.jp/about/ir/en/news/20160317_3.pdf (last accessed on 3 June 2019).

²⁰ See <https://global.medical.canon/News/PressRelease/Detail/3973-834> (last accessed on 3 June 2019).

²¹ Toshiba's response to the Article 11(3) Decision of 7 October 2016, p. 6 (Doc ID 328-487).

²² See e.g. Toshiba internal document titled "Management Committee – Proposal overview", 9 March 2016 (Doc ID 328-183 – TOSH_EC 00000172-T001 - Ref: 2017/055516); See Canon internal document, Email from ARAI Masashi [arai.masashi@canon.co.jp], 24 December 2015, Minutes meeting; Toshiba's response to the Article 11(3) Decision of 7 October 2016, p. 6 (Doc ID 328-487).

²³ See e.g. Toshiba internal document titled "Management Committee – Proposal overview", 9 March 2016 (Doc ID 328-183 – TOSH_EC 00000172-T001 - Ref: 2017/055516).

²⁴ Toshiba's response to the Article 11(3) Decision of 7 October 2016, p. 6 (Doc ID 328-487).

²⁵ Form CO in Case M.8006 – Canon/Toshiba Medical Systems Corporation, paragraphs 26 and 29, footnotes 10, 11 and 12 (Doc Id 246-66 – Ref. 2016/078749).

²⁶ Canon's Reply to the RFI of 11 May 2016, dated 27 May 2016, p. 4; Toshiba internal document, Email from MSH's counsel (TMI) to Canon and Toshiba of 7 March 2016 (Doc ID 328-197 – Ref.2017/055516 - TOSH_EC 00000265-T001); Toshiba internal document, Emails between Canon and Toshiba's counsels on 8 March 2016 (Doc ID 328-207 – Ref. 2017/055516 - TOSH_EC 00000300-T001).

- (20) On 15 March 2016, TMSC's articles of incorporation were amended to include the new and additional classes of shares (the "Amended Articles of Incorporation").²⁸
- (21) First, TMSC created three categories of shares:
- (a) Class A Shares (referred to as "voting shares"),
 - (b) Class B Share (referred to as "non-voting share"), and
 - (c) Class C Shares (referred to as "voting shares with a call option exercisable by TMSC").²⁹
- (22) Second, TMSC converted all of its ordinary shares into Class C Shares and created Share Options for the compulsory buy back of all Class C Shares.³⁰
- (23) Third, on 16 March 2016, TMSC converted the Class C Shares and issued in return.³¹
- (a) 20 Class A Shares,
 - (b) one Class B Share, and
 - (c) 100 so-called "Share Options" attached to Class C Shares.³²

1.2.4. *The rights attached to the different classes of shares*

1.2.4.1. Class A Shares

- (24) Holders of Class A Shares had one voting right at the TMSC shareholder meetings for each Class A Share owned.³³
- (25) Resolutions for the appointment of the directors and of the internal company auditors required a majority of votes of the attending shareholders. Their remuneration also had to be determined by a resolution to be adopted by the shareholder meeting.³⁴

1.2.4.2. Class B Shares

- (26) Class B Shares did not confer any voting rights at the shareholder meetings.³⁵ However, a written consent or a prior resolution of Class B shareholders was required for the following matters:³⁶

²⁷ In accordance with Article 5.1 of the *Shares and Other Securities Transfer Agreement* and Exhibit 5.1.1 to the same, such share alteration is a Pre-Closing Obligation of Toshiba to the *Shares and Other Securities Transfer Agreement* agreed upon between Canon and Toshiba, and executed on 16 March 2016.

²⁸ TMSC's Amended Articles of Incorporation (Shares and Other Securities Transfer Agreement, Exhibit 5.1.1.1 "Details of the Amendment to Articles of Incorporation", p. 2 (Doc ID 246-20 – Ref. 2016/078749).

²⁹ See Form CO, paragraph 24 (Doc Id 246-66 – Ref. 2016/078749). See also Shares and Other Securities Transfer Agreement, Article 5.1 (Doc ID 246-16 – Ref. 2016/078749).

³⁰ See Form CO, paragraph 24 (Doc Id 246-66 – Ref. 2016/078749). See also Shares and Other Securities Transfer Agreement, Article 5.1 (Doc ID 246-16 – Ref. 2016/078749).

³¹ TMSC's Amended Articles of Incorporation, Article 16.4, paragraph 2 (Shares and Other Securities Transfer Agreement, Exhibit 5.1.1.1 "Details of the Amendment to Articles of Incorporation", p. 4 (Doc ID 246-20 – Ref. 2016/078749).

³² See Form CO, paragraph 25 (Doc ID 246-66 – Ref. 2016/078749). See also Shares and Other Securities Transfer Agreement, Article 5.1 (Doc ID 246-16 – Ref. 2016/078749).

³³ TMSC's Amended Articles of Incorporation, Article 16.2, paragraph 1 (Shares and Other Securities Transfer Agreement, Exhibit 5.1.1.1 "Details of the Amendment to Articles of Incorporation", p. 4 (Doc ID 246-20 – Ref. 2016/078749).

³⁴ TMSC's Amended Articles of Incorporation, Chapters 4 and 5 (Shares and Other Securities Transfer Agreement, Exhibit 5.1.1.1 "Details of the Amendment to Articles of Incorporation", p. 7/8 (Doc ID 246-20 – Ref. 2016/078749).

- (a) Matters set forth under Article 322(1) of the Japanese Companies Act;³⁷
- (b) Determining matters concerning the issuance of shares for subscription and share options for subscription;³⁸
- (c) Giving approval under Article 179-3(1) of the Japanese Companies Act;³⁹
- (d) Acquiring treasury shares;⁴⁰ or
- (e) Undergoing a merger, company split, share exchange, share transfer, or other organizational restructuring.

1.2.4.3. So-called Share Options attached to Class C Shares

- (27) The so-called Share Options, also referred to as "First Series Share Options", were described in the Appendix to TMSC's Amended Articles of Incorporation.⁴¹
- (28) The underlying class of shares for the Share Options were TMSC's ordinary Class C Shares and the number of shares underlying each option was 1 349 800 shares.⁴²
- (29) Holders of Class C Shares had one voting right at TMSC shareholder meetings for each Class C Share owned.⁴³ As long as the options were not exercised, the voting rights could not be exercised.

³⁵ TMSC's Amended Articles of Incorporation, Article 16.3, paragraph 1 (Shares and Other Securities Transfer Agreement, Exhibit 5.1.1.1 "Details of the Amendment to Articles of Incorporation", p. 4 (Doc ID 246-20 – Ref. 2016/078749).

³⁶ TMSC's Amended Articles of Incorporation, Article 16.3, paragraph 3 (Shares and Other Securities Transfer Agreement, Exhibit 5.1.1.1 "Details of the Amendment to Articles of Incorporation", p. 5 (Doc ID 246-20 – Ref. 2016/078749). This list is exhaustive.

³⁷ Article 322(1) of the Japanese Companies Act sets out a list of corporate matters which require a resolution of the general meeting of the shareholders of a specific class when the matter "*is likely to cause detriment*" to shareholders of that class. See reply of Canon to questions 4 and 6 of RFI dated 7 October 2016, p.10-14 (Doc ID 133 - Ref. 2016/107572).

³⁸ Canon explains that this right is aimed at preventing TMSC from issuing shares and share options (especially at extraordinary favourable issuance price for subscribers) that would dilute the value of the Class B share and/or share options held by Canon. See reply of Canon to question 6 of RFI dated 7 October 2016, p. 14 (Doc ID 133 - Ref. 2016/107572).

³⁹ Section 4-2 of Chapter II of Part II of the Japanese Companies Act (Article 179 through Article 179-10) provides for compulsory acquisition rights permitting a controlling shareholder holding 90% or more of the voting rights in a company to require other shareholders or share option holders of the company to sell their shares or options to such controlling shareholder subject to the approval of the board of the company, and Article 179-3 provides for procedures of such board approval of the company. See reply of Canon to question 4 of RFI dated 7 October 2016. Canon explains that the purpose of the veto right is to prevent a holder of 100% of voting securities in TMSC (i.e., MS Holding) from being able to compulsorily acquire the Class B share and/or all of the share options held by Canon. See reply of Canon to question 4 of RFI dated 7 October 2016, p. 12. See also reply of Canon to question 2 of RFI dated 25 February 2019, pp. 5ff (Doc ID 133 - Ref. 2016/107572).

⁴⁰ Canon explains that, without this veto right, it would be theoretically possible for TMSC to initiate a share buyback of all Class A Shares from MS Holding that would result in no shareholder holding voting rights; the holder of the Class B share would be the only shareholder, albeit a non-voting shareholder, of TMSC. See reply of Canon to question 6 of RFI dated 7 October 2016, p. 14 (Doc ID 133 - Ref. 2016/107572).

⁴¹ TMSC's Amended Articles of Incorporation, Appendix (Shares and Other Securities Transfer Agreement, Exhibit 5.1.1.1 "Details of the Amendment to Articles of Incorporation", (Doc ID 246-20 – Ref. 2016/078749)).

⁴² TMSC's Amended Articles of Incorporation, Appendix, paragraph 2, (Shares and Other Securities Transfer Agreement, Exhibit 5.1.1.1 "Details of the Amendment to Articles of Incorporation", p. 10 (Doc ID 246-20 – Ref. 2016/078749).

- (30) The Share Options could be exercised at any time before 31 December 2018 provided that all merger control proceedings requiring prior authorisation in the United States of America, the European Union, the People's Republic of China, and Brazil had been completed either by obtaining approval or by expiry of the relevant waiting periods.⁴⁴ Exercising the Share Options was not subject to any other condition.
- 1.2.5. *The implementation of the various agreements between MS Holding, Toshiba, and Canon*
- (31) On 17 March 2016,⁴⁵ Canon and Toshiba entered into a *Shares and Other Securities Transfer Agreement* pursuant to which Canon would acquire (i) one Class B share in consideration for YEN 4 930 (approximately EUR 40)⁴⁶ and (ii) 100 Share Options attached to Class C Shares in consideration of YEN 665 497 806 400 (approximately EUR 5 280 million).⁴⁷
- (32) On 17 March 2016, MS Holding and Toshiba concluded the *Excluded Share Transfer Agreement* whereby MS Holding would acquire the 20 Class A Shares, in consideration for YEN 98 600 (approximately EUR 800).⁴⁸
- (33) The *Excluded Share Transfer Agreement* and the *Shares and Other Securities Transfer Agreement* were executed simultaneously. Pursuant to Article 6.2 of the *Shares and Other Securities Transfer Agreement*,⁴⁹ by 17 March 2016:
- (a) The Articles of Incorporation of TMSC had to be amended as provided in Exhibit 5.1.1.1 of the *Shares and Other Securities Transfer Agreement*;
 - (b) The Share Alteration⁵⁰ had to be legally and validly completed in accordance with the provision of Article 5.1 of the *Shares and Other Securities Transfer Agreement*; and
 - (c) The *Excluded Share Transfer Agreement* had to be legally and validly executed and to remain in full force and effect, the transfer of the Class A Shares to MS

⁴³ TMSC's Amended Articles of Incorporation, Article 16.4, paragraph 1 (*Shares and Other Securities Transfer Agreement*, Exhibit 5.1.1.1 "Details of the Amendment to Articles of Incorporation", p. 4 (Doc ID 246-20 – Ref. 2016/078749)).

⁴⁴ TMSC's Amended Articles of Incorporation, Appendix, paragraph 7 (*Shares and Other Securities Transfer Agreement*, Exhibit 5.1.1.1 "Details of the Amendment to Articles of Incorporation", p.10 (Doc ID 246-20 – Ref. 2016/078749)), and Exhibit 5.1.1.3. "Details of the Share Options", p. 1 (Doc ID 246-21 – Ref. 2016/078749)).

⁴⁵ On the same day Canon passed a resolution to acquire TMSC from Toshiba and make TMSC a subsidiary. *Notice Concerning Acquisition of Toshiba Medical Systems Corporation Shares and Making it a Subsidiary*, Canon, 17 March 2016. See <https://global.canon/en/ir/release/2016/p2016mar17e.pdf> (last accessed 6 June 2019).

⁴⁶ As converted by Canon in Form CO in Case M.8006 – Canon/Toshiba Medical Systems Corporation, paragraph 38 (Doc Id 246-66 – Ref. 2016/078749).

⁴⁷ As converted by Canon in Form CO in Case M.8006 – Canon/Toshiba Medical Systems Corporation, paragraph 54 (Doc Id 246-66 – Ref. 2016/078749).

⁴⁸ As converted by Canon in Form CO in Case M.8006 – Canon/Toshiba Medical Systems Corporation, paragraph 54 (Doc Id 246-66 – Ref. 2016/078749).

⁴⁹ *Shares and Other Securities Transfer Agreement*, Exhibit 5.1.1.1 "Details of the Amendment to Articles of Incorporation", Article 6.2 (Doc ID 246-20 – Ref. 2016/078749).

⁵⁰ The "Share Alteration" is defined in Article 5.1 (2): "Immediately upon the Articles of Incorporation Amendment becoming effective, Seller shall alter all of the 134,980,060 ordinary shares issued by the Target and held by Seller, to Class C Shares, by consent of Seller as the only shareholder in the Target." (*Shares and Other Securities Transfer Agreement*, Article 5.1, paragraph 2 (Doc ID 246-16 – Ref. 2016/078749), p. 10).

Holding had to be completed.⁵¹ The *Excluded Share Transfer Agreement* was conditional on execution and enforceability of the *Shares and Other Securities Transfer Agreement*.⁵²

- (34) In line with the provisions of TMSC's Amended Articles of Incorporation described in recitals (27)-(29) above,⁵³ as soon as the conditions for the exercise of the Share Options were met (meaning the required approvals of competition authorities had been obtained), it was envisaged that:
- (a) Canon would exercise its Share Options and acquire all Class C Shares representing all of TMSC's ordinary shares (134 980 000);⁵⁴
 - (b) TMSC would acquire the Class B Share from Canon and pay YEN 4 930 (approximately EUR 40) to Canon, which is the price that was paid by Canon to acquire that share;⁵⁵ and
 - (c) TMSC would acquire the 20 Class A Shares of MS Holding and pay YEN 1 804 930 (approximately EUR 15 000) per share amounting to an overall consideration of YEN 36 098 600 for the 20 Class A shares (approximately EUR 300 000) while MS Holding had acquired these shares for YEN 98 600 (approximately EUR 800).^{56,57}
- (35) In the event the conditions for the exercise of the Share Options were not met (meaning that the required approvals of competition authorities were not obtained), Canon was entitled to sell its Share Options to a third party at its own discretion.⁵⁸

⁵¹ Shares and Other Securities Transfer Agreement, Article 6.2, paragraph 4 (Doc ID 246-16 – Ref. 2016/078749).

⁵² Pursuant to Article 1.2 of the *Excluded Share Transfer Agreement*, the acquisition by MS Holding of 20 Class A shares “shall be completed on the condition that the *Shares and Other Securities Transfer Agreement* dated March 17, 2016 is lawfully and validly executed between Canon Inc. and Seller and continues to remain in effect, and that, at the time of completion of the Transaction, the transfer of all Class B Shares in the Target and First Series Share Options in the Target under that agreement is reasonably expected to be completed with certainty.” See Shares and Other Securities Transfer Agreement, Exhibit 1.1. Excluded Share Transfer Agreement executed on 17 2016. (Doc ID 252-5 – Ref. 2016/041398).

⁵³ TMSC's Amended Articles of Incorporation, Articles 16.2 and 16.3 (Shares and Other Securities Transfer Agreement, Exhibit 5.1.1.1 “Details of the Amendment to Articles of Incorporation”, p. 4-5 (Doc ID 246-20 – Ref. 2016/078749).

⁵⁴ TMSC's Amended Articles of Incorporation, Appendix, paragraph 2, (Shares and Other Securities Transfer Agreement, Exhibit 5.1.1.1 “Details of the Amendment to Articles of Incorporation” (Doc ID 246-20 – Ref. 2016/078749).

⁵⁵ TMSC's Amended Articles of Incorporation, Article 16.3, paragraph 2 (Shares and Other Securities Transfer Agreement, Exhibit 5.1.1.1 “Details of the Amendment to Articles of Incorporation”, pp. 4-5 (Doc ID 246-20 – Ref. 2016/078749). Amount converted by Canon in Form CO in Case M.8006 – Canon/Toshiba Medical Systems Corporation, paragraph 38 (Doc Id 246-66 – Ref. 2016/078749).

⁵⁶ TMSC's Amended Articles of Incorporation, Article 16.2, paragraph 2 (Shares and Other Securities Transfer Agreement, Exhibit 5.1.1.1 “Details of the Amendment to Articles of Incorporation”, p. 4 (Doc ID 246-20 – Ref. 2016/078749).

⁵⁷ Canon explains that “the purchase price of the Class A shares payable by TMSC to MS Holding upon the exercise of the option was determined by negotiation between Toshiba and Canon, considering the expected corporate tax incurred by MS Holding, incorporation costs of MS Holding, legal fees payable to TMI, and appropriate level of remuneration for three directors of MS Holding”. See Canon's Reply to the RFI dated 11 May 2016, Part I (transaction structure), question 2, dated 27 May 2016, p. 5 (Doc ID 34 – Ref. 2016/051679). Amounts in text as converted by Canon in Form CO in Case M.8006 – Canon/Toshiba Medical Systems Corporation, paragraph 54 (Doc Id 246-66 – Ref. 2016/078749).

⁵⁸ Canon's Reply to the RFI dated 11 May 2016, dated 27 May 2016, p.1 (Doc ID 34 – Ref. 2016/051679).

The third party would then be able to exercise the Share Options, subject to obtaining the relevant merger control clearances, if needed.⁵⁹

- (36) For the purposes of this Decision, the sale of the Class B Share and Share Options attached to the Class C Shares to Canon and the sale of the Class A Shares to MS Holding are together referred to as the "Interim Transaction". The acquisition of 100% of Class C Shares as described in recital (34) above, following the relevant merger control clearances, is referred to as the "Ultimate Transaction". The entire transaction scheme, consisting of the acquisition of sole control by Canon over TMSC by means of the Interim Transaction and the Ultimate Transaction, is referred to in this Decision as the "Concentration".
- (37) On 19 December 2016, after having obtained the last of the relevant merger clearances, namely the clearance from the Ministry of Commerce of the People's Republic of China, Canon exercised its Share Options and completed the Ultimate Transaction.⁶⁰

1.3. Merger control proceedings before the Commission regarding the Concentration

- (38) 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.
- (39) In an email dated 5 April 2016, Canon sent to the Commission the section of the Form CO related to the transaction structure as well as a short presentation describing the different steps of the Transaction.⁶¹ On 18 April 2016, Canon provided to the Commission an English translation of the *Shares and Other Securities Transfer Agreement* and some of its exhibits.⁶²
- (40) On 28 April 2016, Canon submitted a first draft Form CO to the Commission.⁶³ On 11 May 2016, the Commission sent to Canon a number of questions on the draft Form CO, including three questions on the structure of the Transaction,⁶⁴ to which Canon replied on 27 May 2016.⁶⁵
- (41) On 12 August 2016, Canon notified the acquisition of sole control over TMSC by way of acquisition of 100% of its shares to the Commission pursuant to Article 4 of the Merger Regulation, under the normal merger procedure. Canon specified on a without prejudice basis that the notification should be understood as covering the

⁵⁹ Canon's Reply to the RFI dated 11 May 2016, dated 27 May 2016, p.1 (Doc ID 34 – Ref. 2016/051679). See also recital (139) below.

⁶⁰ Email from Canon dated 20 December 2016 (Doc ID 176 – Ref. 2016/126539).

⁶¹ See email from Canon, dated 5 April 2016 (Doc ID 23 – Ref. 2016/034237); see Section 3 of Draft Short Form CO submitted on 5 April 2016 (Doc ID 24 – Ref. 2016/034237); see short presentation on the Transaction submitted on 5 April 2016 (Doc ID 25 – Ref. 2016/034237).

⁶² See cover email from Canon dated 18 April 2016 (Doc ID 26 – Ref. 2016/037589); see *Shares and Others Transfer Agreement* and exhibits 1.1, 5.1.1.1, 5.1.1.3, (Doc ID 27-30 – Ref. 2016/037589).

⁶³ See cover letter from Canon dated 28 April 2016 (Doc ID 251 – Ref. 2016/041398); see draft Short Form CO (Doc ID 252 – Ref. 2016/041398).

⁶⁴ See email to Canon dated 11 May 2016 (Doc ID 255 – Ref. 2016/044957), see RFI 1, dated 11 May 2016 (Doc ID 256 – Ref. 2016/044957).

⁶⁵ See email from Canon dated 27 May 2016 (Doc ID 33 – Ref. 2016/051679); see the parties' replies to questions 1 to 3 of RFI 1, dated 11 May 2016 (Doc ID 34 – Ref. 2016/051679).

entire Concentration, that is from the Interim Transaction to the Ultimate Transaction.⁶⁶

- (42) When assessing the Concentration, the Commission's investigation did not provide any indication that competition concerns would be likely to arise. For this reason, on 19 September 2016, the Commission adopted a decision under Article 6(1)(b) of the Merger Regulation and Article 57 of the Agreement on the European Economic Area ("EEA") declaring the Concentration compatible with the internal market and with the EEA Agreement (the "Approval Decision").⁶⁷

2. INFRINGEMENT PROCEEDINGS UNDER ARTICLE 14(2) OF THE MERGER REGULATION

- (43) On 18 March 2016, a few days after receiving the case team allocation request regarding Canon's proposed acquisition of sole control over TMSC, the Commission was approached by an anonymous complainant (the "Complainant").⁶⁸ The Complainant provided information gathered from public sources, suggesting that Canon may have breached Articles 4(1) and 7(1) of the Merger Regulation in the context of its acquisition of control over TMSC. On 23 March 2016 and 5 April 2016, the Complainant provided additional information on the transaction structure of the Concentration.⁶⁹
- (44) On 11 May 2016, the Commission sent to Canon a request for information ("RFI")⁷⁰ on the first short draft Form CO submitted by Canon on 28 April 2016. This RFI included three questions on the transaction structure, to which Canon replied on 27 May 2016.⁷¹ In its responses, Canon explained that in its view the transaction structure put in place by Canon did not amount to a "warehousing arrangement" as described in paragraph 35 of the Commission Consolidated Jurisdictional Notice (the "CJN").⁷²
- (45) 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)(a) and (b) of the Merger Regulation for possible breaches of the standstill obligation under Article 7(1) of the Merger Regulation and of the notification requirement of Article 4(1) of the Merger Regulation.⁷³
- (46) On 5 September 2016, the Commission received an additional submission from the Complainant.⁷⁴

⁶⁶ Form CO in Case M.8006 – Canon/Toshiba Medical Systems Corporation, paragraph 8 (Doc ID 246-66 – Ref. 2016/078749).

⁶⁷ Case M.8006 – Canon / Toshiba Medical Systems Corporation.

⁶⁸ See email dated 18 March 2016 (Doc ID 351 – Ref. 2017/059758).

⁶⁹ See email dated 23 March 2016 (Doc ID 350 – Ref. 2017/059758); see email dated 5 April 2016 (Doc. ID 352 – Ref. 2017/059758).

⁷⁰ See email to Canon dated 11 May 2016 (Doc ID 255 – Ref. 2016/044957), see RFI 1 dated 11 May 2016 (Doc ID 256 – Ref. 2016/044957).

⁷¹ See email from Canon dated 27 May 2016 (Doc ID 33 – Ref. 2016/051679); see the parties' replies to questions 1 to 3 of RFI 1, dated 11 May 2016 (Doc ID 34 – Ref. 2016/051679).

⁷² Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

⁷³ Letter to the Canon dated 29 July 2016 (Doc ID 2 – Ref. 2016/075916).

⁷⁴ See email dated 5 September 2016 (Doc ID 353 – Ref. 2017/059758), see complainant's submission dated 5 September 2016 (Doc ID 360 – Ref. 2017/059767).

- (47) On 6 October 2016, a State of Play meeting was held between the Commission and Canon.
- (48) On 7 October 2016, the Commission adopted three decisions pursuant to Article 11(3) of the Merger Regulation requesting Canon, TMSC, and Toshiba to provide information and internal documents relevant to the Commission's investigation.⁷⁵
- (49) On 4 November 2016, Canon and TMSC replied to the decisions dated 7 October 2016 that were addressed to them. On the same day, Toshiba partially replied to the decision dated 7 October 2016 addressed to it. Toshiba completed its replies on 25 November 2016, 30 November 2016, and 1 December 2016, thereby complying with the time extension granted by the Commission.⁷⁶
- (50) On 25 November 2016, Canon submitted to the Commission a letter providing its position on the legal issues raised in the decision dated 7 October 2016 addressed to it and during the State of Play meeting of 6 October 2016.⁷⁷
- (51) Following emails from the Commission dated 16 November 2016, 25 January 2017, and 15 February 2017 (to Canon), 18 November 2016 and 25 January 2017 (to Toshiba) and 25 January 2017 (to TMSC):
- (a) on 15 February 2017, Toshiba submitted additional documents in response to the decision dated 7 October 2016 addressed to it⁷⁸;
 - (b) on 24 February 2017, TMSC submitted additional documents in response to the decision dated 7 October 2016 addressed to it;⁷⁹ and
 - (c) on 15 March 2017, Canon submitted additional documents in response to the decision dated 7 October 2016 addressed to it.⁸⁰
- (52) On 6 July 2017, the Commission issued a Statement of Objections (“SO”) addressed to Canon pursuant to Article 18 of the Merger Regulation. In the SO, the Commission reached the preliminary conclusion that Canon had intentionally, or at least negligently breached Articles 4(1) and 7(1) of the Merger Regulation, and therefore, the Commission was considering imposing fines on Canon in accordance with Article 14(2) of the Merger Regulation.
- (53) Canon submitted its reply to the SO on 15 March 2018 and requested an oral hearing.
- (54) On 3 May 2018, Canon presented the arguments developed in its reply to the SO in the course of an oral hearing (the “first Hearing”).

⁷⁵ Respectively “11(3) RFI dated 7 October 2016 to Canon” (Doc IDs 124 to 127 – Ref. 2016/098192), “11(3) RFI dated 7 October 2016 to Toshiba” (Doc ID 115 to 117 – Ref. 2016/097960) and “11(3) RFI dated 7 October 2016 to TMSC” (Doc ID 118 to 120 – Ref. 2016/097960). For Canon, See cover email date 10 October 2016 (Doc ID 124 – Ref. 2016/098192); see 11(3) RFI dated 7 October 2016 to Canon (Doc Ids 125 to 127 – Ref. 2016/098192).

⁷⁶ Toshiba's response to the Article 11(3) Decision of 7 October 2016 (Doc ID 328-487).

⁷⁷ Letter “M.8179 – Canon/Toshiba Medical Systems Corporation – Proceeding pursuant to Article 14(2) of Council Regulation (EC) No. 139/2004 concerning alleged infringements of Article 7(1) and Article 4(1)”, 25 November 2016 (Doc. Id 158 - Ref. 2016/117214).

⁷⁸ Letter from Toshiba dated 15 February 2017 (Doc ID 213 – Ref. 2017/016810); see amended response of Toshiba to the RFI dated 7 October 2016 (Doc ID 330 – Ref. 2017/056303).

⁷⁹ See email from TMSC dated 24 February 2017 (Doc ID 218 – Ref. 2017/020807); see Response to the Follow up email of 25 January 2017 (Doc ID 219 – Ref. 2017/020807).

⁸⁰ See cover letter from Canon dated 15 March 2017 (Doc Id 231 – Ref. 2017/027757); see submitted additional documents (Doc. Id 232 – Ref. 2017/027757).

- (55) On 8 May 2018, the Commission sent Canon an email with questions asked during the first Oral Hearing but to which Canon had not been in a position to respond at the time.⁸¹ Canon submitted its response on 24 May 2018.⁸²
- (56) On 11 June 2018, the Commission received an additional submission from Canon. As “*a follow-up*” to its reply to the SO Canon urged the Commission to close the infringement proceedings in light of the legal test set out by the Court of Justice of the European Union in the *Ernst & Young* judgment delivered on 31 May 2018.⁸³
- (57) On 30 November 2018, the Commission issued a Supplementary Statement of Objections (“SSO”) preliminarily concluding that Canon’s conduct constitutes an infringement of Articles 4(1) and 7(1) of the Merger Regulation, also on the basis of the refined interpretation of the legal framework provided in the *Ernst & Young* judgement.⁸⁴
- (58) Canon submitted its reply to the SSO on 21 January 2019 and requested a second oral hearing.
- (59) On 14 February 2019, Canon presented the arguments developed in its reply to the SSO in the course of an oral hearing (the “second Hearing”).⁸⁵
- (60) On 25 February 2019, the Commission sent Canon an email with questions asked during the second Hearing but to which Canon had not been in a position to respond at the time.⁸⁶ Canon submitted its response on 13 March 2019.
- (61) On 3 April 2019, Canon submitted to the Commission additional comments concerning the Commission’s approach regarding the *Ernst & Young* judgment, as reflected in its presentation in the second Hearing.⁸⁷

3. LEGAL FRAMEWORK

3.1. Articles 4(1) and 7(1) of the Merger Regulation and their objectives

- (62) Under the Merger Regulation, concentrations⁸⁸ having a Union dimension as defined in Article 1 of that Regulation shall be appraised by the Commission with a view of establishing whether they are compatible with the internal market.⁸⁹
- (63) Pursuant to Article 4(1) of the Merger Regulation “concentrations with a [Union] dimension defined in this Regulation shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.”

⁸¹ See email from Commission to Canon’s counsel dated 8 May 2018 (Doc ID 538).

⁸² See email from Canon’s counsel to Commission dated 24 May 2018 (Doc ID 538).

⁸³ Judgment of 31 May 2018, *Ernst & Young*, C-633/16, EU:C:2018:371.

⁸⁴ *Ernst & Young*, paragraph 47.

⁸⁵ Doc ID 672 – Ref. 2019/076634.

⁸⁶ Reply of 13 March 2019 to the Commission’s RFI of 25 February 2019 (Doc ID 654 – Ref. 2019/041318).

⁸⁷ Doc ID 669 – Ref. 2019/065445.

⁸⁸ Pursuant to Article 3 (1) of the Merger Regulation: “A concentration shall be deemed to arise where a change of control on a lasting basis results from: (a) the merger of two or more previously independent undertakings or parts of undertakings, or (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.”

⁸⁹ Article 2(1) of the Merger Regulation.

- (64) Article 7(1) of the Merger Regulation specifies that "a concentration with a [Union] dimension as defined in Article 1, or which is to be examined by the Commission pursuant to Article 4(5), shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6)."
- (65) Articles 4(1) and 7(1) of the Merger Regulation are cornerstones of the *ex-ante* Union merger control regime and are essential to ensure its effectiveness. They require undertakings to notify concentrations with a Union dimension and to not implement these concentrations before notification or before they have been declared compatible with the internal market.⁹⁰
- (66) By imposing a positive obligation to notify concentrations with a Union dimension, Article 4(1) of the Merger Regulation safeguards the Commission's ability to detect, investigate and, when relevant, accept modifications of concentrations prior to their implementation.
- (67) Article 7(1) of the Merger Regulation complements Article 4(1). It provides for a "standstill obligation" which has the additional aim of preventing a concentration from having any potential detrimental impact of concentrations on the competitive structure of the market prior to the conclusion of the Commission's investigation under the Merger Regulation. By suspending the implementation of a concentration, the standstill obligation aims at safeguarding the structure of the market while the Commission carries out its investigation.
- (68) The importance of the *ex-ante* nature of the Union merger control regime was confirmed by the General Court in *Electrabel v. Commission*, where it recalled that the system of control of concentrations which the Merger Regulation established is designed to "*allow the Commission to exercise effective control of all concentrations from the point of view of their effect on the structure of competition [...] and that the effectiveness of that system is ensured by the introduction of ex ante control of the effects of concentrations with a [Union] dimension. The effectiveness of that control rests on a duty for undertakings to notify such concentrations in advance and to suspend their implementation until the Commission has adopted a decision declaring them compatible with the common market [...]*."⁹¹ The Court of Justice recently restated the importance of the Union merger control regime's *ex-ante* nature in *Ernst & Young*.⁹²
- (69) The fundamental importance which the legislator placed on those obligations in the context of the Union merger control regime is also confirmed by the limited possibilities of granting a derogation from the standstill obligation laid down in Article 7 of the Merger Regulation, and, the severity of the penalties set forth in Article 14 of the Merger Regulation for breaches of Articles 4(1) and 7(1),⁹³ which can amount up to 10% of the aggregate turnover of the undertaking concerned, just as for violations of Article 101 or 102 of the Treaty on the Functioning of the European Union ("TFEU").

⁹⁰ Judgment of 12 December 2012, *Electrabel v Commission*, T-332/09, EU:T:2012:672, paragraphs 245-246.

⁹¹ *Electrabel v. Commission*, quoted, paragraphs 245-246. In this sense, see more recently, judgment of 26 October 2017, *Marine Harvest v. Commission*, T-704/14, EU:T:2017:753, paragraph 498.

⁹² *Ernst & Young*, paragraphs 42-43.

⁹³ *Electrabel v. Commission*, paragraph 246.

3.2. The notion of “concentration” in the Merger Regulation

- (70) The notification requirement in Article 4(1) and the standstill obligation in Article 7(1) of the Merger Regulation apply to concentrations within the meaning of Article 3 of the Merger Regulation.⁹⁴
- (71) Pursuant to Article 3 of the Merger Regulation, a concentration is deemed to arise where there is a change of control on a lasting basis, which may result either from the merger between two undertakings or from the acquisition of control of another undertaking.⁹⁵ Recital 20 of the preamble to the Merger Regulation adds that “*it is expedient to define the concept of concentration in such a manner as to cover operations bringing about a lasting change of control of the undertakings concerned and therefore in the structure of the market.*”
- (72) While generally a concentration arises as a result of one single transaction, the concept of concentration within the meaning of Article 3 of the Merger Regulation may encompass several legally distinct but closely connected transactions, which constitute a “single concentration”.
- (73) The concept of single concentration is referred to in recital 20 of the preamble to the Merger Regulation which states: “[i]t is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time”.⁹⁶
- (74) The Union Courts have confirmed on several occasions that separate transactions ought rightly be treated as part of a “single concentration” to the extent the economic reality underlying these transactions warrants such a conclusion.⁹⁷
- (75) To determine whether several transactions form part of a single concentration, regard should be given to “the economic aim pursued by the parties, by examining, when faced with a number of legally distinct transactions, whether the undertakings concerned would have been inclined to conclude each transaction taken in isolation or whether, on the contrary, each transaction constitutes only an element of a more complex operation, without which it would not have been concluded by the parties.”⁹⁸ According to the General Court, in those scenarios, it is irrelevant whether control was acquired in one, two or more stages by means of one, two or more

⁹⁴ The Court recognized that defining the concept of concentration under Article 3 of the Merger Regulation is key for the definition of the scope of Article 7 of the Merger Regulation. See *Ernst & Young*, paragraph 44.

⁹⁵ Articles 3(1) and 3(2) of the Merger Regulation.

⁹⁶ This is not an exhaustive definition of the circumstances in which two transactions constitute a single concentration. See *Marine Harvest v. Commission*, paragraph 150.

⁹⁷ In *Cementbouw*, the General Court therefore held that “*a concentration within the meaning of Article 3(1) of Regulation No 4064/89 may be deemed to arise even in the case of a number of formally distinct legal transactions, provided that those transactions are interdependent in such a way that none of them would be carried out without the others and that the result consists in conferring on one or more undertakings direct or indirect economic control over the activities of one or more other undertakings*”. See Judgment of 23 February 2006, *Cementbouw Handel & Industrie v Commission*, Case T-282/02, EU:T:2006:64, paragraph 109. In *Marine Harvest*, the General Court acknowledged the concept of “single concentration” and assessed whether the control over Morpol had been acquired by means of a single concentration composed of several transactions. See *Marine Harvest v. Commission*, paragraph 229. The Court of Justice also acknowledged the concept of “single concentration” in *Ernst & Young*, making reference to Recital 20 of the preamble to the Merger Regulation. See *Ernst & Young*, paragraph 48.

⁹⁸ *Cementbouw Handel & Industrie v Commission*, paragraph 106.

transactions⁹⁹ to the extent the end result of the transactions is the acquisition of control over the target.¹⁰⁰

- (76) As acknowledged by the General Court in *Marine Harvest v. Commission*, single concentrations can arise when separate transactions “*are linked by condition*” in such a way that one transaction would not have been carried out without the other.¹⁰¹ Under the CJN, this is the case when the transactions are linked *de jure* (i.e., they are mutually conditional) or *de facto* (i.e., from an economic perspective they constitute a single economic project). In this regard, the simultaneous conclusion of the different transactions is an indicator of *de facto* interdependence.¹⁰² Moreover, single concentrations can also arise from separate transactions, which occur in succession but where the nature of the first transaction(s) is only transitory.¹⁰³
- (77) The specific scenario of warehousing schemes, i.e., two-step schemes involving (for an interim period) a third party, is discussed in paragraph 35 of the CJN. Under such schemes, “*an undertaking is 'parked' with an interim buyer, often a bank, on the basis of an agreement on the future onward sale of the business to an ultimate acquirer. The interim buyer generally acquires shares 'on behalf' of the ultimate acquirer, which often bears the major part of the economic risks and may also be granted specific rights. In such circumstances, the first transaction is only undertaken to facilitate the second transaction and the first buyer is directly linked to the ultimate acquirer. [...] no other ultimate acquirer is involved, the target business remains unchanged, and the sequence of transactions is initiated alone by the sole ultimate acquirer.*” Against this background, the CJN concludes that it is appropriate to treat “*the transaction by which the interim buyer acquires control in such circumstances as the first step of a single concentration comprising the lasting acquisition of control by the ultimate acquirer*”. Therefore, the two transactions (the interim transaction and the ultimate transaction) in a warehousing scheme constitute two stages of a single concentration.
- (78) The conclusion drawn in paragraph 35 of the CJN reflects both recital 20 of the preamble to the Merger Regulation and the interpretation of the concept of “single concentration” by the General Court in *Cementbouw*.¹⁰⁴ Indeed, in the context of warehousing schemes as described in paragraph 35 of the CJN, when looking at the entire deal structure in its full economic reality, it is evident that the two transactions – the interim transaction and the ultimate transaction – are closely connected. The interim transaction is only undertaken for the purpose of carrying out the ultimate transaction on the basis of which the ultimate acquirer obtains control over the target on a lasting basis. It follows that the interim transaction, in itself not entailing an acquisition of control on a lasting basis, forms part of a single concentration whereby the ultimate buyer acquires control over the target.
- (79) It is also noted that the scope of paragraph 35 of the CJN does not apply to the specific situation of temporary acquisitions of securities made by financial institutions in their ordinary course of business. These scenarios are covered by the exception of Article 3(5)(a) of the Merger Regulation, which provides that no

⁹⁹ *Cementbouw Handel & Industrie v Commission*, paragraph 64 and *Marine Harvest v. Commission*, paragraph 127. See also CJN, paragraph 39.

¹⁰⁰ *Marine Harvest v. Commission*, paragraphs 116-117.

¹⁰¹ *Marine Harvest v. Commission*, paragraphs 95 and 104-109 and CJN, paragraph 38.

¹⁰² CJN, paragraph 43.

¹⁰³ CJN, paragraph 29ff.

¹⁰⁴ *Cementbouw Handel & Industrie v Commission*, paragraph 106.

concentration arises in case of temporary acquisitions of securities made by financial institutions in their ordinary course of business, subject to the securities being acquired with a view of reselling them and the financial institutions not exercising voting rights which would influence the competitive behaviour of the target. As it is a derogation provision (i.e., an exception to the rule of Article 3(1) of the Merger Regulation), Article 3(5)(a) of the Merger Regulation must be interpreted narrowly. The exception to Article 3(1) of the Merger Regulation concerns the very specific business model of certain financial institutions in their ordinary course of business and it cannot be applied to any other situations involving temporary holdings, in particular the one described in paragraph 35 of the CJN.

- (80) Consequently, in line with the Union rules and the Union Courts' case law, the concept of single concentration implies that a transaction that is transitory in nature and not long-lasting – and, hence, not constituting in and of itself a notifiable concentration – may be considered as part of a single notifiable concentration. With the exception of Article 3(5)(a) of the Merger Regulation, this is the case when a transaction has the same economic aim with another transaction ultimately bringing about a lasting change in control.

3.3. The notion of “implementation” pursuant to Articles 4(1) and 7(1) of the Merger Regulation

- (81) Article 4(1) of the Merger Regulation requires a notification of concentrations with a Union dimension to the Commission prior to their implementation. Article 7(1) of the Merger Regulation provides that a concentration is not to be implemented either prior to its notification or until it has been declared compatible with the internal market.¹⁰⁵
- (82) The notion of "implementation" is not explicitly defined in Articles 4(1) and 7(1) of the Merger Regulation. As the Court put it in *Ernst & Young*, Article 7(1) “provides no indication as to the circumstances in which a concentration is deemed to be implemented” and the wording of the provision “does not, in itself, clarify the scope of the prohibition which it lays down”.¹⁰⁶ The same is true for Article 4(1).
- (83) The notion of "implementation" in Articles 4(1) and 7(1) must thus be interpreted by reference to the “purpose and general scheme” of these provisions.¹⁰⁷ As explained in Section 3.1 above, the purpose and general scheme of Articles 4(1) and 7(1) in the context of the Union *ex-ante* merger control regime is to preserve the *status quo ante* until a concentration has been formally notified to, and declared compatible with the internal market by, the Commission. This allows the Commission to review, *ex ante*, the transactions and ensure that a reorganisation of undertakings (through a concentration) does not result in lasting damage to competition¹⁰⁸ nor affects the structure of competition in the Union.¹⁰⁹
- (84) Moving from that premise, the *Ernst & Young* judgment clarified the concept of implementation of a concentration pursuant to Article 7(1) of the Merger Regulation (which naturally corresponds to the concept of implementation pursuant to Article 4(1) of the Regulation).

¹⁰⁵ *Ernst & Young*, paragraph 38.

¹⁰⁶ *Ernst & Young*, paragraphs 38-39.

¹⁰⁷ *Ernst & Young*, paragraph 40.

¹⁰⁸ *Ernst & Young*, paragraph 41.

¹⁰⁹ *Ernst & Young*, paragraph 41.

- (85) The Court first indicated that Article 7(1) of the Merger Regulation, which prohibits the early implementation of a concentration, limits that prohibition to “concentrations” as defined in Article 3 of the Merger Regulation, thus excluding from its scope transactions that “cannot be regarded as contributing to the implementation of a concentration”.¹¹⁰ It follows that the implementation of a concentration within the meaning of Article 7 of the Merger Regulation “arises as soon as the merging parties implement operations contributing to a lasting change in the control of the target undertaking.”¹¹¹
- (86) Further, the Court explicitly clarified that “partial implementation of a concentration falls within the scope of that article”, as otherwise the effective control of concentrations would not be ensured: “if the merging parties were prohibited from implementing a concentration by means of a single transaction, but it were open to them to achieve the same result by successive partial operations, that would reduce the efficiency of the prohibition in Article 7 of [the Merger Regulation] and would thus put at risk the prior nature of the control required by that regulation and the pursuit of its objectives”.¹¹²
- (87) The Court then added that it is for the same purpose of ensuring an effective *ex-ante* control of concentrations that recital (20) of the preamble to the Merger Regulation provides that “it is appropriate to treat as a single concentration transactions that are closely connected”.¹¹³ The Court explained that this close connection requirement excludes from the scope of Article 7(1) transactions which “despite having been carried out in the context of a concentration, are not necessary to achieve a change of control of an undertaking concerned by that concentration”.¹¹⁴ The Court clarified that “those transactions, although they may be ancillary or preparatory to the concentration, do not present a direct functional link with its implementation, so that their implementation is not, in principle, likely to undermine the efficiency of the control of concentrations”.¹¹⁵ Thus, the Court made clear that, in order to determine if there is early implementation, transactions carried out in the context of a concentration should be considered “necessary to achieve a change of control” over the target undertaking if they “present a direct functional link with [the] implementation” of the concentration.¹¹⁶
- (88) Based on these considerations, the Court concluded: “that Article 7(1) of Regulation No 139/2004 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”.¹¹⁷ It is also worth noting that the Court did not limit this to transactions having effects on the market, as it clarified that “it cannot be ruled out that a transaction having no effect on the market might nevertheless contribute to the change in control of the target undertaking and that therefore, at least partially, it implements the concentration”.¹¹⁸

¹¹⁰ *Ernst & Young*, paragraph 43.

¹¹¹ *Ernst & Young*, paragraph 46.

¹¹² *Ernst & Young*, paragraph 47.

¹¹³ *Ernst & Young*, paragraph 48.

¹¹⁴ *Ernst & Young*, paragraph 49.

¹¹⁵ *Ernst & Young*, paragraph 49.

¹¹⁶ *Ernst & Young*, paragraph 49.

¹¹⁷ *Ernst & Young*, paragraph 59. See also the operative part of the judgement.

¹¹⁸ *Ernst & Young*, paragraph 51.

- (89) The Court then proceeded to examine the specific circumstances of the case at hand, and in particular, whether the withdrawal from the cooperation agreement between KPMG International and KPMG Denmark constituted an early implementation of a concentration.
- (90) The Court concluded that this did not give rise to the early implementation of the concentration, noting that “even though that withdrawal [was] subject to a conditional link with the concentration in question and [was] likely to be of ancillary and preparatory nature (...), it [did] not contribute, as such, to the change of control over the target undertaking”.¹¹⁹ The Court found in that specific case that (i) the withdrawal concerned only one of the merging parties and a third party; (ii) by the termination, Ernst & Young did not acquire the possibility of exercising any influence on KPMG Denmark; and (iii) from a competition law point of view, KPMG Denmark was an independent company both before and after that termination,¹²⁰ specifically noting that before the termination of the cooperation agreement KPMG Denmark was not controlled by KPMG International.¹²¹
- (91) Therefore, the authoritative interpretation of the concept of implementation of a concentration under the Merger Regulation provided by the Court in the *Ernst & Young* judgment clearly defines the applicable legal framework for the assessment of the present case. Specifically, the Court definitively clarified that “*partial implementation of a concentration falls within the scope of [Article 7(1) of the Merger Regulation]*”.¹²²
- (92) As a result, and contrary to Canon’s claims throughout the proceedings to which this Decision relates,¹²³ the concept of implementation of a concentration under the Merger Regulation is not limited to the *full* implementation of a concentration (i.e. the acquisition of control over the target undertaking). Even operations that fall short of acquisition of control may give rise to the implementation of a concentration within the meaning of the Merger Regulation under certain circumstances.
- (93) It is in this sense that the Court underlined that a concentration is implemented “*by a transaction which, in whole or in part, in fact or in law, contributes to the change in control of the target undertaking*”.¹²⁴ This means that, contrary to Canon’s claims, also a transaction which “*contributes*” only “*in part*” to the change in control of the target undertaking falls under the notion of implementation of a concentration under the Merger Regulation. It follows that *Ernst & Young* does not support Canon’s interpretation of the *Editions Odile Jacob* judgment, according to which “*a violation of the standstill obligation is excluded if the acts in question have not yet led to a transfer of control*”.¹²⁵
- (94) Against this background, in the scenario of “parking” or “warehousing” schemes described in paragraph 35 of the CJN, the implementation of the first step of a single concentration (i.e., the interim transaction) generally already amounts to the early

¹¹⁹ *Ernst & Young*, paragraph 60.

¹²⁰ *Ernst & Young*, paragraph 61.

¹²¹ In this regard, *Ernst & Young*, paragraph 61 refers back to *Ernst & Young*, paragraphs 12 and 13, where the Court noted that already before the termination of the cooperation agreement, KPMG Denmark was independent from KPMG International.

¹²² *Ernst & Young*, paragraph 47.

¹²³ Reply to the SO, paragraphs 159ff. and Canon’s presentation in Oral Hearing of 3 May 2018, Doc ID 447 Ref. 2018/111811, p. 13 and reply to the SSO, paragraphs 40ff.

¹²⁴ *Ernst & Young*, paragraph 59.

¹²⁵ Reply to the SSO, paragraphs 40-41.

implementation of the concentration. This is because the two steps are inherently closely connected and within the structure chosen by the parties, the interim transaction is generally necessary to achieve a change of control in the target undertaking, in the sense that it presents a direct functional link with the implementation of the concentration. This means that the interim transaction contributes (at least in part) to the change in control of the target undertaking, as required in *Ernst & Young*.

- (95) Such an approach cannot be put into question by Canon's argument that it would interfere with the jurisdiction of national competition authorities ("NCAs") when the interim transaction is notifiable at national level. According to Canon, the fact that the Commission can review transactions which are not in themselves "notifiable" under the Merger Regulation but which form a single concentration with one or more subsequent transactions, could lead to a situation where NCAs lose their jurisdiction to review the first transaction, even if the subsequent transaction(s) might ultimately not materialize.¹²⁶
- (96) Canon's argument ignores that, as clarified by the Union Courts' case law, several legally distinct transactions that are legally or economically interdependent and are pursued with a single economic aim of causing a lasting change in control of an undertaking must be assessed as a whole. As a result, when the single concentration in its entirety has a Union dimension, it falls within the jurisdiction of the Commission and not of the NCAs, as per Article 21(3) of the Merger Regulation.
- (97) The General Court confirmed this in *Cementbouw*, where two sets of transactions were considered to form a single concentration. The General Court clearly stated in this context that "*the fact that [an NCA] authorised the completion of the first group of transactions certainly did not allow the parties to carry out the concentration [...] Because the concentrations consisting in all the transactions... had a [Union] dimension, [...] the Commission was the only authority competent to examine [it].*"¹²⁷
- (98) This approach does not disregard the allocation of powers between the Commission and the NCAs. As clearly provided by the Merger Regulation, the Commission have exclusive competence over concentrations with a Union dimension. Therefore, a transaction that forms part of such a concentration not only falls within Commission's jurisdiction; it falls within the sole and exclusive jurisdiction of the Commission. A different interpretation would violate the "one-stop shop" principle, which is a cornerstone of the division of powers between the Commission and NCAs, as set out in the Merger Regulation. Based on the above, NCAs cannot "*lose their jurisdiction*" over this transaction, as Canon claimed,¹²⁸ because no NCA had such jurisdiction in the first place. As the General Court put it, the notion of the single concentration may "*have the consequence that even though a transaction does not satisfy the criteria of a [Union] dimension, [...] it may fall within the [jurisdiction of the Commission] owing to the interdependence which links it to one or more other transactions*".¹²⁹ This is justified because the opposite would lead to the

¹²⁶ Reply to the SO, paragraphs 131-133 and Canon's presentation in Oral Hearing of 3 May 2018, Doc ID 447 Ref. 2018/111811, p. 21, and Reply to the SSO, paragraphs 72-73.

¹²⁷ *Cementbouw Handel & Industrie v Commission*, paragraph 155. See also *Cementbouw Handel & Industrie v Commission*, paragraph 158, which reads: "[s]ince the two groups of transactions cannot be severed, owing to their unitary nature, the Commission could make a determination only on the concentration in its entirety, owing to its [Union] dimension".

¹²⁸ Reply to the SSO, paragraph 73.

¹²⁹ *Cementbouw Handel & Industrie v Commission*, paragraph 160.

artificial result “*that the first transaction is economically autonomous*”,¹³⁰ which is not the case if it forms part of a single concentration.

4. APPLICATION TO THE CASE

- (99) Taking into account the legal framework set out in Section 3 and based on the available evidence, the Commission considers that in the present case:
- (a) The Interim Transaction and the Ultimate Transaction together constituted a single concentration within the meaning of Article 3 of the Merger Regulation and the case law of the Union Courts, consisting in the acquisition of control over TMSC by Canon (see Section 4.1).
 - (b) As part of a single concentration, the Interim and the Ultimate Transactions were inherently closely connected. Indeed, the Interim Transaction was a necessary step to achieve a change in control over TMSC, presenting a direct functional link with the implementation of the acquisition of control by Canon over TMSC. For those reasons, the Interim Transaction contributed (at least in part) to the change in control of TMSC within the meaning of the *Ernst & Young*¹³¹ judgment. By carrying out the Interim Transaction, Canon partially implemented the single concentration consisting in the acquisition of control over TMSC by Canon (see Section 4.2).
 - (c) Because it partially implemented the Concentration consisting in the acquisition of control over TMSC prior to notification to and clearance by the Commission, Canon breached Articles 4(1) and 7(1) of the Merger Regulation (see Section 4.3).
- (100) The Commission also considers that Canon acted at least negligently, when it partially implemented the Concentration consisting in the acquisition of control over TMSC prior to notification to and clearance by the Commission (see Section 4.4).

4.1. The Interim Transaction and the Ultimate Transaction together constitute a single concentration

- (101) Taking into account the legal framework set out in Section 3 and based on the available evidence, the Commission considers for the purposes of this case, that the Interim Transaction and the Ultimate Transaction constitute a single concentration within the meaning of Article 3 of the Merger Regulation and the case law of the Union Courts. This is because, despite being legally separate successive transactions, they form part of a single economic project through which Canon acquired control over TMSC from Toshiba. Moreover, the successive transactions entered into between Toshiba, MS Holding and Canon closely corresponded to the type of single concentration transaction structure described in paragraph 35 of the CJN.
- (102) The remainder of this Section explains the reasons why the Interim Transaction and the Ultimate Transaction constitute a single concentration within the meaning of Article 3 of the Merger Regulation and the case law of the Union Courts.¹³² Section 4.1.1 shows that the Interim Transaction was only undertaken in view of the Ultimate Transaction. Section 4.1.2 demonstrates that from the outset the sole purpose of MS

¹³⁰ *Cementbouw Handel & Industrie v Commission*, paragraph 161.

¹³¹ *Ernst & Young*, paragraph 59.

¹³² The Interim Transaction and the Ultimate Transaction constitute a single concentration with a Union dimension as defined in Article 1 of the Merger Regulation. See Case M.8006 – Canon/ Toshiba Medical Systems Corporation, decision of the Commission of 19 September 2016, paragraphs 10-11.

Holding was to facilitate the acquisition of control by Canon over TMSC. Finally, Section 4.1.3 establishes that Canon was always meant to be the (only) ultimate acquirer of TMSC and thus bore the economic risk of the overall operation from the start.

4.1.1. *The Interim Transaction was only undertaken in view of the Ultimate Transaction*

4.1.1.1. Canon's arguments

- (103) In response to the Commission's preliminary finding that the Interim Transaction was undertaken in view of the Ultimate Transaction,¹³³ Canon argued that the Interim and the Ultimate Transactions were severable from each other because the acquisition of TMSC by MS Holding was in no way pre-empted or automatically led to an acquisition of control by Canon over TMSC. Such control – added Canon – was acquired only through the Ultimate Transaction, which was implemented several months after the Commission's clearance.¹³⁴
- (104) In addition, Canon claimed that, even if the Interim Transaction had been undertaken in view of the Ultimate Transaction, this factor would not have been sufficient for the two transactions to constitute a single concentration within the meaning of recital 20 of the preamble to the Merger Regulation or paragraph 35 of the CJN. In Canon's view, under recital 20 of the Merger Regulation, transactions form a single concentration when they are "*closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time*". Canon submitted that the Interim Transaction was not linked by condition with the Ultimate Transaction. Canon also recalled that under paragraph 35 of the CJN, in a warehousing scheme "*the interim buyer generally acquires shares on behalf of the ultimate acquirer*". Canon claimed that MS Holding did not act on behalf of Canon.¹³⁵

4.1.1.2. The Commission's findings

- (105) Based on the overall body of evidence collected in this case, the Commission considers that the Interim Transaction was only undertaken in view of the Ultimate Transaction.
- (106) First, it was Canon that participated in, and ultimately won, the bidding process for TMSC (and not MS Holding).¹³⁶ When the bidding process was launched by Toshiba, MS Holding did not exist. MS Holding was in fact only set up (on Canon's motion)¹³⁷ to facilitate the transaction structure, whereby Canon would acquire TMSC from Toshiba.
- (107) During the bidding process for the sale of TMSC, upon Canon's proposal,¹³⁸ Canon and Toshiba agreed on a deal structure, which involved the Interim Transaction as

¹³³ See SO, Section 4.2.1.1.

¹³⁴ Reply to the SO, paragraphs 223ff. See also Reply to the SSO, paragraph 102, and Canon's presentation in the First Oral Hearing of 3 May 2018, Doc ID 447 Ref. 2018/111811, pp. 7-9 and 13 and Canon's presentation in the Second Oral Hearing of 14 February 2019, Doc ID 672 – Ref. 2019/076634, p. 5.

¹³⁵ Reply to the SO, paragraphs 217-222.

¹³⁶ See e.g. Toshiba internal document titled "Management Committee – Proposal overview", 9 March 2016 (Doc ID 328-183 – TOSH_EC 00000172-T001 - Ref: 2017/055516).

¹³⁷ See recitals (119)ff. above.

¹³⁸ See Canon's letter to Toshiba, titled "New Transaction Structure Proposal for Project Lotus", dated 4 March 2016 (Doc ID 210-3 – NASU00018803_HTR – Ref. 2017/011405). Canon explained that the version of the letter referred to by the Commission was a draft letter submitted by Canon to Toshiba (Reply to the SO, paragraph 20). The essence of the draft and of the final versions (Doc ID 210-20 –

first milestone. By letter of 4 March 2016, Canon wrote to Toshiba: “*We are writing to you to propose and explain a new transaction scheme from Canon in addition to the Toshiba anticipated scheme proposed by Toshiba dated February 19, 2016 to propose a new transaction structure from [Canon’s] side that is a supplement to the structure that you presented to us on February 19, 2016*”.¹³⁹

- (108) Pursuant to the “*NASU/New Scheme Term Sheet*” annexed to Canon’s letter to Toshiba, Canon’s new transaction structure entailed the designation of a third party “*for the sole purpose of holding*” TMSC’s voting stock until Canon obtains the relevant merger clearances. More specifically, Canon suggested in the *NASU/New Scheme Term Sheet* that “*the “Non-Subject Share Acquiring Party” will be a third party who is independent from both [Toshiba] and [Canon], and at present we expect to designate three professionals, etc. as the shareholders and directors, and to use a stock company for the sole purpose of holding the Non-Subject Share. We would like to separately discuss the details of selecting the Non-Subject Share Acquiring Party, the details of the entrusted affairs and the bearing of costs, etc.*”¹⁴⁰
- (109) Such a tripartite transaction structure was put in place in order to allow Canon to transfer the full price of the target (TMSC) at the time of the Interim Transaction, and for TMSC to cease being controlled by Toshiba (which is the first step for the change from Toshiba’s control over TMSC to Canon’s control).
- (110) From Toshiba’s perspective, while the “[c]omplexity and uniqueness” of this structure “*could attract attention*”,¹⁴¹ this structure also came with a great benefit: TMSC would no longer be one of its subsidiaries and, on an accounting basis, it would irreversibly exit Toshiba’s accounts as of the day of signing.¹⁴² Indeed, with this transaction structure, Toshiba was “*certain to complete the sale of all shares in mid-March*”, and it therefore adjudged it as contributing the most to its year-end finances.¹⁴³
- (111) At no point in time was there any other ultimate acquirer than Canon involved. From the outset, the transaction structure predetermined Canon as the ultimate buyer of TMSC, the only condition being the required merger control approvals. From an antitrust perspective, the transaction was clearly unproblematic and therefore it was

Ref. 2017/011405) all dated 4 March 2016, are the same. For instance, regarding the quote cited in (107) above, while the draft version was translated from Japanese to English as “*We are writing to you to propose a new transaction structure from our side that is a supplement to the structure that you presented to us on February 19, 2016*”, the final version was translated as “*to propose and explain a new transaction scheme from Canon in addition to the Toshiba anticipated scheme proposed by Toshiba dated February 19, 2016*”.

¹³⁹ See Canon’s letter to Toshiba, titled “New Transaction Structure Proposal for Project Lotus”, dated 4 March 2016 (Doc ID 210-3 – Ref. 2017/011405 and Doc ID 210-20 – Ref. 2017/011405).

¹⁴⁰ See Canon’s letter to Toshiba, titled “New Transaction Structure Proposal for Project Lotus”, dated 4 March 2016 (Doc ID 210-3 – Ref. 2017/011405 and Doc ID 210-20 – Ref. 2017/011405).

¹⁴¹ Toshiba internal document titled “Management Committee – Proposal overview”, 9 March 2016 (Doc ID 328-183 – TOSH_EC 00000172-T001 - Ref: 2017/055516).

¹⁴² Toshiba internal document titled “PJ Lotus (TMSC Sell Off examination) BoD Materials”, 14 March 2016. Canon did not contest this in Reply to the SO, paragraphs 25ff (Doc ID 328-195 – TOSH_EC 0000025 Ref: 2016/115505).

¹⁴³ See Toshiba internal document titled “Management Committee – Proposal overview”, 9 March 2016 (Doc ID 328-183 – TOSH_EC 00000172-T001 - Ref: 2017/055516).

highly unlikely that Canon would ultimately not be in a position to exercise the Share Options.¹⁴⁴

- (112) Second, the Commission does not share Canon’s views regarding the relationship between the Interim and the Ultimate Transaction and the requirements set out in recital 20 of the preamble to the Merger Regulation and in paragraph 35 of the CJN. The Interim Transaction includes (i) the sale of the Class A Shares from Toshiba to MS Holding and (ii) the sale of the Class B Share and Share Options attached to the Class C Shares from Toshiba to Canon. Contrary to Canon’s claims,¹⁴⁵ both of the elements of Interim Transaction were undertaken in view of the Ultimate Transaction:
- (a) Specifically, as regards the sale of Class A Shares from Toshiba to MS Holding, the Commission notes that the Excluded Share Transfer Agreement¹⁴⁶ was agreed upon by Toshiba (as seller) and MS Holding (as interim purchaser) and it was conditional to the execution and enforceability of the *Shares and Other Securities Transfer Agreement* agreed upon by Toshiba (as seller) and Canon (as ultimate purchaser). Indeed, pursuant to Article 1.2 of the *Excluded Share Transfer Agreement*, the acquisition by MS Holding of 20 Class A shares “*shall be completed on the condition that the Shares and Other Securities Transfer Agreement dated March 17, 2016 is lawfully and validly executed between Canon Inc. and Seller and continues to remain in effect, and that, at the time of completion of the Transaction, the transfer of all Class B Shares in the Target and First Series Share Options in the Target under that agreement is reasonably expected to be completed with certainty.*”
 - (b) In addition, the Interim Transaction does not include just the acquisition of TMSC by MS Holding but also the purchase of a Class B share and Share Options in TMSC by Canon. For the Class B share and the Share Options, Canon paid irreversibly EUR 5 280 million to Toshiba. Canon would not have been involved in the Interim Transaction and would not have made this (irreversible) payment, if it were not for the Ultimate Transaction.
- (113) Moreover, contrary to Canon’s claims,¹⁴⁷ the fact that the Interim Transaction was only undertaken in view of the Ultimate Transaction is essential to conclude that the two form a single concentration. According to *Cementbouw*, to determine whether several transactions form a single concentration, the Commission should assess if the parties “*would have been inclined to conclude each transaction taken in isolation or whether, on the contrary, each transaction constitutes only an element of a more complex operation, without which it would not have been concluded by the parties*”.¹⁴⁸ Based on the above considerations, the Commission unequivocally considers that the Interim Transaction would not have been concluded if it were not for enabling the acquisition of TMSC by Canon.
- (114) Finally, Canon’s interpretation of recital 20 of the preamble to the Merger Regulation and paragraph 35 of the CJN is misguided. Recital 20 does not include “*an*

¹⁴⁴ See Case M.8006 – Canon/Toshiba Medical Systems Corporation, decision of the Commission of 19 September 2016. See also Reply to the SSO, paragraph 102, and Reply of 13 March 2019 to the Commission’s RFI of 25 February 2019 (Doc ID 654 – Ref. 2019/041318), p. 3.

¹⁴⁵ See recital (103) above.

¹⁴⁶ *Shares and Other Securities Transfer Agreement*, Exhibit 1.1. Excluded Share Transfer Agreement executed on 17 2016. (Doc ID 252-5 – Ref. 2016/041398).

¹⁴⁷ See recital (104) above.

¹⁴⁸ *Cementbouw Handel & Industrie v Commission*, paragraph 106.

exhaustive definition of the circumstances in which two transactions constitute a single concentration”, as the General Court recognized in *Marine Harvest*.¹⁴⁹ Other circumstances can also give rise to a single concentration subject to them meeting the criteria set out by the Union Courts in *Cementbouw*. In addition, paragraph 35 of the CJN states that the interim buyer in a warehousing scheme “*generally*” acts on behalf of the ultimate acquirer. Therefore, the CJN does not require that an interim buyer act on behalf of the ultimate purchaser for a warehousing scheme to qualify as a single concentration.

4.1.2. *The sole purpose of MSH was to facilitate the acquisition by Canon of control over TMSC*

4.1.2.1. Canon’s arguments

(115) In response to the Commission’s preliminary finding that the sole purpose of MSH was to facilitate the acquisition by Canon of control over TMSC,¹⁵⁰ Canon argued that it did not gain any advantage from setting up MS Holding and using a two-step transaction structure for the acquisition of TMSC. According to Canon, the creation of MS Holding and the establishment of the two-step transaction structure was driven by Toshiba’s financial difficulties.¹⁵¹

(116) Canon also claimed that it was Canon’s advisors – not Canon – that were involved in discussions related to the set-up of MS Holding. Canon itself only participated in the creation of MS Holding by confirming that there were no facts or circumstances that materially influenced the independence of potential MS Holding shareholders.¹⁵² Canon argued that it received a draft of the *Excluded Share Transfer Agreement* (between Toshiba and MS Holding) but only because it was an Exhibit to the Shares and Other Securities Transfer Agreement (between Canon and Toshiba). Canon only identified one typographical error in the Excluded Share Transfer Agreement and proposed no other changes.¹⁵³

(117) Third, according to Canon, MS Holding’s sole purpose could not be to facilitate TMSC’s acquisition by Canon because MS Holding exercised its shareholder rights in TMSC. Between 17 March 2016 and 19 December 2016, TMSC held six shareholder meetings. In two of them (21 November 2016 and 18 December 2016), dividends were declared and issued.¹⁵⁴ In any event, Canon added that it is natural that MS Holding was not involved in TMSC’s day-to-day business because the role of shareholders in Japanese corporate law is to monitor and appoint the directors of a company but not to influence the company’s day-to-day workings.¹⁵⁵

4.1.2.2. The Commission’s findings

(118) The transaction agreements and various internal documents of Canon show that, from the outset, MS Holding was intended to exclusively act as an interim buyer and that its sole purpose was to facilitate the acquisition by Canon of control over TMSC. This is evidenced by (i) the fact that Canon proposed, and actively participated in, the setting up of MS Holding, including the design of its corporate structure and (ii) MS Holding’s lack of genuine economic interest in TMSC beyond its role as interim

¹⁴⁹ *Marine Harvest v. Commission*, paragraph 150.

¹⁵⁰ Regarding the Commission’s preliminary finding, see SO, Section 4.2.1.2.

¹⁵¹ Reply to the SO, paragraph 236.

¹⁵² Reply to the SO, paragraphs 237ff.

¹⁵³ Reply to the SSO, paragraph 99.

¹⁵⁴ Reply to the SO, paragraph 243.

¹⁵⁵ Reply to the SO, paragraphs 240-241.

buyer for which it was remunerated at a fixed price. These two elements are discussed in detail in the remainder of this Section.

4.1.2.2.1. Canon actively participated in the setting up of MS Holding

- (119) Canon proposed to set up MS Holding as an interim buyer to allow Toshiba to receive the purchase price before the end of financial year 2015 without having to wait for the necessary antitrust approvals.¹⁵⁶ In its final bid submitted on 4 March 2016, Canon stated that it “*studied a new transaction structure to increase the certainty of executing this matter while taking into account the period from filing advanced notifications with the regulatory authorities of each country up to when we obtain clearance*” and that this new structure “*seeks to [enable the Parties to] promptly complete the transaction*”.¹⁵⁷
- (120) Furthermore, it was Canon who suggested, in its final bid, that MS Holding be composed of three shareholders and that its purpose be to hold the Class A voting shares of TMSC up until Canon obtained the relevant merger control clearances from competition authorities. MS Holding will have “[...] *the sole purpose of holding the Non-Target Share, and [...] will have three knowledgeable people as shareholders and directors.*”¹⁵⁸ Canon's bid was the only one where the transfer of the full price was not conditional upon merger clearances and therefore enabled Toshiba to receive the purchase price in an expedited and irreversible way and to secure its financial needs.¹⁵⁹
- (121) Canon was directly involved in the choice of MS Holding's shareholders and also MS Holding's capital, trade name, and head office location. Canon explained “[...] *TMI [external legal counsel of MS Holding] nominated an independent and high-profile lawyer as a shareholder of SPC [MS Holding]. In addition, the respective Japanese accounting advisors of Canon and Toshiba discussed and nominated an independent and high-profile accountant, and the respective financial advisor of Canon and Toshiba discussed and appointed an independent and high-profile business person, as shareholders of SPC [MS Holding] [...]*”.¹⁶⁰ In an email from TMI to Canon's and Toshiba's external legal counsel dated 7 March 2016 (one day before the establishment of MS Holding), TMI stated, “*with regards to the SPC shareholder candidates, we would like to recommend our consulting lawyer, [DIRECTOR NAME]. [...] please get back to me with SPC's [MS Holding] trade name and head office address once they have been decided.*”¹⁶¹ Canon and Toshiba were also invited to decide on the amount of MS Holding's capital, as evidenced by

¹⁵⁶ See the response to Q. 2 of RFI 1, dated 11 May 2016, where the Parties state that: “*the aim and background of this acquisition structure is to accomplish Toshiba's goal of divesting its ownership in TMSC by the end of Toshiba's fiscal year (March 31) due to its financial difficulties, that is, in order to recognize a sufficient capital gain by the sale of TMSC shares during that fiscal year and avoid the capital deficit.*”, p.3 (Doc. Id 34 - Ref: 2016/051679).

¹⁵⁷ See Letter from Canon to Toshiba, 4 March 2016, p.1 (Doc ID 210-3 – Ref. 2017/011405 and Doc ID 210-20 – Ref. 2017/011405).

¹⁵⁸ Share Purchase Agreement, Tsubaki Comments 2016/03/07, Bara comments 4 March, p.13 (Doc ID 178-9 – NASU00031504_HTR – Ref. 2016/126951). Comments on the definition of “Non-Target Share Acquirer” (Article 1.1 Definitions).

¹⁵⁹ See Toshiba internal document titled “Management Committee – Proposal overview”, 9 March 2016 (Doc ID 328-183 – TOSH_EC 00000172-T001 - Ref: 2017/055516), where Toshiba described Canon's warehousing proposal as the “*Only proposal that is not conditional of antitrust law arrangements prior to implementing transaction*”, “*certain to complete the sale of all shares in mid-March*”.

¹⁶⁰ Canon's reply to the RFI of 11 May 2016, dated 27 May 2016, p. 4 (Doc ID 34 – Ref. 2016/051679).

¹⁶¹ Toshiba internal document, Email from MSH's counsel (TMI) to Canon and Toshiba of 7 March 2016 (Doc ID 328-197 - TOSH_EC 00000265-T001 – Ref. 2017/055516).

an email between their external counsel, dated 8 March 2016 (the day MS Holding was established). In this email, Toshiba's external legal counsel explained to Canon's external legal counsel that “[...] *it might be better to increase SPC's capital a little more.*”¹⁶²

- (122) In addition, Canon also commented and decided on MS Holding's Articles of Association. In this regard, in the same email to Canon's and Toshiba's external legal counsel dated 7 March 2016, TMI stated the following: “*Please find attached the articles of association for SPC [...] Please contact me if you notice any points requiring alterations.*” Canon's external legal counsel then responded: “*I am attaching the comments of the relevant parties relating to the SPC Articles of Incorporation. Please take a few moments to take a look.*”¹⁶³
- (123) The Commission does not share Canon's views regarding the set-up of MS Holding and its involvement in the management of TMSC. Contrary to what Canon claimed,¹⁶⁴ even if the choice of transaction structure was driven by Toshiba's needs, Canon was still eager to help establish a deal structure that would best address Toshiba's financial difficulties and therefore allow it to win the bidding process. This way, Canon could achieve the result to acquire TMSC. Contemporaneous correspondence between the two companies confirms this. On 4 March 2016, Canon wrote to Toshiba to propose a new transaction structure stating that a “*scheme in which the transaction is to be conducted at an early stage also fits the wishes of Toshiba as it will make the Purchase more certain [...] we hope that you will tell us the form of transaction that better suits with your wishes*”.¹⁶⁵ Indeed, Toshiba took into account the transaction structure element, when assessing Canon's and rivals' bids. On 9 March 2016, Toshiba noted that Canon's two-step transaction structure was the “*only proposal that is not conditional of antitrust law arrangements prior to implementing transaction*” and that this proposal “*is certain to complete the sale of all shares in mid-March*”.¹⁶⁶
- (124) Contrary to Canon's claim,¹⁶⁷ it is irrelevant that Canon's counsel, on behalf of Canon, rather than Canon itself, were involved in the creation of MS Holding. In the context of the present case, the very fact that Canon's counsel had the opportunity to influence the key features of MS Holding and the set-up of the two-step transaction structure shows Canon's involvement. If Canon was not involved in the creation of MS Holding and had nothing to gain from the two-step transaction structure, it would not have instructed its counsel to follow and comment on the relevant discussions. Furthermore, in *VM Remonts*, the Court stated that the “*an undertaking can be held liable for [anticompetitive conduct] on account of the acts of an independent service provider, supplying it with services [...] if [...] that undertaking was aware of the anti-competitive objectives pursued by its competitors and the service provider and*

¹⁶² Toshiba internal document, Emails between Canon and Toshiba's counsels on 8 March 2016 (Doc ID 328-207 – TOSH_EC 00000300-T01 – Ref. 2017/055516).

¹⁶³ Toshiba internal document, Emails between Canon and Toshiba's counsels and MSH's lawyers between 7 March and 15 March 2016 (Doc ID 328-277 - TOSH_EC 00000407-T001 – Ref. 2017/055516).

¹⁶⁴ See recital (117) above.

¹⁶⁵ See Letter from Canon to Toshiba, 4 March 2016 (Doc ID 210-3– Ref. 2017/011405 and Doc ID 210-20 – Ref. 2017/011405).

¹⁶⁶ See Toshiba internal document titled "Management Committee – Proposal overview", 9 March 2016 (Doc ID 328-183 – TOSH_EC 00000172-T001 - Ref: 2017/055516).

¹⁶⁷ See recital (116) above.

intended to contribute to them by its own conduct".¹⁶⁸ This is exactly the case with Canon and Canon's counsel. Even assuming that it was only Canon's counsel that was involved in the creation of MHM and the two-step transaction structure, Canon was well aware of the objectives that these actions pursued¹⁶⁹ and intended to contribute to them by its own conduct, subscribing to that scheme and paying irrevocably the full price for TMSC at the time of the Interim Transaction.

(125) Even though it was not formally party to the *Excluded Share Transfer Agreement* by which Toshiba transferred the TMSC's voting shares to MS Holding, Canon received a copy of the agreement and it was invited to provide, and provided, its comments on that agreement.¹⁷⁰ It is misleading for Canon to state that it was not involved at all. Contrary to what Canon argued,¹⁷¹ the fact that this agreement would be an Exhibit to the agreement between Toshiba and Canon does not mean as such that Canon had to review the draft *Excluded Share Transfer Agreement* and propose changes.¹⁷² Exhibits to an agreement often include documents that the parties to the agreement did not draft or comment on. In any event, the fact that Canon had the *opportunity* to propose changes is sufficient to show that Canon was involved in the sale of Class A TMSC's shares from Toshiba to MS Holding.¹⁷³ It is irrelevant that Canon did not make substantive changes and only proposed an edit concerning a typographical error.

4.1.2.2.2. MS Holding had no economic interest in TMSC beyond its role as interim buyer for which it was remunerated at a fixed price

(126) MS Holding paid only YEN 98 600 (approximately EUR 800)¹⁷⁴ to acquire all the voting shares of TMSC (whose value was estimated at YEN 665 497 806 400, i.e., more than EUR 5 280 million).¹⁷⁵ Moreover, MS Holding's shareholders agreed *ex-ante* on selling their Class A (voting) Shares upon exercise of the Share Options by Canon at a fixed price.¹⁷⁶ Therefore, the incentive of MS Holding's shareholders was limited to the pre-agreed profit from the sale of those shares, which was guaranteed from the start and was not dependent in any way on the performance of TMSC.

(127) Furthermore, under the transaction structure, MS Holding was not meant to exercise any of its voting rights. For instance, Canon and Toshiba agreed that "*regarding the principles contained in Article 2 [of the Excluded Share Transfer Agreement, between Toshiba and MS Holding] despite the fact that there were absolutely no objections, as a rule it is assumed that there will not be any exercising of rights by*

¹⁶⁸ Judgment of 21 July 2016, *SIA VM Remonts and Others v. Konkurences pandome*, Case C-542/14, ECLI:EU:C:2016:578, operative part.

¹⁶⁹ See Letter from Canon to Toshiba, 4 March 2016, p. 1 (Doc ID 210-3 – Ref. 2017/011405 and Doc ID 210-20 – Ref. 2017/011405).

¹⁷⁰ Toshiba internal document, Emails between Canon and Toshiba's counsels and MSH's lawyers between 7 March and 15 March 2016 (Doc ID 328-277 - TOSH_EC 00000407-T001 – Ref. 2017/055516).

¹⁷¹ See recital (116) above.

¹⁷² The Shares and Other Securities Transfer Agreement between Canon and Toshiba set the execution and enforceability of the Excluded Share Transfer Agreement as condition precedent. See Shares and Other Securities Transfer Agreement, Exhibit 5.1.1.1 "Details of the Amendment to Articles of Incorporation", Article 6.2 (Doc ID 246-20 – Ref. 2016/078749).

¹⁷³ Toshiba internal document, Emails between Canon and Toshiba's counsels and MSH's lawyers between 7 March and 15 March 2016 (Doc ID 328-277 - TOSH_EC 00000407-T001 – Ref. 2017/055516).

¹⁷⁴ As converted by Canon in Form CO in Case M.8006 – Canon/Toshiba Medical Systems Corporation, paragraph 54 (Doc ID 246-66 – Ref. 2016/078749).

¹⁷⁵ Form CO in Case M.8006 – Canon/ Toshiba Medical Systems Corporation, paragraph 54 (Doc ID 246-66 – Ref. 2016/078749).

¹⁷⁶ See recital (34) above.

*shareholders, and I am thinking about making this legally binding on the three individuals. as such would it not be better to remove Article 2 all together?”*¹⁷⁷ Following Canon's and Toshiba's agreement, MS Holding's lawyer wrote: “*thank you for checking on that so quickly. I will explain the subject matter to the three of them*”.¹⁷⁸

- (128) Moreover, there is little evidence, if any, of MS Holding's involvement in TMSC's business. In that regard, TMSC explained that “*Between 17 March 2016 [the date when MS Holding acquired TMSC's Class A Shares] and 19 September 2016 [date of the Commission's clearance Decision], TMSC did not attend any meetings together with MS Holding*”.¹⁷⁹
- (129) Contrary to Canon's claims, the Commission does not argue that MS Holding had no economic interest in TMSC because MS Holding was not involved in the day-to-day management of TMSC. Rather, the Commission referred during the investigation to the fact that MS Holding did not meet with the directors of TMSC (which had been appointed by the previous shareholder Toshiba) in the period between 17 March 2016 and 19 December 2016, indicating an unusual lack of interest for MS Holding, as a new shareholder. Given that MS Holding was a new shareholder in TMSC, it would be expected under normal business circumstances to have strong interest in the management of TMSC, as a new shareholder normally decides in the first months after acquiring control whether confirming or changing the management of the newly acquired company.

4.1.3. *Canon was the only party that could determine the identity of TMSC's ultimate acquirer and bore the economic risk of the overall operation as of the Interim Transaction*

4.1.3.1. Canon's arguments

- (130) In response to the Commission's preliminary finding that Canon was the only party that could determine the identity of TMSC's ultimate acquirer and bore the economic risk of the overall operation as of the Interim Transaction,¹⁸⁰ Canon argued that the “*power to determine the identity of the acquirer*” is not a relevant factor to establish control or influence over TMSC. According to Canon, such power does not relate to TMSC's management or market conduct. In any event, Canon added that “*if the acquisition of this type of influence were sufficient for a finding of a (partial) implementation of a concentration in violation of Article 7(1) [...], then the Commission would have to consider every acquisition of share options pertaining to a controlling share in the target [...] as a violation of the standstill obligation*”.¹⁸¹ According to Canon, this would be contrary to the case law of the Union Courts and the decisional practice of the Commission.¹⁸²

¹⁷⁷ Toshiba internal Document, Email exchange from [NAME] (lawyer at TMI) to [NAME] (lawyer at Nishimura & Asahi) between 7 March and 15 March 2016 (Doc ID 328-277 - TOSH_EC 00000407-T001 – Ref. 2017/055516).

¹⁷⁸ Toshiba internal Document, Emails between Canon and Toshiba's counsels and MSH's lawyers between 7 March and 15 March 2016 (Doc ID 328-277 - TOSH_EC 00000407-T001 – Ref. 2017/055516).

¹⁷⁹ TMSC's response to the Article 11(3) Decision of 7 October 2016, dated 4 November 2016 (Doc ID 135 – Ref. 2016/107575).

¹⁸⁰ Regarding the Commission's preliminary finding, see SO, Section 4.2.1.3.

¹⁸¹ Reply to the SSO, paragraphs 117ff.

¹⁸² Reply to the SSO, paragraph 118 with reference to paragraph 103 and reply to the SO, footnote 141, which cite Judgment of 19 May 1994, *Air France v. Commission*, Case T-2/93, ECLI:EU:T:1994:55,

- (131) Second, Canon held that the squeeze-out veto right in Article 16.3(3)2 of TMSC's Amended Articles of Incorporation "*is nothing but a means to protect Canon's position as a holder of the Class B share*". Canon added that this veto right "*does not give any special or unique rights to Canon*" and "*does not go beyond the level of protection provided by the Companies Act of Japan*".¹⁸³
- (132) Third, Canon took the view that bearing economic risk does not amount to an acquisition of control, nor does it trigger a notification or suspension obligation.¹⁸⁴ Canon added that all share option holders bear the economic risk that the company, and therefore its share options, may lose value. According to Canon, following the logic of the Commission in the present case would mean that "*every acquisition of share options that 'links' the buyer's interest to the target might prima facie lead to a notification obligation*". This would be contrary to the case law of the Union Courts and the decisional practice of the Commission.¹⁸⁵

4.1.3.2. Commission's findings

- (133) As acknowledged by the CJN, warehousing schemes are generally characterised by the fact that the ultimate acquirer "*often bears the major part of the economic risks and may also be granted specific rights*".¹⁸⁶ This is exactly what happened in the present case, as explained in the remainder of this Section. As of the Interim Transaction, Canon (the ultimate acquirer of TMSC) was indeed bearing the entire economic risk of the operation, and was granted the right to determine the identity of TMSC's ultimate acquirer.
- (134) First, although during the interim period Canon did not exercise control over TMSC in the sense of the Merger Regulation, it was the only party that could ultimately dispose of TMSC's controlling shares, either (i) by exercising the Share Options after receiving all antitrust approvals, or (ii) in the (unlikely) event of the absence of antitrust approvals, by selling the Share Options to an acquirer of its choice. Canon did not contest this. Instead, it acknowledged "*[t]he acquisition by Canon was subject to the condition of obtaining merger control clearance [...] If clearance could not have been obtained [...], Canon could have sold – and would have sold – its share options to a third party*".¹⁸⁷ As a result, following the Interim Transaction, Canon had the sole power to determine the identity of TMSC's ultimate acquirer (be it Canon itself or potentially a third party that would acquire Canon's Share Options).
- (135) Contrary to Canon's suggestion,¹⁸⁸ the Commission did not take the view that Canon acquired control over TMSC following the Interim Transaction because it was able

paragraph 71; Case M.604 – Albacom, recital 18, Case M.2777 – Cinven/Angel Street Holdings, recital 9, and Case M.5096 – RCA/MAV Cargo, recitals 6ff.

¹⁸³ Reply of 13 March 2019 to the Commission's RFI of 25 February 2019, p. 7 (Doc ID 654 – Ref. 2019/041318).

¹⁸⁴ Reply to the SO, paragraphs 199ff and 245.

¹⁸⁵ Reply to the SO, paragraph 199, which refers to footnote 141.

¹⁸⁶ CJN, paragraph 35.

¹⁸⁷ Reply to the SO, paragraphs 47-48. In the Reply to the SSO (paragraph 116), Canon also acknowledged the possibility that control of TMSC could "*continue to remain with MSH if the share options expired without being sold*". Canon did not refer again to this possibility in its reply of 13 March 2019 to the Commission's RFI of 25 February 2019, p. 3, where it only recognized that in case of a competition authority prohibited the Ultimate Transaction, "*Canon could have collected all or substantially all of the consideration [it paid for TMSC] by selling the share options to a third party*" (Doc ID 654 – Ref. 2019/041318).

¹⁸⁸ See recital (130) above.

to determine the ultimate owner of TMSC.¹⁸⁹ Instead, the Commission finds that the Interim Transaction gave Canon influence over the future of TMSC – *inter alia* because of the Share Options that would allow Canon to decide on the ultimate acquirer of TMSC.¹⁹⁰ Canon would not have had such influence before the acquisition of sole control over TMSC if the acquisition was not structured as a two-step warehousing scheme.

- (136) Second, when Canon acquired the Class B Share and Share Options in TMSC, it was also granted a veto right as per Article 16.3(3)2 of TMSC's Amended Articles of Incorporation. With this right, Canon could prevent MS Holding from using Article 179-3 of the Japanese Companies Act, a provision that allows majority shareholders with 90% or more of voting rights to acquire the outstanding shares and share options in a company. This veto right allowed Canon to pre-empt one of the legal rights of the majority shareholder. It thus ensured that only Canon would be determining the future owner of TMSC, because MS Holding could not buy the Share Options relying on Article 179-3 of the Japanese Companies Act.
- (137) Contrary to Canon's original claims, the veto right in Article 16.3(3)2 of TMSC's Amended Articles of Incorporation did not only protect Canon as a holder of the Class B Share. Importantly, Canon could use this veto right to protect its share options, which would allow it to determine the ultimate acquirer of TMSC. Canon acknowledged that “*only the Class B Shareholder has such a veto right, but not the share option holder*”. Because Canon had both a Class B share and Share Options, “*it seems fair to say that the veto right protect[ed] Canon from both (i) a “squeeze out” in its capacity as a minority shareholder and (ii) a “squeeze out” in its capacity as a share option holder*”.¹⁹¹ Nor is Canon correct that Article 16.3(3)2 of the Amended Articles of Incorporation did not go beyond the level of protection provided in Article 322(1) of the Companies Act of Japan. Indeed, Article 16.3(3)2 of TMSC's Amended Articles of Incorporation stated that it contains veto rights “*in addition to the matters set forth under Article 322(1)*”.¹⁹²
- (138) Third, Toshiba and Canon agreed that Canon – and not MS Holding – would bear the economic risk of the Concentration from the start. Indeed, Canon bore the economic risk of the Concentration, as it paid the full price for TMSC (YEN 665 497 806 400 or approximately EUR 5 280 million)¹⁹³ to Toshiba for the acquisition of the Share Options, i.e., already at the stage of the Interim Transaction and prior to acquiring control through the Ultimate Transaction. This payment appears to have been made on or around 18 March 2016¹⁹⁴ (following the signing of the transaction agreements) and it was irreversible. Canon would not have been able to claim back the purchase price in the event that it did not obtain all the necessary merger control approvals.¹⁹⁵

¹⁸⁹ SO, paragraphs 110ff.

¹⁹⁰ In this sense, the factual pattern in the present case is different from the facts in *Ernst & Young* where the Court found that a measure did not fall within the scope Article 7(1) of the Merger Regulation because, among other reasons, it did not give Ernst & Young (the acquirer) “*any*” influence over the target (KPMG DK). See *Ernst & Young*, paragraph 61.

¹⁹¹ Reply of 13 March 2019 to the Commission's RFI of 25 February 2019, p. 6 (Doc ID 654 – Ref. 2019/041318).

¹⁹² See Articles of Incorporation of MS Holding Corporation (Doc ID 246-9).

¹⁹³ As converted by Canon in Form CO in Case M.8006 – Canon/Toshiba Medical Systems Corporation, paragraph 54 (Doc Id 246-66 – Ref. 2016/078749).

¹⁹⁴ See *The Wall Street Journal*, article dated 18 March 2016: “*A Toshiba spokesman, said Canon had already paid ¥665 500 million [...]*”, (Doc ID 292 - Ref: 2017/051597).

¹⁹⁵ See recital (112)(b) above.

In this regard, Toshiba noted “[...] *Canon took an extraordinary level of risk by separating the disbursement of substantially all of the consideration from its obtaining control over TMSC.*”¹⁹⁶

- (139) Finally, Canon is erroneous to conclude that the Commission departs from the case law of the Union Courts or its decisional practice because of its approach to Canon’s Share Options.¹⁹⁷ It is misguided to compare the Share Options that Canon acquired and the share options involved in past cases before the General Court and the Commission. In fact, when an investor gets the option to buy (shareholding in) a company, at that moment it does not normally pay the whole amount for the potential future acquisition of the shareholding (corresponding to the value of that shareholding), but only a premium corresponding to the value of the option (rather than the value of the shares itself). By the expiry date of the option, the holder can decide whether to exercise the option taking into account the contemporaneous value of the company. Until that time, the holder of the call option only bears the economic risk for the premium paid.
- (140) On the contrary, in the present case Canon pre-paid irreversibly the full amount (EUR 5 280 million) for the acquisition of TMSC (corresponding to the estimated value of that company). Canon did not pay a premium corresponding to the value of the option to buy TMSC at a later stage (as it would be the case for “genuine” options). After pre-paying the full amount, Canon also acquired the right to become (without any further payment) the sole shareholder of TMSC or alternatively to determine the ultimate acquirer of TMSC (by selling the Share Options against the payment of a price corresponding to TMSC’s value). This shows that Canon did not get “genuine” options, which would give it the right (i.e., the possibility) to buy TMSC at a later stage (by paying the price at the time of the exercise of the options), but fully paid the price for the acquisition of TMSC in exchange of a special, *de facto* automatic, mechanism for the acquisition of the company or the right to sell it on to a third party of its choice.
- (141) This clearly distinguishes the present case from previous precedents. In more detail:
- (a) In *Air France v. Commission* (the only Union Court judgment that Canon cited), the General Court found that the Commission was right to ignore the share options that British Airways had but had not exercised in TAT, when assessing a possible concentration between British Airways and TAT. What was key for the General Court was that British Airways had not exercised the options at the time when the Commission’s decision was adopted nor was it clear that it had any intention to do so.¹⁹⁸ In the present case, the exercise of the Share Options was far from hypothetical. Unlike in *British Airways*, already at the time of the Interim Transaction, Canon had decided to exercise its Share Options, after obtaining merger clearances. This is shown by the fact that Canon had already irreversibly pre-paid the full amount for the acquisition of TMSC. Canon indeed expected that there was “*almost no possibility*” not to receive merger clearances.¹⁹⁹ This is confirmed by the fact that Canon

¹⁹⁶ Toshiba’s response to the Article 11(3) Decision of 7 October 2016, p. 6 (Doc ID 328-487).

¹⁹⁷ In fact, the Commission’s approach is fully in line with the CJN which states that share options could confer control when they are to be exercised in the near future according to legally binding agreements. See CJN, paragraph 60.

¹⁹⁸ *Air France v. Commission*, paragraph 71.

¹⁹⁹ E.g., “*We believe that there is almost no possibility that the Purchase will substantively restrict competition in a related market*”. See Canon letter to Toshiba dated 4 March 2016 (Doc ID 210-20 –

exercised the Share Options on 19 December 2016, the very first working day following the last competition approval.

- (b) In the Commission's decisions that Canon cited, the holder of the (call) options had not pre-paid the full amount of the shares already at the time when it acquired the options.²⁰⁰ What is more, in Case M.5096 – RCA/MAV Cargo, the acquirer explicitly stated that it would have acquired the target even if the holder of the options would not exercise them. This is different from the present case, where MS Holding would not have acquired TMSC (paying EUR 800) if Canon had not acquired and pre-paid for its own Share Options²⁰¹.

4.1.4. Conclusion

- (142) Based on the above, the Commission concludes for the purpose of this Decision that the Interim and Ultimate Transactions constituted together a single concentration given that the Interim Transaction was only undertaken in view of the Ultimate Transaction, the sole purpose of MSH was to facilitate the acquisition by Canon of control over TMSC, and Canon was the only party that could determine the identity of TMSC's ultimate acquirer and bore the economic risk of the overall operation as of the Interim Transaction.²⁰²

4.2. The Interim Transaction contributed to a lasting change of control over TMSC

- (143) Taking into account the legal framework set out in Section 3 and based on the available evidence, the Commission considers that within the structure chosen by the Parties, the Interim Transaction was necessary to achieve a change of control in TMSC, in the sense that it presented a direct functional link with the implementation of the concentration. This means the Interim Transaction contributed (at least in part) to the change in control of the target undertaking, within the meaning in *Ernst & Young*.²⁰³ It follows that the Interim Transaction constituted a partial implementation of the concentration by which Canon acquired lasting control over TMSC. Canon's conduct thus falls within the scope of Articles 4(1) and 7(1) of the Merger Regulation.²⁰⁴

- (144) The remainder of this Section sets out the reasons why the Interim Transaction contributed (at least in part) to the change in control of TMSC.

4.2.1. Canon's arguments

- (145) In response to the Commission's preliminary finding that the Interim Transaction contributed (at least in part) to the change in control of TMSC,²⁰⁵ Canon argued that

Ref. 2017/011405). See also an earlier version of this letter (Doc ID 210-3 – Ref. 2017/011405) which reads: “we believe that there is almost no chance of the Purchase leading to a substantial competition restriction in related markets”. See also Reply to the SSO, paragraph 102 and Reply of 13 March 2019 to the Commission's RFI of 25 February 2019 (Doc ID 654 – Ref. 2019/041318), p. 3.

²⁰⁰ See Case M.604 – Albacom, recital 18, Case M.2777 – Cinven/Angel Street Holdings, recital 9, and Case M.5096 – RCA/MAV Cargo, recitals 6ff.

²⁰¹ See Case M.5096 – RCA/MAV Cargo, recital 7.

²⁰² These facts set the present case apart from a previous case (Case M.7771 – *Parcom/Pon/Imtech Marine/JV*), where the Target was acquired by an independent holding company, which actively financed and managed the Target, while the ultimate buyer was not yet known.

²⁰³ *Ernst & Young*, paragraph 46.

²⁰⁴ The Court's statement only refers to Article 7(1) because the preliminary question of the national court only mentions that provision. The Court's findings apply also to Article 4(1) of the Merger Regulation, which complements Article 7(1).

²⁰⁵ Regarding the Commission's preliminary finding, see SSO, Section 5.2.1.

the Interim Transaction was not necessary “*from Canon’s perspective*”²⁰⁶ to achieve control in TMSC. Canon acknowledged that the two-step warehousing scheme involving an Interim Transaction “*may have been preferred from Toshiba’s perspective*” but argued that there were many other different ways for Canon to acquire control over TMSC.²⁰⁷ For example, Canon could have purchased directly the shares in TMSC from Toshiba (subject to and conditional upon merger control clearance). Canon could also have purchased a share option from Toshiba that would have allowed Canon to purchase the shares in TMSC after obtaining merger control clearance.²⁰⁸

- (146) Canon also recalled that to constitute a violation of Article 7(1) of the Merger Regulation, a measure must contribute to the change in control of the target. Canon added that “*this is only the case if the relevant measure as such is necessary for and has a direct functional link to, the transfer of control of a target company from the seller to the acquirer*”.²⁰⁹ Canon argued that the Commission did not explain why the Interim Transaction had a direct functional link with the change in control in TMSC. It simply concluded that such a link existed because the Interim Transaction was allegedly a necessary step to achieve a change of control.²¹⁰

4.2.2. *The Commission’s findings*

- (147) According to the operative part of *Ernst & Young* judgment, a concentration is implemented by a transaction that, in whole or in part, in fact or in law, contributes to the change in control of the target undertaking. Moreover, the Court clarified that a transaction is considered necessary to achieve a change in control over an undertaking when it presents a direct functional link with such change in control. In this context, the Commission considers that, to conclude whether the Interim Transaction was necessary to achieve a lasting change in control over TMSC, that transaction needs to be assessed taking into account the actual structure chosen by the parties to the transaction (which would normally reflect the relevant interests of the parties). Whether or not the transfer of control could technically have been achieved via other means is not relevant to the assessment of necessity.
- (148) During the bidding process for TMSC, Canon agreed with Toshiba on a two-step deal structure involving the Interim Transaction.²¹¹ The two-step structure was put in place in order to allow Canon to transfer the full price of the Ultimate Transaction at the time of the Interim Transaction, and for TMSC to cease being controlled by Toshiba (which is the first step for the change from Toshiba’s control over TMSC to Canon’s control).²¹² Canon itself does not contest that the Interim Transaction was intended to enable the Ultimate Transaction.²¹³

²⁰⁶ See Reply to the SSO, paragraph 85.

²⁰⁷ See Reply to the SSO, paragraph 85.

²⁰⁸ See Reply to the SSO, paragraph 85. See also Reply to the SO, paragraph 236.

²⁰⁹ See Reply to the SSO, paragraph 78.

²¹⁰ See Reply to the SSO, paragraph 86.

²¹¹ See recitals (14)-(15) above. See also e.g., Letter from Canon to Toshiba, 4 March 2016, (Doc ID 210-3 – Ref. 2017/011405 and Doc ID 210-20 – Ref. 2017/011405).

²¹² See recitals (106) and (110) above. See also e.g., Letter from Canon to Toshiba, 4 March 2016, (Doc ID 210-3 – Ref. 2017/011405). See also, e.g., Toshiba internal document titled “Management Committee – Proposal overview”, 9 March 2016 (Doc ID 328-183 – TOSH_EC 00000172-T001 - Ref: 2017/055516).

²¹³ E.g. Canon’s reply of 13 March 2019 to the Commission’s RFI of 25 February 2019, p. 3 (Doc ID 654 – Ref. 2019/041318).

- (149) In the present case, in the context of the transaction structure as determined by the parties, the two-step transaction structure was *necessary* for the change in control in TMSC in order to address the financial difficulties of Toshiba. Within the two-step transaction structure set up by Canon and Toshiba,²¹⁴ the Interim Transaction was necessary for Canon to achieve a change in control over TMSC. In more detail:
- (a) Without the two-step transaction structure proposed by Canon, it would have been impossible for Toshiba to relinquish control over TMSC and receive the TMSC payment irreversibly before the end of March 2016, because Toshiba would have had to wait for antitrust clearances on the TMSC sale. Only the Canon proposal for a two-step transaction did not require antitrust clearances before Toshiba could relinquish control over TMSC. Put differently, among the proposals that Toshiba proposed and received, Canon’s two-step transaction structure was the only one that allowed the change in control over TMSC in a way that would address the financial needs of Toshiba.²¹⁵
 - (b) Within this two-step transaction structure, the Interim Transaction was a necessary step to achieve a change in control in TMSC. The whole purpose of the two-step transaction structure was to include a first step (the Interim Transaction) that would allow (i) an interim buyer to purchase all voting shares in TMSC but without triggering any antitrust notification requirements and (ii) Canon to pay the TMSC consideration to Toshiba irreversibly while obtaining as much certainty as possible that it would ultimately acquire control over TMSC. This is exactly what the Interim Transaction achieved and why the Interim Transaction was necessary to achieve a change in control of TMSC in the context of the transaction structure that Toshiba and Canon designed.
 - (c) The requirements and expectations of Toshiba were key for the choice of the transaction structure. None of the hypothetical alternative transaction structures could address Toshiba’s need to recognize a significant amount of capital contribution before 31 March 2016. The sale of TMSC was primarily driven by Toshiba’s need to address its financial difficulties by the end of financial year 2015.²¹⁶ Canon also acknowledged that the two-step warehousing scheme in the context of the specific circumstances of this concentration: “*might not fully protect Canon’s investment in TMSC [...] compared to more common structures in standard transactions [...] However, Canon considered that [...] this was the only and best option that Canon could take in the unique situation created by Toshiba [...]*”.²¹⁷ These “*unusual*” circumstances should be

²¹⁴ In accordance with the *Shares and Other Securities Transfer Agreement and the Shares and the Excluded Share Transfer Agreement*.

²¹⁵ Toshiba itself confirmed that the Interim Transaction was tailored specifically to achieve the sale of TMSC under the particular circumstances that Toshiba was facing. It submitted: “*The 17 March transactions [the Interim Transaction] arose to address highly unusual and exigent circumstances. The transactions were narrowly tailored to address these circumstances [...] This structure is therefore unlikely to find application outside of this transaction*”. See Toshiba’s response to the Article 11(3) Decision of 7 October 2016, p. 6 (emphasis added) (Doc ID 328-487).

²¹⁶ When proposing the two-step transaction structure on 4 March 2016, Canon wrote to Toshiba: “*we believe that this new structure, which seeks to promptly complete the transaction, will satisfy your wishes [...] the new transaction we are proposing [...] is not a rejection of the Final Proposal [...] dated March 4, 2016. We would like to ask you to consider both structures, and to let us know if there is a transaction that is more in line with your wishes*”. See Letter from Canon to Toshiba, 4 March 2016 (Doc ID 210-3 – Ref. 2017/011405 and Doc ID 210-20 – Ref. 2017/011405).

²¹⁷ See Canon’s reply of 13 March 2019 to the Commission’s RFI of 25 February 2019, p. 3 (Doc ID 654 – Ref. 2019/041318), emphasis added.

accounted for when assessing the necessity of the Interim Transaction to achieve a change in control over TMSC.

- (150) The Interim Transaction was a tripartite operation involving Toshiba, MS Holding, and Canon. As explained above, it consisted of two simultaneous operations, namely (i) the sale of a Class B Share and Share Options in TMSC from Toshiba to Canon and (ii) the sale of Class A Shares in TMSC from Toshiba to MS Holding.²¹⁸ Canon was heavily involved in the sale of Class A Shares in TMSC to MS Holding. Canon made proposals and comments on the identity of the shareholders, the size of the equity capital, and the Articles of Association of MS Holding.²¹⁹ Canon was also invited to comment on the terms of the agreement between Toshiba and MS Holding regarding the Class A Shares.²²⁰ In addition, the *Excluded Share Transfer Agreement*²²¹ between Toshiba and MS Holding and the *Shares and Other Securities Transfer Agreement* were simultaneous.²²²
- (151) Furthermore, Canon paid the full price for the acquisition of TMSC already at the stage of the Interim Transaction.²²³ MS Holding only paid approximately EUR 800 for the acquisition of control over TMSC through the acquisition of Class A Shares. By paying irreversibly the full price for the acquisition of TMSC already at the stage of the Interim Transaction, Canon became the only party that could ultimately determine the identity of TMSC's ultimate acquirer and bore the economic risk of the overall operation from the start.
- (152) In any event, MS Holding's control over TMSC was temporary by definition, considering (i) the minimal price that MS Holding paid for the voting shares of TMSC;²²⁴ (ii) the fact that MS Holding shareholders had agreed *ex ante* to sell all their shares in TMSC at a fixed price upon exercise of Canon's Share Options;²²⁵ and (iii) the common understanding of Canon and Toshiba that MS Holding would not exercise any of its voting rights over TMSC.²²⁶ A further confirmation that MS Holding's control over TMSC was merely temporary can be found in TMSC's internal documents concerning the potential acquisition of Wako Pure Chemical Industries Ltd, a subsidiary of Takeda Pharmaceutical Company Limited, showing that TMSC's management was acting having in mind the subsequent transfer of TMSC's shares to Canon.²²⁷

²¹⁸ See e.g., Shares and Other Securities Transfer Agreement (Doc ID 246-16 – Ref. 2016/078749) and Excluded Share Transfer Agreement (Doc ID 252-5 – Ref. 2016/041398).

²¹⁹ See recitals (120)ff above.

²²⁰ Toshiba internal document, Emails between Canon and Toshiba's counsels on 8 March 2016 (Doc Id 328-207 – TOSH_EC 00000300-T01 – Ref. 2017/055516).

²²¹ Shares and Other Securities Transfer Agreement, Exhibit 1.1. Excluded Share Transfer Agreement executed on 17 2016; Article 1.2. (Doc ID 252-5 – Ref. 2016/041398).

²²² Regarding the relationship of the two agreements, see paragraph (112)(a) above.

²²³ See e.g., Shares and Other Securities Transfer Agreement (Doc ID 246-16 – Ref. 2016/078749).

²²⁴ Namely YEN 98 600 (approximately EUR 800). See Excluded Share Transfer Agreement, Article 1.1 (Doc ID 252-5 – Ref. 2016/041398). Amount converted by Canon in Form CO in Case M.8006 – Canon/Toshiba Medical Systems Corporation, paragraph 54 (Doc Id 246-66 – Ref. 2016/078749).

²²⁵ See recitals (38) and (126) above.

²²⁶ See recital (127) above.

²²⁷ In a document sent to [NAME AND POSITION IN TMSC], it is stated that “*Although Chairman Mitarai [Canon's CEO] entrusts TMSC management of business within commonsensical scope until completion of the acquisition, TMSC hoped to get his approval as this transaction may have some impacts*” (document prepared by Mizuho for TMSC titled “*Talking Script for a conference with Nomura Securities (draft)*”, dated 8 August 2016, p. 1-2 (Doc ID 220-576); emphasis added). TMSC's

- (153) The Commission does not share Canon’s views²²⁸ that the Interim Transaction did not contribute to a lasting change of control because it was not *per se* necessary to achieve control in TMSC.²²⁹ Canon’s claim is based on a hypothetical assessment of the different theoretical options available to Canon for the acquisition of TMSC. Canon explicitly stated that it assessed the necessity of the Interim Transaction “*from Canon’s perspective*”.
- (154) As indicated, the Commission considers that the “necessity” of the transaction should not be considered in isolation from the specific circumstances of the case. As explained above,²³⁰ the specific transaction structure agreed by Canon and Toshiba is the context that needs to be taken into account when assessing the necessity of the Interim Transaction for the change of control over TMSC. Canon itself acknowledged that “*the establishment of MS Holding was [...] necessary for the divestment of TMSC by Toshiba, in light of Toshiba’s financial situation*”.²³¹ This means that the Interim Transaction presented a “*direct functional link*” with the change of control over TMSC. Indeed, contrary to Canon’s claims,²³² the Commission considers that the Court did not identify the “*direct functional link*” as a separate requirement that needs to be present for a transaction to fall within the scope of Article 7(1) of the Merger Regulation.²³³
- (155) Further to the above considerations, the Commission notes that, contrary to the case in *Ernst & Young*,²³⁴ (i) the Interim Transaction was not a transaction concerning only one of the merging parties and a third party; (ii) Canon acquired the possibility of exercising some degree of influence over TMSC following the Interim Transaction; and (iii) TMSC was not an independent company before the Interim Transaction, as it was controlled by Toshiba, and, following the Interim Transaction, Toshiba’s control over TMSC was removed.
- (156) First, the Interim Transaction was not just a transaction between one of the merging parties (TMSC) and a third party (MS Holding). It involved both merging parties, namely, TMSC and its ultimate acquirer, Canon.
- (157) Second, while Canon did not control TMSC between the Interim Transaction and the Ultimate Transaction, it was the only party that could ultimately dispose of TMSC controlling shares, by either (i) exercising the Share Options or (ii) in the (unlikely) event of no antitrust approvals, by selling the Share Options to the acquirer of its choice. As a result, Canon inevitably acquired the possibility of exercising influence over TMSC’s future, as, from the moment of the Interim Transaction onwards, it had the sole power to determine the identity of TMSC’s ultimate acquirer (be it Canon itself or potentially a third party that would acquire Canon’s Share Options).
- (158) Moreover, when Canon acquired the Class B Share and Share Options in TMSC, it was also awarded a veto right as per Article 16.3(3)2 of TMSC’s Articles of

internal documents do not contain a single reference to the interests, plans, or future expectations of MS Holding.

²²⁸ See recital (145) above.

²²⁹ Consequently, the Commission does not share Canon’s view that Interim Transaction could be “ancillary” to the Ultimate Transaction. See Canon’s letter of 3 April 2019, paragraph 17 (Doc ID – Ref. 2019/051026).

²³⁰ See recital (118) above.

²³¹ Reply to the SO, paragraph 236 (emphasis added).

²³² See recital (146) above.

²³³ See recital (87) above.

²³⁴ *Ernst & Young*, paragraph 61.

Incorporation.²³⁵ With this right, Canon could prevent MS Holding from using Article 179-3 of the Japanese Companies Act, a provision that allows majority shareholders with 90% or more of voting rights to acquire the outstanding shares and share options in a company.²³⁶ This veto right allowed Canon to pre-empt one of the legal rights of the majority shareholder. It thus ensured that only Canon would be determining the future owner of TMSC, because MS Holding could not buy the Share Options and possibly sell them further.

(159) Third, before the Interim Transaction, TMSC was not an independent undertaking. On the contrary, as indicated, it was controlled by Toshiba, and indeed the Interim Transaction removed Toshiba's control over TMSC with the view to subsequently transferring it to Canon. Following the Interim Transaction, TMSC was no longer one of the subsidiaries of Toshiba. Moreover, as indicated above, MS Holding's control over TMSC through the acquisition of Class A Shares was temporary by definition.²³⁷

(160) For these reasons, the Commission concludes that the Interim Transaction was a necessary step to achieve a change of control in TMSC presenting a direct functional link with the implementation of the Ultimate Transaction.

4.2.3. *Conclusion*

(161) In light of the arguments set out in this Section, the Commission concludes that, because the Interim Transaction was necessary to achieve a lasting change of control over TMSC and thus, had a direct functional link with the change of control over TMSC, the Interim Transaction contributed (at least in part) to the change of control over TMSC.

4.3. The Concentration was implemented before notification to and clearance by the Commission

(162) Based on the Commission's assessment in Section 4.1, the Interim Transaction, which occurred on 17 March 2016, formed a single concentration together with the Ultimate Transaction. The two transactions were inherently closely connected. According to the Commission's assessment in Section 4.2, within the structure chosen by the Parties, the Interim Transaction was necessary to achieve a change of control in TMSC, in the sense that it presented a direct functional link with the implementation of the concentration. Thus, the Interim Transaction contributed (at least in part) to the change in control of the target undertaking, as required in *Ernst & Young*.

(163) The remainder of this Section explains that Canon consequently breached Articles 4(1) and 7(1) of the Merger Regulation by implementing the Concentration consisting in the acquisition of control over TMSC prior to notification to and clearance by the Commission.

4.3.1. *Canon partially implemented the Concentration before notification to the Commission in breach of Article 4(1) of the Merger Regulation*

(164) By carrying out the Interim Transaction on 17 March 2016 (when the two agreements giving rise to the Interim Transaction were executed), Canon partially

²³⁵ See recital (26) above.

²³⁶ See also footnote 39 and reply of Canon to question 4 of RFI dated 7 October 2016, Doc Id 133 – Ref. 2015/1075272, p. 12.

²³⁷ See recital (152) above.

implemented, within the meaning of Article 4(1) of the Merger Regulation, the Concentration by which it acquired lasting control over TMSC prior to its notification to the Commission, which took place on 12 August 2016.

(165) The Commission therefore concludes that Canon breached the notification requirement set out in Article 4(1) of the Merger Regulation.

4.3.2. *Canon partially implemented the Concentration before clearance by the Commission in breach of Article 7(1) of the Merger Regulation*

(166) By carrying out the Interim Transaction on 17 March 2016 (when the two agreements giving rise to the Interim Transaction were executed), Canon partially implemented, within the meaning of Article 7(1) of the Merger Regulation, the Concentration by which it acquired lasting control over TMSC prior to its clearance by the Commission, which was granted on 19 September 2016.

(167) The Commission therefore concludes that Canon breached the standstill obligation set out in Article 7(1) of the Merger Regulation.

4.3.3. *Conclusion*

(168) The Commission therefore finds that Canon implemented partially the Concentration before notification to and clearance by the Commission in breach of Articles 4(1) and 7(1) of the Merger Regulation.

4.4. Canon acted at least negligently

4.4.1. *Canon's arguments*

(169) During the investigation, Canon disputed the Commission's preliminary finding that the infringements of Articles 4(1) and 7(1) of the Merger Regulation were committed by Canon intentionally, or at least negligently.²³⁸

(170) Canon argued that it did not commit any intentional or negligent infringement of the Merger Regulation given the fact that (i) the legal situation was "*at the very least, unclear*" and (ii) Canon did not have "*any reason to circumvent*" the pre-merger control mechanism given the lack of substantive concerns raised by the Concentration.²³⁹

(171) Regarding the former argument, Canon contended that the CJN would be inconsistent with the *Odile Jacob*²⁴⁰ case law that would be favourable to "*warehousing*" structures such as the one of the present case. Canon further claimed that in the absence of precedent about "*warehousing*" structures, Canon could not know that its understanding - that such structures are legal - was in fact incorrect. More generally, Canon argued that the imposition of a fine in this case would violate the legal certainty and *nullum crimen, nulla poena sine lege* principles.

4.4.2. *The Commission's findings*

(172) According to the case law of the Union Courts, the gravity of an infringement must be assessed in the light of numerous factors, although non-exhaustive, such as the

²³⁸ Regarding the Commission's preliminary finding, see Section 5.2 of the SO.

²³⁹ Reply to the SO, paragraphs 262 and 264 respectively.

²⁴⁰ See Judgment of 6 November 2012, *Editions Odile Jacob v. Commission*, Case C-551/10, ECLI:EU:C:2012:681.

particular circumstances of the case, its context and the dissuasive effect of fines.²⁴¹ The Commission will therefore assess in this Decision the gravity of Canon's behaviour in light of Canon's intention or negligence, as well as the concerns raised by the concentration at issue.

- (173) In the present case, the Commission considers that Canon's infringements were at least negligent because Canon knew, or at least should have known, that its conduct would infringe Articles 4(1) and 7(1) of the Merger Regulation.
- (174) First, Canon is a large multinational company, which has substantial legal resources at its disposal. Canon is also a company, which has been previously, involved in merger control proceedings before the Commission²⁴² and other competition authorities ensuring an *ex ante* merger control regime. The Commission therefore considers that Canon was aware of the Union merger control rules and the obligations that these rules entail.
- (175) Second, regarding Canon's argument of legal uncertainty, it should be also noted that in *Odile Jacob*, the Union Courts did not assess nor rule on whether, in the context of reportable concentrations structured through warehousing, the implementation of the interim transaction before notification to and clearance by the Commission infringes Articles 4(1) and/or 7(1) of the Merger Regulation. In the *Odile Jacob* judgement, the Court was asked to set aside the General Court's judgment²⁴³ that dismissed the annulment of the Commission's decision in Case M.2978 - Lagardère/Natexis/VU.²⁴⁴ In other words, the question at issue related to the legality of a Commission's decision authorizing a concentration. The question of the early implementation of concentrations when warehousing structures are implemented before notification to and clearance by the Commission was not assessed by the Court. In fact, in response to Odile Jacob's claim that "*the General Court erred in approving the creation of a 'warehousing contract' undertaking which evades the control of concentrations*", the Court recalled the General Court's finding that "*the characterisation of the nominee holding arrangement in respect of the target assets is, in any event, of no relevance to the legality of the contested decision*".²⁴⁵
- (176) Moreover, the Commission's assessment of warehousing structures is made clear in the CJN. Paragraph 35 of the CJN indeed explains that: "[f]rom the date of the adoption of this Notice (10 July 2007), the Commission will examine the acquisition of control by the ultimate acquirer, as provided for in the agreements entered into by the parties. The Commission will consider the transaction by which the interim buyer acquires control in such circumstances as the first step of a single concentration comprising the lasting acquisition of control by the ultimate buyer." The CJN, which has remained unchanged since its adoption on 10 July 2007, gives a clear explanation to undertakings of the Commission's approach to warehouse structures.

²⁴¹ See *Marine Harvest v. European Commission*, paragraph 482. See also judgment of 28 June 2005, *Dansk Rørindustri*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 241.

²⁴² See Case M.6773 – Canon/Iris, decision of the Commission of 15 April 2013; Case M.5672 – Canon/Oce, decision of the Commission of 22 January 2010; and Case M.3980 – Canon/Canon Espana, decision of the Commission of 18 November 2005.

²⁴³ See Case T-279/04, *Éditions Odile Jacob v Commission*, ECLI:EU:T:2010:384.

²⁴⁴ See Case No M.2978 – Lagardère/Natexis/VUP. See Case M.7993 – Altice/PT Portugal, recital 573. See also Case M.7184 – Marine Harvest/Morpol, recital 136.

²⁴⁵ See Case T-279/04, *Éditions Odile Jacob v Commission*, paragraph 162. See also Case C-551/10, *Éditions Odile Jacob v. Commission*, paragraphs 27 and 33.

- (177) Third, even if Canon was in doubt as to the legality of the transaction structure of the Concentration, Canon could and should have approached the Commission through the process of a consultation on the applicability of Articles 4(1) and 7(1) of the Merger Regulation. Moreover, and in view of the financial difficulties of Toshiba and the need to proceed quickly with the payment, Canon could have asked for a derogation from the standstill obligation under Article 7(3) of the Merger Regulation. Canon has not taken any of these steps.
- (178) Fourth, as to Canon’s argument that the Merger Regulation’s infringement could not be intentional since Canon did not have “*any reason to circumvent*” the pre-merger control mechanism given the lack of substantive concerns raised by the Concentration,²⁴⁶ the Commission does not dispute the fact that Canon eventually notified the concentration and successfully obtained approval. The Commission disputes Canon’s view that it notified the concentration prior to implementing it. As illustrated by Canon and Toshiba’s internal documents, Canon had reason to implement the Concentration before notification to, and clearance by, the Commission given that Toshiba needed to close the TMSC acquisition before the end of March 2016. Despite the lack of substantive concerns raised by the Concentration, which had Union dimension, a notification to, and clearance by, the Commission before the end of March 2016 was not feasible.²⁴⁷

4.4.3. Conclusion

- (179) The Commission concludes that Canon knew or should have known that carrying out the Interim Transaction would, or at least could, amount to an infringement of Articles 4(1) and 7(1) of the Merger Regulation. The Commission therefore concludes that Canon's infringements have been carried out at least negligently.

5. FINES

- (180) Articles 14(2)(a) and 14(2)(b) of the Merger Regulation provide that: “The Commission may by decision impose fines not exceeding 10% of the aggregate turnover of the undertaking concerned within the meaning of Article 5 on the persons referred to in Article 3(1)b or the undertakings concerned where, either intentionally or negligently, they fail to notify a concentration in accordance with Articles 4 or 22(3) prior to its implementation, unless they are expressly authorised to do so by Article 7(2) or by a decision taken pursuant to Article 7(3); implement a concentration in breach of Article 7 [...]”
- (181) Pursuant to Article 14(3) of the Merger Regulation, “[i]n fixing the amount of the fine, regard shall be had to the nature, gravity and duration of the infringement.”
- (182) Having established that Canon infringed both Article 4(1) and Article 7(1) of the Merger Regulation and that Canon acted at least negligently, this Section assesses the factors that are relevant for the purposes of fixing the amount of the fines for the two infringements.
- (183) Given that the conduct giving rise to the two infringements is one and the same (implementation of a concentration with a Union dimension before notification and

²⁴⁶ See Reply to the SO, paragraphs 262 and 264 respectively.

²⁴⁷ See Toshiba internal document titled “Management Committee – Proposal overview”, 9 March 2016 (Doc ID 328-183 – TOSH_EC 00000172-T001 - Ref: 2017/055516). See also Letter from Canon to Toshiba, 4 March 2016 (Doc ID 210-3 –Ref. 2017/011405 and Doc ID 210-20 – Ref. 2017/011405).

before clearance), for the purpose of ensuring proportionality, the assessment in this Section relates to both infringements at the same time (unless otherwise specified).

- (184) The Commission will assess the duration of the two infringements separately. On the one hand, an infringement of Article 4(1) of the Merger Regulation is an instantaneous infringement, which is committed by failing to notify a concentration before notification. As such, Canon infringed Article 4(1) of the Merger Regulation on 17 March 2016, namely, the day of execution of the two agreements (the (i) Shares and Other Securities Transfer Agreements and the (ii) Excluded Share Transfer Agreement) which constitute the Interim Transaction. On the other hand, an infringement of Article 7(1) of the Merger Regulation is a continuous infringement that remains ongoing for as long as the concentration at issue is not declared compatible with the internal market by the Commission in accordance with the Merger Regulation. As an infringement of Article 7(1) ends only when the Commission adopts a decision declaring the proposed concentration compatible with the internal market, Canon's infringement of Article 7(1) of the Merger Regulation ended on 19 September 2016, namely, the date when the Commission declared the Concentration compatible with the internal market.
- (185) Pursuant to Article 1 of Council Regulation No 2988/74,²⁴⁸ the limitation period for the Commission to pursue an infringement is (i) three years in the case of infringements of provisions concerning applications or notifications of undertakings or associations of undertakings, requests for information, or the carrying out of investigations, and (ii) five years in the case of all other infringements. According to Article 2 of Council Regulation No 2988/74, any action taken by the Commission for the purpose of the preliminary investigation or proceedings in respect of an infringement shall interrupt the limitation period in proceedings.
- (186) It follows from these provisions that the limitation period is three years for an infringement of Article 4(1) of the Merger Regulation and it is five years for an infringement of Article 7(1) of the Merger Regulation. As a result, in light of the steps taken by the Commission for the purpose of the investigation (including the notification of the SO on 6 July 2017, the first Oral Hearing on 3 May 2018, the SSO on 30 November 2018 and the second Oral Hearing on 14 February 2019), these two infringements are not prescribed in the present case.

5.1. The nature of the infringements

5.1.1. Canon's arguments

- (187) During the investigation, Canon contested the Commission's preliminary finding that the infringements committed by Canon are serious in nature.²⁴⁹
- (188) First, Canon claimed that the alleged "*serious*" nature of the infringements overstates the importance of the standstill obligation for Union merger control. Canon argued that there are numerous national merger regimes in the European Union that do not require advance notifications of transactions (such as Italy, Latvia, and the United Kingdom).²⁵⁰ In Canon's view, the initial Union merger control rules (applicable

²⁴⁸ Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ L 319, 29.11.1974, p. 1).

²⁴⁹ Regarding the Commission's preliminary finding, see Section 5.1 of the SO.

²⁵⁰ Canon's argument is technically incorrect. The merger control regimes in force in Italy and Latvia do require the notification of reportable concentrations before implementation (although there is no standstill obligation).

before the Merger Regulation) were “*efficient*” despite the fact that they included only a very limited standstill obligation of three weeks.²⁵¹

- (189) Second, Canon also argued that the assessment of the “*serious*” nature of infringements of Articles 4(1) and 7(1) of the Merger Regulation should take account of the absence or existence of substantive problems raised by the concentration at issue.²⁵²

5.1.2. *The Commission’s findings*

- (190) Canon partially implemented a (single) concentration with a Union dimension as of 17 March 2016, therefore breaching Articles 4(1) and 7(1) of the Merger Regulation.

- (191) As set out in Section 3.1 above, the standstill obligation enshrined in Article 7(1) of the Merger Regulation and the duty to notify provided for in Article 4(1) of the Merger Regulation are essential pillars of the Union's *ex-ante* merger control system. Recital 34 of the Merger Regulation states: “[t]o ensure effective control, undertakings should be obliged to give prior notification of concentrations with a Community dimension following the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest.”

- (192) By making concentrations with a Union dimension conditional upon notification and prior authorisation by the Commission, the Union legislator aimed at preventing undertakings from implementing such concentrations before the Commission has taken a final decision regarding their compatibility with the internal market, with a view to avoiding any permanent and irreparable damage to effective competition.

- (193) In line with its decisional practice,²⁵³ infringements of Article 4(1) and Article 7(1) of the Merger Regulation generally, and Canon's conduct in this case in particular, constitute by their very nature, serious infringements of the Merger Regulation because they can undermine the effectiveness of the Union merger control system.²⁵⁴

- (194) The Commission strongly disagrees with Canon’s views that the importance of the standstill obligation for Union merger control is relative. Such views are directly contradicted by the case law of the Union Courts.

- (195) In the recent *Ernst & Young* judgment, the Court of Justice expressly held that the standstill obligation is a keystone of the Union merger control rules.²⁵⁵ The Court of Justice expressly ruled that “[i]t is precisely in order to ensure effective control that, as is apparent from recital 34 of Regulation No 139/2004, undertakings are obliged to give prior notification of concentrations and that their implementation should be suspended until a final decision has been taken”.²⁵⁶

- (196) The General Court also consistently confirmed that any violations of Articles 4(1) and 7(1) of the Merger Regulation constitute, by nature, serious infringements.²⁵⁷ In *Electrabel*, more recently recalled in *Marine Harvest*, the General Court held that

²⁵¹ Reply to the SO, paragraphs 279-280.

²⁵² Reply to the SO, paragraph 280.

²⁵³ Case M.7184 – Marine Harvest/ Morpol, recital 136. See also Case M.7993, Altice/PT Portugal, recital 577.

²⁵⁴ See Case M.7993 – Altice/PT Portugal, Decision of the Commission of 20 April 2018, recital 573. See also Case M.7184 – Marine Harvest/Morpol, Decision of the Commission of 23 July 2014, recital 136.

²⁵⁵ See *Ernst & Young*, paragraph 42.

²⁵⁶ See *Ernst & Young*, paragraph 42.

²⁵⁷ See *Marine Harvest ASA v European Commission*, paragraph 480. See also *Electrabel v. Commission*, paragraph 235.

“[t]he Commission was therefore correct to state [...] that, ‘[b]y making concentrations with a Community dimension conditional upon notification and prior authorisation, the Community legislature wanted to ensure that such concentrations were subject to effective control by the Commission, allowing the Commission where appropriate to prevent such concentrations from being carried out before it takes a final decision, thereby avoiding irreparable and permanent damage to competition’. The Commission was therefore able, without making an error, to characterise the infringement as serious, in view of its nature.”²⁵⁸

- (197) The legislator has determined that breaches of Articles 4(1) and 7(1) of the Merger Regulation may be as serious as breaches of Articles 101 and 102 TFEU by having set the same maximum fine thresholds in each of the applicable regulations (the Merger Regulation and Regulation No. 1/2003).
- (198) In addition, regarding Canon’s arguments that the Concentration did not raise substantive problems, the Commission recalls that, in line with the Commission’s precedents,²⁵⁹ violations of Articles 4(1) and 7(1) of the Merger Regulation occur irrespective of the positive outcome of the merger review procedure carried out by the Commission. The fact that the concentration is ultimately authorised and the Concentration can later be implemented has no bearing on the existence of the violation or its nature. As will be addressed in Section 5.2 below, the fact that the Concentration did not raise substantive problems is taken into account for the gravity of the infringements.²⁶⁰

5.1.3. Conclusion

- (199) To conclude, the Commission considers that Canon’s violations of Articles 4(1) and 7(1) of the Merger Regulation are both, by their very nature, serious infringements.

5.2. The gravity of the infringements

5.2.1. Canon’s arguments

- (200) During the investigation, Canon disputed the Commission’s preliminary finding that the infringements of Articles 4(1) and 7(1) of the Merger Regulation were committed by Canon intentionally, or at least negligently, which was considered for the gravity of Canon’s infringement.

5.2.2. The Commission’s findings

- (201) First, for the reasons explained in Section 4.4 above, the Commission considers that Canon knew or should have known that carrying out the Interim Transaction would, or at least could, amount to an infringement of Articles 4(1) and 7(1) of the Merger Regulation and thus, Canon’s infringements have been carried out at least negligently.
- (202) Second, for the purpose of calculating the fines, the Commission takes into consideration the fact that the Canon/TMSC Transaction did not raise competitive concerns and was declared compatible with the internal market and with the EEA Agreement by a decision adopted by the Commission based on Article 6(1)(b) of the Merger Regulation and Article 57 of the Agreement on the EEA.²⁶¹

²⁵⁸ See also *Electrabel v. Commission*, paragraph 235 (emphasis added). See also *Marine Harvest ASA v European Commission*, paragraph 480.

²⁵⁹ See Case M.7993 – Altice/PT Portugal, Decision of the Commission of 20 April 2018, recital 275.

²⁶⁰ See *Marine Harvest v. European Commission*, paragraph 497.

²⁶¹ See *Marine Harvest v. European Commission*, paragraph 497.

5.2.3. Conclusion

(203) The Commission concludes that, for setting the fines on Canon, account should be taken of the fact that (i) Canon acted at least negligently when breaching Articles 4(1) and 7(1) of the Merger Regulation and (ii) the Canon/TMSC Transaction was cleared by the Commission in a decision based on Article 6(1)(b) of the Merger Regulation and Article 57 of the Agreement on the EEA.

5.3. The duration of the infringements

5.3.1. Canon's arguments

(204) During the investigation, Canon argued that the duration of its infringement of Article 7(1) of the Merger Regulation was “*partly caused by the Commission*”.

(205) First, Canon argued that if the duration of the violation of Article 7(1) of the Merger Regulation lasted for six months and two days, this was “*to a large extent caused by the comprehensive RFIs Canon received from the Commission, which lacked of close understanding of the market*”.²⁶² According to Canon, while “*this is understandable, this should not be to the disadvantage of Canon*”.²⁶³

(206) Second, Canon claimed that the assessment of the infringement's duration should take account of the fact that the Commission requested a Full Form CO on 22 July 2016, namely, almost three months after Canon provided a draft short Form CO to the case team (on 28 April 2016).²⁶⁴ Canon suggests that such request was not necessary. According to Canon, had the Commission defined the geographical market correctly (i.e., EEA-wide rather than national according to Canon), a simplified procedure would have sufficed and the duration of the infringement at issue would have been much shorter.

5.3.2. The Commission's findings

(207) The Commission considers the start of both infringements to be 17 March 2016. This day corresponds to the date by which Toshiba, Canon, and MS Holding signed the *Shares and Other Securities Transfer Agreement* and the *Excluded Share Transfer Agreement*, which both led to the execution of the Interim Transaction and the implementation of the acquisition of control by Canon over TMSC.

(208) The Commission further considers that a violation of Article 4(1) of the Merger Regulation is an instantaneous infringement, which is committed by failing to notify a concentration before its implementation.²⁶⁵ Therefore, Canon has infringed Article 4(1) of the Merger Regulation on 17 March 2016, that is the day on which it signed the *Shares and Other Securities Transfer Agreement* and the *Excluded Share Transfer Agreement*.²⁶⁶

(209) On this basis, the Commission considers that Canon's infringement of Article 4(1) of the Merger Regulation had a duration of 1 day.

(210) On the other hand, the infringement of Article 7(1) of the Merger Regulation is a continuous infringement, which begins once a concentration has been implemented and continues for so long as it remains implemented until it is declared compatible

²⁶² See Reply to the SO, paragraph 295.

²⁶³ See Reply to the SO, paragraph 295.

²⁶⁴ See Reply to the SO, paragraph 296.

²⁶⁵ See *Electrabel v. Commission*, paragraph 187. See also *Marine Harvest v. European Commission*, paragraphs 304 and 352.

²⁶⁶ Regarding the relationship of the two agreements, see paragraph (112)(a) above.

with the internal market by the Commission pursuant to the Merger Regulation.²⁶⁷ Therefore, Canon's infringement of Article 7(1) of the Merger Regulation started on the day of the implementation of the Interim Transaction, that is on 17 March 2016, and ended on the date on which the Commission declared the Concentration compatible with the internal market and with the EEA Agreement, that is on 19 September 2016.

- (211) On this basis, the Commission considers that Canon's infringement of Article 7(1) of the Merger Regulation had a duration of 6 months and 2 days.
- (212) Canon's arguments on the duration exclusively apply to Canon's infringement of Article 7(1) of the Merger Regulation, which is a continuous infringement. The above considerations do not affect the duration of Canon's infringement of Article 4(1) of the Merger Regulation as it is an instantaneous infringement, whose duration is in any event of a single day.
- (213) Moreover, such argument that the duration of Canon's violation of Article 7(1) of the Merger Regulation was partly caused by the Commission's thorough investigation cannot stand. The duration of Canon's merger proceeding was not delayed by the Commission. Rather, such duration reflects the time Canon took to provide a complete filing form (Form CO or draft Form CO).
- (214) It should be recalled that, pursuant to the Merger Regulation and its implementing regulation,²⁶⁸ the notifying party bears the responsibility to submit a correct and complete filing form. It is therefore the obligation of the notifying party to submit to the Commission a filing form, which is complete and contain all the information requested therein. The submission of market share data at the appropriate geographic level(s) is a crucial information of a filing form. In the present case, the Commission requested to Canon, during pre-notification, information necessary to consider the filing form complete. Should this information not have been included in the Form CO, the Commission would have had to declare the notification of the filing form incomplete, therefore delaying the process further. Therefore, the Commission cannot be held responsible of the fact that Canon did not initially provided a complete filing form. Canon cannot rely on its own misconduct (starting from the implementation of a concentration prior to notification and clearance, up to the submission of an incomplete draft filing form) to benefit from a more lenient fine.
- (215) Moreover, the conclusion that the notified transaction had to be reviewed under the non-simplified procedure was taken based on the data that Canon submitted at a late stage. While Canon originally indicated that the transaction could be notified to, and reviewed by the Commission under the simplified procedure,²⁶⁹ the market share data subsequently provided (in response to a Commission request) showed that the conditions for the simplified procedure to apply were not met.²⁷⁰ Indeed, Canon's subsequent submission showed that the combined share of the parties in the market

²⁶⁷ See *Electrabel v. Commission*, paragraph 190.

²⁶⁸ Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (Text with EEA relevance) (OJ L 133, 30.4.2004, p.1).

²⁶⁹ See Canon's case allocation request, Doc ID 366, Ref: 2016/025872.

²⁷⁰ See M.8006 – Canon/Toshiba Medical Systems Corporation (TMSC), Reply to the RFI dated 22 July 2016, question 1, Doc ID 266, Ref: 2016/077466.

for static flat panel detectors (“FDP”) in Hungary was 26% in 2015, i.e., exceeding the threshold laid down in Article 5 of the Simplified Procedure Notice.²⁷¹

5.3.3. Conclusion

(216) Consequently, the Commission concludes that Canon's infringement of Article 4(1) of the Merger Regulation had a duration of 1 day, while Canon's infringement of Article 7(1) of the Merger Regulation had a duration of 6 months and 2 days, and it was therefore relatively limited in time.

5.4. Mitigating and aggravating circumstances

5.4.1. Mitigating circumstances

(217) The Commission notes that there are no mitigating circumstances in this case.

(218) The fact that the Concentration did not raise serious doubts as to its compatibility with the internal market is taken into account by the Commission for the purposes of assessing the gravity of the infringements.²⁷²

(219) Moreover, contrary to Canon’s claims, a decision imposing fines in the present case would not violate the *nullum crimen, nulla poena sine lege* principle.²⁷³

5.4.2. Aggravating circumstances

(220) The Commission notes that there are no aggravating circumstances in this case. The fact that Canon is a multinational company that was aware of the Union merger control rules and the obligations that those rules entail has been taken into account for the purposes of assessing the gravity of the infringement.²⁷⁴

5.5. Conclusion

(221) Both breaches of Articles 4(1) and 7(1) of the Merger Regulation are serious in nature. The Commission considers that Canon has, at least negligently, infringed Articles 4(1) and 7(1) of the Merger Regulation. The Commission also takes account of the fact that the concentration arising from the Canon/TMSC transaction did not raise competitive concerns and was declared compatible with the internal market in a decision adopted by the Commission under Article 6(1)(b) of the Merger Regulation and Article 57 of the Agreement on the EEA.

(222) The breach of Article 4(1) of the Merger Regulation is an instantaneous breach. The breach of Article 7(1) of the Merger Regulation lasted 6 months and 2 days, and it was therefore relatively limited in time.

(223) Finally, the Commission considers that there are no aggravating or mitigating circumstances in this case and that the overall amount imposed in this case for the infringements is proportionate to the nature, gravity, and duration of both infringements.

6. AMOUNT OF THE FINES

(224) When imposing penalties, the Commission takes into account the need to ensure that fines have a sufficiently deterrent effect. In the case of an undertaking of the size of

²⁷¹ Commission Notice of 5 December 2013 on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004.

²⁷² See recital (202) above.

²⁷³ See recitals (172)-(178) above.

²⁷⁴ See recital (172) above.

Canon, the amount of the penalty must be significant in order to have a deterrent effect.

- (225) Given the specific circumstances of the case at hand and, in particular, the nature, the gravity, and the duration of the infringements discussed in Section 5, the Commission considers it appropriate to impose fines under Article 14(2)(a) and (b) of the Merger Regulation of EUR 14 000 000 for the infringement of Article 4(1) of the Merger Regulation and of EUR 14 000 000 for the infringement of Article 7(1) of the Merger Regulation.
- (226) Canon's turnover in the business year ending 31 December 2018 was YEN 3 951 937 million (EUR 30 307.2 million).²⁷⁵ As the final amount of the fines set is below 10% of that figure, no adaptation is necessary.

HAS ADOPTED THIS DECISION:

Article 1

By failing to notify a concentration with a Union dimension prior to its implementation (on 17 March 2016) without express authorisation to do so by Article 7(2) of Regulation (EC) No 139/2004 or by a decision taken pursuant to Article 7(3) of that Regulation, Canon Inc. has, at least negligently, breached Article 4(1) of that Regulation.

Article 2

By implementing a concentration with a Union dimension (on 17 March 2016) before its clearance (on 19 September 2016), Canon Inc. has, at least negligently, breached Article 7(1) of Regulation (EC) No 139/2004.

Article 3

A fine of EUR 14 000 000 is hereby imposed on Canon Inc. pursuant to Article 14(2)(a) of Regulation (EC) No 139/2004 for the breach referred to in Article 1 of this Decision.

Article 4

A fine of EUR 14 000 000 is hereby imposed on Canon Inc. pursuant to Article 14(2)(b) of Regulation (EC) No 139/2004 for the breach referred to in Article 2 of this Decision.

Article 5

The fines imposed by Articles 3 and 4 shall be credited, in euro, within a period of three months from the date of notification of this Decision to the following bank account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT

1-2, Place de Metz

L-1930 Luxembourg

²⁷⁵ See Canon's results for the fourth quarter and the fiscal year ended 31 December 2018 (<https://global.canon/en/ir/results/2018/rslt2018e.pdf> (last accessed on 3 June 2019)). Amounts converted to EUR based on the average 2018 EUR/JPY conversion rate of the European Central Bank ("ECB") (1 EUR= 130.396 JPY).

IBAN: LU02 0019 3155 9887 1000

BIC: BCEELULL

Ref.: European Commission – BUFI/M.8179.

After the expiry of this period, interest will automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this decision is adopted, plus 3.5 percentage points.

If Canon Inc. lodges an appeal, it must cover the fines by the due date in accordance with Article 108 of the Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council.²⁷⁶

Article 6

This Decision is addressed to:

Canon Inc.
30-2, Shimomaruko 3-chome
146-8501 - Ohta-ku, Tokyo
Japan

This Decision shall be enforceable pursuant to Article 299 of the Treaty and Article 110 of the Agreement on the European Economic Area.

Done at Brussels, 27.6.2019

For the Commission

(Signed)
Margrethe VESTAGER
Member of the Commission

²⁷⁶ OJ L193 of 30.07.2018.