

24 May 2022

# EU Merger Control: EUR 28 Million Gun-Jumping Fine Upheld

---

## General Court Upholds EUR 28 Million Gun-Jumping Fine for Canon's Two-Step "Warehousing" Acquisition of Toshiba Medical Systems

---

Gun-jumping enforcement is back centre-stage in the EU. On Wednesday, 18 May 2022, the General Court of the EU handed down a judgment (the "**Judgment**") in which it whole-heartedly endorsed the Commission's 2019 decision fining Canon, Inc. ("**Canon**") EUR 28 million for partially implementing its two-step acquisition of Toshiba Medical Systems Corporation ("**Toshiba Medical Systems**") prior to receiving EU merger control approval in violation of the EU Merger Regulation.<sup>1</sup>

The Judgment serves as a timely reminder that gun-jumping will not go unnoticed in the EU and that it comes with a hefty price tag. The Judgment reaffirms that multi-step transactions, such as acquiring **call options** in so-called **warehousing** or **parking structures**, continue to be **particularly suspect** to EU authorities and are likely to amount to gun-jumping – both transaction structure and potential merger control filing requirements should therefore be analysed carefully prior to the implementation of any step in the acquisition process.

---

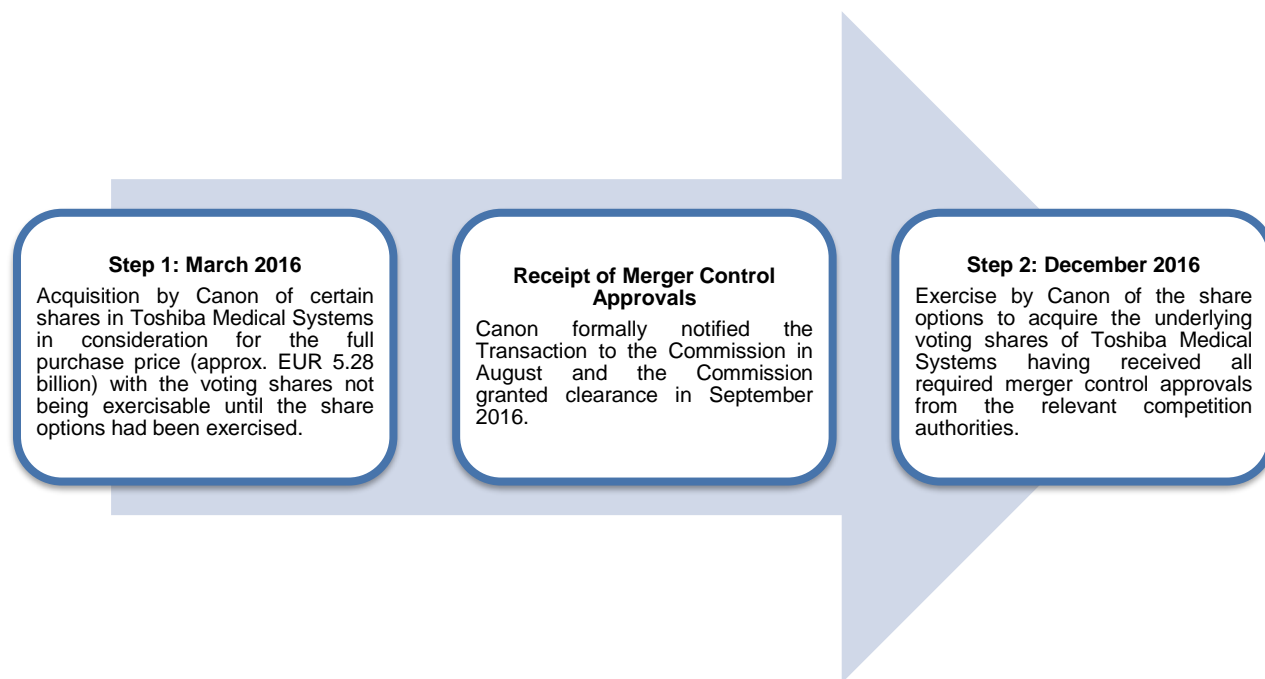
### I. THE FACTS

Towards the beginning of 2016, Toshiba Corporation ("**Toshiba**") found itself in severe financial difficulties and initiated an accelerated bidding process for the sale of Toshiba Medical Systems (the "**Transaction**"). Canon won the process as the only bidder that had not made payment of the purchase price conditional on the prior receipt of merger control approvals. The Transaction was structured via a "warehousing" sale to an intermediate buyer, such that the sale of Toshiba Medical Systems would be recognised as a capital contribution in Toshiba's accounts by 31 March 2016, but without Canon actually acquiring control until it

---

New York   Washington, D.C.   Los Angeles   Palo Alto   London   Paris   Frankfurt   Brussels  
Tokyo   Hong Kong   Beijing   Melbourne   Sydney

had obtained merger control approval from the relevant competition authorities. This was to be achieved in two steps:



The Commission found that, by acquiring the share option in March 2016, Canon had partially implemented its acquisition of Toshiba Medical Systems: Step 1 and Step 2 constituted **a single overall transaction**. Step 1 contributed to a lasting change of control over the target and, because Canon had failed to notify and receive prior approval from the Commission, amounted to gun-jumping.

---

## II. THE JUDGMENT

The General Court endorsed the Commission's decision and dismissed Canon's appeal in its entirety:

1. **Broad interpretation of gun-jumping:** The General Court held that the test for determining whether the notification and standstill obligations under the EU Merger Regulation are violated not only turns on whether an acquirer prematurely acquires decisive influence (control) over a target undertaking, but on whether a particular action **contributes** in whole or in part, in fact or in law, to a change of control. In other words, gun-jumping can occur even prior to the actual acquisition of any decisive influence if the action in question is a preparatory step with a direct functional link to the ultimate acquisition of control of the target.
2. **No bright lines:** Whether a certain step in a multi-step transaction amounts to gun-jumping is a question of degree. Whether formally distinct legal transactions constitute a single transaction that is unitary in nature must be assessed in light of all relevant legal and factual circumstances.

3. **On the facts of the case**, the General Court held that the Commission was right to consider Step 1 and Step 2 as unitary in nature because:
    - (a) Following Step 1, Canon had not merely acquired an option to acquire Toshiba Medical Systems at a later stage, but had assumed the economic risk of the entire Transaction. Canon had acquired the right to become Toshiba Medical Systems's owner or to sell to another purchaser of its choice, thus having the sole power to determine the identity of the ultimate purchaser of Toshiba Medical Systems and therefore having acquired the possibility of exercising a certain degree of influence over it;<sup>2</sup> and
    - (b) Step 1 was a necessary and irreversible step, and thus represented a direct functional link, to achieving the ultimate change in control of Toshiba Medical Systems. The economic objective of the two-step structure was to allow an intermediate buyer (a special purpose vehicle controlled by Canon) to purchase all the voting securities of Toshiba Medical Systems and for Toshiba to receive the full purchase price, while obtaining the greatest certainty that Canon would ultimately acquire control of Toshiba Medical Systems. Step 1 and Step 2 were interdependent in a way that one transaction would not have been carried out without the other.
- 

### III. KEY TAKEAWAYS

**A European Trend.** The General Court Judgment is the latest in a series of judgments endorsing the Commission's **unyielding enforcement practice** against premature implementation of transactions prior to notification and approval, including its EUR 124.5 million fine against Altice Europe in 2018 (Altice's appeal against the General Court judgment of 22 September 2021 largely upholding the fine<sup>3</sup> remains pending before the European Court of Justice (Case C-746/21 P)), and two separate fines amounting to EUR 10 million each against Mowi ASA, formerly Marine Harvest (the European Court of Justice upheld<sup>4</sup> the underlying General Court judgment and Commission decision in March 2020).<sup>5</sup>

**Beware of (Not So) Clever Warehousing Structures and Disgruntled Competing Bidders.** The Judgment illustrates the skepticism with which two-step "warehousing" acquisition structures will be met by the Commission and the European Courts. Structures allowing merging parties to close more quickly ahead of seeking the relevant clearances are **unlikely to pass muster** under the EU Merger Regulation.

The Judgment also serves as a reminder of the **significance of complainants** in the Commission's approach to gun-jumping investigations. As the General Court notes in paragraph 24 of its Judgment, the Commission was approached by an "anonymous complainant" prior to opening its gun-jumping investigation, likely a disgruntled competing bidder who had been unsuccessful in acquiring Toshiba Medical Systems – perhaps due to the conditionality of its offer on the prior receipt of merger control approvals – which undoubtedly poured gas onto the flame.

Canon has two months to decide whether or not to appeal the Judgment on points of law.

\* \* \*

---

ENDNOTES

- 1 Specifically, the obligation to notify under Article 4(1) and the standstill obligation under Article 7(1) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of transactions between undertakings (the “**EU Merger Regulation**”).
- 2 See paragraph 195 of the Judgment: “[...] the present case, based on a two-step transaction structure, differed from a ‘standard’ share purchase agreement [...] when an investor has the option to purchase a shareholding in a company, he or she normally does not pay the full amount of 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 [...] on the date of expiry of the option, the holder could decide to exercise the option taking into account the current value of the company and that, until that date, the holder of the call option bore only the economic risk of the premium paid. In the present case, the applicant ‘did not get “genuine” options which would give it the right . . . to buy TMSC at a later stage’ (recital 140 of the contested decision), but paid the full price for the acquisition of TMSC in exchange for a special, *de facto* automatic mechanism for acquiring it or for having the right to sell it to a third party of its choice.”
- 3 Case T-425/18 *Altice Europe NV v Commission* [2021] ECLI:EU:T:2021:607. The General Court broadly upheld the Commission’s fine, but reduced it by 10% in light of Altice’s cooperation (a total of EUR 118.2 million). See also S&C Client Memo available here: <https://www.sullcrom.com/files/upload/sc-publication-EU-court-upholds-commissions-gun-jumping-analysis.pdf>.
- 4 Case C-10/18 P *Mowi ASA v Commission* [2020] ECLI:EU:C:2020:149.
- 5 Other noteworthy fines imposed by the Commission in recent years include the EUR 110 million fine against Facebook in relation to its acquisition of Whatsapp (May 2017) and the EUR 52 million fine against General Electric in relation to its acquisition of LM Wind (2019), in each case for providing incorrect information during the Commission’s merger investigation.

# SULLIVAN & CROMWELL LLP

## **ABOUT SULLIVAN & CROMWELL LLP**

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 875 lawyers on four continents, with four offices in the United States, including its headquarters in New York, four offices in Europe, two in Australia and three in Asia.

## **CONTACTING SULLIVAN & CROMWELL LLP**

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers or to any Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future publications by sending an e-mail to [SCPublications@sullcrom.com](mailto:SCPublications@sullcrom.com).