



Press and Information

General Court of the European Union

**PRESS RELEASE No 86/22**

Luxembourg, 18 May 2022

Judgment in Case T-609/19  
Canon v Commission

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## **The General Court dismisses the action brought by Canon, which was fined € 28 million by the Commission for failure to comply with merger control rules in its acquisition of Toshiba Medical Systems Corporation**

In 2016, Canon Inc ('the applicant'), a Japanese multinational company specialising in the manufacture of optical and image processing products, took over Toshiba Medical Systems Corporation (TMSC), a wholly-owned subsidiary of Toshiba Corporation ('Toshiba').

**That acquisition was carried out in two steps, through a securitisation vehicle** (MS Holding) created specifically for that purpose. In the first step, on 17 March 2016, MS Holding acquired certain voting shares in TMSC for approximately € 800, while the applicant, in consideration for payment of the full price agreed for the purchase of TMSC (approximately € 5.28 billion), acquired call options on all the remaining voting shares in TMSC. In addition, the applicant acquired the one non-voting share in TMSC for approximately € 40 ('the interim transaction').

In a second step, on 19 December 2016, after obtaining merger clearance from the Commission, the applicant exercised its options to acquire the underlying voting shares of TMSC, while TMSC purchased its voting shares held by MS Holding as well as the non-voting share held by the applicant ('the ultimate transaction'). By those two transactions, TMSC became a wholly-owned subsidiary of the applicant.

The rationale for that staged acquisition was that the sale of TMSC would be recognised as a capital contribution in Toshiba's accounts by 31 March 2016 at the latest, without the applicant formally acquiring control until it had obtained the necessary clearances from the relevant competition authorities.

Following a pre-notification sent by the applicant in March 2016, the concentration was notified to the Commission in August and cleared by the Commission in September of the same year.

However, in parallel, the Commission opened an investigation into possible infringements of the standstill obligation and the obligation to notify under the Merger Regulation <sup>1</sup>. In accordance with those obligations, **undertakings involved in a concentration with a European dimension must notify their plans to the Commission for examination before they are put into effect ('obligation to notify')** <sup>2</sup> and **may not put the notified operation into effect before obtaining clearance from the Commission ('standstill obligation')** <sup>3</sup>.

By its decision of 27 June 2019 <sup>4</sup>, **the Commission found that the applicant had infringed those obligations in that it had prematurely implemented its acquisition of TMSC.** In

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<sup>1</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ 2004 L 24, p. 1).

<sup>2</sup> Article 4(1) of the Merger Regulation.

<sup>3</sup> Article 7(1) of the Merger Regulation.

<sup>4</sup> Commission Decision C(2019) 4559 final of 27 June 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).

essence, the Commission considered that, by proceeding with the interim transaction, the applicant had partially implemented the single concentration consisting of the acquisition of TMSC and had thereby infringed the standstill obligation and the obligation to notify. For that reason, the Commission imposed two fines totalling € 28 million.

The applicant brought an action for annulment of that decision, which was dismissed in its entirety by the Sixth Chamber of the Court.

### **The Court's assessment**

The Court begins by rejecting the applicant's argument that the interim transaction did not result in the acquisition of control of TMSC and therefore did not constitute an infringement of the standstill obligation and obligation to notify under the Merger Regulation.

Referring to well-established case-law of the Court of Justice <sup>5</sup>, the General Court notes in that respect that a concentration is implemented as soon as the parties to the concentration carry out operations which contribute to a lasting change of control over the target undertaking. Any partial implementation of a concentration thus falls within the scope of the standstill obligation, which meets the requirement of ensuring effective merger control. With that in mind, the Merger Regulation treats closely related transactions as a single concentration, with the sole exception of cases where such transactions are not necessary to achieve a change of control over the target undertaking and therefore do not have a direct functional link with the implementation of the concentration.

**The Commission was therefore right to observe that the Court's case-law distinguishes between the concepts of 'concentration' and 'implementation of a concentration'.** While a 'concentration' is only deemed to have been implemented when a lasting change of control takes place, the 'implementation' of a concentration can take place as soon as the parties to a concentration implement operations contributing to a lasting change of control of the target undertaking, that is to say, possibly before the acquisition of control over such an undertaking.

Therefore, the test for determining whether the standstill obligation and obligation to notify were infringed by the applicant is not whether there was an acquisition of control of TMSC prior to the clearance of the concentration, but whether the contested actions contributed, in whole or in part, in fact or in law, to the change of control of that undertaking before that date.

In that context, the Court also rejects the applicant's argument that the Commission's control of the merger was not at any time and in any way impeded, since the applicant acquired control of TMSC only after it had obtained all the clearances from the competition authorities concerned. According to the applicant, as long as control is not acquired, the concentration cannot be implemented in advance. A partial implementation of a concentration would thus require the acquisition of partial control. However, according to the Court, either control is acquired, when an entity has the possibility to exercise decisive influence over the target company, or it is not. Therefore, an alleged 'partial control' cannot be the condition for a partial implementation of the concentration. The Court also recalls that, in order to be effective, the Commission's control must be carried out before the merger is implemented, even partially.

Referring to its own case-law <sup>6</sup>, the Court also rejects the applicant's argument that the interim transaction did not constitute a partial implementation of the concentration.

In that regard, **the Court notes that a concentration may be implemented in the presence of a number of formally distinct legal transactions and that in such a case it is for the Commission to assess whether those transactions constitute a single concentration in that they are unitary in nature.** In the presence of several legally distinct transactions, it is thus for the Commission to identify, in the light of the factual and legal circumstances of each case, the

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<sup>5</sup> Judgment of the Court of 31 May 2018, *Ernst & Young*, [C-633/16](#).

<sup>6</sup> Judgment of the General Court of 23 February 2006, *Cementbouw Handel & Industrie v Commission*, [T-282/02](#).

economic purpose pursued by the parties, by examining whether the undertakings concerned would have been prepared to enter into each transaction in isolation or whether, on the contrary, each transaction constitutes only one element of a more complex operation, without which it would not have been entered into by the parties.

In that context, **the Commission did not err in classifying the interim transaction as a partial implementation of the concentration.** It was right to find that, from the date of the interim transaction, and irrespective of the outcome of the merger clearance, the applicant had acquired the possibility of exercising a certain degree of influence over TMSC since, following the completion of that transaction, it had sole power to determine the identity of the ultimate purchaser of the latter.

**The Court also disputes the applicant's argument that the interim transaction did not have a direct functional link with the change of control of TMSC and therefore did not contribute to the change of control.** The Court considers that, without the two-step transaction structure proposed by the applicant, Toshiba would have been unable to relinquish control of TMSC and irreversibly collect payment from TMSC before the end of March 2016. Moreover, under that two-step structure, the interim transaction was a necessary step to achieve a change of control of TMSC. In fact, the objective of that two-step structure was that the interim transaction would allow, first, an intermediate buyer to purchase all the voting securities of TMSC and, secondly, the applicant to pay the price of TMSC to Toshiba in an irreversible manner while obtaining the greatest certainty as to whether it would ultimately acquire control of TMSC.

The Court dismisses the action in its entirety and orders the applicant to pay the costs.

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**NOTE:** An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision.

**NOTE:** An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery

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