

CORPORATE AND M&A

The Canon decision and gun-jumping under the Irish merger control rules

Last month in *Canon v Commission (Case T-609/19)*, the EU's General Court upheld the European Commission's €28m fine on Canon in 2019 for gun-jumping in relation to its two-step acquisition of Toshiba Medical Systems Corporation (TMSC).

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SUMMARY

Under the EU Merger Regulation (**EUMR**), parties to a notifiable transaction must: (i) notify the transaction to the European Commission (**Commission**) before implementation (i.e. the **obligation to notify**), and (ii) not implement the transaction before it has been approved by the Commission (i.e. the **standstill obligation**). A breach of these obligations can lead to substantial fines under the EUMR.

The General Court's decision (which may yet be appealed) sheds further light on these gun-jumping issues. These include what might constitute premature implementation of a transaction prior to notifying and obtaining Commission approval under the EUMR. In particular, even *contributions* to a change of control in a transaction can constitute gun-jumping.

The decision also provides pointers for the Irish merger control rules on gun-jumping (i.e. contained in the Competition Act 2002 (as amended) (**Competition Act**)) for multi-step transactions. This is particularly noteworthy in light of the more vigorous gun-jumping rules contained in the Competition (Amendment) Bill 2022 (**Bill**) and which is expected to come into force.

The Canon decision

In Canon, the transaction was carried out in two steps. In the first step, a securitisation vehicle acquired voting shares in TMSC, while Canon, in consideration for payment of the agreed price for the purchase of TMSC, acquired call options on the remaining voting shares in TMSC (the interim step). In the second step, Canon exercised its options to acquire the underlying voting shares of TMSC after obtaining clearance from the Commission under the EUMR. As a result of these two steps, TMSC would become a wholly-owned subsidiary of Canon. The Commission considered that the interim step was a partial implementation of the overall acquisition of TMSC and infringed the standstill obligation (as well as the obligation to notify) under the EUMR. For that reason, the Commission imposed two fines on Canon totalling €28m.

Canon appealed the Commission's decision to the General Court on the basis that,

among other things, the interim step did not result in an acquisition of control (i.e. of TMSC) and there was therefore no breach of either the standstill obligation or the obligation to notify the Commission under the EUMR. In upholding the Commission's decision to fine Canon, the General Court found, among other things, that:

- Implementation of a transaction under the EUMR is not limited to a situation in which the purchaser acquires control of the target, but also covers a transaction which “contributes” to such a change in control (the General Court referred to the Court of Justice’s 2018 decision in *Ernst & Young* (C 633/16) on the implementation of transactions).
- A partial implementation of a transaction falls within the scope of the standstill obligation under the EUMR.
- The criterion to determine if the standstill obligation has been infringed is not whether there has been an acquisition of control of the target but whether the transaction “*contributed, in whole or in part, in fact or in law, to the change of control of that undertaking*”.

- A transaction may still be implemented by formally distinct legal transactions and it is for the Commission to determine if those transactions constitute a single transaction (i.e. if they are unitary in nature).
- Partial implementation of a transaction doesn't only occur in the event of an acquisition of partial control – contribution to a change of control is sufficient to constitute implementation of a transaction and Canon had acquired *“the possibility of exercising a certain degree of influence over TMSC as a result of the interim [step]”*.
- The interim step had a direct functional link with the change of control of TMSC and contributed to the change of control – under the two-step structure, the interim step was necessary to achieve a change of control of TMSC.

Gun-jumping under Irish merger control

Under Irish merger control, there is an obligation on merging parties under the Competition Act to notify a qualifying transaction to the Competition and

Consumer Protection Commission (**CCPC**) where either the turnover thresholds are met (i.e. all merging parties with aggregate turnover in Ireland of at least €60m/each of 2 merging parties with turnover in Ireland of at least €10m) or it's a media merger. Breach of that obligation is an offence.

There is also an obligation under the Competition Act not to “put into effect” any such transaction (or where a transaction is “voluntarily” notified to the CCPC) before CCPC clearance is obtained. Breach of that obligation means that the transaction is void. For example, there were proceedings in Ireland in the District Court for gun-jumping in the *Armalou Holdings/Lillis O'Donnell Motor Company* case in 2019. However, this involved an acquisition of control of a company prior to notification to the CCPC. This was a clearer example of putting a transaction into effect before CCPC approval – the challenge for merging parties in other transactions is to assess situations where there are more nuanced transaction-related activities that may constitute our improper putting of a transaction into effect.

The CCPC has previously referred to:

- improper exchanges of competitively sensitive information
- the implementation of co-ordinated strategies
- ceding of operational control
- management or operational issues

as examples of gun-jumping under Irish merger control.

In one case, the CCPC stated that: *“Moreover, the [Competition] Act does not permit partial implementation of a merger ... even where a “framework agreement” or other kind of hold-separate arrangement is put in place with regard to certain parts of the business within [Ireland].”*

The period between signing and completion of a transaction (under the acquisition documents) will be of particular importance in this regard when a purchaser will look to ensure that the target doesn't change (at least materially) from what it has agreed to purchase.



What changes will the Competition (Amendment) Bill bring about to the gun- jumping rules in Ireland?

As a result of the Bill, it will become an offence to put a relevant transaction into effect before CCPC approval (rather than simply resulting in the transaction being void). In addition to applying to transactions that are required to be notified under the Competition Act (or are voluntarily notified to the CCPC), the Bill adds to this list transactions that do not require to be notified but which the CCPC “calls-in” for notification by the merging parties because the CCPC is concerned that they may affect competition in Ireland (and have not yet been put into effect). The merging undertakings themselves (or persons in control of such undertakings who knowingly and wilfully permit the breach) will be guilty of the offence and will be subject to fines of up to €250,000 (plus daily default fines). Currently, the Director of Public Prosecutions brings summary proceedings before the District Courts for gun-jumping - as a result of the Bill, the CCPC will be able to bring its own summary proceedings for gun-jumping.

Concluding comments

While the obligation under the EUMR is that a notifiable transaction must “not be implemented” before notification to or approval by the Commission and the obligation under the Competition Act is that a transaction must “not be put into effect” before CCPC approval, the practical effect of these two obligations is similar. The Canon decision (following from the *Altice* (Case T-425/18) and *Marine Harvest* (Case C 10/18 P) line of cases on gun-jumping in the European Courts) confirms that, in a multi-step transaction, partial implementation can include steps which contribute to but do not necessarily involve acquiring control over a target prior to obtaining Commission clearance.

The notion of “partial implementation” of a transaction is known under Irish merger control. However the Canon decision suggests that merging parties, particularly in a multi-step transaction, need to avoid any steps that “contribute” to (but which are not actually) a change of control.

A purchaser therefore needs to consider carefully what it can legitimately do regarding a target before it obtains merger control approval from either the Commission or the CCPC (as well as before it is entitled, under the acquisition documents, to finally complete a transaction).

For more information on this topic please contact any member of [A&L Goodbody's Corporate and M&A](#) or [EU, Competition & Procurement](#) teams.

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