

# e-Competitions

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## The EU Commission imposes a fine of €28 million for “gun-jumping” on a Japanese manufacturer of imaging and optical products (*Canon*)

**MERGERS, AUDIOVISUAL , MERGER NOTIFICATION, SANCTIONS / FINES / PENALTIES, EUROPEAN UNION, GUN JUMPING**

EU Commission, Canon, M.8179, Press release, 27 June 2019

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On 27 June 2019 the European Commission imposed a fine of €28 million on the Japanese imaging and optical products manufacturer Canon for “gun-jumping” by using a warehousing structure in its 2016 acquisition of Toshiba Medical Systems (TMS), and this comes two years after the Commission announced that it had opened an investigation. Canon has announced that it will appeal the fine.

This decision has important implications for companies wishing to structure the sale of a business so that signing and closing take place simultaneously, despite the buyer needing to obtain regulatory approvals or achieve other gating items before taking full control of the target.

### What Happened?

‘Warehousing’ or ‘parking’ arrangements involve splitting a sale into two steps. The target business is transferred to an interim buyer, usually a bank, which temporarily acquires the target from the seller on behalf of the ultimate buyer, without the need for regulatory clearance. It holds the target until the final buyer has obtained all required regulatory clearances.

In this case, an interim buyer acquired 95% of the share capital in TMS for €800, while Canon paid €5.28 billion for the remaining 5% and share options over the interim buyer’s stake. Canon then notified its intention to acquire TMS, which the Commission cleared unconditionally. In the second step of the transaction, Canon exercised its share options once it had its regulatory approvals over the 95% of the shares held by the interim buyer to take full ownership of TMS.

## Why Did the Commission Have a Problem with This?

The EU Merger Regulation contains two provisions related to gun-jumping. Article 4(1) states that all transactions must be notified before they are implemented, which preserves the ability of the Commission to detect transactions, referred to as the “notification requirement.” Article 7(1) states that transactions must not be implemented before they are cleared, which prevents any potential harm to competition pending the outcome of its investigation, referred to as the “standstill obligation.”

The Commission concluded that, taken together, the two steps of the transaction transferring TMS to Canon formed a single notifiable transaction and, therefore, the first step of the transaction constituted a partial implementation of the transaction prior to notification and clearance, thus infringing both the notification obligation and the standstill obligation.

## Does This Represent a Change in the Law of Commission Policy?

Yes and no. The Merger Regulation exempts temporary acquisitions made by financial institutions from having to be notified because they do not result in a lasting change of control. The Commission’s 2008 Jurisdictional Notice sought to discourage warehousing structures, however, specifying that the Commission would consider the transfer of a target to an interim buyer on behalf of the ultimate buyer to constitute an integral first step of a single notifiable transaction and therefore be notifiable.

Prior to 2008, there was no such restriction on warehousing. The Commission’s acceptance of this practice is exemplified in its 2004 clearance decision of Lagardère’s acquisition of the assets of Vivendi Universal Publishing using such a transaction structure. A third party (Odile Jacobs) appealed this decision, first to the General Court in 2010 and then to the Court of Justice in 2016, both of which upheld the Commission decision, on the basis that it took place prior to the 2008 Jurisdictional Notice. Some interpreted this as the Courts opening the door to allow such warehousing transactions despite the explicit guidance in the Jurisdictional Notice; this case shows that the Commission continues to consider warehousing structures to constitute gun-jumping.

There has also been substantial dispute in the last 24 months regarding what steps actually constitute “implementation” of a transaction. Shortly after the Commission issued its preliminary findings to Canon (a document referred to as a “statement of objections”), the Court of Justice issued a preliminary ruling in relation to a gun-jumping case prosecuted in Denmark against Ernst & Young. In that case, the General Court found that the Danish Competition Authority had erred in finding that a preparatory step taken in the context of a corporate sale contributed to the implementation of the transaction. In particular, the Court noted that only steps which “in whole or in part, in fact or in law, contribute to the change in control of the target undertaking” can be considered as implementing a transaction.

Five months later, the Commission issued a supplementary statement of objections to Canon, “complementing the preliminary view taken in the statement of objections and reflecting developments in the case law.” The application of that preliminary ruling to this case will likely be highly relevant when the Court comes to consider Canon’s appeal of its fine.

The Commission has recently shown an increased willingness to prosecute companies for procedural breaches of the Merger Regulation, imposing fines on a number of companies for both gun-jumping and the provision of false or misleading information. Given the infrequency with which warehousing is used and the potential difficulties

posed by the Ernst & Young preliminary ruling, the Commission's decision to consider prosecuting warehousing structures as an enforcement priority reflects this more interventionist policy.

It also represents a risk for the Commission. If the Court overturns the Commission's decision against Canon, the 2008 Jurisdictional Notice will need to be revised and warehousing structures may come back into fashion, in contrast to the situation now where they are infrequently used given the question about their legality.

### **What About the Fine?**

Pursuant to Article 14(3) of the Merger Regulation, the Commission must take into account the nature, gravity and duration of the infringement as well as general principles of EU law, including proportionality. However, unlike infringements of Article 101 or 102, there are no detailed fining guidelines for the Commission to follow when imposing fines on procedural breaches of the Merger Regulation. Accordingly, there is even less transparency in the Commission's decisions on how the fines are actually calculated (with some wits noting that the recent Altice gun-jumping fine of €124.5 million almost exactly aligns with the 124 pages of the decision).

The €28 million fine in this case is markedly lower than the €124.5 million imposed on Altice; rather, it is of a similar magnitude to its two older gun-jumping cases, Electrabel (2009) and Marine Harvest (2013), which were each fined €20 million. There are likely a number of factors driving this lower fine, including the duration of the infringement, the fact that while with the interim buyer, the ultimate buyer does not normally have any influence over the target and the fact that this acquisition did not present any competition concerns. In comparison, the Commission found that Altice not only had the ability to exercise decisive influence over the target, PT Portugal, but it also found examples of Altice actually exercising decisive influence over the target before clearance and in some cases prior to notification.

Regardless, it is worth noting that the fine is well below the cap of 10% of worldwide revenue that the Commission may impose on undertakings for gun-jumping cases, representing just 0.08% of Canon's worldwide turnover in 2018.