

July 12, 2019

## Antitrust Month in Review – June 2019

In June, the United States Department of Justice (DOJ) and the European Commission (EC) both announced fines for violations of the agencies' respective merger reporting-and-waiting requirements for transactions which resulted in Canon Inc.'s acquisition of a Toshiba Corp. business. The DOJ also announced an additional guilty plea in an ongoing investigation relating to the alleged rigging of bids for borrowing "pre-release" American Depository Receipts (ADRs).

We discuss these and other developments below.

### US – DOJ/FTC Merger

*Canon and Toshiba Agree to Fine for Violating HSR Act; DOJ Alleges Transaction Was Structured to Avoid Waiting Period; European Commission Also Imposes Fine*

On June 10, the DOJ announced that Canon Inc. and Toshiba Corp. "agreed to settle federal charges that the companies violated the premerger notification and waiting period requirements of the Hart-Scott-Rodino Act (HSR Act), when Canon acquired Toshiba Medical Systems Corporation from Toshiba in 2016." The DOJ accused the parties of structuring their transaction in a way that "had no purpose' other than to . . . avoid the HSR Act's waiting period requirements" in order to close the deal in time for Toshiba "to recognize the proceeds of the sale" prior to the close of its fiscal year.

As described by the DOJ:

Toshiba and Canon caused the creation of a special purpose company, MS Holding Corporation ("MS Holding"). MS Holding was the device that Toshiba and Canon used to evade the HSR Act. During March 15-17, 2016, in a multi-step process, Toshiba transferred ownership of TMSC to Canon in a manner designed to evade notification requirements. First, Toshiba rearranged the corporate ownership structure of TMSC to make the scheme possible: it created new classes of voting shares, a single non-voting share with rights custom-made for Canon, and options convertible to ordinary shares. Second, Toshiba sold Canon TMSC's special non-voting share and the newly-created options in exchange for \$6.1 billion, and at the same time transferred the voting shares of TMSC (a \$6.1 billion company) to MS Holding in exchange for a nominal payment of nine hundred dollars. Later—in December 2016—Canon exercised its options and obtained formal control of TMSC's voting shares. This scheme masked the true nature of the acquisition. When Toshiba sold its interests in TMSC, while nominal voting-share ownership was divested by Toshiba and passed to MS Holding, true beneficial ownership passed to Canon. MS

Holding bore no risk of loss, and no meaningful benefit of gain, for any decrease or increase in TMSC's value. Rather, it was Canon which bore that risk or would realize any potential gain from TMSC's operations. MS Holding merely served to temporarily hold TMSC voting securities for Canon's benefit. Therefore, Canon became the owner of TMSC in March 2016 when it paid Toshiba the \$6.1 billion purchase price for the company.

According to the DOJ's announcement, the companies agreed to pay \$2.5 million each. In addition, the European Commission fined Cannon €28 million for violating its reporting and waiting requirements. [Press Release, U.S. Dep't of Justice, Canon Inc., Toshiba Corporation Agree to Pay \\$5 Million for Violating Federal Antitrust Laws \(Jun. 10, 2019\)](#); [Compl., U.S. v. Canon Inc., No. 19-cv-1680 \(D.D.C. Jun. 10, 2019\)](#); [Competitive Impact Stmt., U.S. v. Canon Inc., No. 19-cv-1680 \(D.D.C. Jun. 10, 2019\)](#); [Press Release, Eur. Comm'n, Mergers: Commission fines Canon €28 million for partially implementing its acquisition of Toshiba Medical Systems Corporation before notification and merger control approval \(Jun. 26, 2019\)](#).

#### *FTC and DOJ Adopt HSR Reporting Modifications*

On June 27, the FTC announced that certain Hart-Scott-Rodino rules and reporting instructions will be amended. The amendments relate to how certain industry and product information is reported. According to the FTC's press release, the updated rules and instructions will "incorporate the new 10-digit North American Product Classification System, or NAPCS, codes introduced by the Census Bureau, and the updated 6-digit North American Industry Classification System, or NAICS, codes." [Press Release, Fed. Trade Comm'n, FTC and DOJ Approve Procedural Changes to HSR Rules and Form \(June 27, 2019\)](#).

#### **US – DOJ Criminal**

##### *DOJ Announces Additional Guilty Plea in Pre-Release ADR Bid Rigging Investigation*

The DOJ announced that it has secured a guilty plea from "the former head of the securities lending desk at Banca IMI Securities Corp. . . . for his involvement in a bid-rigging conspiracy for . . . rigged bids to borrow pre-release American Depositary Receipts (ADRs)." Banca IMI pleaded guilty earlier. According to the press release, "[d]uring the conspiracy, a U.S. depository bank began using an auction-style process for pre-release ADRs and invited Banca IMI and other broker-dealers to submit competitive bids for rates to borrow ADRs. In response, [the] co-conspirators intensified their coordination in an effort to artificially increase their profits under the auction-style process. On at least 30 occasions, Banca IMI reached an agreement with one or more co-conspirators as to the bids they would submit to U.S. depository banks." [Press Release, U.S. Dep't of Justice, Former Financial Services Executive Pleads Guilty To Rigging Bids for Financial Instruments in Violation of Antitrust Law \(June 27, 2019\)](#).

**US – Private Litigation***Court Dismisses Complaints Alleging German Car Manufacturers Conspired to Reduce Innovation*

On June 17, Judge Charles R. Breyer of the United States District Court for the Northern District of California granted defendants' motion to dismiss complaints brought by putative classes of auto dealers and consumers alleging that Audi, BMW, Daimler, Porsche and Volkswagen agreed "to reduce innovation" relating to a variety of "vehicle components." According to the court's opinion, the allegations in the complaints stem largely from European Union and German investigations reported in the press in 2017. In dismissing the complaints, the court found, among other things, that the plaintiffs' allegations "lack important specificity" and "require . . . speculation." The court wrote: "Before Plaintiffs are allowed to pursue such a broad antitrust claim, they must do more than point to a European antitrust investigation (the scope of which is now much narrower than Plaintiffs' claims), two examples of agreements by Defendants to use certain technical standards, and Defendants['] participation in working groups and trade associations." [In re Ger. Auto. Mfrs. Antitrust Litig., 17-md-2796 \(N.D. Cal. Jun. 17, 2019\)](#).

*UK CMA Clears PayPal's Acquisition of iZettle after In-depth Review*

On June 12, the UK Competition and Markets Authority announced that it "has cleared PayPal's completed takeover of rival mobile payments company iZettle after an in-depth, Phase 2, investigation." In November, the CMA said that PayPal's acquisition of iZettle could result in PayPal "fac[ing] insufficient competition in the UK" and that "the merger could result in customers, which include small and medium-sized businesses, paying higher prices or receiving a lower quality service." However, the CMA's in-depth investigation "revealed that, while iZettle and PayPal are 2 of the largest suppliers of mPOS [mobile point-of-sale] devices, their customers are also willing to switch to 'traditional' POS devices. The 2 largest suppliers of payment services to smaller merchants, Worldpay and Barclaycard, account for almost 60% of the market at present and will continue to constrain the merged company. The merged company will also face significant competition from other mPOS-only players, such as Square and SumUp, which have both grown significantly in recent years." [Press Release, UK Competition & Mkts. Auth., PayPal / iZettle merger raises competition concerns \(Nov. 26, 2018\)](#); [CMA clears PayPal / iZettle deal \(Jun. 12, 2019\)](#).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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