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# Canon and Toshiba Pay $5 Million for HSR Avoidance Scheme

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Canon Inc. and Toshiba Corporation agreed to pay $2.5 million each to settle allegations that they deliberately structured a $6.1 billion transaction to avoid premerger notification and waiting period requirements in violation of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act). *U.S. v Canon Inc., et al.*, Case No. 1:19-cv-01680 (D. D.C. Jun. 10, 2019). According to the complaint, the parties devised a scheme to enable Toshiba to recognize the proceeds from its sale to Canon of its subsidiary, Toshiba Medical Systems Corporation (TMSC), prior to its fiscal year end. The case was referred to the Department of Justice (DOJ) by the Federal Trade Commission (FTC).

The HSR Act requires parties engaged in certain transactions where jurisdictional dollar thresholds are met to file a premerger notification and report form with the FTC and DOJ, and to observe a statutory waiting period (usually 30 days) prior to consummating the transaction. The notification process and waiting period are designed to allow the federal antitrust agencies to analyze a proposed transaction before it is consummated to determine whether it will harm competition. According to the Assistant Attorney General of the DOJ's Antitrust Division, "[t]he HSR Act is an essential tool for antitrust enforcement, because it allows federal antitrust enforcers to review proposed acquisitions for potential anti-competitive effects before they occur." The HSR rules explicitly prohibit "[a]ny transaction(s) or other device(s) entered into or employed for the purpose of avoiding the obligation to comply with the requirements of the [HSR] [A]ct."

In 2015, long-running financial irregularities at Toshiba became public with the disclosure that the company had overstated its profits by billions of dollars. To improve its resulting financial difficulties, Toshiba decided to sell TMSC to Canon with the goal of recognizing the proceeds of that sale before March 31, 2016—the end of its 2015 fiscal year. The government alleged that as Toshiba's fiscal year end approached, the parties recognized that Canon could not acquire TMSC outright because there was no longer sufficient time to allow for the statutory HSR waiting period to expire before the self-imposed March 31 deadline. Instead, the parties devised a scheme to avoid the HSR Act requirements.

The HSR Act requires notification of the acquisition of voting securities valued over applicable dollar thresholds, which are adjusted annually, assuming no exemptions apply. However, the HSR Act does not require notification of the acquisition of non-voting securities or options, regardless of value. The parties attempted to take advantage of this distinction between voting and non-voting securities by developing a multi-step acquisition process. First, Toshiba revised the corporate ownership structure of TMSC to create new classes of voting and non-voting securities, as well as options convertible into ordinary shares. Second, on March 17, 2016, Toshiba sold Canon the TMSC non-voting share and options for $6.1 billion—a dollar amount that exceeded the jurisdictional threshold, but a transaction that nonetheless was not reportable because it was an acquisition of non-voting securities. Also on March 17, Toshiba transferred all of the TMSC voting securities to a newly created special purpose holding company (MS Holding) in exchange for a nominal payment of $900—an amount below the threshold. Finally, Canon and MS Holding filed an HSR notification on April 26, 2016 for Canon's exercise of the options to acquire TMSC's ordinary shares.

According to the government, this complex, multistep transaction structure had no purpose other than to avoid the HSR notification and waiting period requirements. In fact, the government alleged that MS Holding never acquired beneficial ownership of TMSC, but instead that beneficial ownership went directly to Canon before the parties filed their HSR notification. According to the government, as of the March 17 sale of all of the voting securities, non-voting securities, and options, Toshiba no longer had any interest in, ownership rights in, or control over, TMSC. Rather, that interest, ownership, and control all passed directly to Canon on March 17, because MS Holding was not an entity independent of Canon. The government pointed to Canon's direction and control over the formation of MS Holding, and the selection and briefing of MS Holding's principals. Furthermore, the government alleged, MS Holding never had a meaningful risk of loss or benefit of gain in connection with its holding of the TMSC voting securities because it was already guaranteed a fixed amount for Canon's exercise of the TMSC options.

Civil penalties for violating the HSR Act in 2016 are a maximum of $40,000 per day of violation. The government alleged violation from March 17 until August 22, 2016, when the waiting period for the parties' corrected HSR notification expired, resulting in a possible maximum penalty of $6.36 million, which was settled for a combined $5 million. In addition, Toshiba and Canon are both required for a period of three years to develop and maintain an HSR compliance program and submit to compliance inspections.

Here, Toshiba and Canon are sophisticated parties likely represented by experienced HSR legal counsel. It is possible that their complex transaction structure was part of a calculated risk, where the potential HSR violation and resulting fine was weighed against the need to complete the $6.1 billion transaction within a certain time period. Nonetheless, this case provides an important reminder to parties contemplating potentially HSR reportable transactions that the antitrust agencies will investigate and take action against any avoidance scheme.