

CJEU Decision in the Towercast case

Ex-post review of deals by the back door?

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On 16 March 2023, the CJEU ruled that a concentration between undertakings that has not been notifiable under either European or national merger control law may be subject to an ex-post review in light of abuse of dominance rules (Art. 102 TFEU).

INTRODUCTION

Until recently, due to the clear-cut turnover-based rules defining the applicability of the EU Merger Regulation (“EUMR”), legal certainty was a cornerstone of merger control practice: Where the turnover thresholds of Art. 1 EUMR were not met, transactions did not need to be notified to the European Commission. The same generally applied where national merger control thresholds were not met. However, recent developments have put this legal certainty, the bedrock of European merger control, at risk.

In two recent proceedings, *Illumina* (C-625/22 P) and *Towercast* (C-449/21), the General Court and the Court of Justice of the European Union (“CJEU”) were confronted with the question of whether mergers that do not meet the requirements for EU and national merger control to be applied may still be scrutinized:

- In the *Illumina* case, the General Court took the view that mergers which do not meet the merger control thresholds may still be referred to the European Commission (“Commission”) by EU Member States on the basis of Art. 22 EUMR and may subsequently be subject to its merger control review. It thereby supported the Commission’s new practice of encouraging EU Member States to refer deals even in such circumstances. The appeal

against this decision is still pending before the CJEU. [See our previous blog post here.](#)

- In its preliminary ruling in *Towercast* on 16 March 2023, the CJEU ruled in the same vein, deciding that a transaction which does not meet the European or national merger control thresholds may be subject to an ex-post review under dominance rules. This means that competition authorities and courts may assess whether a purchaser who is holding a dominant position on a given market and has acquired control over another undertaking on that market has, through that conduct, substantially impeded competition within the internal market or a substantial part of it. We will look at this case in more detail in this blog post.

Even though the ex-post review of deals has not been present in practice since the introduction of the first EUMR in 1990, the CJEU’s decision fits into recent developments that provide competition authorities with additional review powers regarding below-threshold acquisitions. These powers mainly address a recent concern, which is especially strong in the tech and pharma industries, that incumbent firms arguably acquire innovative start-ups or nascent competitors solely to discontinue their business and pre-empt future competition (“killer acquisitions”). The more extensive use of merger control tools and the

respective broadening of jurisdiction is an iterative process characterized, inter alia, by the following steps in Europe:

- Several Member States (including Germany, Austria and Italy) have recently broadened the scope of their merger control jurisdiction – e.g. through the introduction of transaction value-based thresholds – to ensure the review of otherwise below-turnover threshold deals.
- In 2021, the Commission published its Guidance on the application of the referral mechanism to below-threshold deals, and will – unlike before – encourage Member States to refer cases to the Commission even where the deal in question does not meet the Member States’ merger control thresholds, but may nevertheless impede competition in the internal market.
- Ultimately, the Digital Markets Act (“DMA”) will require certain large online platform (so-called gatekeepers) to inform the Commission of proposed concentrations involving other platform providers within the digital sector irrespective of whether the transaction would be subject to merger control by the Commission or a national competition authority. The CJEU’s decision in Towercast, which allows for ex-post review of below-threshold deals, can be seen as a continuation of this trend. Unsurprisingly, Advocate General Kokott explicitly referred to “killer acquisitions” in her non-binding legal opinion prepared for the CJEU prior to its decision. She argued that the latitude to assess transactions under dominance rules through ex-post merger review is necessary to safeguard effective competition and avoid enforcement gaps.

CONTEXT OF THE PRELIMINARY RULING IN TOWERCAST

In 2017, Towercast, a company active on the French terrestrial television broadcasting market, filed a complaint with the French Competition Authority (“FCA”). The complaint was directed against the acquisition of control over Itas by TDF, the dominant operator on the market and – following the takeover – the only remaining competitor of Towercast. The acquisition was not notified to the FCA and the European Commission, as neither the French nor the

European merger control turnover thresholds were met. Further, the transaction was not referred to the Commission under Art. 22 EUMR, so there was no ex-ante assessment of the deal.

Towercast argued that the acquisition was a killer acquisition, i.e. that TDF acquired Itas solely to eliminate a competitor with particularly aggressive pricing tactics from the market. It thus alleged that the acquisition constituted – in itself – an abuse of a dominant position. According to Towercast, the acquisition has had the effect of hindering competition on both the upstream and downstream wholesale markets for digital transmission of terrestrial television services by significantly strengthening TDF’s dominant position. Towercast proceeded to invoke the CJEU’s judgment in Continental Can (1973), the first case in which the CJEU reviewed a concentration on the basis of Art. 86 EEC Treaty (now Art. 102 TFEU). In that decision, the CJEU stated that an “abuse may [...] occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition.”

The FCA rejected the complaint, arguing that, while TDF did hold a dominant position, the takeover did not constitute an abuse of it. According to the FCA, the Continental Can case law was merely the CJEU’s response to the lack of a compulsory ex-ante merger control process within the European Union at that time. This lack was remedied in 1990 with the introduction of a European merger control mechanism through Regulation 4064/89, the predecessor of the EUMR. The FCA found that these regulations drew a clear distinction between merger control and the control of anticompetitive practices under Art. 101 and 102 TFEU. In the view of the FCA, this means that Art. 102 TFEU is inapplicable to ex-post merger control, and that consequently the Continental Can case law has been superseded by today’s merger control mechanism.

Towercast challenged the decision before the Paris Court of Appeal. Having noted disparities, not only between the parties’ interpretation of the law as applied to the facts in the case at hand, but also in the solutions provided by the authorities and courts of Member States in similar cases, the Paris Court of Appeal referred the following question to the CJEU for a preliminary ruling: “Is Article 21(1) [EUMR] to be interpreted as precluding a national competition

authority from regarding a concentration which has no Community dimension within the meaning of Article 1 of that regulation, is below the thresholds for mandatory ex ante assessment laid down in national law, and has not been referred to the European Commission under Article 22 [EUMR], as constituting an abuse of a dominant position prohibited by Article 102 TFEU, in the light of the structure of competition on a market which is national in scope?”

The Commission intervened and supported Towercast’s view that an ex-post review under dominance rules is possible where merger control thresholds are not met and there has not been a referral to the Commission. According to the Commission, the application of the dominance rules is part of a necessary “safety net” consisting of, inter alia, (i) value-based transaction thresholds (introduced in some Member States), (ii) a wide remit to refer below-threshold cases to the Commission and (iii) the DMA deal reporting obligations, designed to catch killer acquisitions which could otherwise entirely avoid authority merger control review.

THE JUDGMENT OF THE CJEU

In its judgment handed down on 16 March 2023, the CJEU follows Advocate General Kokott’s proposal to interpret Art. 21(1) EUMR (which is governing the EUMR’s applicability and competent authorities) in such a way that it does not limit the application of Art. 102 TFEU to cases where a concentration is caught by neither European nor national ex-ante merger control mechanisms. Advocate General Kokott mainly based her arguments on the hierarchy of norms, the supremacy of European Law and the objective of European competition law to protect the internal market from distortions.

A) THE SCOPE OF THE EUMR’S APPLICABILITY

The Court’s judgment follows the Advocate General’s proposal but differs in its emphasis on certain points. Overall, it represents a textbook application of legal interpretation methods, using the provision’s wording, its context, and the EUMR’s objectives and purpose as well as its genesis, to assess the relationship between the Art. 102 TFEU (an act of primary EU law) and the EUMR (secondary (subordinated) EU law only).

Following Advocate General Kokott’s argument, the Court firstly explains that the wording of Art. 21(1) EUMR delineates the scope of the Regulation’s applicability only as regards other acts of secondary

EU legislation. However, according to the CJEU, the provision does not answer the question of the relationship between ex-ante merger control under the EUMR (secondary law) and Art. 102 TFEU (primary law). As Advocate General Kokott pointed out in her Opinion, it follows from the hierarchy of norms that primary EU law, i.e. Art. 102 TFEU, cannot be restricted by secondary EU law, i.e. the EUMR.

The Court then reiterates that the EUMR’s objective is to ensure that concentrations do not result in lasting damage to competition in the internal market. To do so, the Regulation uses thresholds to catch concentrations which may significantly impede effective competition and imposes an obligation to notify where they are met. The Regulation further serves to distribute competences between the EU and national competition authorities by virtue of the “one-stop-shop”-principle, which declares that, where a concentration has a Community dimension, ex-ante national merger control is not to be applied. According to the CJEU, however, it cannot be inferred from this ex-ante control mechanism that the legislator intended from the outset to exclude ex-post control of a concentration in light of abuse of dominance rules (Art. 102 TFEU).

On the contrary, the Court argues that it follows from the Regulation’s objective that, together, ex-ante control under the EUMR and ex-post control under Art. 101 and 102 TFEU are parts of a legislative whole which ensures competition is not distorted. Any other interpretation of Art. 21(1) EUMR would ultimately amount to disregarding EU primary law and the individual rights of third parties provided for under Art. 102 TFEU, which the competent national authorities, the Commission and the courts must protect.

B) CONTINUITY OF THE CONTINENTAL CAN CASE

In *Continental Can*, the Court established the applicability of Art. 102 TFEU (then Art. 86 EEC) to control concentrations in the absence of autonomous merger control provisions, a gap that has now been filled by the EUMR. However, according to the CJEU, this does not preclude the applicability of Art. 102 TFEU: The EU legislator did not intend that the control of a merger carried out at a national level should exclude the application of the abuse of dominance rules for in the TFEU. Further, the Court found that the prohibition contained in Art. 102 TFEU is sufficiently clear, precise and unconditional such that there is no need for secondary EU law (such as the EUMR) to

expressly order or permit its application by the national authorities and courts. Thus, the introduction of the EUMR does not preclude a concentration without a Community dimension from being subject to control by national competition authorities or courts on the basis of dominance rules.

C) CONDITIONS FOR AN ABUSE OF A DOMINANT POSITION

Concerning the application of Art. 102 TFEU to such an undertaking, the Court clarifies that the mere finding that the merger strengthened its dominant position was insufficient to establish that there was an abuse of that dominant position. Rather, the degree of dominance achieved by the merger should be established as substantially hindering competition: There must be only undertakings dependent on the dominant undertaking's behavior left in the market.

D) COULD ART. 102 TFEU BE APPLIED DESPITE THE JURISDICTION OF A MEMBER STATE'S MERGER CONTROL REGIME?

Going beyond the initial questions of the Paris Court of Appeal, Advocate General Kokott addressed – as a “hypothetical situation” – the possibility of applying Art. 102 TFEU even to notified and cleared transactions. Ultimately, she rejected the possibility and argued that transactions that have been declared to be compatible with the internal market could not be qualified (any longer) as an abuse of a dominant position. Hence, Advocate General Kokott provided for an – albeit small – safe harbor. Unfortunately, the CJEU did not come back to the question of whether to apply Art. 102 TFEU to transactions that have been cleared.

It seems possible to infer from the Court's reference in the decision (para. 52) to the fact that Art. 102 TFEU applies only to transactions that fall below merger control thresholds, that the CJEU follows Advocate General Kokott's considerations. However, a clarification by the Court in this regard would have been desirable.

OUTLOOK AND PRACTICAL IMPLICATIONS OF THE DECISION

Even though the view put forward by the CJEU is well derived from a legal theoretical perspective and seems to fit with previous CJEU case law, it is not a very satisfactory result for legal practice, as it leads to considerable legal uncertainties and their associated problems. Ultimately, it suggests that transactions which are not subject to merger control under EU or

national law generally may be subject to ex-post behavioral control. It is noteworthy that, according to the CJEU, any such transaction carried out by an (alleged) dominant company can still be challenged under dominance rules without any time limit, even long after closing (like in the Towercast case). This could potentially lead to the dissolution of a concentration, rather than just a fine, as Advocate General Kokott assumed.

The logical result of this is that the sword of Damocles hangs over diverse currently non-notifiable transactions, something underlined by the fact that Art. 102 TFEU is a general clause, which means that – as in the case of Art. 22 EUMR – the authorities have extensive discretionary powers and scope for assessment. The concern that the CJEU's decision will act as a trigger for new proceedings has already come true within less than a week: The Belgian Cartel Authority has opened an ex officio investigation into a possible abuse of dominance by Proximus in the context of its (below merger control threshold) takeover of edpnet, in application of the Towercast case law.

In summary, merger control practice may have to prepare for even more turbulent times. This is particularly true for sectors that are currently in the focus of competition authorities, especially large players in the digital space and pharmaceutical sector. But the Towercast case demonstrates that there is no safe harbor for any industry sector. This is because third-party competitors affected by below-threshold transactions of market dominant players may bring claims before national courts to challenge a concentration arguing a breach of Art. 102 TFEU.

Companies should therefore carefully examine especially non-notifiable prospective merger project to see whether it might be caught under dominance rules. From now on, when consulting with the authorities and drafting transactional documents, undertakings would be well advised to take into account the possibility of ex-post control without a time limit.

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