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A Merger May Be an Abuse of a Dominant Position

Recent Guidance From the CJEU in *Towercast*

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Can a merger that does not need to be notified to a competition authority constitute an abuse of a dominant position? The Court of Justice of the European Union (CJEU or Court) has recently answered this question in the affirmative. The practical implications of this ruling include the following:

(i) Going forward, companies should assess not only whether their proposed merger is a reportable transaction under merger control rules, but also whether it is compatible with antitrust rules prohibiting an abuse of dominant position

(ii) Looking backwards, mergers that were not notified under merger control rules could still be open to challenge under the antitrust rules prohibiting abuses of a dominant position, either in national courts or before the competition authorities, subject only to the applicable statutory limitation periods

This practical implication will be particularly relevant to so-called "killer acquisitions", where a dominant player tries to acquire a smaller and nascent competitor before the latter grows to a size triggering merger control filing requirements. The Court's judgment also opens the gate for private enforcement. Competitors may bring actions before national courts for damages, but also for other forms of relief, including an order to cease the abuse. How this is applied to a merger which closed many years before remains to be seen.

Background

On 16 March 2023, the CJEU published its ruling in Case C-449/21 *Towercast SASU v Autorité de la concurrence* (the Judgment), which arose from a preliminary reference from the Paris Court of Appeal. That court was tasked with determining an appeal against the decision of the French competition authority not to proceed with Towercast's complaint against Télédiffusion de France's (TDF) acquisition of a competitor. Towercast's complaint alleged that, even though the acquisition did not fall within EU or French merger control legislation, it still constituted an abuse of TDF's dominant position on the market for the provision of digital terrestrial television broadcasting services in France, as it significantly strengthened TDF's dominant position on that market.

In particular, Towercast argued that, even though the acquisition did not meet the turnover thresholds for notification in Article 1 EU Merger Regulation (EUMR) or Article L. 430-2 of the French Commercial Code, and was not referred by the French competition authority to the European Commission under Article 22 EUMR, it constituted an abuse of a dominant position in breach of Article 102 TFEU and Article L. 420-2 of the French Commercial Code.

The French competition authority decided that a concentration, by itself, could not constitute an abuse of a dominant position, even if it had not been subject to mandatory notification to the French competition authority or the European Commission.

This had been, before the Advocate-General's opinion in this case, the generally accepted response to the question. A below-threshold merger, if not exceptionally referred to the Commission under the recent Article 22 EUMR approach, was generally accepted as safe.

To address Towercast's appeal, the Paris Court of Appeal considered it necessary to ask the CJEU whether the EUMR is to be interpreted as precluding a national competition authority from regarding a concentration that:

(i) Does not meet the turnover thresholds in Article 1 EUMR

(ii) Is below the turnover thresholds for mandatory notification set out in national law

(iii) 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 light of the structure of competition on a market which is national in scope.

The Judgment

The CJEU decided that the EUMR does not preclude a concentration that does not need to be notified to a competition authority from constituting an abuse of a dominant position on the market. This answer goes directly against the decision of the French competition authority, which was based on the conclusion that the establishment of a system of prior control of concentrations at the European level rendered the application of Article 102 to mergers irrelevant.

First, the Court considered the relevance of Article 21(1) EUMR, which provides that "this Regulation alone shall apply to concentrations as defined in Article 3, and Council Regulations (EC) No 1/2003 […] shall not apply". It stated that Article 21(1) EUMR serves to exclude the application of norms of secondary EU competition law, such as Regulation No 1/2003, which provides rules for the implementation of Article 102 TFEU by competition authorities. However, as a norm of secondary EU competition law itself, it could not exclude the application of Article 102 TFEU, which is a norm of primary EU competition law. Article 21(1) was therefore irrelevant to the relationship between the EUMR and Article 102 TFEU.

Second, the CJEU considered the purpose and legislative history of the EUMR. It stated, by reference to the EUMR's recitals, that the EUMR "forms part of a legislative whole intended to implement Articles 101 and 102 TFEU and to establish a system of control ensuring that competition is not distorted in the internal market of the European Union". As evidenced by the legislative basis for its adoption by the European Union, the EUMR was enacted "to give effect to the principles set out in Articles 101 and 102 TFEU", so that it could not "preclude the possibility for a competition authority to capture a concentration operation under Article 102 TFEU under certain conditions".

Third, the Court considered the relevance of its judgment in *Case 6/72 Europemballage and Continental Can v Commission*, in which it established that, in the context of the acquisition of a competitor, "abuse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one". While acknowledging that Article 102 TFEU was used in that case to overcome the absence of any express provision of EU law on the control of concentrations, the CJEU concluded that the subsequent adoption of the EUMR did not affect the principle in *Continental Can*. Crucially, for there to be a finding of abuse of dominant position, the degree of dominance achieved through the concentration should substantially hinder competition, so that only undertakings dependent on the dominant undertaking's behaviour are left on the market.

Conclusion

The Judgment clarifies an important point as to the scope of application of EU and national competition law on merger control and is likely to have significant practical implications not only for future cases, but also for past cases that are still within the relevant statutory limitation periods.

In fact, the Court rejected TDF's request to limit the temporal effects of the Judgment, which it argued on the basis that the Judgment would have "serious consequences in terms of legal certainty […] for all undertakings which have in good faith carried out concentration operations below the thresholds, which would now be challengeable before the national authorities or courts on the basis of Article 102 TFEU". One example of such an investigation is the recent decision by the Belgian Competition Authority to investigate a possible abuse of dominance by Proximus in the context of its acquisition of Edpnet. Similarly, the Italian Competition Authority had sanctioned TicketOne for having abused its dominant position, among other things, by acquiring a number of promoters to foreclose its competitors – this decision was subsequently annulled on appeal for lack of reasoning in rejecting the efficiencies defence put forward by TicketOne, but the Judgment may now allow the Italian Competition Authority to re-adopt its decision.

These investigations may, in turn, potentially result in follow-on damages claims by competitors or other persons harmed. The matter also may tempt stand-alone litigation. In the context of cartels, stand-alone litigation remains very rare, as a plaintiff would have to prove an illegal agreement without having the investigative means into the facts of the case (who discussed what, with whom, and when) of a competition authority. In the context of abuse of dominance through acquisition, the facts of the case are easily accessible, and it will come down to their economic assessment. Many national competition laws allow claims not only for monetary damages, but also to rectify the harm. It remains untested, of course, how far courts will go if the only effective means of rectifying the harm would be a dissolution of the merger.

The Judgment does not address the issue of whether a below-threshold merger that has not been the subject of an Article 22 EUMR reference could be open to challenge on grounds that it infringes (or infringed) the prohibition of anticompetitive agreements under Article 101 TFEU. The reasoning of the ECJ in this case would suggest that the answer to that question may also be "yes". Article 101 TFEU is also directly applicable and it remains to be seen whether the fact that an exemption can be granted under Article 101(3) TFEU will lead to a different conclusion.

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