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ECJ Advocate General Opines That Non-Reportable Transactions Could Be Caught By Abuse of Dominance Rules

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Advocate General Juliane Kokott has proposed that the EU Court of Justice should find that competition authorities have the power to apply Article 102 TFEU to corporate transactions that are not reportable and test under that provision whether the transaction as such constitutes an abuse of a dominant position. However, a competition authority cannot in this way apply the abuse of dominance rules to transactions that were already approved under an EU merger control regime.

Background

In June 2016, television transmission service operator TDF Infrastructure ("**TDF**") acquired its competitor Itas SAS ("**Itas**"). Prior to the acquisition, TDF was already the largest of the three companies active in the relevant market, i.e., TDF, Itas and Towercast S.A.S.U. ("**Towercast**"). Following the transaction, the market was left with only two service providers, TDF and Towercast. The acquisition did not exceed notification thresholds at the EU or French level.

In November 2017, Towercast filed a complaint with the French Competition Authority that the acquisition constituted an abuse of dominant position because it significantly strengthened TDF's already dominant position and restricted competition on the upstream and downstream wholesale markets for digital transmission of terrestrial television services. Towercast relied on the seminal *Continental Can* ruling (pre-dating the adoption of the *ex ante* merger control regime in the EU), in which the European Court of Justice ("**ECJ**") essentially held that an abuse of a dominant position may occur if a company in a dominant position strengthens such position by way of an acquisition.[1]

In January 2020, the French Competition Authority rejected the complaint reasoning that the principles set out in the *Continental Can* ruling were not applicable to the assessment of the transaction in question. The authority held that *Continental Can* was delivered at a time when no EU merger control regime existed and that the adoption of the European Merger Control Regulation ("**EUMR**") and the EU national merger control regimes rendered the *Continental Can* obsolete, meaning that Article 102 TFEU ("**Article 102**") could not be used as an instrument of *ex post* merger control.

Towercast appealed the decision asking the Paris Court of Appeal to recognise that concentrations below the EU merger control thresholds (national and at the EU level) are reviewable under Article 102. [2]

In July 2021, the Paris Court of Appeal asked the ECJ whether Article 21(1) EUMR precludes the application of Article 102 to under-threshold transactions that have not been referred to the European Commission ("**EC**") pursuant to Article 22 EUMR. Article 21(1) establishes that the EUMR is the only regulation applicable to concentrations and expressly excludes the application of Regulation 1/2003 [3] to concentrations. [4]

Key points of the Opinion

The Opinion of AG Kokott was delivered on 13 October 2022. AG Kokott essentially takes the view that Article 102 applies to non-reportable mergers.

First, AG Kokott concludes that provisions contained in the EUMR (or equivalent national merger control legislation) [5] cannot preclude or limit the applicability of Article 102 to transactions because Article 102 as a provision of primary and directly applicable law is hierarchically superior to the secondary rules contained in the EUMR. [6] She specifically rejects the argument made by the French government and the French Competition Authority that EU and national *ex ante* merger control regimes should have the status of a *lex specialis* derogating the application of general antitrust rules. [7]

She further reasons that the referral mechanism under Article 22 EUMR, according to which Members States can ask the EC to review non-reportable mergers that do not meet the EU or national thresholds, is irrelevant to the interpretation of the relationship between the EUMR and Article 102, and therefore cannot justify the exclusion of Article 102. [8]

Second, AG Kokott argues that an acquisition by a dominant company in itself may amount to abusive conduct and thus falls within Article 102. She stresses that Article 102 has a wide field of application and therefore the abusive exclusion of a competitor from the market can take a variety of forms and a dominant company has a special responsibility not to allow its behaviour to impair genuine, undistorted competition in the internal market. [9]

Third, AG Kokott finds that Article 102 fulfils a complementary role as it helps to address an enforcement gap in capturing "*problematic*" mergers that were not notified because they did not trigger thresholds at the national or EU level but nonetheless merit review. AG Kokott refers in particular to so-called "killer acquisitions" or acquisitions occurring in highly concentrated markets, where the aim is to eliminate competitive pressure from an emerging competitor. [10]

AG Kokott also suggests that if an under-threshold transaction is subsequently found to be in breach of Article 102, such a transaction would usually not be unwound but rather the dominant company would be sanctioned by the imposition of a fine for abusing its dominant position. [11]

Fourth, relying on the principle of legal certainty, the AG considers that completed transactions that were approved as part of a merger control regime cannot be subsequently reviewed under Article 102. This is because the merger control approval – declaring the effects of the transaction on market structure to be compatible with the internal market – in principle disqualifies the

transaction from being classified as abusive within the meaning of Article 102 unless the company concerned has engaged in conduct which goes beyond the merger control assessment and could be found to constitute an abuse of dominance. [12]

Outlook

The Opinion is not binding on the ECJ that will have the last word. However, if the ECJ follows the Opinion, Article 102 will be confirmed as an additional avenue to challenge already completed transactions that flew under European competition authorities' radars because they did not trigger merger control thresholds anywhere in the EU. European competition authorities may therefore be able to join some other regulators around the globe, including for example the US or Canada, which have powers to review consummated under-threshold transactions. There is an open question as to how far back could the authorities look and review non-reportable transactions. Presumably, a competition authority can only go back for as long as local prescription rules allow, starting from the date of the completion of the acquisition.

Nevertheless, we do not expect to see many such reviews because the bar for a non-reportable transaction to fall within the scope of Article 102 seems to be relatively high, given that the acquiring company must be dominant at the time of signing a SPA. Moreover, there is no clear case law as to which acquisitions could constitute an abuse, in a horizontal, let alone a vertical or conglomerate context (taking into account in particular that even in a merger control assessment, the predicted structural effects of a merger involve some predicted conduct of the merged entity, such as increasing prices, foreclosing access to input materials or customers, or tying and bundling). From that perspective, it would seem more likely that Article 102 applies mainly to cases where the acquisition is directly and causally linked with a specific conduct that qualifies as an abuse of dominance as opposed to a standalone finding that a corporate transaction in itself constitutes an abuse of dominance. Consequently, a potentially problematic non-reportable transaction seems much more likely to be picked up by the Article 22 EUMR referral policy. As a reminder, the EC's Article 22 referral policy and the subsequent General Court judgment in *Illumina/Grail* are currently being challenged before the ECJ. [13] It remains to be seen whether the General Court's judgment will be upheld by the ECJ. However, the EC continues to actively monitor transactions. In the course of the last 12 months, the EC has accepted Article 22 referral requests in two additional cases (*Meta/Kustomer* [14] and *Inmarsat/ Viasat*).

If the ECJ follows AG Kokott in *Towercast*, there is a question as to whether the application of Article 102 to completed mergers removes the legitimacy behind the new Article 22 EUMR referral policy, proving that there is no enforcement gap (at least as far as the main concern is derived from the acquirer's dominant position) precisely because of the existence of Article 102.

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[1] Judgment of 21 February 1973, *Europemballage Corporation and Continental Can Company v Commission* (6/72, EU:C:1973:22, paragraphs 25 and 26).

[2] Article 102 prohibits dominant undertakings from abusing their dominant position.

[3] Council Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ("**Regulation 1/2003**").

[4] Other than joint ventures that do not have a Community dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent.

[5] AG Kokott Opinion in Case C-449/21 ("**Opinion**"), paragraph 37.

[6] Opinion, paragraphs 35 and 43.

[7] Opinion, paragraph 42.

[8] Opinion, paragraph 47.

[9] Opinion, paragraph 45.

[10] Opinion, paragraph 48.

[11] Opinion, paragraph 63.

[12] Opinion, paragraph 60.

[13] Case T-227/21, *Illumina, Inc. v Commission*, EU:T:2022:447, on appeal in Cases C-611/22 P and C-625/22 P.

[14] Case M.10262-*Meta(Formerly Facebook)/Kustomer*.

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