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European Court of Justice Confirms that National Authorities Can Review Ex-Post Below-Threshold Mergers Under Abuse of Dominance Rules

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The long-awaited European Court of Justice's judgment in *Towercast* confirmed that national competition authorities (and national courts) can apply abuse of dominance rules to mergers that did not trigger EU and national merger control thresholds and were not referred to the European Commission under Article 22 of the EU Merger Regulation. However, uncertainties still remain.

Background

The case follows a Paris Court of Appeal's request for a preliminary ruling on whether Article 21(1) of the EU Merger Regulation (**EUMR**) precludes the application of Article 102 to mergers that fall below the notification thresholds at national and EU level, and that have not been referred to the European Commission (**EC**) pursuant to Article 22 EUMR. Last October, AG Kokott suggested that Article 102 could be enforced by national competition authorities vis-à-vis such mergers.

Key points of the judgment

The ECJ confirmed AG Kokott's view. Transactions that fall below EU and national merger control thresholds, and at the same time have not been referred to the EC pursuant to Article 22 of the EUMR, may be subject to Article 102 TFEU (paras 52 and 53).

That being said, the ECJ does not give a "carte blanche" to national authorities. The ECJ emphasizes that strengthening a dominant position through an acquisition (and creating such a position logically cannot be an abuse in the first place) is not in itself sufficient for finding an abuse. In other words, the mere acquisition by a dominant company in and of itself would not be enough. The judgment specifies that "*it must be established that the degree of dominance reached through the acquisition would* ***substantially impede competition****, that is to say, that only undertakings whose behaviour depends on the dominant undertaking would remain in the market*" (para 52).

The requirement that the merger must "*substantially impede competition*" implies that the acquisition of the target must make a material difference in the competitive landscape (not only in view of the market share increment but also qualitative elements).

Furthermore, the reference to "*only undertakings whose behaviour depends on the dominant undertaking [remaining] in the* market" seems to indicate that the merger must have in reality resulted in near-total elimination of competition. If what remains is competitors/customers/suppliers that can only subsist by their conduct is entirely dependent on the dominant company, this is not real competition. This reading of the *Towercast* judgment is consistent with the test in Continental Can, where the Court stated that conduct "*can be regarded as an abuse if an undertaking holds a position so dominant that the objectives of the Treaty are circumvented by an alteration to the supply structure which seriously endangers the consumer's freedom of action in the market, such a case necessarily exists if practically all competition is eliminated*" (para 12).

The ECJ also confirmed that the temporal effect of the judgment is not limited retrospectively (Towercast, paras 54-61). This means that transactions that took place before the judgment was delivered could be reviewable under Article 102 TFEU. The ECJ however failed to clarify how far back before the judgment the competition authorities could look and review such non-reportable transactions. Notably, the transaction challenged in the Towercast case closed in 2016.

The judgment does not resolve everything and leaves a degree of uncertainty. Unlike AG Kokott's Opinion, namely paras 58 to 60 of the Opinion, the ECJ does not explicitly refer to mergers that were reviewed and approved as part of a merger control regime. Here, a distinction can be made between mergers that were reviewed and approved by the EC and mergers that were nationally reviewed and cleared.

For the former, the ECJ does not even consider the application of Article 102 as a hypothetical scenario. Instead, it conditions the possibility for a competition authority to capture a concentration operation under Article 102 TFEU on "*certain conditions*" being present (para 40). And when it sets out its conclusions in paragraph 52, it only refers to the application of Article 102 TFEU to mergers that fall below the thresholds. This may be interpreted as meaning that for the ECJ this scenario is impossible to contemplate.

For the latter, the ECJ's position is unclear. Although the operative part mentions only mergers that fall below national notification thresholds and that were never referred to the EC, a degree of uncertainty remains because parts of the reasoning may suggest otherwise. So it cannot be excluded that national authorities (and – not to forget – national courts) could conceivably apply Article 102 TFEU even to mergers that were nationally reviewed and cleared.

Finally, AG Kokott in her Opinion suggested that if a below-threshold transaction is subsequently found to be in breach of Article 102 TFEU, such a transaction would usually not be unwound but rather the dominant company would simply receive a fine for abusing its dominant position (para 63). The ECJ did not deal with this issue at all. Dealmakers will therefore have to account for these remaining uncertainties in their risk assessments regarding acquisitions by potentially dominant enterprises.

Outlook

It is now clear that national competition authorities and national courts can review concentrations under Article 102 TFEU not subject to prior review. In brief, concentrations in the EU can be subject to either an ex-ante review (if thresholds are met or if referred to the EC under Article 22 EUMR) or an ex-post review under Article 102 TFEU. This new review mechanism increases uncertainty in deal-making, although we expect that it will be used only exceptionally. This is because the bar for a non-reportable transaction to fall within the scope of Article 102 TFEU seems to be relatively high, given that (i) the acquiring company must be dominant at the time of the acquisition and (ii) the threshold for finding an abuse pursuant to Article 102 TFEU solely by way of an acquisition seems also to be rather high. Still, it remains to be seen how national competition authorities and courts will interpret the test in practice. The risk of ex-post reviews will also depend on the likelihood of complaints by customers/competitors (as in this case).

Not even a week later, on March 22, it was reported that the Belgian Competition Authority will review under its abuse of dominance rules Proximus' completed acquisition of edpnet, explicitly citing the *Towercast* case law. This case will set an important precedent for how such a review will work in practice.

Finally, it will be interesting to see how the new referral policy under Article 22 EUMR will interact with this ex-post tool to review below-threshold mergers under Article 102 TFEU.

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“>Mergers
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