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The CJEU in *Towercast*

Status of NCA intervention in below-threshold mergers

by **Martim Valente**

The European Court of Justice (CJEU)'s recent judgment in Case C-449/21, *Towercast v Autorité de la Concurrence*[1] has generated a great deal of interest from the EU competition law community.

For some, *Towercast* is no more than the confirmation of the well-established case law set out by the CJEU in its seminal *Continental Can* judgment, where it held that then Article 86 of the EEC Treaty (now Article 102 of the TFEU) could be applied in the context of a concentration that created or reinforced a dominant position.[2]

For others, the fact that *Continental Can* was decided prior to the adoption of the EU Merger Regulation[3] (EUMR) was significant. The EUMR represented lex specialis in this domain – giving a competition authority the chance to have another bite at the cherry created legal and commercial uncertainty.

To this school of thought, if a concentration does not meet the applicable ex ante merger control thresholds (either at the EU or national level), it should not face any further obstacles – for example, via ex post scrutiny of the concentration's competitive effects.

In either instance, the main outcome of this important judgment is significant. At a time where competition authorities are increasing their scrutiny of review of transactions – for example, through the use Article 22 of the EUMR and through the adoption of theories of harm based on dynamic and potential competition – the CJEU has given national competition authorities (NCAs) legal certainty that they can examine the competitive effects of completed concentrations not subject to ex ante merger control.

Indeed, a few days following the judgment by the CJEU, the Belgian Competition Authority (BCA) opened an abuse of dominance investigation related to the acquisition of edpnet by telecoms incumbent, Proximus.[4]

In its press release announcing the investigation, the BCA noted:

> "[T]he Court of Justice has unambiguously confirmed the competence of national competition authorities to analyse ex post non-notifiable concentrations under merger control, on the basis of Article 102 of the TFEU, which is equivalent to Article IV.2 [of domestic competition law]."[5]

The remainder of this article will: (1) describe the *Towercast* proceedings before the Autorité de la Concurrence (AdC); (2) set out the key points emerging from the CJEU's judgment; and (iii) conclude with an overview of some of the practical implications of this judgment.

The *Towercast* proceedings before the AdC

On 15 November 2017, Towercast SASU (Towercast) lodged a complaint with the AdC alleging an abuse of dominant position by the French broadcaster, TDF.

According to Towercast, TDF's October 2016 acquisition of Itas constituted an abuse of dominant position, in that TDF hindered competition on the upstream and downstream wholesale markets for digital transmission of terrestrial television services by significantly strengthening TDF's dominant positions on those markets.[6] The transaction was not reportable under either the EU or French merger control rules.

On 16 January 2020, following an investigation which included the adoption of a Statement of Objections,[7] the AdC closed its investigation. In the press release that accompanied this decision, the AdC set out why, in its view, the *Continental Can* case law did not apply to below-threshold concentrations.

The AdC's press release noted that "following the *Continental Can* judgment, a system of compulsory prior control of mergers was introduced at the European level by [the EUMR]" and that under the current merger control rules there was already a system in place that allowed for the referral of below-threshold mergers to the European Commission (Article 22 of the EUMR).[8]

The press release further noted that "When [the EUMR] was adopted, the Council and the Commission considered 'for pressing reasons of legal security, that this new Regulation will apply solely and exclusively to concentrations (...)'" and that "Currently, Article 21 of [the Merger Regulation]

specifies [that] Regulations implementing Articles 101 and 102 TFEU are not applicable to concentrations ..."[9]

Towercast challenged the AdC's decision before the Paris Court of Appeal on 9 March 2020. This court sought guidance from the CJEU on whether Article 21 of the Merger Regulation precluded the application of Article 102 TFEU to concentrations that:

- Do not meet the threshold for ex ante merger control under EU and national merger control rules; and
- Have not been referred to the Commission under Article 22 of the Merger Regulation.[10]

The section that follows sets out the CJEU's response to these questions.

The CJEU's judgment – defining the substantive limits of the EUMR

In essence, the Paris Court of Appeal was seeking to clarify the exact hierarchy of laws as between a provision of the Treaty – Article 102 TFEU – the Merger Regulation and national provisions that, as is the case in France and across the EU, prohibit the abuse of a dominant position.

The Paris Court of Appeal's questions focused, therefore, on two key points: (i) how relevant was it that the *Continental Can* judgment was decided prior to the first version of the EUMR and before the notion of a "concentration" was on the EU statute books; and (ii) how relevant was it that there was a specific provision of the EUMR – Article 22 – that allows member states to refer transactions that do not meet EU thresholds for *ex ante* review by the European Commission?

In its judgment, the CJEU clarified that:

- The scope of Article 21 – which provides that only the EUMR applies to concentrations with an EU dimension – is to set aside the application to concentrations of any other "pieces of secondary EU legislation regarding competition", including Regulation 1/2003.[11]
- It could not be inferred from the introduction of the one-stop shop principle for the assessment of the impact on competition of concentrations "that the legislature intended to render the control carried out at national level on a concentration operation in light of Article 102 TFEU devoid of purpose".[12]
- The CJEU recognised that the principle of legal certainty meant that "the mechanism for the prior control of concentrations as defined by [the EUMR] must be applied as a matter of priority" but that that "cannot, however, preclude the possibility for a competition authority to capture a concentration operation under Article 102 TFEU under certain conditions".[13]
- The fact the EUMR introduces an ex ante control mechanism for concentrations with a Community dimension "does not preclude an ex post control for concentration operations that do not meet that threshold".[14]
- The interpretation put forward by the AdC and TDF "ultimately amounts to ruling out the direct applicability of a provision of primary law by reason of the adoption of secondary legislation covering certain types of conduct of undertakings on the market".[15]

As concerns the direct effect of Article 102 TFEU, the CJEU made a number of additional observations.

The CJEU held that it was well established "that that article is a provision having direct effect and that its application is not conditional on prior adoption of a procedural regulation".[16] The CJEU further noted in this respect that "no exemption may be granted, in any manner whatsoever, in respect of abuse of a dominant position; such abuse is simply prohibited by the Treaty"[17] and that the CJEU "has held that the list of practices and types of conduct contained in Article 102 TFEU is not exhaustive".[18]

In conclusion, the CJEU held that the EUMR could not "preclude a concentration operation with a non-Community dimension [from] being subject to a control by the national competition authorities and by the national courts, on the basis of the direct effect of Article 102 TFEU (...)".[19]

A final note of interest relates to the CJEU's response to TDF's and Tivana's request that – in the event the CJEU reached the above conclusion – the CJEU limit the temporal scope of such a judgment for reasons of legal certainty.

The argument put forward was that such a judgment by the CJEU would seriously impact "legal certainty [for] all the undertakings which have in good faith carried out concentration operations below the thresholds, which will now be challengeable before the national authorities or courts on the basis of Article 102 TFEU".[20]

The CJEU rejected this request, noting that "the interpretation of EU law given by the court in the present judgment is a continuation of the well-established case law of the Court of Justice and the General Court on the direct effect of Article 102 TFEU (...)".[21]

The CJEU also noted that "neither the request for a preliminary ruling nor the observations submitted to the court contain evidence capable of proving that the interpretation given by the court would entail a risk of serious difficulties, since there is no precise indication as to the number of legal relationships which might be affected (...)".[22]

Practical implications of the CJEU's *Towercast* judgment

The CJEU's judgment can be read as the mere confirmation of well-established rules and principles of EU law.

The CJEU held that there is no question that Article 102 TFEU is directly applicable and that, as a matter of first principles, secondary legislation cannot set aside primary legislation that is sufficiently clear and precise such that it clearly confers rights and obligations under the TFEU.

However, as the CJEU itself notes in this judgment, "the interpretation of EU law requires account to be taken not only of its wording, but also of the context in which it occurs, as well as the objectives and purpose pursued by the act of which it forms part".[23]

The temporal and substantive context behind this judgment is the emergence of new mechanisms for competition authorities to assess the competitive effects of concentrations on competition and – as is the case here and in respect of the application of Article 22 of the EUMR – the readoption or repurposing of tools that have been part of the statute book for many decades.

However, one of the key practical implications of the *Towercast* judgment is that NCAs now have certainty that they have the legal power to assess killer acquisitions, ie the acquisition of innovative competitors by incumbents to eliminate potential future sources of competition.

The judgment could not be clearer in this respect: NCAs have had this power (even if they were not aware of it and/or decided not to use it) since the inception of the Treaty and even in light of the adoption of the EUMR and domestic merger control rules.

Indeed, the BCA's press release referenced in the introduction to this article can be read to conclude that, absent the *Towercast* judgment, it would have been unlikely that the BCA would have opened its investigation into Proximus' acquisition of edpnet.

The restatement of the law for some – or the creation of legal certainty at the very least for others – will be particularly important in member states whose merger control thresholds are based on turnover data only.

This is true for most member states, save for a number of exceptions such as Portugal and Spain, both of which have market share notification thresholds. Arguably, member states with market share notification thresholds already have the scope to intervene in transactions where a target has limited turnover and/or where total market sizes in value terms are low.

However, even in cases where national rules provide for ex ante merger control based on a transaction exceeding certain market share thresholds, there will still be scope for the *Towercast* case law to apply. For example, in entirely nascent markets, where a target company may hold pipeline products or intellectual property rights that could reinforce an incumbent's dominant position, or in digital markets where dynamic or potential competition can be significant drivers of competition.[24]

A further – critical – implication of this judgment is whether and what type of remedies can be applied to mitigate any anti-competitive effects of a concentration that has been implemented and which is subsequently found to have breached Article 102 TFEU or its national equivalent.

Some such concentrations may have been implemented many years beforehand. The extent to which structural remedies would be effective or proportionate is unclear.

The mere prospect of such divestment orders has the potential to materially increase legal and commercial uncertainty. A dominant undertaking contemplating a transaction that could be caught by the scope of this judgment cannot notify the transaction in question to address such uncertainty as, by definition, an NCA would not have the power to assess the transaction in question as it is not caught by its ex ante merger control powers.

In this respect, Advocate General Kokott noted in her Opinion that "contrary to the fears expressed by some of the parties to the proceedings – in view of the primacy of behavioural remedies and the principle of proportionality, there is not usually a threat of subsequent dissolution of the concentration, but rather only the imposition of a fine".[25]

One thing is clear: dominant companies that are contemplating the acquisition of a competing firm via a transaction that does not trigger ex ante national merger control now face an additional element to contemplate in the assessment of regulatory risk.

It will be interesting to see whether NCAs – and national courts – use the greater legal certainty provided by the CJEU in this important judgment to increase their scrutiny of killer acquisitions, and whether AG Kokott's view that post-completion dissolution of transactions caught by the scope of this ruling would be disproportionate, is confirmed in practice.

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Endnotes

1. *Towercast v Autorité de la concurrence*, Case C-449/21, ECLI:EU:C:2023:207,https://curia.europa.eu/juris/liste.jsf?num=C-449/21.
2. *Europemballage Corporation and Continental Can Company Inc v Commission,* Case C-6/72, ECLI:EU:C:1975:50, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61972CJ0006.
3. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29 January 2004).
4. Press release number 10/2023, 22 March 2023, "The Belgian Competition Authority opens an ex officio investigation into a possible abuse of dominance by Proximus in the context of the takeover of edpnet, in application of the *Towercast* case law".
5. Ibid.
6. *Towercast v Autorité de la concurrence*, Case C-449/21, opinion of Advocate General Kokott, ECLI:EU:C:2022:777, at paras 17 and 18, https://curia.europa.eu/juris/liste.jsf?num=C-449/21.
7. Ibid, note 1, at para 21.
8. Ibid, note 4.
9. Ibid, note 4.
10. Para 29: "Is Article 21(1) of [the Merger Regulation] to be interpreted as precluding a national competition authority from regarding a concentration which has no Community dimension [and] 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 of [that regulation], 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?".
11. Ibid, note 1, at para 33.
12. Ibid, note 1, at para 37.
13. Ibid, note 1, at para 40.
14. Ibid, note 1, at para 41.

15. Ibid, note 1, at para 42.
16. Ibid, note 1, at para. 44.
17. Ibid, note 1, at para 45.
18. Ibid, note 1, at para 46.
19. Ibid, note 1, at para 50.
20. Ibid, note 1, at para 55.
21. Ibid, note 1, at para. 58.
22. Ibid, note 1, at para 59.
23. Ibid, note 1, at para 31.
24. The likelihood that the impact of this judgment will be more keenly felt in certain industries was noted by Advocate General Kokott in her Opinion preceding the judgment: "... supplementary application of Article 102 TFEU, similar to that of Article 22 of the [EUMR], is likely to contribute to the effective protection of competition [...], in so far as concentrations which are problematic under competition law do not meet the thresholds under merger control law and are therefore not subject, in principle, to ex ante control. This is because [...] a gap in protection has emerged in recent years in the coverage and control, under competition law, of acquisitions of innovative start-ups, for example in the fields of internet services, pharmaceuticals or medical technology ('killer acquisitions')." Ibid, note 8, at para 48.
25. Ibid, note 7, at para 63.

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