ALERT MEMORANDUM

Towercast: EU Court of Justice Endorses Post-Closing Review of Concentrations

April 11, 2023

On March 16, 2023, in a preliminary ruling issued in the Towercast case, the EU Court of Justice ruled that concentrations that escape *ex ante* EU and national merger control review may still be subject to an *ex post* review under Article 102 TFEU prohibiting abuse of dominance, including after the closing of the transaction.[1]

Less than a week after, relying on *Towercast*, the Belgian Competition Authority opened an investigation *ex officio* for a possible abuse of dominant position resulting from Proximus' acquisition of Edpnet. It remains to be seen (i) if other national competition authorities will follow suit, (ii) if they will limit the application of Article 102 TFEU to putative 'killer acquisitions' of innovative start-ups or also target other types of transactions, and (iii) crucially, which types of remedies (*i.e.*, behavioral or divestiture remedies) they will impose when finding abuse concerns post-closing.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

BRUSSELS

Antoine Winckler
+32 2 287 2018
awinckler@cgsh.com

F. Enrique González-Díaz
+32 22872117
fgonzalez-diaz@cgsh.com

François-Charles Laprévote
+32 22872184
fclaprevote@cgsh.com

Anita Magraner
+32 2 287 2133
amagraneroliver@cgsh.com

Inés Pérez Fernández
+32 2 287 2024
iperezfernandez@cgsh.com

Ariane Lonmon
+32 2 287 2308
alonmon@cgsh.com

[1] *Towercast v Autorité de la concurrence* (Case C-449/21), ECLI:EU:C:2023:207.

Background

Article 102 TFEU prohibits undertakings from abusing their market dominance. In 1973, the Court of Justice held in its landmark *Continental Can* judgment that an acquisition by a dominant company of a rival that strengthens that dominant position constitutes an abuse in violation of Article 102 TFEU.[2] *Continental Can* was then widely perceived as a means of overcoming the absence of express provision for the control of concentrations. In 1989, however, the EU Merger Regulation ("**EUMR**")[3] put in place a dedicated *ex ante* control of concentrations, and the Commission explicitly stated at the time that it "*does not normally intend*" to apply Article 102 TFEU to concentrations.[4]

In 2017, Towercast filed an abuse complaint with the French Competition Authority, alleging that the French television broadcasting service operator TDF has abused its dominant position by acquiring its rival Itas. The transaction fell below the EU and French merger control thresholds and avoided any pre-closing merger review. The French Competition Authority rejected the complaint on the basis of a "*clear dividing line between merger control and the control of anticompetitive practices,*"[5] taking the view that the EUMR applies exclusively to concentrations and that Article 102 TFEU is no longer applicable where no anticompetitive conduct distinct from the concentration is manifested. Towercast appealed. The Paris Court of Appeal stayed the proceedings and referred a question to the Court of Justice which, in essence, called into question the relationship between the rules of *ex ante* merger control and *ex post* control of abuse under Article 102 TFEU. The question was formulated as follows: "*Is Article 21(1)* [EUMR][6] *to be interpreted as precluding a* [NCA] *from regarding a concentration which has no Community dimension within the meaning of Article 3* [thereof]*, 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 light of the structure of competition on a market which is national in scope?*".

The Court of Justice Judgment

The Court of Justice answered in the negative.[7] The Court of Justice insisted that Article 102 TFEU is a directly applicable provision of primary EU law, which creates rights for individuals that national courts must protect and whose application is not conditional on the prior adoption of procedural rules.[8] In short, the adoption of the EUMR did not and could not preclude the direct application of Article 102 TFEU, a higher norm in the hierarchy of norms.

The Court of Justice went on clarifying the legal standard that NCAs must apply when examining concentrations under Article 102 TFEU. It held that,

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2 *Europemballage Corporation and Continental Can Company Inc. v Commission* (Case C-6/72), ECLI:EU:C:1975:50.

3 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, p. 1, which was repealed and replaced by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22.

4 The Commission stated that "*it does not normally intend to apply Articles 85 and 86 of the Treaty establishing the European Economic Community to concentrations as defined in Article 3 other than by means of [EUMR].*" Notes on Council Regulation (EEC) 4064/89, "re Article 22", available at: https://ec.europa.eu/competition/mergers/legislation/notes_reg4064_89_en.pdf.

5 Decision 20-D-01 of the French Competition Authority of January 16, 2020 regarding a practice implemented in the digital terrestrial television broadcasting sector and *Towercast v Autorité de la concurrence* (Case C-449/21), ECLI:EU:C:2023:207, para. 21.

6 "*This Regulation alone shall apply to concentrations as defined in Article 3, and Council Regulation (EC) No 1/2003 […] shall not apply […].*" (emphasis added). Regulation (EC) No 1/2003 relates to the implementation of the rules on competition laid down in Articles 101 and 102 TFEU.

7 *Towercast v Autorité de la concurrence* (Case C-449/21), ECLI:EU:C:2023:207, para. 40.

8 *Towercast v Autorité de la concurrence* (Case C-449/21), ECLI:EU:C:2023:207, para. 42–47.

contrary to the legal standard applicable in merger control proceedings, "*the mere finding that an undertaking's position had been strengthened is not sufficient for a finding of abuse, since it must be established that the degree of dominance thus reached would substantially impede competition, that is to say, that only undertakings whose behavior depends on the dominant undertaking would remain in the market*".[9]

It follows that NCAs must establish three conditions to demonstrate that a concentration is abusive under Article 102 TFEU: (i) the buyer must, pre-transaction, hold a dominant position on a given market; (ii) the buyer must acquire an actual or potential competitor in that market; and (iii) post-transaction, "*only undertakings whose behavior depends on the dominant undertaking*" must remain in the market. It is not clear, however, what this third condition means in practice and which legal test it applies.

Take-aways

The *Towercast* ruling further complexifies merger control risk analysis on several accounts:

— **Several possible proceedings.** When considering a potential acquisition or merger, it is no longer sufficient for transactional parties to verify whether a contemplated transaction exceeds EU or national merger control thresholds. They also need to consider the degree of risk of: (i) a merger control review by the Commission following a referral by a NCA under Article 22 EUMR[10] and (ii) a potential abuse investigation under Article 102 TFEU by the Commission[11] or NCAs, in line with *Towercast*. As to whether there could be a double assessment of a concentration under both merger control and Article 102 TFEU, the Court of Justice held that "*for reasons of legal certainty, the mechanism for the prior control of concentrations* […] *must be applied as a matter of priority*", which does not entirely exclude the possibility of a double assessment.[12]

— **Application of national procedural rules.** The *Towercast* judgment holds that NCAs will have to examine non-EU-wide concentrations under Article 102 TFEU on the basis of their own procedural rules,[13] as EUMR excludes the application of EU Regulation No 1/2003 to concentrations, but this may raise procedural issues given how tightly connected national procedural rules and EU Regulation No 1/2003 are.

— **Transactions most likely to be targeted.** Advocate General Kokott's Opinion indicates that the application of Article 102 TFEU to concentrations will allow regulators to capture acquisitions of innovative start-ups, "*for example in the fields of internet services, pharmaceuticals or medical technology ('killer acquisitions')*", as well as acquisitions of "*emerging competitors*" in

[9] *Towercast v Autorité de la concurrence* (Case C-449/21), ECLI:EU:C:2023:207, para. 52 (emphasis added).

[10] The scope of Article 22 EUMR is subject to an appeal before the Court of Justice: *Illumina v Commission* (Case C-611/22 P) and *Grail v Commission* (C-625/22). With respect to Article 22 EUMR, a possible implication of the *Towercast* judgment is that the Commission's expansive re-interpretation of Article 22 EUMR is not necessary in light of the Court of Justice's endorsement of *ex post* review of below-threshold concentrations under Article 102 TFEU.

[11] The *Towercast* judgment concerns the application of Article 102 TFEU by NCAs, but its reasoning could be extended to the Commission, for concentrations that fall below the EU merger control thresholds and produce effects on trade between Member States.

[12] *Towercast v Autorité de la concurrence* (Case C-449/21), ECLI:EU:C:2023:207, para. 40 (emphasis added). Advocate General's Opinion takes the view that there remains room for the application of the principle *lex specialis derogate legi generali*, that is to say, that a concentration which would have been cleared under EUMR could not "*as such be qualified (any longer) as an abuse of a dominant position within the meaning of Article 102 TFEU, unless the undertaking concerned has engaged in conduct which goes beyond that and could be found to constitute such an abuse.*" *Towercast v Autorité de la concurrence* (Case C-449/21), opinion of Advocate General Kokott, ECLI:EU:C:2022:777, para. 60.

[13] *Towercast v Autorité de la concurrence* (Case C-449/21), ECLI:EU:C:2023:207, paras. 47–50.

"*highly concentrated markets*".[14] However, nothing precludes regulators from investigating concentrations in other scenarios; and absent any guidance from the Commission, there is a risk that NCAs and national courts start applying Article 102 TFEU extensively to challenge below-thresholds concentrations.

— **Possible remedies.** Any acquisition by a putatively dominant company might potentially be scrutinized years after closing, given that there is no deadline to initiate an abuse investigation.[15] Advocate General Kokott's Opinion suggests that any abuse concerns would likely be resolved through the imposition of behavioral remedies and fines rather than divestment orders.[16]

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[14] *Towercast v Autorité de la concurrence* (Case C-449/21), opinion of Advocate General Kokott, ECLI:EU:C:2022:777, para. 48.

[15] The statute of limitations impacts the ability to impose fines.

[16] *Towercast v Autorité de la concurrence* (Case C-449/21), opinion of Advocate General Kokott, ECLI:EU:C:2022:777, para. 63: "*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.*"