COMPETITION FORUM
LAW & ECONOMICS

January 6th, 2022

The resurrection of *Continental Can's* ex-post merger control?

Victor DELTOUR

To quote this paper: V. DELTOUR, "The resurrection of Continental Can's ex-post merger control?", *Competition Forum,* 2022, n° 0020, https://competition-forum.com.

Resume: *With its decision, dated July 16, 2021, N°20/04300, the Paris Court of Appeal asked the European Court of Justice for a preliminary ruling to find out whether Article 102 of the TFEU can be applied to a concentration which would be below the thresholds of merger control.*

Context: In its decision of January 16, 2020, the French Competition Authority (FCA) endorsed the end of the famous Continental Can case law. The latter had been seized by the television and broadcasting company Towercast, which contested the purchase by *Télévision de France* (TDF), the dominant operator on the market, of its competitor Itas in October 2016. The merger flew under the radars of the supervisory authorities, reaching neither the European, nor the French thresholds. Wishing to put an end this takeover, Towercast then appealed to the FCA.

To justify its complaint before the FCA, Towercast decided to act, not on the matter of merger control, but on that of antitrust law. The company argued that this takeover was in itself an abuse of a dominant position in that it significantly strengthened the market position of TDF, which was left with only one competitor. In other words, Towercast was invoking here the Continental Can judgment of February 21, 1973, which for the first time saw the Court of the European Communities control a concentration on the basis of the old article 86 (new 102 of the TFEU). The CJEC had, at the time, justified its decision by holding that the *"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*" [1].

[1] CJEC, 21 February 1973, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, Case 6-72, Recital 26.

This daring argument was nevertheless swept aside by the FCA, which refused to control the merger operation on the basis of article 102 of the TFEU or on article L.420-2 of the French Commercial Code. The FCA will indeed consider that the former regulation nº 4064/89 of December 21, 1989, creating an ex-ante merger control, had rendered the Continental Can case law null and void[2].

But Towercast did not budge, and then seized the Paris Court of Appeal with a request to quash the Authority's decision. This dispute therefore pits Towercast against the Competition Authority, joined by TDF and the French minister of Economy.

The arguments put forward by the FCA and TDF: The FCA will support its previous reasoning by asserting that the new Regulation 139/2004 formally disqualifies the application of Article 102 in the matter of ex post merger control. It justifies this position by explaining that the Continental Can case law was only a means used at the time by the CJEC to face the lack of legal provisions for merger control. This lack has been filled and the 1989 and 2004 regulations subsequently drew a clear line between anti-competitive practices and merger control. In addition, for the FCA, the need to control merger that are below the thresholds is fulfilled by article 22 of the regulation, which allow any Member State to ask the European Commission "*to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request*". Furthermore, the FCA claim that the survival of an ex-post-merger control would create confusion between the two subjects of Competition Law; merger law having been thought of as a means of prevention, while antitrust law is above all governed by a repressive vocation. For the FCA such confusion would be the source of strong legal uncertainty for companies.

In support of the FCA, TDF produced a judgment of the British Court of Appeal dated December 4, 1992 which considered in a similar situation that Articles 101 and 102 of the TFEU were not intended to apply to a takeover operation[3].

The arguments put forward by Towercast: The claimant acknowledges that the procedure provided for in Article 22 of the Regulation allows to ask European Commission to control a concentration below the thresholds, but it also notes that

[2] French Competition Authority, January 16, 2020, Case 20-D-01.

[3] Court of Appeal, Civil Division, December 4, 1992 *Regina v Secretary of State for Trade and Industry, ex parte Airlines of Britain Holdings Pic and Another.*

this article can only be activated at the discretion of a Member State. Towercast maintains that the regulations of 1989 and 2004 did not have the effect of rendering Continental Can obsolete, since they only apply to the concentrations which come within its application. The plaintiff company claims that Article 102 being hierarchically superior to the regulations, its application should take precedence over that of Regulation 139/2004. To justify its claims, it cites recital 7 of Regulation 139/2004 which states that: ***Articles 81 and 82, while applicable, according to the case-law of the Court of Justice, to certain concentrations****, are not sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty*. So that unless there was an express ruling from the CJEU, the door left by Continental Can would still be open.

To support its reasoning Towercast raises the fact that several Authorities or courts of other Member States have ruled in favor of the survival of Continental Can, in particular the decisions of the Luxembourg Competition Council[4], and the Brussels Court of Appeal[5].

The ruling of the Paris Court of Appeal: After having listened to the arguments of the parties, and noted the disparities in the solutions provided by the authorities and courts of the other member states, the Paris Court of Appeal considered that there is a serious doubt in the application of positive law and will decide to seize the CJEU of a preliminary question translated as follows : "*Should Article 21 of Council Regulation (EC) No 139/2004 of 20 January 2004 on merger control be interpreted as meaning that it precludes a transaction concentration, without a Community dimension within the meaning of Article 1 of the aforementioned regulation, located below the mandatory ex ante control thresholds provided for by national law and not having given rise to a referral to the European Commission in application of Article 22 of said regulation, be analyzed by a national competition authority as constituting an abuse of a dominant position prohibited by Article 102 of the TFEU, with regard to the structure of competition on a national market ?* ".

In view of the arguments put forward by the parties, it is difficult to imagine a different response from the Paris Court of Appeal; the question of the applicability of Article 102 of the TFEU does not benefit from a unified answer within all the Member States.

Authors are divided by this question. On one hand some, like lawyers Olivier Billard and Quentin Colombier says that a decision in favor of Towercast would be contrary to the

[4] Luxembourg Competition Council, June 17, 2016, Case 2016-FO-04.

[5] Brussels Court of Appeal, December 15, 2006, *Gabriella Rocco*, Case 2006/MR/1.

ratio legis of the European legislator[6]. On the other hand, some like professor David Bosco wonder if this revival of Continental Can case law will not find an echo among European judges, at a time when the question of the modernization of antitrust provisions is particularly raised, in particular to face the specific case of companies on the digital market. Thus, we can think of the predatory acquisitions of small companies passing under the radar of the supervisory authorities and which could therefore potentially be apprehended by antitrust law[7].

On the other hand, we can only note the obvious problem of legal certainty if such a confirmation were to be given by the CJEU, any concentration, even those which have been the subject of an ex-ante control, could be challenged, and potentially be canceled.

In any case, the solution to this dispute is now in the hands of the CJEU, which will therefore have to settle this sensitive question.

Victor DELTOUR

[6] Revue Lamy de la concurrence, nº 109, October 1 2021 - *Contrôle des concentrations : quand la cour d'appel de Paris fait de l'archéologie*, Olivier BILLARD, Quentin COLOMBIER.

[7] Contrats Concurrence Consommation n° 8-9, August 2021, *Continental Can : une renaissance ?* David BOSCO