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Application of the former Continental Can case law: the return of ex-post control of mergers involving abuse of a dominant position

CJEU March 16, 2023, Case C-449/21, TOWERCAST

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Resume: *In a ruling handed down on March, 16, 2023, the Court of Justice of the European Union applied its earlier Continental Can case law to a reference for a preliminary ruling, stating that a competition authority may review an ex post merger for abuse of a dominant position if the merger does not exceed the European or national thresholds and has not been referred to the Commission.*

This ruling originally arose from a dispute between competing companies Towercast and Télédiffusion de France (TDF), both of which provide digital terrestrial television (DTT) broadcasting services in France, in particular following an acquisition transaction dated October 13, 2016, between TDF and Itas, a company also active in the DTT broadcasting sector, TDF took sole control of Itas by acquiring all of the latter's shares.

This transaction had not been notified or examined under the prior merger control procedure, as it fell below the thresholds defined in Article 1 of Regulation No. 139/2004 and in Article L. 430-2 of the French Commercial Code, nor had it given rise to a referral procedure to the Commission under Article 22 of Regulation No. 139/2004.

On November 15, 2017, following this merger, Towercast lodged a complaint with the French Competition Authority regarding a practice implemented in the terrestrial broadcasting sector, alleging that TDF's takeover of Itas constituted an abuse of a dominant position in that it hindered competition on the upstream and downstream wholesale DTT broadcasting markets by significantly strengthening TDF's dominant position on these markets.

A statement of objections was sent to TDF infrastructure and TDF infrastructure Holding on June 25, 2018, accusing them of *"abusing its dominant position on the downstream wholesale market for DTT broadcasting services by taking exclusive control of the Itas group*". In its decision of January 16, 2020[1], the Autorité de la concurrence adopted a different analysis from that adopted by its investigating departments, finding that the complaint against the TDF group companies had not been established and that there were no grounds for continuing the proceedings. Furthermore, it considered, in substance, that *"the adoption of Regulation No. 4064/89 had drawn a clear dividing line between merger control and the control of anti-competitive practices and that Regulation No. 139/2004, which succeeded it, applied exclusively to mergers as defined in Article 3 of that Regulation and rendered the application of Article 102 TFEU to a merger irrelevant, in the*

[1] French Competition Authority, Decision nº 20-D-01 of January 16, 2020

absence of abusive conduct on the part of the undertaking concerned that was detachable from that merger".

Towercast's application was rejected and it appealed against this rejection before the Paris Court of Appeal on March 9, 2020, relying on the judgment of February 21, 1973 in Europemballage and Continental Can ([2]), in which the Court held that the Commission could lawfully apply Article 86 of the EEC Treaty (now Article 82 EC, itself now Article 102 TFEU) to mergers between undertakings. In its pleadings, the company alleges that the principles set out in that judgment are still relevant and that the introduction of prior merger control by Regulations Nos 4064/89 and 139/2004 would not have rendered the application of Article 102 TFEU to a merger that does not have a Community dimension irrelevant. It relies on the direct effect of Article 102 TFEU and claims, in respect of mergers below the thresholds, ex post control of compatibility with that article.
In its defence, the Autorité de la concurrence maintains the analysis set out in its decision before the referring court, in particular as regards the scope of the case law arising from the Continental Can v Commission judgment which, in its view, has become *"irrelevant since the creation of a specific merger control regime. It considers that the mechanism thus established excludes, in essence, the ex post review applicable to anti-competitive practices".*

That appeal therefore enabled the referring court to refer the following question to the Court for a preliminary ruling: *"Is Article 21(1) of Regulation (EC) No 139/2004 to be interpreted as precluding a concentration which does not have a Community dimension within the meaning of Article 1 of that regulation, below the thresholds for compulsory ex ante control laid down by national law and which has not given rise to a referral to the European Commission pursuant to Article 22 of that regulation, to be analysed by a national competition authority as constituting an abuse of a dominant position prohibited by Article 102 TFEU, having regard to the structure of competition on a market with a national dimension?"*

In a ruling dated March 16, 2023, the CJEU provided a clear answer to this question.
It thus held that Article 21(1) of Council Regulation (EC) No 139/2004 of January 20, 2004 on the control of concentrations between undertakings must be interpreted as meaning that it does not preclude a concentration of undertakings which does not have a Community dimension within the meaning of Article 1 of that Regulation, below the thresholds for mandatory ex ante control laid down by national law and which has not given rise to a referral to the European Commission pursuant to Article 22 of that regulation, to be analysed by a competition authority of a Member State as constituting an abuse of a dominant position prohibited by Article 102 TFEU in the light of the structure of competition on a market with a national dimension.

With this judgment, the Court of Justice of the European Union has updated the Continental Can case law (I), which has led to the advent of a

[2] Case 6-72 Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities., EU:C:1973:22., February 21, 1973

new ex post control of mergers through the abuse of a dominant position (II).

I- The modernised renaissance of Continental Can

Through its judgment, the Court of Justice of the European Union puts an end to the argument that the Continental Can case law is obsolete by recognising that it is fully applicable (A), and in so doing, allows for the introduction of a new instrument for ex-post control of mergers through the abuse of a dominant position, the application of which results in the modernisation of the old case law. This judgment has thus provided some fundamental lessons (B)

A- Rejection of the argument that Continental Can is obsolete

In the Continental Can case, the European Court of Justice ruled that the Commission could legally apply Article 86 of the EEC Treaty (now Article 82 EC, itself now Article 102 TFEU) to mergers between undertakings.

However, this judgment was handed down in a context where, at the time, there was no Merger Regulation and, in a way, filled a certain legal vacuum.

Thus, when the Merger Regulation appeared first in 1989[3] and then in 2004[4] , many authors thought that this case law had become "obsolete", in the words of Advocate General Juliane Kokott in her opinion in the *Austria Asphalt* case[5] .

This assertion was legitimate, to say the least, since the Regulation had made it possible to introduce into European law a regime specifically devoted to the *ex ante* control of merger operations, although American law continues to apply both tools, i.e. ex ante control via merger law and ex post control via the law on abuse of a dominant position for control operations.

However, it was this theory of the obsolescence of the Continental Can case law that prompted the French competition authority to reject Towercast's complaint against TDF for its acquisition of Itas on the grounds that a merger could not constitute an abuse of a dominant position since 1989[6]. This decision reflected the Autorité's desire *"to bury once and for all the Continental Can case law"*[7].

It was therefore with great surprise that we received the conclusions of Advocate General Kokott[8], who clearly changed her position and finally came out in favour of restoring the Continental Can jurisprudence to mergers below the thresholds.

This position gave rise to strong criticism. And it was on the basis of these conclusions that the Court of Justice delivered its long-awaited ruling on March 16, 2023, providing a clear response to the Paris Court of Appeal. In so doing, it explained that the Continental Can case law, far from being obsolete, is still fully applicable, since Regulation (EC) 139/2004 does not preclude a

[3] EEC] Reg. 4064/89
[4] EC] regulation 139/2004
[5] CJEU 27 Apr 2017, aff. C-248/16
[6] French Competition Authority Decision n°20-D-01, of January 16, 2020
[7] L. François-Martin & M.-L. Hyvernaud, L'Autorité de la concurrence enterre définitivement la jurisprudence Continental Can, La lettre d'option droit & affaires, February 5, 2020
[8] JULIANE KOKOTT, Advocate General, Opinion, Case C-449/21, October 13, 2022

merger that does not cross either the European or the national thresholds and has not been referred to the Commission from being examined by a national competition authority applying Article 102 TFEU.

Accordingly, in holding that the Autorité de la concurrence had jurisdiction to deal with the acquisition in question under Article 102 of the Treaty on the Functioning of the European Union[9], the Court unambiguously rejected the argument that the Continental Can case law was obsolete.

The Court of the European Union therefore pays little heed to the previously commonly held view that the Continental Can case law has become obsolete since the adoption of the merger control regulations. On the contrary, it relies on recital 7 of Regulation (EC) 139/2004, which states that *"Articles 81 and 82, while applicable, according to the case-law of the Court of Justice of the European Communities, to certain concentrations, are not sufficient to control all transactions",* in order to deduce that the legislature's intention was not to render Article 102 TFEU inapplicable to concentrations, since its applicability is recognised in the recitals of the Regulation itself.[10]

This solution of applying the Continental Can case law is now clear, even if it has had to adapt to a number of recent changes.

B- The fundamental contributions of the Towercast judgment: a modernisation of the old case law.

Although this solution is clear, and the contribution of the Continental Can case law is widespread, it must be seen in the context of the new reading of Article 22 of Regulation (EC) 139/2004, whereby the Commission now accepts referrals of transactions from authorities whose national thresholds are not exceeded.

This new reading was recognised in the Illumina grail case[11].

The Court thus sets out conditions, holding that a competition authority may control a merger ex post by means of an abuse of a dominant position if that merger does not cross either the European or the national thresholds and has not been the subject of a referral request to the Commission.

Thus, a merger that has escaped ex ante control because it has not met the thresholds required by EU and national law may be subject not only to ex post control on the basis of Article 22 of Regulation 139/2004, which allows national competition authorities to ask the Commission to examine such a merger, but also, if this first mechanism is not used, on the basis of the prohibition of abuse of a dominant position provided for in Article 102 TFEU.

[9] Matthieu Blayney, Counsel, and Jean-Baptiste Roche, PhD student (Université Panthéon-Assas) and junior associate, Cabinet Linklaters, « The Towercast case: the Court of Justice of the European Union revives its case law on the application of Article 102 TFEU to concentrations », May 11, 2023

[10] Matthieu Blayney, Counsel, and Jean-Baptiste Roche, PhD student (Université Panthéon-Assas) and junior associate, Cabinet Linklaters, « The Towercast case: the Court of Justice of the European Union revives its case law on the application of Article 102 TFEU to concentrations », May 11, 2023

[11] Case T-227/21 Illumina v Commission, Judgment of the European Court of First Instance.

However, the question arises as to whether these solutions could in fact be treated in a complementary manner, given that Article 102 of the TFEU only allows insufficient ex post control, thus justifying ex ante control even below the thresholds thanks to the reference in Article 22?

In any event, through the application of the Continental Can case law and, in so doing, the advent of this new ex post control, the Court of Justice of the European Union has provided a number of lessons for M&As and private equity transactions and private equity transactions, since, after the lesson learned since the prohibition of the *Illumina/Grail* merger, it is now possible for a non-notifiable merger to be referred to and/or examined by the Commission on the basis of Article 22 of the Merger Regulation and, where appropriate, to be challenged a posteriori. The Towercast judgment provides a fundamental lesson, namely that a non-notifiable merger may be challenged *a posteriori* by the Commission or a national authority if an abuse of a dominant position can be established, which is certainly the result of the merger, but which is detachable from it.[12]

On this point, however, the Court of Justice is careful to emphasise that the acquirer cannot be found to have abused its dominant position on a given market merely by having acquired control of another undertaking on that same market, and that it is for the authority to which the case is referred to establish that *"the degree of dominance thus achieved substantially impedes competition, that is to say, it leaves only undertakings whose conduct is dependent on the dominant undertaking"*[13].

In addition, the Court states that although the Merger Regulation establishes a system of prior control of concentrations which must be applied as a matter of priority, *"it does not exclude ex post control of concentrations"* which are below the control thresholds[14].
It also points out that Article 102 on abuse of a dominant position is a provision with direct effect, meaning that it can be directly invoked by litigants without them having to rely on the Merger Regulation. Consequently, the position defended by the Authority would be tantamount to *"disapplying the direct applicability of a provision of primary law by reason of the adoption of an act of secondary legislation"*[15], which the Court rules out.
Finally, it concludes that the Merger Regulation *"cannot preclude a merger with a non-Community dimension [...] from being reviewed by national competition authorities and by national courts under the direct effect of Article 102 TFEU using their own procedural rules"*.

The national competition authorities are therefore likely to mobilise this new control instrument without delay. In this respect, it is interesting to note that the Belgian competition authority did not take long to apply the *Towercast* judgment, since it decided to open an ex officio investigation against Proximus on March 22, 2023 concerning a possible abuse of a dominant position in the context of the takeover of the

[12] Frédéric Pradelles, Partner, McDermott Will & Emery Paris, « Concentration: the return of ex post control, a new risk for companies? »

[13] C-449/21 Towercast, Paragraph 52
[14] Ibid Paragraph 41.
[15] Ibid Paragraph 42.

Edpnet group, for which the merger is not notifiable[16].

This ruling has thus enabled the resurrection of ex post control through the abuse of a dominant position.

II- The resurrection of ex post control through abuse of a dominant position

As mentioned above, in its Towercast ruling, the Court of Justice of the European Union revived the Continental Can case law, which in particular led to the resurrection of ex post control through the abuse of a dominant position.

This decision can be explained by the policy launched in recent years to combat killer acquisitions (A). However, although this decision makes it possible to strengthen merger control, it is not without risk, and may even lead to a degree of legal uncertainty (B).

A- A determination to combat acquisition killers

At a time when killer acquisitions in the digital and pharmaceutical sectors were on the increase, and reports were appearing here and there calling on the competition authorities to put an end to this phenomenon, which is seen as destructive for the economy and for competition[17], the European Union has in recent years put in place a genuine policy to combat killer acquisitions, not only through its case law, but also through its legislation, for example with the adoption of the Digital Market Act on October 12, 2022, applicable from May 2, 2023, which aims to prevent the major online platforms, known as gatekeepers, from abusing their dominant position. In order to combat killer acquisitions, gatekeepers will now have to inform the European Commission of any acquisitions or mergers they intend to carry out, even if they fall below the notification thresholds set out in the legislation, provided that the transaction enables data to be collected[18].

In merger law, a "killer acquisition" refers to the situation in which a dominant or structuring player in a market acquires, directly or indirectly, an innovative or promising player, in order to strengthen its position on the market and to achieve external growth with the consequence or objective of preventing the emergence of a potential competitor and eliminating or mothballing that competitor or the products or services it was developing.[19]

In principle, proposed takeovers and mergers exceeding a certain size and meeting the turnover thresholds set by law (Commercial Code article L.430-2) or Council Regulation no. 139/2004 of January 20, 2004 on the control of concentrations between undertakings must be notified to the authorities. Through this upstream control, the authorities ensure that these transactions do not reduce competition, and make their authorisation conditional on the implementation of appropriate

[16] French Competition Authority, March 22, 2023, Press release N°10/2023

[17] Alain Ronzano, « Article 102 TFEU has direct effect, allowing ex post control of concentrations below the thresholds », Competition Weekly 11/2023

[18] Reg. 2002/1925, art. 14.1

[19] Cynthia Picart, « Killer acquisitions, Dictionnaire de droit de la concurrence », Concurrences, Art. N°109482

solutions where there is a risk of harm to competition.

However, it is not proposed takeovers and mergers that meet the turnover thresholds set by law or Council Regulation 139/2004 of January 20, 2004 that are prejudicial, but mergers involving companies with low turnover that are "below the thresholds" and not subject to the notification requirement.

This is why, in the case of Illumina's acquisition of Grail, the European Court of Justice confirmed that a national competition authority could refer the control of a transaction below the concentration thresholds to the European Commission on the basis of Article 22 of Regulation 139/2004.[20]

This new reading of Article 22 was justified in particular by the desire to control predatory acquisitions of small operators by dominant companies. Such acquisitions would be harmful to competition, but would fall under the radar of the thresholds. Insofar as it turns out that the competition authorities do in fact have the power under Article 102 TFEU to control such behaviour, the appropriateness of this new reading seems more questionable.

Thus, the Towercast case law offers a second major legal tool for controlling mergers that do not meet the notification thresholds, since a merger that escaped ex ante control because it did not meet the thresholds required by EU and national law may not only be subject to ex post control on the basis of Article 22 of Regulation 139/2004, which allows national competition authorities to ask the Commission to examine such a transaction, but also, if this first mechanism is not used, on the basis of the prohibition of abuse of a dominant position provided for in Article 102 of the TFEU.

Although beneficial, the application of this new ex-post control is not without consequences.

B- The risk of creating legal uncertainty

Ultimately, apart from reviving a long-standing body of case law that has lain dormant for many years and strengthening the merger control mechanism, should the Towercast ruling not also be seen as a new source of unpredictability and legal uncertainty for companies, adding to the legal arsenal available to the competition authorities, which they are clearly not hesitating to use?

This new revolution in merger law may create uncertainty about the risks of challenging mergers that are not subject to a notification obligation.

So could an ill-intentioned third party, such as a competitor or a customer, opposed to a merger find in this ruling by the Court of Justice of the European Union a new way of "scuppering" a transaction with competition authorities?[21]

It remains to be seen how this Towercast ruling will be received by national authorities, since until now, the competition authority has been reluctant to apply such a control[22].

Companies likely to be in a dominant position will therefore have to be extra cautious in order to anticipate in the best possible way the risk of

[20] Case T-227/21 Illumina v European Commission.

[21] Frédéric Pradelles, Partner, McDermott Will & Emery Paris, « Concentration: the return of ex post control, a new risk for companies? ».

[22] French Competition Authority, Decision nº 20-D-01 of January 16, 2020

the operation being called into question in the future when a merger is deemed sensitive for competition.[23]

This is what TDF argued in its pleadings, asking the Court to limit the temporal effects of the present judgment in the event that it were to find that a transaction below the thresholds and not referred to the Commission on the basis of Article 22 could be analyzed in the light of Article 102 TFEU. The company argued that such a position by the Court would have serious consequences in terms of legal certainty.

The Court dismissed the claim, pointing out first of all that the interpretation which the Court gives to a rule of Union law, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, clarifies and specifies the meaning and scope of that rule, as it must be or should have been understood and applied since the date of its entry into force[24]. Such a temporal limitation of the effects of a decision can only be allowed in exceptional cases, where the interested parties are acting in good faith and where there is a risk of serious disturbance[25]. On the first point, the Court finds that the interpretation of Union law given by the Court of Justice in the present judgment is consistent with the well-established case-law of the Court of Justice and the Court of First Instance concerning the direct effect of Article 102 TFEU and the consequences attached thereto[26]. Furthermore, neither the reference for a preliminary ruling nor the observations lodged with the Court contain any evidence that the interpretation adopted by the Court in the present judgment would entail a risk of serious disturbance[27]. Finally, the possibility for a national competition authority to examine under Article 102 TFEU a concentration which is below the thresholds and which has not given rise to a referral to the Commission pursuant to Article 22 of that Regulation does not necessarily imply that such a transaction would be in danger of being called into question, thereby infringing property rights and entailing considerable financial consequences[28].

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[23] Michel Ponsard's analysis of the prohibition on abuse of a dominant position laid down in the Treaties in the context of a merger of undertakings of a non-Community dimension
[24] C-449/21 Towercast, Paragraph 56
[25] Ibid, Paragraph 57
[26] Ibid, Paragraph 58
[27] Ibid, Paragraph 59
[28] Ibid, Paragraph 60