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The French Competition Authority carries out the first review of mergers below the national notification thresholds under cartel law

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Resume: *The French competition authority has dismissed a case of alleged geographical distribution of the rendering market between several companies, due to the lack of sufficient evidence to establish an anti-competitive agreement. The authority therefore applies antitrust law to a merger below the thresholds.*

In decision no. 24-D-05 of May 2, 2024, the French Competition Authority dealt with a case involving practices in the rendering sector.

First of all, rendering is defined in article L226-2 of the French Rural and Marine Fisheries Code, which states that "the collection, handling, storage after collection, treatment or elimination of one or more corpses or parts of corpses of animals or other animal matter, the list of which is determined by order of the minister responsible for agriculture, constitutes a rendering activity".

Rendering therefore comprises three phases: collection of products, securing and processing of collected products and, where applicable, recovery of products after processing.

In this case, from 2009 onwards, the companies Akiolis, Saria and Verdannet maintained relations that resulted in exchanges of tonnages, contract work and transfers of goodwill. From 2012 onwards, these exchanges intensified, mainly between Akiolis and Saria, with a view to carrying out reciprocal business transfers, which were implemented on June 26, 2015. Exchanges between the companies were governed by a confidentiality agreement, and one of the meetings took place in the presence of specialized lawyers from each company to "secure compliance with competition law".

The business transfer agreements were signed on June 26, 2015, involving 21 transactions that had an impact on the physical location of the parties' collection and processing centers, on customers and/or suppliers transferred without being attached to a collection center, and on the ATM (Animals Found Dead) markets. In addition, certain commercial

partners of the three respondents expressed concern about the deterioration in pricing conditions and the weakening of competitive conditions between operators.

As a result, an investigation was opened on June 9, 2016, and on May 10, 2019, the Authority opened an ex officio investigation into practices in the rendering sector.

Consequently, the grievances notified to the companies are as follows: "having, in the rendering sector in mainland France, devised and implemented a geographic market-sharing agreement, ultimately achieved through the cross-selling of business assets. Such a practice has anti-competitive object and effect, and is prohibited by Articles 101(1) TFEU and L. 420-1 of the French Commercial Code."[1].

The Authority considered that the existence of an agreement to implement the above-mentioned global plan had not been demonstrated, and that in application of the Towercast case law, the merger agreements analyzed did not have an anti-competitive object[2].

The French Competition Authority dismisses all claims relating to practices in the rendering sector.

The French competition authority rules on the applicability of antitrust law to a merger (I) and sets out its implementation (II).

I. The applicability of cartel law to mergers

There is a principle of incompatibility between merger control procedures and the law on anti-competitive practices (A). However, where there has been no ex ante control, this means that there is only one procedure, and Towercast case law will therefore be applicable to an ex post control (B).

A. A principle of incompatibility of procedures

Akiolis, Saria and Verdannet take the view that a merger cannot be the subject of an ex post review on the basis of Articles 101 TFEU and L. 420-1 of the French Commercial Code, even in the absence of an ex ante review, as is the case here.

The respondents rely on a case law from 1996 in which the Cour de cassation ruled inadmissible appeals against agreements for the reciprocal transfer of businesses that had been authorized by the Minister of the Economy under the merger control procedure, since the parties had not alleged any illicit practices[3].

[1] Point 88 of the decision
[2] Towercast, CJEU, March 16, 2023, C-449/21
[3] Court of Cassation, Commercial Division, November 26, 1996, No. 94-20.055

The authority points to the 1994 Appeal Court ruling, which lays down a principle of incompatibility between procedures, in order to rule out an examination of the same transaction under both merger control and anti-competitive practices law. Indeed, the ruling states that "the procedures laid down in Title III relating to cartel control and Title V relating to merger control are different and irreconcilable"[4].

In the present case, this jurisprudence is inapplicable, since its principle is to exclude an examination of the same transaction under both merger control and anti-competitive practices. As a result, it cannot be invoked in the present case, since the mergers in question were not subject to ex ante control, and there was only one procedure.

In addition, the respondents refer to Article 3 of the Merger Control Regulation[5], which excludes the application of the Competition Enforcement Regulation[6]. The companies also cite a case in which the Court of Justice held that Regulation no. 1/2003 was not a priori applicable to a merger[7]. However, Advocate General Kokott states that it is common ground that Article 101 TFEU is a provision having direct effect, and she reiterated this in her opinion in the Towercase judgment.

B. <u>The application of ex post control in the light of the Towercast case law</u>

In the latter case, the Court of Justice ruled that the Merger Regulation does not prevent a national competition authority from analyzing a transaction below the ex ante thresholds as an abuse of a dominant position under Article 102 TFEU, if it affects the structure of competition on a national market.[8].

However, the respondents argue that this case law relates only to Article 102 TFEU and not to Article 101. In addition, they state that the application of antitrust law to a merger requires the identification of an anticompetitive practice detachable from the merger.

On the basis of the Towercast judgment, this analysis is erroneous, as the judgment states that certain concentrations may escape ex ante control and be subject to ex post control[9]. Moreover, Article 102 TFEU is applicable to a merger because it is a provision with direct effect, and Article 101 TFEU is also a provision with direct effect.

[4] Paris Court of Appeal, June 28, 1994
[5] EC Regulation no. 139/2004
[6] EC Regulation no. 1/2003
[7] Austria Asphalt case, September 7, 2017, C-248/16, paragraph 32
[8] Towercast, paragraph 53
[9] Towercast paragraphs 38 and 39

As Advocate General Kokott recalled in her Opinion in the Towercast decision, "the Court also deduced from this direct applicability of Articles 101 and 102 TFEU, and from the primacy attaching thereto, that the national competition authorities were required to disapply contrary national provisions"[10].

In the light of these considerations, the Authority considers that it is possible for a merger that has not been subject to ex ante control to be subject to a posteriori control on the basis of articles 101 TFEU and L420-1 of the French Commercial Code.

In this case, the 21 reciprocal business transfers between renderers constituted 5 separate concentrations: business transfers from Akiolis to Saria, business transfers from Saria to Akiolis, business transfers from Akiolis to Verdannet, business transfers from Verdannet to Akiolis, and business transfers from Verdannet to Saria. None of these 5 transactions met the national merger control thresholds set out in Article L430-2 of the French Commercial Code.

Consequently, the Authority is justified in assessing whether these reciprocal transfers constitute an anti-competitive agreement within the meaning of articles 101 TFEU and L. 420-1 of the French Commercial Code.

II. Conditions for implementing cartel law

The Authority analyses the agreement between the three defendants (A) and then examines the purpose of the agreement and its effects (B).

A. Agreement to implement a global market-sharing plan

The Court of Justice has ruled that, in order to classify an agreement as anti-competitive, "it is sufficient for the undertakings concerned to have expressed their joint intention to behave on the market in a particular way[11].

Proof of agreements and concerted practices may derive from self-sufficient evidence or from a cluster of clues. Clues must be serious, precise and concordant, but it is not necessary for each piece of evidence to meet these conditions. It is sufficient for the cluster of clues, assessed as a whole, to meet this requirement[12].

[10] Opinion of Advocate General Kokott of October 13, 2022, C-449/21, Towercast, paragraph 32
[11] Court of Justice, July 8, 1999, Anic Partecipazioni SpA, C-49/92, paragraph 40
[12] European Commission/Keramag Keramische Werke GmbH, C-613/13, points 50 to 52

In the present case, investigation revealed that the respondents agreed to set up a global plan for the geographical distribution of the market, ultimately achieved by bilateral agreements for the transfer of goodwill on June 26, 2015, which are legally mergers.

Nevertheless, the analysis revealed that the various acts and exchanges prior to the actual completion of the 21 transfers were part of a framework of bilateral discussions.

As a result, the Authority concludes that the exchanges between the respondents constitute preparatory discussions prior to a merger. What's more, the evidence in the file does not sufficiently demonstrate that the parties ceased to compete with each other. On the contrary, Akiolis and Saria continued to exert competitive pressure on each other after entering into discussions with a view to carrying out the divestitures. Furthermore, the indivisibility of the bilateral divestiture agreements does not demonstrate the existence of a plan going beyond the mere implementation of merger operations. The indivisibility of bilateral agreements means that one agreement is conditional on the completion of another, but this does not necessarily prove that they form part of a wider anti-competitive cartel. It may simply reflect a logical or economic interdependence between separate transactions. Accordingly, the Authority found that the earlier acts and discussions were part of normal negotiations for the implementation of the divestitures.

In conclusion, the existence of an agreement to implement a global plan for the geographical distribution of the French rendering markets, encompassing but not limited to the divestitures, has not been demonstrated.

B. Successive analysis of anti-competitive object and effects

Articles 101 TFEU and L420-1 of the French Commercial Code prohibit cartels when they have the object or may have the effect of preventing, restricting or distorting competition on a market.

Restrictions by object and restrictions by effect are alternative conditions. If the analysis of the object of the agreement does not reveal a sufficient degree of harmfulness to competition to characterize a prohibited agreement, the object of the agreement must be examined first, and then its effects[13].

Certain types of coordination between undertakings reveal a sufficient degree of harmfulness to competition, so it is not necessary to examine the effects.

[13] CJEU april 2, 2020, C-228/18, Gazdasági Versenyhivatal c./Budapest Bank Nyrt

Agreements which tend to "share markets or sources of supply" are, on the one hand, expressly covered by Articles 101 TFEU and L. 420-1 of the French Commercial Code and, on the other hand, considered, under settled case law, to constitute "particularly serious violations of competition" and to have "an object restrictive of competition in themselves"[14].

In this case, with regard to the anti-competitive object, the evidence in the file does not allow to conclude that these concentrative agreements are comparable to a geographic market sharing agreement, nor that they have an anti-competitive object. It cannot be disputed that each of the respondents had overall knowledge of all the sales concluded. However, this knowledge does not necessarily reflect collusion or a desire to allocate markets geographically, but can also be explained by the need, in a complex cross-selling process, to ensure minimum logistical and economic coordination between the parties.

Moreover, the information in the file relating to the infringement period covered by the notified grievance does not demonstrate that the parties did not adopt a competitive strategy when negotiating the reciprocal transfers. In addition, the Authority notes that an analysis of the legal and economic context, as revealed by the facts of the case, corroborates the absence of any anti-competitive purpose in the cross-assignments. Indeed, the transfer agreements were motivated by objective economic reasons.

On the other hand, according to the investigating authorities, the evidence in the file demonstrates the existence of actual or potential anti-competitive effects caused by the reciprocal business transfers of June 26, 2015 on the market concerned by the practices. However, the documents and statements do not make it possible to delimit the impact of the disputed transactions on the defined product and geographic market.

In any case, the Authority reveals that the volumes concerned by the disputed practices represent a marginal level, of the order of 3%, in relation to the total volume of the market.

Consequently, the Authority considers that the information on file does not establish that the reciprocal transfers of June 26, 2015 had anticompetitive effects.

The conditions for a prohibition under Article 101 TFEU have not been met, and the practices cannot be prohibited on the basis of Article L420-1 of the French Commercial Code.

[14] CJEU, January 20, 2016, Toshiba Corporation v. Commission

For these reasons, the French Competition Authority has ruled that the practices implemented in the rendering sector cannot be pursued.

In its press release, the Authority emphasizes the innovative nature of this decision, pointing out that this is the first time that concentrations below the national notification thresholds have been examined under competition law from a cartel perspective, in line with the Towercast ruling by the Court of Justice of the European Union.

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