

## THE ECJ'S TOWERCAST JUDGMENT: MERGERS CAN BE CHALLENGED AS AN ABUSE OF DOMINANCE

In its Towercast judgment of 16 March 2023, the European Court of Justice (the "ECJ") ruled that national competition authorities ("NCAs") and courts can review acquisitions by dominant entities under abuse of dominance rules, if those acquisitions are not notifiable under EU or national merger control laws.

The possibility for NCAs and courts to review future and past transactions even after they have closed, creates significant legal uncertainty and risk for dominant businesses, as well as opportunities for rivals and customers to challenge such transactions. If an NCA finds that a transaction substantially impedes competition, dominant companies could face fines, behavioural obligations, damages claims and, in extreme cases, the break-up of the transaction. While there are some options for dominant businesses to mitigate and clarify these risks, there is no one-size-fits-all solution.

### The Facts

In October 2016 the French broadcaster Telediffusion de France ("TDF"), acquired its rival Itas. The transaction was not reviewed under either the EU merger control rules ("EUMR") or the French merger control rules as it did not meet the respective jurisdictional thresholds, and the French Competition Authority ("FCA") did not refer the case to the European Commission ("EC") under Article 22 of the EUMR (see box, next page).

Almost a year later, Towercast complained to the FCA that the transaction amounted to an abuse of TDF's dominant position in the digital terrestrial television sector, in breach of Article 102 of the Treaty on the Functioning of the EU ("Article 102"). Following an investigation, the FCA closed its procedure on the grounds that it had no power to apply the abuse of dominance rules to a merger. Towercast appealed the FCA's conclusion before the Court of Appeal of Paris.

### Key issues

- Mergers that are not reviewed under EU or national merger control rules may be challenged at the national level under abuse of dominance rules, even after their closing.
- A challenge can be brought by a national competition authority as well as an aggrieved third party before national courts.
- These new risks of challenge concern only transactions by dominant companies, and only to the extent that they were not cleared under EU or national merger control rules.
- Dominant entities should assess this new risk on a case-by-case basis. Competitors of dominant companies have new avenues through which to challenge transactions of their dominant rivals.
- While there are options to mitigate and clarify this risk, there is no one-size-fits-all solution.

## The Question

The Court of Appeal sought guidance from the ECJ on the interplay between the EUMR and Regulation 1/2003, which governs the powers of the EC and NCAs to investigate abuses of dominance under Article 102. Article 21(1) EUMR provides that Regulation 1/2003 does not apply to mergers involving an acquisition of decisive influence, regardless of whether such mergers meet the thresholds for notification under the EUMR.

The Court of Appeal asked the ECJ whether Article 21(1) EUMR precluded national competition authorities from reviewing mergers under Article 102, even where those mergers have never been notified or reviewed under the EUMR or any national merger control regimes.

## The ECJ's Answer

The ECJ clarified that Article 21(1) EUMR does not preclude the review by NCAs of mergers that fall below the EUMR's thresholds. However, as Regulation 1/2003 does not apply, such reviews must be carried out on the basis of national procedural rules.

The ECJ also outlined the relevant test for a finding of an abuse. It stated that the mere finding that a dominant undertaking's position has been strengthened by a merger is not sufficient for a finding of abuse. Rather, it must be established that "the degree of dominance thus reached would substantially impede competition, that is to say, that only undertakings whose behaviour depends on the dominant undertaking would remain in the market". This, on its face, appears to be a more stringent test than is applied under merger control laws. In particular, a transaction that results in a strengthening of a dominant position would meet the legal test for challenge under the EUMR, whereas it seems that something more would be required for it to amount to an abuse of dominance under Article 102. This is likely to be clarified in future cases.

## The implications of the ECJ's judgment

The judgment reopens a route for the review of both past and future mergers undertaken by dominant entities; a route which had long been thought effectively closed off by the introduction of the original version of the EUMR in 1990.

Since 2021, the Commission is already able to challenge mergers that are not subject to national or EU merger control review because they do not meet the relevant notification thresholds, under the Article 22 referral procedure. The *Towercast* judgment confirms that NCAs and private parties can also challenge these transactions but based on the Article 102 abuse of dominance rules, even after closing of the transaction. This may provide interesting opportunities for third parties, such as competitors or customers, who have suffered harm from an acquisition implemented by a dominant company.

- NCAs will now be emboldened in appropriate cases to review mergers under Article 102 either on their own initiative or following a complaint. Indeed, less than a week after the ECJ's judgment, the Belgian Competition Authority initiated its first investigation (into an ongoing merger) referring explicitly to the *Towercast* ruling. Depending on the applicable national rules, Article 102 reviews could extend to transactions that closed years ago and could result in behavioural obligations or divestment remedies (although the latter are much rarer in Article 102 proceedings). Unlike merger control reviews, which block anticompetitive

### The Article 22 referral procedure

Article 22 of the EUMR allows the EC to review mergers that fall below the filing thresholds of the EUMR, if asked to do so by one or more member states, and provided certain conditions are met.

In 2021, in a major shift in its policy, the EC started accepting Article 22 referrals in relation to transactions that were not notifiable under the national merger control regimes of any EU member state (previously, it only accepted referrals if the concentration was notifiable in at least one member state).

mergers from happening in the first place, an Article 102 investigation could also result in substantial fines for dominant companies that are found to have implemented an anticompetitive transaction.

- As Article 102 can be enforced directly before national courts, third parties can bring private actions to challenge a transaction on that basis. These will be subject to national procedural rules, e.g., regarding standing and limitation periods. In case of a finding of an infringement, courts can award damages for any losses caused to the claimant as a result of an anticompetitive merger. They may also grant injunctions to bring an infringement to an end, which could include orders to divest all or part of the acquired business. However, mandatory injunctions of that nature are rare in most EU member states.

The consequences of the judgment for mergers that have been approved by the EC or national competition authorities depend on the procedure:

- For transactions cleared under the EUMR (other than as a result of an Article 22 referral) the judgment does not appear to create new risks. The Advocate General's opinion in the case stated that a cleared merger could not be qualified as an abuse of dominance, as the merger would have already been found by the EC not to impede competition, and there are indications in the ECJ's judgment that it shares that view.
- The same is true for transactions cleared under national merger control regimes of EU member states, such that they should not be challengeable under Article 102 in those EU member states. However, an Article 102 challenge could still be brought in member states where no clearance has been obtained.
- For transactions cleared by the EC under the Article 22 referral procedure, the clearance applies only in respect of markets in the member states that made or joined the referral. Therefore, if the relevant markets are national in scope, Article 102 challenges may still be possible in member states that did not make or join the referral request.

## **Mitigating the risks for dominant companies**

Dominant entities that engage in mergers that fall below the threshold for review under the EUMR and national merger control rules should consider whether their transactions might meet the substantive test for an abuse of dominance in those EU member states where no merger control filing is required, by undertaking at least some preliminary competitive assessment of potentially affected markets. Where risks are identified, the possible options for mitigating or clarifying them prior to closing of the merger include the following:

- Asking the EC to review the merger under the EUMR in line with the referral procedure in Art 4(5) EUMR. A clearance under this procedure would apply in respect of the entirety of the EU and should therefore preclude subsequent Article 102 challenges. However, the procedure is only available if the transaction is capable of being reviewed under the national merger control laws of at least three EU member states, and none of them objects to the EC reviewing the transaction.
- Making a voluntary national merger control filing. However, this is possible only in a small number of EU member states, such as Ireland, Hungary and Latvia and, as noted above, would not preclude Article 102 challenges in other member states.

- Informing the EC of the merger, with a view to triggering Art. 22 referral requests from member states. As noted above, this may provide limited comfort in respect of member states that do not request or join such a referral.
- Engaging in discussions with NCAs to seek comfort that they will not challenge the transaction, or to ascertain whether such comfort can be obtained through the offer of commitments. However, that approach has its downsides (it brings the transaction to the attention of the NCA) and limits (it may not bind the NCA, which may undermine the position of the dominant company, especially if a well-documented complaint is filed).

There is, however, no one-size-fits all solution and there will inevitably be some transactions for which no combination of the above options can sufficiently address the risk of Article 102 challenges. Dominant businesses will therefore have to be aware of this risk and take it into account when considering the legal certainty of their transactions.

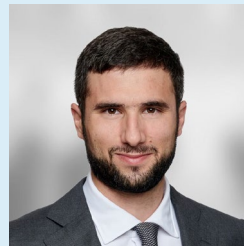
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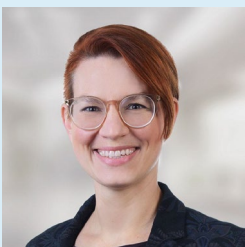
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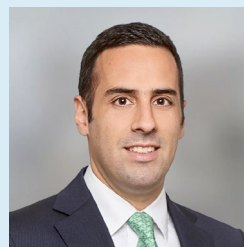
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