

ARTICLE

MERGERS THAT DO NOT MEET THE THRESHOLDS CAN BE CONTROLLED, AFTER THEIR COMPLETION, ON THE BASIS OF ABUSE OF DOMINANT POSITION

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Mergers that do not meet the thresholds can be controlled, after their completion, on the basis of abuse of dominant position

On 16 March 2023, the Court of Justice of the European Union (the "**Court**") delivered an important and much-awaited merger control judgment[1] in the context of a preliminary question referred by the Paris Court of Appeal.

The Towercast case

This judgment is part of the context of the 2016 takeover of Itas by Télédiffusion de France ("**TDF**"), in the field of digital terrestrial television ("**DTT**") broadcasting services in France. The transaction did not meet national or EU merger control thresholds, nor was it referred under Article 22 of Merger Regulation 139/2004 (the "**Merger Regulation**") [2]. It was therefore carried out without prior notification, review or clearance by the French Competition Authority (the "**Authority**") or the European Commission (the "**Commission**").

On 15 November 2017, Towercast, a competitor of TDF, filed a complaint with the Authority alleging an abuse of TDF's dominant position. Towercast considered that the acquisition of Itas had significantly strengthened TDF's dominant position and impeded competition in the market.

On 16 January 2020 [3], the Authority rejected the abuse of dominance claim and stated that there were no grounds for further proceedings. According to the Authority, "*merger operations are governed by a set of rules of their own, different from the control of anti-competitive practices*". It added that "*as the law currently stands, a merger cannot in itself constitute an abuse of a dominant position [...] even if it has not been subject to prior control by the Authority or the Commission*".

This position was based, inter alia, on Article 21 of the Merger Regulation, according to which Regulation 1/2003 [4], which implements the prohibition of anti-competitive practices, is in principle not applicable to concentrations as defined in Article 3 of the Merger Regulation.

This seemed to be contradicted by a judgment of the Court of Justice of the European Communities (the "**CJEU**") of 21 February 1973 concerning the acquisition of Europemballage by Continental Can [5]. The CJEU had held that the Commission could apply the abuse of dominance test to merger cases.

This judgment was given before the introduction of EU merger control. For the Authority, the introduction of this control in 1989 rendered the principle laid down in the Continental Can judgment obsolete.

Towercast has appealed against the Authority's decision. The Paris Court of Appeal stayed the proceedings and referred a question to the Court for a preliminary ruling [6].

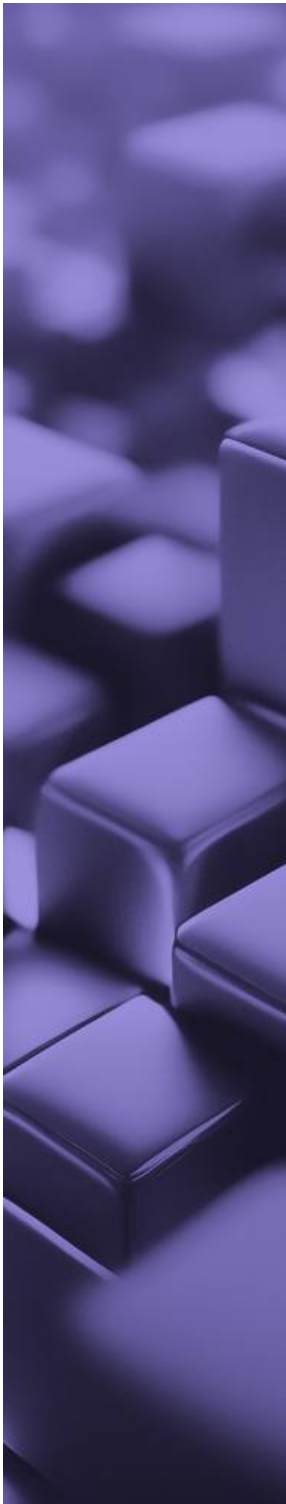
The issue was to determine whether a merger that was not subject to prior control because the thresholds were not met could be "*analysed by a national competition authority as constituting an abuse of a dominant position prohibited by Article 102 TFEU* [7], in the light of the structure of competition on a market with a national dimension" [8].

The Court's analysis

In its judgment of 16 March 2023, the Court recalled that "*the interpretation of a provision of Union law requires account to be taken not only of its terms but also of the context in which it is set and the objectives and purpose pursued by the act of which it forms part*" [9].

It states that the Merger Regulation "*aims to ensure that corporate restructuring, in particular in the form of mergers, does not lead to lasting damage to competition*". It constitutes "*the only procedural instrument applicable to the prior and centralised examination of mergers*" and should allow for the effective control of all mergers whose market effects go beyond the territory of a single Member State [10].





On the other hand, it cannot be inferred from this particular role of the Merger Regulation that the Community legislator "*intended to render irrelevant the control carried out at national level of a merger under Article 102*" of the TFEU on abuses of a dominant position^[11].

The Merger Regulation "*is part of a legislative package designed to implement Articles 101 and 102 TFEU*" and contributes to safeguarding free and undistorted competition in the EU internal market.

Consequently, while the Merger Regulation establishes a system of prior control of mergers which must be applied as a matter of priority, "*it does not exclude ex post control of mergers*" which are below the control thresholds^[12].

The Court also recalls that Article 102 on abuse of dominance is a provision with direct effect, i.e. it can be directly invoked by litigants without having to rely on the Merger Regulation. Consequently, the position defended by the Authority would amount to "*ruling out the direct applicability of a provision of primary law by reason of the adoption of an act of secondary legislation*"^[13], which the Court excludes.

The Court concludes that the Merger Regulation "*cannot preclude a concentration with a non-Community dimension [...]* from being *reviewed by national competition authorities and national courts under the direct effect of Article 102 TFEU by recourse to their own procedural rules*".

The Court then recalls the conditions under which a merger may constitute an abuse of a dominant position. This requires establishing that the acquirer was, prior to the transaction in question, in a dominant position on a particular market, and that it has, through the transaction, "*substantially impeded competition on the market*".

The mere strengthening of the dominant position is not enough: it is necessary to demonstrate "*that the degree of dominance thus achieved [...] would leave only undertakings who are dependent, in terms of their behaviour, on the dominant undertaking*"^[14].

TDF had asked the Court to limit the temporal effects of the judgment, on the grounds that it would have serious consequences in terms of legal certainty for all undertakings that had carried out in good faith mergers in that did not meet the control thresholds.

The Court recalls that the interpretation of Article 21 of the Merger Regulation expressed in the judgment specifies its meaning and scope "*as it must or should have been understood and applied since the date of its entry into force*" and can therefore be applied to situations arising before 16 March 2023.

In other words, mergers below the thresholds prior to this date may be challenged if they constitute abuses of dominance.

The solution found by the Court is a new upheaval in merger control.

Previously, a transaction that did not meet the control thresholds could be implemented and was not open to challenge.

This situation has changed with the Commission's new approach to Article 22 of the Merger Regulation. The Commission can now control deals that do not meet the national notification thresholds even after they have been completed^[15].

With the position expressed by the Court, these transactions can also be viewed from the perspective of abuse of dominance.

In short, whenever a company carries out an external growth operation, it should bear in mind the potential impact on competition, which may even lead to the operation being called into question.

[1] Judgment of 16 September 2023, C-449/21, Towercast.

[2] Article 22 of Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings provides for a referral mechanism which allows a national competition authority to request that the Commission examine "*any concentration*" which does not exceed the Community thresholds "*but which affects trade between Member States and threatens to significantly affect competition within the territory of the Member State(s) making the request*". The Commission may also invite the Member States concerned to submit such a request where it considers that these criteria are met.



[3] Decision No. 20-D-01 of 16 January 2020 concerning a practice implemented in the digital terrestrial television broadcasting sector.

[4] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (now Articles 101 and 102 TFEU).

[5] ECJ, 21 February 1973, 6/72, Europemballage and Continental Can v Commission.

[6] Paris Court of Appeal, 1st July 2021, No. 20/04300.

[7] Treaty on the Functioning of the European Union.

[8] Paragraph 29 of the Judgment.

[9] Paragraph 31 of the Judgment.

[10] Paragraph 36 of the Judgment.

[11] Paragraph 37 of the Judgment.

[12] Paragraph 41 of the Judgment.

[13] Paragraph 42 of the Judgment.

[14] Paragraph 52 of the Judgment.

[15] Our article on this subject: <https://www.august-debouzy.com/fr/blog/1861-les-operations-de-concentration-sous-les-seuils-pourront-bien-etre-controlees>.
