COMMEO
Rechtsanwälte und Notar

Meeting Competition

Newsletter, 26 June 2023

Merger Control below merger control thresholds: not an issue ... Now it could be!

M&A in the context of non-notifiable transactions (under national and EU merger control legislation) after the CJEU's *Towercast* decision

In the context of M&A deals, companies and their advisers in the past have relied on an apparent 'Safe Harbor' and ticked the checkbox 'merger control' on their list if EU and national merger control thresholds were not exceeded by a proposed concentration. Post 2021, they might have already added the checkbox "Art. 22 Guidance"[1] to the list after the European Commission ("Commission") decided to extensively interpret the referral system under Art. 22 EU Merger Regulation ("EUMR"), which allows Member States to request the Commission to examine concentrations, even if they would normally fly 'under the radar' below merger control thresholds. Unfortunately, in 2023 advisers have to update their list again by adding a new checkbox "Abuse of a dominant position": The Court of Justice of the European Union ("CJEU") has decided in *Towercast*[2] that national competition authorities ("NCAs") of the Member States can under Art. 102 of the Treaty on the Functioning of the European Union ("TFEU") retrospectively review concentrations on the grounds of an abuse of a dominant position by means of a concentration, even if such concentration was not notifiable under national or EU merger control rules and no Member State has requested a review under Art. 22 EUMR.

▪ Checkbox "Abuse of a dominant position"

Decision of the CJEU

The proceedings before the CJEU were initiated in November 2017 by a complaint of Towercast to the French NCA directed against the takeover by TDF (*Télédiffusion de France*) in October 2016 of the target company Itas. Towercast and TDF (as former state owned enterprise) both provide digital terristic television ("**DTT**") broadcasting services in France whilst Itas is active this field as well. In its complaint, Towercast claimed that the acquisition of Itas constituted an abuse of a dominant position by TDF which is prohibited under Art. 102 TFEU. TDF is to be considered dominant on the relevant market whilst the takeover of Itas significantly strengthened such market position and thus hindered competition on the up- and downstream wholesale markets for DTT broadcasting.

At first, the French NCA in June 2018 sent a statement of objections to TDF. Then, in January 2020, it followed the legal arguments advanced by TDF and decided that it is not appropriate to proceed with the complaint, as the introduction of the EU merger control regime in 1989[3] had excluded the application of Art. 102 TFEU in such cases.[4]

However, Towercast challenged the NCA's decision before the competent French court of appeals arguing that Art. 102 TFEU is primary EU law with direct effect which cannot be overruled by the EU merger control regime as secondary legislation. At the same time, Towercast stated that the EU merger control regime can only apply if its thresholds are met or if the Member States requested a review by the Commission via Art. 22 EUMR, which both was not evident.

As advised by Advocate General *Kokott*, the CJEU has now followed Towercast's approach: Whilst the EU merger control regime introduced an *ex ante* (prior) control mechanism for concentrations with community dimension

[1] See Commeo Newsletter of 30/04/2021.
[2] CJEU, Decision of 16 March 2023, Case C-449/21 – *Towercast SASU / Autorité de la concurrence / Ministre chargé de l'économie ("Towercast")*.
[3] Council Regulation No 4064 of 21 December 1989 on the control of concentrations between undertakings repealed by Regulation No 139/2004 of 20 January 2004 (EUMR).
[4] As decided by the CJEU, Decision of 21 February 1973, Case 6/72 – *Europemballage and Continental Can v Commission*.

(which means: if the turnover thresholds are exceeded or upon referral), it does not preclude an *ex post* (retrospective) control below this threshold on a national level. It follows, that even a transaction qualified as 'concentration' under merger control law that does not meet the thresholds for prior control *"may be subject to Art. 102 TFEU where the conditions laid down in that article for establishing the existence of an abuse of a dominant positions are satisfied".*

Scope of application

According to the CJEU, for an abuse by means of a concentration in the light of the structure of competition on a "*national*" (or EU-wide) market, it is not already sufficient that an undertaking's position has (just) been strengthened, but the degree of dominance reached needs to substantially impede competition insofar *"that only undertakings whose behavior depends on the dominant undertaking would remain in the market."* Consequently, companies and M&A advisers concerned should tick the checkbox "Abuse of a dominant position" with due caution if the acquiring party might already be in a dominant market position on a national or even EU-wide market, especially when no equal competitor will remain post-transaction or in case of dependencies on the acquirer on the same or a close-by market.

- **Checkbox: "Art. 22 Guidance"**

The Commission's approach

In its Art. 22 Guidance[5], the Commission intended to close an enforcement gap for concentrations that do not meet the EU or national merger control thresholds because of relatively low turnovers of the target companies but that, at the same time, inhale high competitive potentials based on key technologies or assets.

Generally, under the Art. 22 EUMR referral mechanism, Member States can request the Commission to review a concentration that not only affects trade between Member States (i.e. at least in the entire territory of a Member State), but actually and based on a preliminary analysis threatens to significantly affect competition within the requesting Member State. Initially, 1989 the scheme was designed to allow Member States without a national merger control regime to bring cases to the Commission. However, it never ended there, and in 2004 Art. 22 EUMR was further adjusted. What is new now, is the Commission's broad view of Art. 22 EUMR interpreting it as allowing and encouraging Member States to also refer cases below national thresholds to the Commission. This approach was already in July 2022 confirmed by the General Court[6] whilst an appeal before the CJEU is currently still pending.

Comment

In *Towercast*, the CJEU has enabled the Member States to do what the Commission already wanted to achieve with its Art. 22 Guidance: to introduce a review mechanism for critical cases 'under the radar'. While the Commission under its Art. 22 Guidance is formally still dependent on a request of the Member State for examining non-notifiable concentrations, it seems to be only a matter of time until the Commission and/or NCAs will, as well, pick up a case relying on Art. 102 TFEU as "*in any manner whatsoever [an] abuse is simply prohibited*". At the same time, the Commission has already developed an effective screening mechanism for 'low flying pilots' with a total of 40 cases so far, which includes cases reported from merging parties, NCAs or third-parties (as in *Towercast*) and cases uncovered by the Commission's active market screening.

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COMMEO is an independent law firm specialized in competition law. We are an established team of experienced lawyers advising clients on all aspects of German and European competition law.

[5] Communication of the Commission of 26/03/2021, Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases (2021/C 113/01) ("**Art. 22 Guidance**").

[6] European General Court, Decision of 13 July 2022, Case T-277/21 – *Illumina v. Commission*.