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Insights

DOING A DEAL AS AN ABUSE OF DOMINANCE? THE ECJ'S DECISION IN TOWERCAST

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SUMMARY

On 16 March 2023, the ECJ published its judgment in *Towercast* (C-449/21), confirming that Article 102 TFEU (which prohibits abuses of a dominant market position) may apply to transactions which fall below national and EU merger control thresholds, and have not been referred to the European Commission under Article 22 of the EU Merger Regulation ("**Merger Regulation**"). This followed the opinion of Advocate-General Kokott on 13 October 2022, which we analysed here.

The judgment, in an echo of *Continental Can,* re-establishes a mechanism for competition authorities and third parties to scrutinise below-threshold transactions (which would not otherwise be subject to mandatory merger control filings and review), including so-called "killer acquisitions". It will generate concern and uncertainty for merging parties, and potentially opportunities for aggrieved third parties, while its wider significance may depend in part on how the ECJ interprets the application of Article 22 of the Merger Regulation in its forthcoming *Illumina/Grail* judgment.

Case History

The judgment arose from a November 2017 complaint made by Towercast SASU to the French Competition Authority ("**FCA**") that the completed acquisition of Itas by Télédiffusion de France ("**TDF**") constituted an abuse of dominance. The acquisition was completed in October 2016 and was not reviewed by any authority as it fell below both the EU and French merger control thresholds; nor was it referred to the Commission under Article 22 of the Merger Regulation. Towercast relied on the ECJ's 1973 judgment in *Continental Can* (6/72, EU:C:1973:22) in support of its complaint. *Continental Can* established (prior to the existence of the Merger Regulation) that a merger may constitute an abuse of dominance in cases where, due to the merger, a dominant acquirer strengthens their dominance and, thereby, substantially fetters competition.

The FCA initially rejected Towercast's complaint. Drawing a bright line between "incompatible and irreconcilable" *ex ante* merger control regime and *ex post* prohibition against anticompetitive

behaviour, the FCA found that mergers were regulated exclusively by the Merger Regulation and the merger control laws of Member States (Decision 20-D-01 of 16 January 2020). The FCA therefore held that there could be no abuse of dominance finding in relation to a merger in itself. The form of abuse established in *Continental Can* therefore appeared obsolete.

Faced with the same question on appeal, the Cour d'appel de Paris made a preliminary reference to the ECJ (Decision 20/04300 of 1 July 2021). It asked whether a national authority could find that a merger constitutes an abuse of dominance, in circumstances where that merger fell below national or EU merger review thresholds, and was not referred to the Commission under Article 22 of the Merger Regulation (please see our summary of Article 22 here).

The ECJ found that it could. Adopting the opinion of Advocate-General Kokott, the ECJ determined that national competition authorities are not precluded from finding that acquisitions falling below EU or EU Member State merger thresholds that have not been referred to the Commission under Article 22 may constitute an abuse of dominance. The ECJ's ruling was grounded in the direct effect of Article 102 TFEU; as a provision of primary law the ECJ ruled that it cannot be overridden by the Merger Regulation, which is secondary law.

The ECJ rejected TDF's request for its judgment to apply prospectively only. In doing so, it rejected TDF's argument that the ruling could undermine legal certainty.

However, the ECJ also fired a warning shot to third parties and regulators who may seek to rely on the revived *Continental Can* ground of abuse to challenge proposed or completed mergers. It reiterated that for a finding of an abuse of dominance on this ground, an acquisition must **substantially impede competition** such that it results in the market consisting of only companies whose behaviour depend on the dominant company. Mere 'strengthening of dominance' is insufficient.

On the one hand, the judgment is unsurprising insofar as it refuses to confine *Continental Can* to history. In view of the ever-growing regulatory scrutiny applied to merger control in the EU and more widely, coupled with concerns regarding the applicability of merger thresholds to "killer acquisitions", the ECJ's decision in *Towercast* provides further ammunition for regulators and third parties to scrutinise mergers. As evidence of this, already in the few days since the judgment was published the Belgian Competition Authority launched an investigation into whether a completed acquisition constitutes an abuse of dominance, citing *Towercast* as precedent.

Whether regulators seek to apply *Towercast* frequently may depend on the outcome of the appeal of the decision of the General Court's decision in *Illumina/Grail* regarding the interpretation of Article 22 of the Merger Regulation – and in particular whether the European Commission has the right (as asserted by the Commission and the General Court) to review transactions referred to it by EU Member State national competition authorities in those circumstances where the referring authority

does not itself have jurisdiction to review the merger. If the Commission's interpretation is upheld, regulators will likely continue to favour the less demanding Article 22 route to scrutinise mergers.

In the meantime, interested third parties including possible complainants and those with cases for injunctions or damages will keep a close eye on the pending decision of the Cour d'appel de Paris in the Towercast case, the investigation by the Belgian competition authority, and whether any further merger abuse of dominance cases come out of the woodwork.

We provide in more detail below implications of *Towercast* for competition authorities, transaction parties, and third parties.

WHAT THIS MEANS FOR COMPETITION AUTHORITIES

WHAT THIS MEANS FOR COMPETITION AUTHORITIES	
	▪ *Continental Can* has been re-affirmed: national competition authorities may investigate and make findings that a completed merger that was not referred under EU Member State rules or the EU Merger Regulation constitutes an abuse of dominance. ▪ The judgment is narrow, and existing difficulties in demonstrating an abuse of dominance remain. ▪ However, this does not prevent national authorities from looking backwards to completed deals such as "**killer acquisitions**" (such as, for example, the acquisition of financially small targets that have the potential to be strategically significant future competitors) that slipped the net. This point is put most starkly by reference to the Belgian competition authority as recently as 22 March 2023 launching an investigation into whether a completed acquisition constitutes an abuse of dominance, stating direct application of *Towercast*. ▪ Whether the UK Competition and Markets Authority ("**CMA**") will follow suit is an open question. It is worth noting that the CMA retains flexibility in its approach to review acquisitions that do not trigger the monetary thresholds found in many EU jurisdictions, on the basis that the CMA utilises its 'share of supply' test for jurisdiction, and which has increasingly been applied on a broad basis to capture for review a wide-range of transactions. In cases where a transaction falls below this threshold, it might also be questionable whether (on a horizontal acquisition) that transaction involves a dominant undertaking (though note the share of supply test might not be met on a vertical or conglomerate acquisition). Some EU Member State authorities also have a "below-threshold" capability to review mergers, such as Sweden, or most recently Italy.
WHAT THIS MEANS FOR TRANSACTION PARTIES	
	▪ *Towercast* increases uncertainty for merged parties.

WHAT THIS MEANS FOR COMPETITION AUTHORITIES	
	Completed deals that were not reviewable under EU Member State or EU Merger Regulation thresholds, and that were not referred to the Commission under Article 22 may be found to be an abuse of dominance. The remedies for an abuse finding will depend on the applicable jurisdiction, however it is worth noting Advocate-General Kokott's opinion which highlighted the primacy of financial and behavioural remedies over structural remedies, outlining that it is unlikely a finding will lead to unwinding orders, rather than simply a fine. ▪ Furthermore, *Towercast* creates uncertainty for parties in the process of merging. National authorities (if allowed by national procedural rules) may be emboldened to use their national equivalent to Article 102 to investigate a national merger that will not meet EU Member State or EU Merger Regulation thresholds, and is not suitable for an Article 22 reference to the European Commission (the Belgian competition authority appears to have launched its investigation on this basis). ▪ In her opinion, Advocate-General Kokott made clear that an acquisition cleared under the specific merger regulations could not be found to be an abuse of dominance unless the dominant company engages in abusive conduct beyond the merger. The ECJ were not explicit on this point, but there is logic behind Advocate-General Kokott's consideration that a merger that clears the specific merger regulations may necessarily exclude an abuse of dominance finding. It might be that the ECJ in its judgment have presumed this point, and it seems highly unlikely that any mergers that have been cleared will be challenged under Article 102. ▪ The burden of proving an abuse of dominance is a rigorous test. Though the application of an abuse of dominance has been clarified by *Towercast*, transaction parties might take comfort in the fact that *Towercast* only applies to acquisitions by undertakings that are already dominant, and in the standard an abuse of dominance finding has to meet. It

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	is worth noting that DG Comp Director-General Guersent on 7 February 2023 discouraged the use of Article 102 for regulation of mergers; noting that it would not be as effective in terms of clarity and speed, and that Article 22 referrals are intended to prevent "entirely" mergers being reviewed under Article 102.
WHAT THIS MEANS FOR THIRD PARTIES	
	▪ The ECJ's judgment in *Towercast* may embolden third parties seeking to challenge mergers to bring private damages claims based on the *Continental Can* ground of abuse. While such claims present considerable difficulties, third parties may seek remedies for abuse of dominance, including injunctive relief, as an additional means of challenging proposed mergers. A particularly interesting area will be whether third parties seek financial compensation as a remedy for any effects of completed mergers on *Towercast* grounds. ▪ The ECJ's refusal to limit the temporal applicability of its judgment could have significant implications for completed mergers. Third parties may consider using *Towercast* to re-open completed mergers. National courts may be confronted with difficult questions regarding the limitation period for such claims; especially if facing any complaint in relation to long-lasting completed mergers.

If you are working on deals and want to know more about this decision; including how it may impact your deals directly or indirectly, please speak to **Andrew Hockley**, **Dave Anderson, Julie Catala Marty, Victoria Newbold, Rémi Beydon, Ben Bolderson, George Christodoulides, Paul Culliford, Thomas Wright,** or your usual BCLP contact.

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