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THE TOWERCAST JUDGMENT - CJEU CLARIFIES THAT A NON-NOTIFIABLE TRANSACTION CAN CONSTITUTE AN ABUSE OF DOMINANCE

On 16 March 2023, the Court of Justice of the European Union ("CJEU") issued an interesting judgment (C-449/21), in response to the Paris Court of Appeal's request for a preliminary ruling, on whether a national competition authority may ex-post investigate as abuse of dominance a transaction which does not meet the established threshold defined in the EU Merger Regulation or national legislation.

BACKGROUND

In October 2016, **Télédiffusion de France** ("**TDF**"), which provides digital terrestrial television ('**DTT**') broadcasting services in France, acquired sole control of **Itas**, a company which is also active in the DTT broadcasting sector, by acquiring all of its shares. The acquisition of Itas, which was below the thresholds defined in the EU Merger Regulation ("**EUMR**") and the French Commercial Act, was not notified or examined under the relevant merger control regimes.

In November 2017, Towercast, a company providing DTT broadcasting services in France, lodged a complaint with the French Competition Authority arguing that the acquisition constituted an abuse of dominant position because it significantly strengthened TDF's already dominant position, and restricted competition on the upstream and downstream wholesale markets for DTT services.

After its complaint was rejected, Towercast appealed. The Paris Court of Appeal sought a preliminary ruling from the CJEU to determine whether a national competition authority could ex post evaluate a concentration run by an undertaking in a dominant position against the prohibition of abuse of a dominant position within the meaning of Article 102 TFEU (where that concentration does not meet the relevant turnover-related criteria of the EUMR and national merger control law). In other words, in practice, a transaction can be revisited by the competition authorities after the transaction was closed.

CJEU'S REASONING

On 16 March 2023, the CJEU established that Article 102 TFEU is a primary law, which produces direct legal effects and cannot be limited in its scope by provisions of secondary law, such as the EUMR. Article 102 clearly forbids the abuse of a dominant position and does not grant any exceptions to this rule. As such, each M&A transaction might theoretically be examined ex-post to see whether the parties had violated Article 102 TFEU. CJEU explained that the introduced "one-stop shop" principle should not be interpreted as depriving national authorities of the power to prohibit abuse of a dominant position.

Therefore, the CJEU concluded that a transaction which does not meet the respective thresholds for prior control laid down by the EUMR and by the applicable national law may be subject to Article 102 TFEU where the conditions laid down in that article for establishing the existence of an abuse of a dominant position are satisfied. In particular, it is for the authority in question to verify that a purchaser who is in a dominant position on a given market and who has acquired control of another undertaking on that market has, by that conduct, substantially impeded competition on that market. In that regard, the "mere finding that an undertaking's position has been strengthened is not sufficient for a finding of abuse, since 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".

OVERVIEW

The ability of national authorities to conduct ex-post reviews of below-threshold transactions is made clear. However, it is an open question as to what for these purposes constitutes an abuse of a dominant position: whether the fact that the transaction has been implemented or that the combined entity

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a relevant issue for the limitation periods in national legislation.

In addition to the national authorities' options, it can be another tool for competitors, suppliers and customers to take action against certain acquisitions in a market, either before the authority or at court. When considering claims before civil courts, there is also the matter of when the right of action will arise and what legal grounds there are for it. These questions are likely to be answered by the legislation and the case law of national authorities.

Aftermath

The Belgian Competition Authority announced within a week of the CJEU judgment (22 March) that it would review the acquisition of Edpnet by telecommunications operator Proximus under the rules prohibiting abusive conduct by dominant companies referring specifically to the Towercast judgment.

In conclusion, recent EU case law (with reference also to the *Illumina/Grail case, C 611/22 P*) indicates that transactions below the threshold in certain key market sectors may come to the attention of competition authorities. Undertakings should carefully assess all potential transactions, especially those that are not notifiable, to determine if they may be subject to national investigations regarding abuse of dominance. They should also engage in discussions with local counsels to mitigate or clarify the risks regarding ex-post investigations.

It remains to be seen to what extent this tool will be used by the national authorities, but it is clear that having seen the Belgian announcement, national authorities have taken the message that this tool is available.

The judgment is available here: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62021CJ0449