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QUICK LINKS

European Court of Justice holds that concentrations falling below merger control thresholds can be subject to *ex-post* review for abuse of dominance

The European Court of Justice (CJ) has held that concentrations that fall below merger control thresholds can still be subject to *ex-post* review under the abuse of dominance rules. The *Towercast* judgment, handed down on 16 March 2023, therefore recognises an additional avenue for regulators to catch concentrations which are not otherwise subject to *ex-ante* merger control.

BACKGROUND

Following the end of a statutory monopoly in the French market for digital terrestrial television, the market was contested by TDF Infrastructure Holding S.A.S, Towercast SASU and Itas SAS. In 2016, TDF acquired Itas (the Acquisition). The Acquisition was not subject to *ex-ante* merger review as it did not satisfy either the national or EU merger control thresholds; nor was it referred to the European Commission under Article 22 of the EU Merger Regulation (EUMR).

On 15 November 2017, Towercast lodged a complaint with the French Competition Authority alleging that the Acquisition constituted an abuse of a dominant position in that TDF had hindered competition on the upstream and downstream wholesale markets for digital transmission of terrestrial television services. The French Competition Authority issued a statement of objections to this effect in June 2018. However, in January 2020, the French Competition Authority decided that the abuse of dominance rules were not applicable in circumstances where a concentration had not met the thresholds for merger control and there was no alleged anti-competitive conduct independent of the creation of the concentration itself.

In March 2020, Towercast lodged an appeal before the Paris Court of Appeal, who in turn referred a question to the CJ for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (TFEU). The question for the CJ was whether a national competition authority could subject a concentration to an *ex-post* assessment for abuse of dominance under Article 102 TFEU, in circumstances where that concentration does not meet the thresholds for either EU or national merger control regimes.

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JUDGMENT

Advocate General Juliane Kokott issued her opinion in October 2022, answering the above in the affirmative. She considered that *ex-post* review for abuse of dominance provided an additional safety net, alongside the Article 22 EUMR referral process, for regulators to catch so-called 'killer acquisitions' which can have an adverse impact on competition. AG Kokott noted that these are transactions which typically involve the acquisition of an innovative start-up by a powerful undertaking, for example in the markets for internet services or pharmaceuticals. AG Kokott's opinion is considered in further detail in our November 2022 newsletter.

On 16 March 2023, the CJ similarly answered the question in the affirmative. The CJ held that, whilst the EUMR *"introduces ex-ante control for concentration operations with a community dimension, it does not preclude an ex-post control of concentration operations that do not meet that threshold"*.

The CJ emphasised that an abuse of a dominant position is prohibited by Article 102 TFEU and that there are no exemptions from this position. Moreover, the types of conduct prohibited by Article 102 TFEU are not exhaustive. Therefore, the question for national competition authorities is whether a purchaser in a dominant position on a given market, who has acquired control of another undertaking on that market, has by that conduct substantially impeded competition on that market.

The CJ also rejected TDF's request to limit the temporal effects of the judgment. TDF had argued that, otherwise, the judgment would have serious consequences in terms of legal certainty for dominant undertakings which had carried out concentrations falling below the merger control thresholds. The CJ rejected this on two grounds. Firstly, the CJ found that TDF could not reasonably have expected the concentration not to be examined for an abuse of dominance under Article 102 TFEU. Secondly, the CJ noted that neither the reference for a preliminary ruling nor the observations submitted to the Court contained any evidence to establish that the interpretation adopted by the Court would entail a risk of serious disturbance.

CONSEQUENCES

By virtue of the *Towercast* judgment, national competition authorities and courts are afforded another avenue to catch transactions that may have an impact on competition. There is now greater scope for more merger transactions to be analysed by competition regulators where they would otherwise have avoided scrutiny under the *ex-ante* merger control rules. In practical terms, this introduces a further degree of uncertainty for merger transactions on top of that already established by the Commission's recent change in policy to encourage national competition authorities to refer mergers under Article 22 EUMR where the jurisdictional thresholds are not satisfied in Brussels or the Member States.

It remains to be seen what impact this will have on transactions moving forwards. The judgment means that dominant undertakings will have to consider the possible impact on competition of merger transactions that would not otherwise satisfy the thresholds for merger control review. Notably, since the *Towercast* judgment was published, the Belgian Competition Authority has opened an investigation into a possible case of abuse of dominance by Proximus, relating to its takeover of edpnet. This may serve as an early indication that national competition authorities are eager to embrace this additional avenue to review concentrations falling below the merger control thresholds.

OTHER DEVELOPMENTS

ANTITRUST

CMA FINES TEN CONSTRUCTION FIRMS NEARLY £60 MILLION FOR BID RIGGING

On 23 March 2023, the UK's Competition and Market's Authority (CMA) announced that it has fined ten construction firms over £59 million in total and secured the disqualification of three directors for breaches of competition law. The CMA found that the companies had rigged bids for asbestos removal contracts worth over £150 million both in relation to private and public contracts from January 2013 to June 2018. The projects affected included the development of Bow Street Magistrates Court and Police station, the Metropolitan Police training centre in Hendon, Selfridges (London), shopping centres, properties owned by universities, and some office blocks.

The CMA found that when submitting bids for tenders, the firms had colluded on prices through illegal cartel agreements. The bids were rigged through a practice known as 'cover bidding,' where one or more firms submitted bids deliberately designed to lose the tender. Additionally, at least once each, five firms had been involved in arrangements where the intended 'losers' would be compensated by the 'winners' of the tenders. The compensations varied and on one occasion, the CMA found this compensation to be over £500,000.

Of the ten firms fined, each was involved in at least one instance of bid-rigging during the five-year period. For the firms who settled with the CMA, the fines were reduced, and ranged from £423,615 to £16,000,000. In addition, Erith and Squick, who chose not to settle, were fined £17,568,800 and £2,000,000, respectively. The CMA also secured three director qualifications at Erith and Cantillon, ranging from 4 years and 6 months to 7 years and 6 months. This decision of the CMA followed a large-scale investigation opened in 2019 and signals the CMA's continued hard stance on cartel activity.

EUROPEAN COMMISSION INSPECTION DECISIONS ANNULLED BY EUROPEAN COURT OF JUSTICE IN FRENCH SUPERMARKETS CASE

On 9 March 2023, the CJ overturned the General Court's (GC) ruling and partly annulled the Commission's 2017 decisions to authorise unannounced inspections at the premises of a number of French undertakings in the distribution sector, including Casino, ICA, Intermarché, and some others. The dawn raids were carried out due to Commission concerns that the undertakings may have exchanged information on the supply markets for everyday consumer goods, in addition to future consumer strategies. Casino, ICA and Intermarché launched appeals against the Commission's inspection decisions in April 2017.

On 5 October 2020, the GC issued its judgments annulling the decisions in part. The GC held that the Commission did not have sufficiently strong evidence to launch unannounced inspections in respect of some of the suspected behaviour, namely in relation to exchanges of information concerning the future commercial strategies. However, the GC found that the Commission did have sufficiently strong evidence in relation to the suspected exchange of information between supermarkets on (i) discounts obtained on the supply markets for certain everyday consumer products, and (ii) the prices on the market for the sale of distribution services to manufacturers of branded products. The GC also upheld the EU's system for conducting antitrust raids, rejecting the supermarkets' arguments, *inter alia*, that their defence rights were violated, and that they had no effective legal recourse against the dawn raids. The supermarkets subsequently launched an appeal to the CJ.

The CJ rulings in part set aside the GC judgments, annulling the Commission's decisions to order the dawn raids. The CJ noted that the Commission is required to record any interview which it conducts in order to collect information relating to the subject matter of an investigation, as part of its obligations under Article 19 of Regulation 1/2003. The CJ further clarified that this obligation applies irrespective of whether the interview in question was conducted before the formal opening of an investigation (in order to collect indicia of an infringement) or afterwards (for the purpose of collecting evidence of an infringement). This was contrary to the

GC's ruling, which had found that the Commission had no obligation to record interviews conducted before the opening of an investigation.

The CJ further confirmed that interviews may be recorded in any form – including orally. In the cases before it, the CJ found that the GC had erred in holding that the Commission did not have an obligation to record the interviews with the suppliers of the three companies, on the ground that no investigation had yet been formally opened. Also, the CJ concluded that oral statements arising from interviews with the company's suppliers should have been recorded. In this regard, the key consideration by the GC should have been whether these interviews were aimed at collecting information relating to the subject matter of an investigation, having regard to their content and context.

HONG KONG COMPETITION COMMISSION TAKES FIRST CARTEL CASE RELATING TO A GOVERNMENT SUBSIDY SCHEME TO THE COMPETITION TRIBUNAL

On 22 March 2023, the Hong Kong Competition Commission (HKCC) announced that it had commenced proceedings in the Competition Tribunal (Tribunal) against four IT companies and their representatives over alleged cover bidding in a tender to supply IT solutions to local enterprises affected by COVID 19 under the Distance Business Programme (D-Biz), a government subsidy scheme. The HKCC is seeking for the Tribunal to impose a fine and recover costs, as well as to issue a declaration that the conduct contravened the First Conduct Rule. Also, it is seeking the Tribunal to issue orders requiring each company to adopt an effective compliance programme, as well as a director disqualification order against one of the individuals.

The respondents to the HKCC's application are Multisoft Limited and its parent company MTT Group Holdings Limited (Multisoft), BP Enterprise Company Limited and Noble Nursing Home Company Limited (BP/Noble), KWEK Studio Limited (KWEK) and Yat Ying Hong (Yat Ying) and three relevant individuals. The HKCC alleged that their conduct constituted 'serious anti-competitive conduct' (price-fixing, customer allocation, bid-rigging and/or sharing competitively sensitive information) through the parties' use of cover bidding (as explained above). In the context of D-Biz, the terms of the scheme required that at least two quotations from different service providers are obtained, which allegedly resulted in the need for cover bidding. In some cases, it is alleged that Multisoft and KWEK provided a higher-priced cover bid to ensure BP/Noble and Yat Ying's lower-priced D-Biz application would win. In other cases, BP/Noble and Yat Ying are alleged to have provided cover bids for each other's D-Biz applications, allowing the other to win. It is alleged that there were 189 D-Biz applications in which these four undertakings bid against each other, which involved approximately HK$13 million of approved government funding. It appears that the alleged cover bidding arrangement did not envisage that Multisoft or KWEK should win any of the relevant tenders.

It is notable that two of the relevant individuals (who are married to each other) were acting on behalf of both BP/Noble and Yat Ying, despite there being no formal employment relationship with one or both undertakings, which highlights the fact that the HKCC is focused on the conduct of relevant individuals, rather than their formal employment arrangements. This also has similarities with the Cleaning Cartel Case (brought by the HKCC in December 2021), whereby the same person allegedly handled the bids of two separate undertakings.

BP/Noble has admitted liability and entered into a cooperation agreement with the HKCC. In its press release, the HKCC highlighted its analysis of extensive bidding data to inform its direction of investigation. This case also

marks the first time that the HKCC did not apply any confidentiality redactions, as we are still awaiting the Tribunal's judgment on the use of such redactions in Hong Kong.

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