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Advocate General's Opinion in Case C-449/21 | Towercast

According to Advocate General Kokott, a concentration between undertakings that has not been the subject of any *ex ante* assessment under merger control law may be assessed *ex post* on the basis of the prohibition of abuse of a dominant position under primary law

However, if a concentration has been approved under merger control law, a further assessment against the standard of prohibition of abuse is in principle excluded

The French company TDF Infrastructure Holding held, on the French market for terrestrial television broadcasting, a statutory monopoly, until that market was liberalised at the beginning of 2004. However, in recent years, a strong concentration has re-emerged. At a time when, in addition to TFD, only two other companies were still active on that market, namely Itas and Towercast, TDF, which had by far the largest market share, acquired control of Itas.

As that acquisition was below the thresholds provided for in the EU Merger Regulation ('the Merger Regulation') and the French Commercial Code, it was not subject to any *ex ante* control by either the Commission or the French competition authority. Nor was there a referral to the Commission under the Merger Regulation since neither France nor any other Member State had made a request to that effect.

Towercast submits that TDF's acquisition of Itas is an infringement of the prohibition of abuse of a dominant position. According to Towercast, TDF hinders competition on the upstream and downstream wholesale markets for digital transmission of terrestrial television services (digital video broadcasting – terrestrial or DVB-T) by significantly strengthening its dominant position on those markets.

After the French competition authority rejected its complaint, Towercast lodged an appeal before the Court of Appeal, Paris. That court asks the Court of Justice, in essence, **whether it is possible for a national competition authority to subject a concentration operated by an undertaking with a dominant position to an *ex post* assessment against the standard of the prohibition of abuse of a dominant position under EU law (Article 102 TFEU) where that concentration does not meet the relevant turnover-related thresholds of the Merger Regulation and national merger control law, and therefore no *ex ante* assessment has taken place in that regard.**

In her Opinion delivered today, Advocate General Juliane Kokott answers that question in the affirmative.

In her view, supplementary application of Article 102 TFEU is likely to contribute to the effective protection of competition in the internal market, in so far as concentrations which are problematic under competition law do not meet the thresholds under merger control law and are therefore not subject, in principle, to *ex ante* control.

A **gap in protection** has emerged in recent years in the coverage and control, under competition law, of acquisitions of innovative start-ups, for example in the fields of internet services, pharmaceuticals or medical technology ('killer acquisitions'). This concerns situations in which established and powerful undertakings acquire emerging undertakings which do not yet have a large turnover and which operate in the same, neighbouring, upstream or downstream markets, at an early stage of their development in order to eliminate them as competitors and consolidate their own market position. In order also to ensure effective protection of competition in that respect, it should therefore be possible for a national competition authority to resort at least to the 'weaker' instrument of punitive *ex post* control under Article 102 TFEU, provided that the conditions for this are met.

If that control leads to a finding that there is an abuse of a dominant position, in the Advocate General's view, there is **not usually a threat of subsequent dissolution** of the concentration, **but rather** only the imposition of **a fine**. This follows from the primacy of behavioural remedies over structural remedies and from the principle of proportionality.

However, if a concentration has been approved under the more specific rules of merger control, and consequently, its effects on market structure and competition conditions have been declared to be compatible with the internal market, it cannot as such be qualified (any longer) as an abuse of a dominant position within the meaning of Article 102 TFEU, unless the undertaking concerned has engaged in conduct which goes beyond that and could be found to constitute such an abuse.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

The full text of the Opinion is published on the CURIA website on the day of delivery.

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