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Judgment of the Court in Case C-449/21 | Towercast

The prohibition of abuse of a dominant position laid down by the Treaties permits an *ex post* control, at national level, of a concentration of undertakings with a non-Community dimension

The temporal effects of a judgment of the Court confirming the applicability of that prohibition should not be limited

The Digital Terrestrial Television (DTT) platform has been in use in France since 2005. The main DTT network operator is the company TDF, which, until that point, had enjoyed a State monopoly on the French terrestrial television broadcasting market.

The liberalisation of the French audiovisual area enabled, inter alia, Towercast and Itas – competitors of TDF – to enter the broadcasting market. In 2016, TDF acquired sole control of Itas thanks to an acquisition operation which was below the thresholds laid down by the EU Merger Regulation¹ and by the French Commercial Code: it was therefore not notified or examined under the prior control of concentrations. Moreover, that operation did not give rise to a procedure for referral to the Commission under Article 22 of the Merger Regulation.

Towercast considers that the acquiring of control of Itas by TDF constitutes a breach of the prohibition of abuse of a dominant position laid down by primary EU law (Article 102 TFEU). According to Towercast, TDF is hindering competition on the upstream and downstream wholesale markets for DTT broadcasting services by significantly strengthening its dominant position on those markets.

The French Competition Authority having rejected the complaint lodged by Towercast, the latter has brought an appeal before the cour d'appel de Paris (Court of Appeal, Paris, France). That court asks the Court of Justice whether it is possible for a national competition authority to carry out, in view of the prohibition of abuse of a dominant position laid down by EU law, an *ex post* control of a concentration operation performed by an undertaking in a dominant position, where that concentration remains below the relevant turnover thresholds laid down by the Merger Regulation and by the national law on concentrations and has thus not been subject to an *ex ante* control in that regard.

In its judgment, the Court rules that **a concentration operation with a non-Community dimension may be subject to a control by the national competition authorities and by the national courts, on the basis of the direct effect of the prohibition** of abuse of a dominant position laid down by EU law, **having recourse to their own procedural rules for that purpose.**

The Court emphasises that, notwithstanding the principle that the Merger Regulation is the only regulation applicable to concentration operations, **it is the procedural law of the Member States that is applicable to concentrations with a non-Community dimension.**

The 'one-stop shop' system introduced by the Merger Regulation is a specific procedural instrument. It is

¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("the EC Merger Regulation") (OJ 2004, L 24, p.1).

exclusively applicable to concentrations of undertakings involving significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State. It is not appropriate to infer from this that the EU legislature intended to render the control carried out at national level on a concentration operation in the light of the prohibition of abuse of a dominant position laid down by primary law devoid of purpose.

Consequently, the prior control of operations with a Community dimension introduced by the Merger Regulation **does not preclude** a subsequent control of concentration operations that do not meet that threshold: **certain concentrations may both escape a prior control and be subject to a subsequent control.**

When carrying out such a subsequent control in the light of the prohibition of abuse of a dominant position, **the authority in question must verify** whether 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.**

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.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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