Case C-449/21

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

21 July 2021

Referring court:

Cour d'appel de Paris (France)

Date of the decision to refer:

1 July 2021

Applicant:

Towercast

Defendants:

Autorité de la concurrence

Ministère de l'Économie

Cour d'appel de Paris

(Court of Appeal, Paris, France)

Judgment of 1 July 2021

I. Subject matter of the main proceedings

1 An action has been brought before the Cour d'appel de Paris (Court of Appeal, Paris, France) by the company Towercast for the annulment of a decision of the French competition authority discontinuing its examination of a transaction for the acquisition by the company TDF of a competitor company.

II. Provisions relied upon

A. European Union law

2 Pursuant to Article 102 of the Treaty on the Functioning of the European Union ('TFEU'):

'Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.'

3 Recitals 5 to 9, 20 and 24 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings – which was the successor of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings – provide as follows:

'(5) … it should be ensured that the process of reorganisation does not result in lasting damage to competition; …

(6) A specific legal instrument is therefore necessary to permit effective control of all concentrations in terms of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations. Regulation (EEC) No 4064/89 has allowed a Community policy to develop in this field. In the light of experience, however, that regulation should now be recast into legislation designed to meet the challenges of a more integrated market and the future enlargement of the European Union. In accordance with the principles of subsidiarity and of proportionality as set out in Article 5 of the Treaty, this regulation does not go beyond what is necessary in order to achieve the objective of ensuring that competition in the common market is not distorted, in accordance with the principle of an open market economy with free competition.

(7) Articles 81 and 82, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty. This regulation should therefore be based not only on Article 83 but, principally, on Article 308 of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, …

(8) The provisions to be adopted in this regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State. Such concentrations should, as a general rule, be reviewed exclusively at Community level, in application of a "one-stop shop" system and in compliance with the principle of subsidiarity. Concentrations not covered by this regulation come, in principle, within the jurisdiction of the Member States.

(9) The scope of application of this regulation should be defined according to the geographical area of activity of the undertakings concerned and be limited by quantitative thresholds in order to cover those concentrations which have a Community dimension. …

(20) It is expedient to define the concept of concentration in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market. …

(24) In order to ensure a system of undistorted competition in the common market, in furtherance of a policy conducted in accordance with the principle of an open market economy with free competition, this regulation must permit effective control of all concentrations from the point of view of their effect on competition in the Community. Accordingly, Regulation (EEC) No 4064/89 established the principle that a concentration with a Community dimension which creates or strengthens a dominant position as a result of which effective competition in the common market or in a substantial part of it would be significantly impeded should be declared incompatible with the common market.'

4 Article 1 of Regulation No 139/2004 defines the regulation's scope in the following terms:

'1. Without prejudice to Article 4(5) and Article 22, this [r]egulation shall apply to all concentrations with a Community dimension as defined in this [a]rticle.

…'.

5 Article 2(1) and (4) of Regulation No 139/2004 provides as follows:

'1. Concentrations within the scope of this [r]egulation shall be appraised in accordance with the objectives of this [r]egulation and the following provisions with a view to establishing whether or not they are compatible with the common market.

In making this appraisal, the Commission shall take into account:

(a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;

…

4. To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 81(1) and (3) of the Treaty,

with a view to establishing whether or not the operation is compatible with the common market.'

6 Article 3 provides as follows:

'1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:

(a) the merger of two or more previously independent undertakings or parts of undertakings, or

(b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

2. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

3. Control is acquired by persons or undertakings which:

(a) are holders of the rights or entitled to rights under the contracts concerned; or

(b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

…'.

7 Article 21, headed 'Application of the [r]egulation and jurisdiction', reads:

'1. This [r]egulation alone shall apply to concentrations as defined in Article 3, and Council Regulations (EC) No 1/2003, (EEC) No 1017/68(9), (EEC) No 4056/86(10) and (EEC) No 3975/87(11) shall not apply, except in relation to joint ventures that do not have a Community dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent.

2. Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this [r]egulation.

3. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.

…'.

8 Article 22, which provides for the possibility of referral to the European Commission, provides as follows:

'1. One or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.

…'.

B. National law

9 Article L.430-2 of the Code de commerce (French Commercial Code) provides as follows:

'I. Any merger operation within the meaning of Article L.430-1 is subject to the provisions of Article L.430-3 *et seq.* of the present title when the following three conditions are met:

– the aggregate worldwide turnover exclusive of tax of all of the companies or of all of the natural persons or legal entities involved in the merger is greater than 150 million euros;

– the aggregate turnover exclusive of tax achieved in France by at least two of the companies or groups of natural persons or legal entities concerned is greater than 50 million euros;

– the operation does not fall within the scope of Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

…'.

10 Article L.430-9 of the Code de commerce provides as follows:

'The Competition Authority may, in the event of the abuse of a dominant position or of a state of economic dependence, enjoin, by reasoned decision, the undertaking or group of undertakings involved to amend, supplement or cancel, within a specified period, all agreements and all acts by which the concentration of economic power allowing the abuse has been carried out, even if these acts have been subject to the procedure specified by this title.'

11 Paragraph 314 of the 2013 version of the French guidelines on the control of concentrations, published by the French competition authority, states, with reference to the application of Article L.430-9 of the Code de commerce, that:

'This article applies to any abuse which has been made possible by a concentration operation, whether or not it has been the subject of an authorisation procedure before the Competition Authority or, prior to that, before the Minister.'

III. The facts and background to the dispute

12 By an investment agreement concluded on 23 June 2016 and subsequently amended by an addendum dated 30 June 2016, the company TDF Infrastructure acquired the entire share capital of its competitor Itas SAS, the parent company of the group, and took sole control over that company. Following that operation, there remain on the relevant French market only two service providers, TDF and Towercast.

13 The operation for the acquisition of Itas did not exceed the notification thresholds laid down in Article 1 of Regulation No 139/2004 and Article L.430-2 of the Code de commerce, and did not give rise to any procedure for the prior control of concentrations or to the application of the procedure for referral to the Commission laid down in Article 22 of Regulation No 139/2004.

14 By letter registered on 15 November 2017, Towercast lodged a complaint with the French competition authority, in which it alleged that TDF's acquisition of control of Itas, dated 13 October 2016, constituted an abuse of a dominant position, in that it hindered competition on the upstream and downstream wholesale markets for digital terrestrial television ('DTT') broadcasting by significantly strengthening the already dominant position enjoyed by TDF on those markets.

15 On 25 June 2018, a statement of objections was addressed to the companies of the TDF group (TDF infrastructure, TDF infrastructure Holding, Tivana France Holdings, Tivana Midco and Tivana Topco), in which it was alleged that, '*on 13 October 2016, [they had], as a single undertaking for the purposes of competition law, abused the dominant position held by that single undertaking on the downstream wholesale market for DDT broadcasting by acquiring sole control of the Itas group*' and that that practice was liable to have the effect of preventing, restricting or distorting competition on the downstream wholesale market for DDT broadcasting, a practice prohibited by Article L.420-2 of the Code de commerce and by Article 102 TFEU.

16 By Decision No 20-D-01 of 16 January 2020 ('the contested decision'), the competition authority concluded that the alleged abuse of a dominant position by the companies of the TDF group had not been demonstrated and that it was therefore not appropriate to continue the procedure.

17 Towercast brought an action against that decision, seeking its annulment. The companies of the TDF group request the Cour d'appel de Paris to uphold that decision in its entirety and to dismiss Towercast's action. The competition authority, the Minister for Economic Affairs and the Public Prosecutor agree with the analysis in the contested decision and also request the referring court to dismiss the action.

IV. Arguments of the parties

A. The competition authority

18 In the contested decision, and before the referring court, the competition authority argues that, with the adoption of Regulations Nos 4064/89 and 139/2004, a clear dividing line was drawn between the control of concentrations and the control of anti-competitive practices and that the creation of a specific regime for the control of concentrations at European Union level *de facto* rendered obsolete the application of the '*Continental Can*' line of case-law, which was established at a time when no European mechanism for the control of concentrations existed.

19 It considers, in essence, that, after the entry into force of Regulation No 4064/89, Article 102 TFEU continued to apply to abusive conduct that may be separated from the concentration itself, but its application to structural concentrations, as provided for in Regulation No 139/2004, became devoid of purpose, even though the regulation does not expressly exclude such application.

20 It also submits that Article 3 of Regulation No 139/2004, like Article 3 of Regulation No 4064/89 before it, defines concentrations by reference to substantive criteria, and not by reference to the thresholds defined in Article 1 of the regulation. From that, it infers that Regulation No 139/2004 applies exclusively to concentrations, as defined in Article 3 (set out above), and renders the application of Article 102 TFEU to concentrations devoid of purpose, where there is no distinct conduct by the undertaking in question following that concentration.

21 It applies the same analysis to the question of the application of national law, represented by Article L.420-2 of the Code de commerce, taking the view that procedures concerning anti-competitive practices and the procedure concerning the control of concentrations are different and irreconcilable.

B. Towercast

22 In its application, Towercast disputes that interpretation of the legislation. Its principal argument rests on the objective which has been pursued since the adoption of the EEC Treaty of creating a regime which ensures competition in the common market is not distorted, and it refers to the principles set out in *Continental Can* (referred to above), which it regards as still relevant. It points out

that those principles have been referred to in several later cases (judgments of 21 September 2005, *EDP* v *Commission*, T-87/05, EU:T:2005:333, paragraphs 46 and 47, and of 14 December 2005, *General Electric* v *Commission*, T-210/01, EU:T:2005:456, paragraph 86) and it has produced a legal opinion supporting its assertion that, in the majority, the authorities and courts of the Member States continue to apply the *Continental Can* line of case-law.

23 It also relies on the direct effect of Article 102 TFEU and claims that, in so far as concentrations below the thresholds are concerned, an *ex-post* review of compatibility with that article is possible.

24 It states that, although Regulations Nos 139/2004 and 1/2003 cannot both apply in the same case, Regulation No 139/2004, on the other hand, applies exclusively only to concentrations which fall within its scope, which is to say concentrations having a Community dimension or those which have been referred to the Commission by a national competition authority or by the parties.

25 In reply to the other parties, Towercast argues that if control were limited to conduct that may be separated and is abusive, it would not be possible to capture concentrations which significantly hinder competition by substantially strengthening the dominant position of the purchaser. It adds that the referral system provided for in Article 22 of Regulation No 139/2004 is not sufficient to ensure adequate control, because it is optional and is triggered at the sole discretion of the Member States. It also points out that, until recently, the Commission was unwilling to examine concentrations below the national thresholds for control.

C. The other parties to the procedure

26 The Minister for Economic Affairs agrees with the competition authority's analysis. The companies of the TDF group, which have intervened, also agree with it. They also point out that, in its judgment of 7 September 2017, *Austria Asphalt* (C-248/16, EU:C:2017:643, paragraphs 30 to 33), the Court of Justice held that Articles 101 and 102 TFUE did not apply to concentrations within the meaning of Article 3 of Regulation No 139/2004, whether or not the thresholds were exceeded. Lastly, they emphasise the legal uncertainty that would be caused by applying Article 102 TFEU to concentrations such as that at issue in the present situation, in that it would mean that they could be challenged years after they had been completed, not to mention the risk of divergence resulting from an explosion of merger control litigation.

V. Referring court's analysis

27 In *Continental Can* (judgment of 21 February 1973, *Europemballage and Continental Can* v *Commission*, 6/72, EU:C:1973:22), the Court of Justice held that, 'in the absence of explicit provisions, one cannot assume that the Treaty,

which prohibits in Article 85 certain decisions of ordinary associations of undertakings restricting competition without eliminating it, permits in Article 86 that undertakings, after merging into an organic unity, should reach such a dominant position that any serious chance of competition is practically rendered impossible.' From that, the Court inferred that 'abuse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e., that only undertakings remain in the market whose behaviour depends on the dominant one.'

28 That case-law is usually interpreted as an acknowledgement that the strengthening of a dominant position, by means of acquisitions, to the point where any serious chance of competition is precluded cannot, given the objectives pursued, be excluded from the scope of Article 102 TFEU (formerly Article 86 of the EEC Treaty), which is a provision of primary law which has direct effect.

29 However, that judgment was delivered at a time when there was no mechanism under EU law for the control of concentrations. Since that time, the European Union has adopted rules that apply to concentrations which may significantly impede effective competition in the common market or in a substantial part of it.

30 It should be noted that, in order to prevent a double assessment, *ex ante* and *ex post*, of mergers falling within their scope, successive regulations on the control of concentrations have provided that concentrations having a Community dimension, which must be examined *ex ante*, cannot then become subject also to the provisions of the regulations (Regulation No 17 and subsequently Regulation No 1/2003) governing the application of the provisions prohibiting anti-competitive practices (Articles 85 and 86 TEC and subsequently Articles 101 and 102 TFEU).

31 Article 3 of Regulation No 139/2004, moreover, gives a substantive definition of the concept of concentration, without referring to the thresholds mentioned in Article 1 by reference to which a concentration is defined as one that has a Community dimension. The exclusion laid down in Article 21 would therefore appear to apply to any operation which satisfies the definition in Article 3, whether or not the mandatory control thresholds are exceeded.

32 Nevertheless, recital 7 of Regulation No 139/2004 states that 'Articles 81 and 82, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty', with the result that the referring court questions whether the interpretation established in the *Continental Can* line of case-law continues to apply to operations such as that at issue in the present situation, in relation to which it is common ground that the definition in Article 3 of the regulation is satisfied and the effects of which on competition have not been subject to any *ex-ante* assessment.

33 In its recent case-law, the Court of Justice does not appear to have expressed a position on whether the exclusion laid down in Article 21 of Regulation No 139/2004 applies equally to concentrations which have not been the subject of any *ex-ante* assessment.

34 In its judgment of 7 September 2017 in Case C-248/16, *Austria Asphalt*, the Court of Justice pointed out the following:

‘31. [Regulation No 139/2004] … forms part of a legislative whole intended to implement Articles 101 and 102 TFEU and to establish a system of control ensuring that competition is not distorted in the internal market of the European Union.

32. As follows from Article 21(1) of Regulation No 139/2004, that regulation alone is to apply to concentrations as defined in Article 3 of the regulation, to which Regulation No 1/2003 is not, *in principle*, applicable. [Italics added by the referring court.]

33. By contrast, Regulation No 1/2003 continues to apply to the actions of undertakings which, without constituting a concentration within the meaning of Regulation No 139/2004, are nevertheless capable of leading to coordination between undertakings in breach of Article 101 TFEU and which, for that reason, are subject to the control of the Commission or of the national competition authorities.’

35 However, it does not appear that the Court has given further detail of the possible exceptions to the principle expressed in paragraph 32 of the judgment; nor has it ruled on whether the interpretation given in *Continental Can* is still capable of applying, in particular, to concentrations below the thresholds for mandatory control, which have not been analysed in the context of mandatory *ex-ante* control or as a result of a referral to the Commission under Article 22 of Regulation No 139/2004.

36 Having regard to the direct effect of Article 102 TFEU and to the scope which might be attributed to the provisions governing concentrations (Article 21(1) of Regulation No 139/2004), the referring court has doubts regarding the proper interpretation of those two provisions, and as to whether it is indeed impossible, in principle, to apply independently the rules on competition which stem from primary law mentioned above to a concentration which, such as that in the present situation:

– is capable of satisfying the definition in Article 3 of Regulation No 139/2004;

– has not been the subject of any prior assessment, either on the basis of EU law or on the basis of national law applicable to concentrations; and

– which, accordingly, does not give rise to the risk of Regulation No 139/2004 and Regulation No 1/2003 being applied cumulatively, or of any contradictory outcome arising from a double, *ex-ante* and *ex-post*, analysis.

37 This interpretative difficulty is compounded by the referring court's examination of the national rulings on which the parties rely, from which it appears that EU law has been applied in different ways.

VI. Reasons for the request for a preliminary ruling

38 Since it does not appear that the Court of Justice has yet decided the legal point at issue in the present case, it therefore appears necessary, in light of the divergent interpretations put forward and in order to ensure the uniform interpretation and application of that legislation within the European Union, to refer a question to the Court of Justice for a preliminary ruling.

VII. The question referred for a preliminary ruling

39 The Cour d'appel de Paris refers to the Court of Justice of the European Union the following question for a preliminary ruling:

'Is Article 21(1) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings to be interpreted as precluding a national competition authority from regarding a concentration which has no Community dimension within the meaning of Article 1 of that regulation, is below the thresholds for mandatory *ex ante* assessment laid down in national law, and has not been referred to the European Commission under Article 22 of Regulation No 139/2004, as constituting an abuse of a dominant position prohibited by Article 102 TFEU, in the light of the structure of competition on a market which is national in scope?'