Cooley

Europe's Top Court on Merger Review: No Deals Are 'Off the Table'

April 14, 2023

The European Union's top court recently confirmed that an M&A transaction that does not require mandatory pre-merger authorization may be investigated post-merger on suspicion that the transaction involved an 'abuse' of the acquirer's 'dominant position'. Per the ruling in the *Towercast* case, pre-merger authorization under the EU Merger Regulation (or EU member state equivalents) is required for certain specified transactions, but the rules on merger review do not exclude the applicability of the general antitrust prohibitions in Article 101 (restrictive agreements) and Article 102 (abuse of dominance) of the Treaty on the Functioning of the European Union (TFEU) and EU member state equivalents.

The recent judgment is notable because, over the past several decades when mandatory pre-merger control was introduced or enhanced, European competition authorities only very rarely relied on abuse of dominance provisions to investigate acquisitions. The ruling clarifies how the rules on merger control complement the general antitrust laws within the EU and the framework for companies' assessment of antitrust risk under EU and member states' laws. In the following, we summarize the main points of the *Towercast* judgment – as well as its enforcement implications – and explain important considerations for dealmakers.

The *Towercast* case

The *Towercast* case involved an acquisition by Télédiffusion de France (TDF), a French provider of digital terrestrial broadcasting services, of one of its rivals, Itas. The deal was not reportable for merger review to the European Commission (EC) or the French Competition Authority (FCA). After the TDF/Itas deal closed, Towercast, a competitor, complained to the FCA that TDF had abused its dominant position by the acquisition. The FCA dismissed the complaint on the basis that it lacked competence to review the transaction retrospectively, because it was not reportable under the merger control rules. Towercast appealed the FCA's decision, and the Court of Appeal of Paris requested guidance from the Court of Justice of the European Union (CJEU) on the relationship between the rules on abuse of dominance and merger review.

The CJEU noted that merger control rules assume that acquisitions that satisfy certain thresholds can have harmful effects on the market structure and competition – and so, must be notified for pre-merger review. The CJEU clarified, however, that this does not mean that acquisitions that do not meet the thresholds for review should never be subject to post-merger investigation under the abuse of dominance rules, which apply generally and independently of the merger control rules. The CJEU ruled in 1973, in *Continental Can*, that a firm holding a dominant position, in certain circumstances, may abuse that position contrary to Article 102 TFEU by way of an acquisition. In the decades since, specific merger control rules were adopted, but those rules did not affect the applicability of Article 102 TFEU.

On that basis, mergers & acquisitions that are subject to mandatory pre-merger review (under the EU Merger Regulation or corresponding member state laws) are immune from abuse of dominance claims under Article 102 TFEU. But where pre-merger reviews are not triggered, competition authorities and courts remain free to investigate whether an acquirer that holds a dominant position on a relevant market has abused that dominant position by acquiring a competitor. In that analysis, a finding of abuse presupposes that the acquisition strengthened the acquirer's dominant position to such a degree that competition is '**substantially**' impeded in the sense that the behavior of all remaining rivals '**depends**' on the acquirer.

Implications for enforcement

The EC has reviewed more than 8,268 M&A deals since the EU Merger Regulation took effect in 1990, and many more have been reviewed by national competition authorities under the member states' merger control laws. The EU Merger Regulation gives the EC and member states the opportunity to refer jurisdiction over M&A deals

to ensure that a case is dealt with by the most appropriate authority. Over the years, 456 transactions have been referred to the EC by member states – around 90% of those were initiated by merging parties and around 10% by member states' authorities. Conversely, 309 deals have been referred from the EC to member states – around two-thirds of those were initiated by merging parties and one-third by the EC.

Despite this robust enforcement record and interagency collaboration, the EC and member states' authorities perceive an 'enforcement gap' in the merger control system. The concern is that certain M&A deals, especially deals involving nascent or emerging innovative tech and life sciences targets, may have adverse effects on competition, even though they fall outside the scope of mandatory pre-merger review. To that end, in March 2021, the EC announced a shift in its policy on encouraging and accepting referrals for its review of transactions that fall below the thresholds for automatic jurisdiction under the EU Merger Regulation, as well as member states' laws. Although that policy change has not caused a major increase in the number of referrals from member states (in total, five such 'Article 22' referrals have been made since 2021, including one involving a deal over which no member state had initial jurisdiction), the EC is understood to have evaluated more than 30 deals for potential referral. The policy is therefore controversial, as it creates uncertainty in deal negotiations and execution and remains subject to challenge before the CJEU.

We expect that the pre-merger notification route will remain the mainstay for competition analysis of M&A deals also after the *Towercast* judgment. Certain deals that fall outside the scope of automatic review remain subject to potential Article 22 referral for review by the EC; but, as a threshold matter, any such deal must affect trade '**between member states**' and pose a '**significant**' threat to competition in the member state(s) requesting referral.

We do not expect that *Towercast* will open floodgates of new antitrust investigations. The judgment clarifies that there are two possible routes for review of an M&A deal that does not meet the requirements for pre-merger review: an authority may initiate a referral to the EC for pre-merger review under the EU Merger Regulation (as mentioned above) or an ex officio post-merger investigation into suspected abuse of dominance.

A deal with cross-border dimensions may in principle be a candidate for referral to the EC, but a purely domestic deal will unlikely affect trade between member states – even if it presents risks to domestic competition. Still, several factors militate against investigating even complex local deals under abuse of dominance rules.

First, any post-merger investigation is fraught with difficulty, not least in terms of ultimately implementing effective remedies such as a reversal or unscrambling of the deal. The EU Merger Regulation was adopted precisely because Article 102 TFEU, while applicable, is not well-suited to M&A settings.

Second, the *Towercast* standard for intervention under Article 102 TFEU is stricter and more difficult to satisfy, compared to that applicable in pre-merger review under the EU Merger Regulation. Intervention under *Towercast* presupposes that the acquirer holds a dominant position pre-transaction and that this position is not merely '**strengthened**' but strengthened to '**substantially**' impede competition such that the remaining rivals '**depend**' on the acquirer. Under the EU Merger Regulation, intervention is possible if dominance is strengthened and effective competition thereby is '**significantly impeded**'.

That said, the risks of post-merger intervention are real and should be taken seriously by dealmakers. For instance, only a few days after the CJEU's ruling in *Towercast*, the Belgian Competition Authority announced that it was investigating whether the country's leading telecom operator may have abused a dominant position by acquiring a smaller broadband communications services provider.

Considerations for dealmakers

The *Towercast* ruling confirms that deals beyond the perimeter of the European pre-merger review system remain subject to post-merger EU antitrust law intervention. Conceptually, the position is similar to, for instance, the US, where deals that satisfy the thresholds for Hart-Scott-Rodino review must be reported to antitrust agencies. But those agencies retain jurisdiction to investigate any deal, whether reportable or not. US law goes further than the *Towercast* ruling, with US authorities retaining jurisdiction over deals that have been reported.

Given this ruling – as well as European agencies' concerns around the potential future roles of nascent or emerging innovative tech and life sciences firms – dealmakers should keep the following points in mind:

- Sellers and buyers alike need to develop comprehensive regulatory strategies to control for timing and execution risks in M&A deals.

- Regulatory strategies should include assessment of M&A deals' likely substantive effect on competition, even where targets have no or only low turnover, or where the parties have limited presence in Europe. Mere analysis of mandatory filing requirements, or the likely outcome of such reviews, does not enable buyers or sellers to comprehensively calibrate risk of enforcement action and impact on timing.
- Regulatory strategies should include parameters for proactive engagement with enforcement agencies, as appropriate for pre-merger notification, and factor in the potential for referrals of jurisdiction for pre-merger review.
- Sellers and buyers alike need to factor in the potential for post-merger review under abuse of dominance rules. Where such risk exists, it is not only a buy-side concern. Even if an investigation were to materialize only after closing, the seller needs to anticipate that risk at the negotiation stage as it may influence the buyer's proposed terms.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our legal notices.

Key Contacts

Megan Browdie **Washington, DC**	**mbrowdie@cooley.com** **+1 202 728 7104**
Caroline Hobson London	chobson@cooley.com +44 20 7556 4522
Jonas Koponen Brussels	jkoponen@cooley.com +32 2 486 7545
Anna Caro London	acaro@cooley.com +44 20 7556 4329

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.