



ECJ confirms below-threshold mergers can be abusive

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National competition authorities can open abuse of dominance investigations into below-threshold mergers after they have closed, the European Court of Justice has ruled.

In a preliminary ruling today, the EU's highest court [held](#) that antitrust enforcers can investigate whether an already-completed deal constitutes an abuse of dominance even if the transaction was not subject to review under merger control rules.

The EU Merger Regulation does not prevent national enforcers from pursuing abuse complaints related to unreviewed deals within their own jurisdictions, although they cannot open such probes if a tie-up has been cleared following a merger review, it held.

That means France's Competition Authority was wrong to assume that deals falling below merger thresholds cannot be abusive when it [dismissed](#) a television broadcaster's complaint in 2020, the ECJ said.

The top EU court also refused to exempt its decision from applying retroactively, as it did not find any evidence that its interpretation would risk "seriously disturbing" the companies involved in the underlying case or their relationship.

The Paris Court of Appeal [asked](#) the ECJ in July 2021 to clarify if national competition authorities should exclusively assess transactions under EU and national merger control rules, or whether they can apply an abuse of dominance assessment to those deals to create a delayed "blocking effect".

The French court is presiding over television broadcaster Towercast's appeal against the French enforcer's dismissal of its complaint alleging that rival TDF abused its dominance in the digital terrestrial television (DTT) market when it purchased smaller broadcaster Itas in October 2016.

Towercast claimed the purchase was an abuse of dominance because it significantly strengthened TDF's already-dominant position as the former state-owned incumbent broadcaster on both the upstream and downstream wholesale markets for DTT, a type of signal used to transmit audiovisual content to televisions.

The deal also reduced the number of competitors in the market from three to two, the complaint said.

The acquisition did not meet the turnover-based thresholds for notification under French or EU law. But Towercast referred to the ECJ's *Continental Can* judgment, which [held](#) that "the strengthening of the position of an undertaking may be an abuse and prohibited under [EU law] regardless of the means and procedure by which it is achieved if it has the effect of substantially fettering competition."

The French authority rejected Towercast's argument, claiming that the introduction of the EU merger control regime 16 years after *Continental Can* made that case law obsolete.

The EU's adoption of a merger control regime in 1989 was intended to draw a line between anticompetitive behaviour and acquisitions, it determined.

The watchdog also cited EU advocate general Juliane Kokott's *Austria Asphalt* opinion, in which she [wrote](#) in 2017 that merger reviews form "a system of preventive and mandatory ex-ante control", but abuse of dominance is subject "only to punitive ex-post control".

The EU's merger regulation "constitutes the dividing line" between these "two areas of EU competition law", Kokott said in that case.

But in her opinion on this case in October, Kokott criticised the French authority's reliance on her *Austria Asphalt* opinion. Deals that potentially harm competition and that are not subject to ex-ante control should be investigated under the EU's abuse of dominance rules, she [said](#).

The advocate general said a recent emerging "gap" in competition enforcement has led to so-called killer acquisitions, where dominant companies acquire smaller competitors to kill off the competition – notably in the digital and pharmaceutical markets.

To curb this trend, national competition authorities should be allowed to apply Article 102 of the Treaty on the Functioning of the European Union to such deals, even if it is the "weaker" instrument when compared to merger control rules, she said.

However, a transaction's effects on competition have already been declared "compatible" with its relevant market if it has already been approved under merger control rules, Kokott added. In these circumstances, she said an enforcer can no longer consider launching an abuse of dominance probe.

The ECJ today fully adopted the advocate general's opinion, holding that the French enforcer's interpretation essentially rules out the direct applicability of "primary law" – Article 102 TFEU – because of the adoption of a "secondary law", the EU merger regulation.

But Article 102 is a provision with a direct effect that may not be granted an exemption "in any manner whatsoever" because abusive conduct is simply prohibited by the treaty, it said.

Therefore, national competition authorities are prohibited from applying Article 102 to a transaction just because that deal falls below transaction thresholds, the court said.

Before the ECJ, TDF urged the court to limit the temporal effects of its judgment if it did find that the French enforcer should have pursued an abuse of dominance investigation as it could have "serious consequences" for the legal certainty of below-threshold mergers, including their own.

The temporal effects of a court's judgment allow its decisions to affect cases retroactively, which would mean TDF's merger with Itas could be investigated as an abuse depending on the Paris Court of Appeal's application of the ECJ's ruling.

But the EU court said it would not grant TDF's request as it only limits the effects of its rulings in "very exceptional cases" when the conduct in question was carried out "in good faith" and there is a "risk of serious disturbances" to the companies involved or the entire market at issue.

TDF cannot claim that it did not know it would be probed for breaching Article 102, nor is there any evidence quantifying how badly the court's judgment would disturb TDF, Itas, their relationship or the DTT market, the ECJ held.

'A significant clarification'

A spokesperson for the French competition authority said it welcomes the ECJ's clarification of the legal framework applicable to below-threshold mergers that have not been referred to the European Commission.

TDF declined to comment. Towercast was contacted for comment.

Romain Maulin, a partner at Maulin Avocats in Paris, said today's preliminary ruling will not necessarily create extra work for national competition authorities as the court made clear that a deal cleared under merger rules cannot then be scrutinised for alleged abuse of dominance.

The ruling is predictable but it is a significant clarification of the exact meaning of the ECJ's *Continental Can* decision, he said.

However, to avoid the extra burden of a potential surge in complaints by unhappy rivals of merged companies, Maulin said it is likely that competition authorities will consider referring tie-ups to the European Commission under Article 22 of the EUMR so the regional enforcer can examine them even if they are national deals.

In this case, TDF may now have to demonstrate to France's antitrust authority that its purchase of Itas was not a "killer acquisition" and did not amount to an abuse, he added.

However, Maulin said the French authority cannot order the companies to unwind their deal if it finds an abuse. It could instead invite TDF to submit commitments to assuage its competition concerns under the threat of a significant fine, he said, noting that the agency already sanctioned the company for abuse in a separate case in 2016.

Vogel & Vogel partner Joseph Vogel in Paris said the fact that a non-notifiable merger can constitute an abuse of dominance is "unreasonable" and raises many difficulties, including legal certainty – which was already "eroded" by the new interpretation of Article 22.

This ruling will lead to even more uncertainty for companies as they will need to assess whether a merger they are considering potentially infringes Article 102, yet that is not always evident as it requires an assessment of the market shares and any potential counter powers, he said.

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Documents

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