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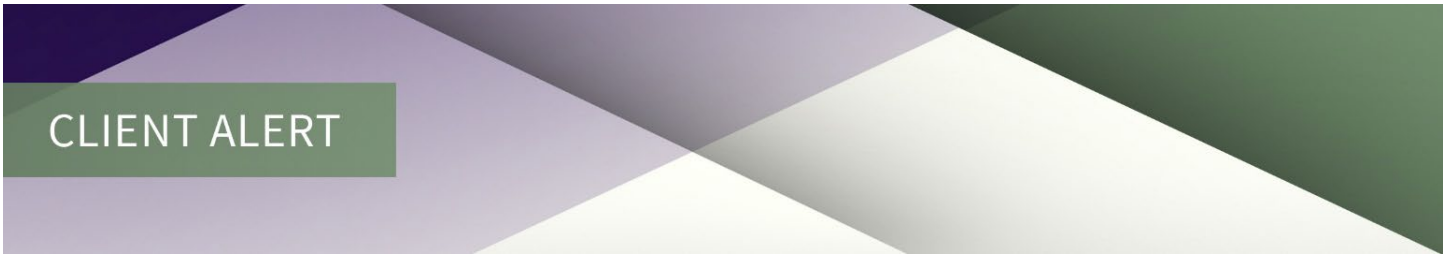

M&A deals falling below merger filing thresholds may be reviewed in Europe under behavioral antitrust laws

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In a landmark judgment of 16 March 2023[1], the European Court of Justice ("***ECJ***") found that an M&A transaction that was not subject to *ex ante* EU or EU Member State merger control can still be reviewed *ex post* by Member States Competition Authorities ("***NCAs***") under Article 102 of the Treaty on the Functioning of the European Union ("***TFEU***") to assess whether the acquirer, with the acquisition, abused its dominant position. This is an additional legal risk for (closed) below-thresholds transactions besides the possibility that NCAs may refer such deals to the European Commission ("***EC***") under Article 22 of the EU Merger Regulation ("***EUMR***").[2]

Background

The ECJ ruling was adopted in the context of a long-lasting French litigation sparked by the acquisition by TDF, the largest television transmission service operator in France, of its competitor Itas, in 2016. Towercast remained the only competitor to a reinforced TDF. The TDF/Itas acquisition did not meet the merger control thresholds at the EU level or in France and, hence, the deal was not reviewed under any merger control regime.

1 ECJ, case C-449-/21, *Towercast*, March 16, 2023.
2 Council Regulation (EC) No 139/2004 of January 20, 2004, on the control of concentrations between undertakings.

Towercast filed a complaint with the French NCA, arguing that the acquisition constituted an abuse of dominance by TDF. In 2020, the NCA turned down the complaint. It found that the existing *ex ante* EU merger control regime would bar the application of the antitrust provisions of the TFEU as the basis for a post-closing review of a transaction which constituted a "concentration" under the EUMR.[3] On appeal, the Paris Court of Appeal referred the case to the ECJ with a request for a preliminary ruling.[4]

Conservative approach of the ECJ

The ECJ adopted a strict legal interpretation of the TFEU and closed a "regulatory gap" it identified for situations like the one at stake. The ECJ referred to its Continental Can judgment of 1973[5], in which it held that an acquisition by a dominant company may be considered an abuse of dominance prohibited under (today's) Article 102 TFEU. The Continental Can ruling was overwhelmingly perceived as a necessary legal basis for the EC to review mergers as specific merger control legislation was not in place at that time.

However, following the adopting of an *ex ante* EU merger control regime in 1989, it was widely argued that the Continental Can judgment was no longer relevant. The EUMR provided a clear legal basis for the EC to review concentrations and prevent companies from becoming too dominant. In other words, a concentration would be in the scope of the EUMR independently from the question of whether the filing thresholds are met. As a result, concentrations had to be considered only under merger control rules, and if such rules excluded a filing requirement, authorities would not be allowed to use antitrust rules as an alternative instrument to review the deal.

The ECJ dismissed this position:

- First, the ECJ recalled that Article 102 TFEU constituted primary EU law, whereas the merger control regime was based on secondary legislation (the EUMR). While the EU merger control regime formed part of a legislative package intended to implement *inter alia* Article 102 TFEU, it could not be interpreted as ruling out the applicability of the latter.

- Second, although the ECJ admits that the EUMR excludes the application of the EU antitrust procedural rules, on substance, the direct effect of Article 102 TFEU still had to allow NCAs to review below-thresholds transactions under that provision by applying their national procedural rules.

- Third, maintaining the applicability of Article 102 TFEU to a below-thresholds transaction was in line with the objectives of the merger control regime, which sought to ensure that concentrations did not result in lasting damage to competition in the EU and its Member States. The ECJ infers from this objective that "*the EU must*

[3] French Competition Authority, case 20-D-01, January 16, 2020.

[4] Paris Court of Appeal, case 20/04300, July 1, 2021.

[5] ECJ, case 6-72, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, February 21, 1973.

therefore include provisions governing those concentrations which may significantly impede effective competition in the internal market or in a substantial part of it" (para. 36). Article 102 TFEU was such a provision providing for the general prohibition of an abuse of dominance.

Reduced legal certainty for below-thresholds transactions

The ECJ admits that under the general EU competition law scheme, which includes both merger control review and prohibition of an abuse of dominance "*the mechanism for the prior control of concentrations […] must be applied as a matter of priority*" (para. 40). However, priority did not mean exclusivity and, therefore, the existence of the EU merger control regime could not "*preclude the possibility for a competition authority to capture a concentration operation under Article 102 TFEU under certain conditions*" (para. 40).

This solution undoubtedly provides more leeway for authorities to investigate below-thresholds transactions, including "*killer acquisitions*" of innovative start-ups by dominant companies or transactions in highly concentrated but smaller markets. The Belgian NCA referred to the TDF ruling on March 22, 2023, when it announced an inquiry on such basis into the main Belgian telecom company's recent below-thresholds acquisition of a smaller competitor. The drawback is, however, that companies engaging in such transactions are now subject to an increased legal uncertainty as to whether their agreement will stand in case of an often lengthy and open-ended antitrust scrutiny.

In practice, the key questions for merging parties will be whether (a) the acquirer can be considered dominant on the relevant market(s) already prior to the transaction given that the ECJ explicitly requested authorities to "*verify that a purchaser […] is in a dominant position on a given market*" (para. 52), and (b) the transaction would result in a substantial increase of the acquirer's market power and, hence, achieving such degree of dominance that the behavior of the other companies remaining in the market depends on the dominant company.

In any event, companies must not lose sight of the fact that for below-thresholds transactions, NCAs can, in addition to opening an investigation under Article 102 TFEU, also consider referring such transactions to the EC under Article 22 of the EU Merger Regulation (see our alert on "*European Commission Prohibits Illumina-Grail Acquisition*", dated September 19, 2022[6]). The two options cannot, however, be combined, meaning that an NCA could either refer a below-thresholds transaction to the EC, or investigate the acquirer in such transaction under Article 102 TFEU, but it would be precluded from doing both.

[6] See Willkie's client alert here.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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